

COMPENSATION FOR INJURIOUS AFFECTION

WHERE NO LAND IS TAKEN

by

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ABSTRACT

This thesis addresses the topic of compensation for injurious affection, where no land is taken from the claimant. The topic involves a consideration of the relationship between the individual and the state and the responsibility of the state for injuries caused to private owners by state activities.

The right of the private landowner is to use and enjoy his property without being subjected to unjustified or unreasonable nuisances emanating from neighbouring property. The right of the public as landowner is generally to use public property for a public purpose. Whenever one party has a right, there is some other party who has a duty corresponding to that right. The public, as owner, has a duty not to use its property in a manner that is so unreasonable as to be an actionable nuisance in the circumstances or to cause injurious affection to a neighbouring landowner.

This area of law had its roots in the Common Law tort of nuisance and the defences of statutory authority and immunity of the Crown. The Common Law in this area developed in nineteenth century England. Since the rights being claimed were new at the time, the Courts sensed a need to develop certain restrictions. There was a fear that if the restrictions were not developed, the floodgates to this sort of claim would open. Accordingly, over a period of about seventy-five years, three restrictive rules to such claims

were developed by the English Courts. These three restrictions were accepted by the Canadian Courts as part of the Common Law in Canada.

Eventually, the law in Ontario (and by and large in the other provinces) was codified and the statute retained two of the three Common Law rules. The first of these is the Construction Rule, which permits only claims for damages resulting from the construction of a public project. Claims for damages resulting from the use of the public project are not allowed. The second of these restrictive rules, the Actionable Rule, prohibits claims unless the injury would have been an actionable wrong but for the statutory authority.

In 1967, an Ontario Law Reform Commission Report recommended that both rules remain in force. In 1971, a British Columbia Law Reform Commission Report recommended that the Construction Rule be abolished.

Professor Eric Todd, a prominent critic in this area, criticized the continued existence of both rules proposing that they be abolished and that, subject to certain conditions, all provable economic loss which is not too remote be compensated. The British Columbia Report considered Professor Todd's proposal as a replacement for the Actionable Rule, but declined to make any decision until a study is made of the economic consequences. In a similar vein, the Ontario Report, although recommending that the Actionable Rule remain in effect, said that before abolishing the rule, a general study of statutory immunity should be carried out.

Ultimately, finding a balance between the doctrine of nuisance and the defence of statutory authority or statutory immunity is a question of policy. The right of a private landowner to use and enjoy his property without being injuriously or detrimentally affected by some unreasonable public use of neighbouring land must be balanced with the public right to use public property for a public purpose. The writer concludes this thesis by offering his own preference in terms of policy.

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CHAPTER I - INTRODUCTION

There are two types of "injurious affection". The first type arises when part of an owner's land is taken for the construction of a public work. In addition to compensation for the land actually taken, the owner will have a claim for the injurious affection to the land remaining after the taking. The second type of injurious affection arises when a claimant's property is damaged by the construction of a public work even though none of the claimant's land is taken. In this case, the public work can be constructed entirely on public land or on land taken from a private owner other than the claimant.

This paper addresses the issue of compensation for damage caused to private property by a public project where none of the claimant's land is taken for the project. As stated above, this damage is commonly known as "injurious affection". Although this issue is addressed in expropriations legislation, it really does not involve an expropriation. The word "expropriate" means the "taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers" (emphasis mine).¹ "Injurious affection" in this sense is caused by a "statutory authority" as distinct from an "expropriating authority". A "statutory authority" is defined as "the Crown or any person empowered by statute to

1. The Expropriations Act R.S.O. 1980, c. 148, s. 1(1)(c). (See Appendix A for copies of relevant sections of this Act.)

expropriate land or cause injurious affection" (emphasis mine).² It is clear that a "statutory authority" is one which has the power to cause injurious affection whether it has the power to expropriate or not. This paper is restricted to a discussion of injurious affection where the statutory authority, although it may have the power to expropriate, does not expropriate any land from the claimant. The public project causing the injurious affection may be constructed on property owned by the public authority or on property taken from some other private owner.

This area of law had its roots in tort law. Traditionally, if something has been done in accordance with statutory authority, a person who was injured as a result of the exercise of that statutory authority did not have any right to compensation except where the statute specifically provided for such compensation. The statutory authority to construct a public work was said to be a statutory immunity. However, if the same act were done without statutory authority or with statutory authority but negligently, then there was a cause of action at common law or in equity.

This paper is further restricted to a discussion of the exercise of powers specifically authorized by a statute which provides for compensation. The paper will not address the case where an act which is authorized by statute is done negligently. As will be shown, although the statute authorizing the act provided for compensation (even though the act was not done negligently), it was necessary for the courts to impose limits on the grounds for such compensation.

2. Ibid, s. 1(1) (m).

The broad issue to be examined is the conflict between the right of one owner (including the public as owner) to use his property as he sees fit and the right of another owner not to be interfered with in the legitimate use or enjoyment of his property. The more specific conflict discussed herein is the right of the general public to the advantages and benefits of improvements leading to the creation of a better environment versus the right of an individual not to be harmed or injured by some work done for the general benefit of the public.

In attempting to resolve this conflict, it is necessary to examine how the law in this area evolved, why it evolved in that way and what the law is today. Chapter 2 will show the development of the law in England during the Industrial Revolution including the restrictive rules. Chapters 3 and 4 will demonstrate how the British cases influenced the development of the Canadian law in this area leading to statutory codification (in Ontario 1968).

Chapter 5 will examine how the cases in Ontario interpreted the statutory codification of the law. Drawing mainly from Ontario, (with some references to cases from other jurisdictions) Chapter 6 will set out several heads of damage under which claims for injurious affection have been advanced. One of the three restrictive rules developed by the British Courts (see Chapter 2), having been statutorily eliminated in Ontario, Chapter 7 will address the issue of whether the two remaining rules should be left intact.

Chapter 8 will discuss the Alberta experience with a statute providing for compensation which, in the end, was amended twice by the Legislature because of pressure from authorities. Chapter 9 discusses an example of a recent work by an authority in the context of the law of Ontario as codified. Finally, Chapter 10 contains proposals for reform.

CHAPTER II - THE EARLY BRITISH COMMON LAW

1. Prior to the Land Clauses Consolidation Act (1845)

The right to compensation for injurious affection where no land is taken evolved as a substitute for the Common Law action of nuisance. The claimant could have pursued an action in nuisance were it not for the statutory authority to construct the work.

The story begins in England in 1810 with the case of The King v. The Directors of the Bristol Dock Company.³ Under the Bristol Dock Act⁴ an authority was empowered to improve and complete the harbour of Bristol. A company, which was engaged in brewing, occupied premises contiguous to the River Avon. Pipes had been laid along the bank joining the river at the low water mark. These pipes were used by the brewers to draw fresh water to their premises to be used in the brewing process. As a result of the improvements authorized by the Act (damming up the river in order to form and float the harbour) the water drawn by the pipes became noxious and unfit for brewing. The brewing company claimed to have sustained a loss in their trade.

The compensation clause in the legislation recognized that the works may cause damage to property and render it less valuable. In such a situation, the legislation required the company "either to purchase (the

3. (1810) 12 East. 429; 104 E.R. 167.

4. 43 Geo. 3, c. 140.

properties) or to make a just and liberal compensation".⁵ This wording was broad enough to cover injurious affection but the Court held that, if anything, the lack of accessibility to the river was a public nuisance. This meant that an individual citizen would not have a cause of action unless the damage he suffered was different from that suffered by the general public. The Court held that since the claimant could not establish a special interest (such as an easement) in the River Avon which the general public did not have, there was no compensation payable.

In this very early case, Lord Ellenborough C.J. expressed a fear of how wide and numerous the claims would be if the brewer's claim were permitted:

But here the injury if any, is to all the King's subjects; and that is the subject matter of indictment and not of action; otherwise every person who had before used the water of the river might equally claim a compensation; for which there is no pretence. And by the same rule if the salubrity of the air in Bristol were impaired in consequence of the docks, ⁶every inhabitant of the place might as well claim a compensation.

His Lordship was asking whether in allowing such a claim he would be crossing some critical line behind which the Courts ought to stop.

In a later case of The Queen v. Eastern Counties Ry⁷ where the alleged injury was to neighbouring land and was caused by an act expressly within the powers conferred on the company, Chief Justice Denman had no such fear:

5. Ibid, s. 107.

6. Loc. cit., note 3, p. 432; 104 E.R. p. 169.

7. (1841) 2 Q.B. 347; 114 E.R. 136.

We shall briefly advert to an argument much pressed upon us; that, if we make this rule absolute, any injury to land at any distance from the line of the railway may become the subject of compensation. If⁸ extreme cases should arise, we shall know how to deal with them.

Twenty five years after the initial case in 1810, a similar issue arose in The King v The London Dock Company,⁹. The Company was empowered by statute to make a new entrance to their dock in London. Like the Bristol Dock legislation, the statute authorizing the London Dock Company to carry out the work created a right to compensation. The Company made a depression in the road entering the dock area. As a result, several thoroughfares were blocked at the depression making several routes more circuitous. The owners in the neighbourhood claimed their properties had decreased in value as a result of the more circuitous routes. Chief Justice Denman found the claim could not succeed because the inconvenience is "a necessary consequence of the lawful act done by the company",¹⁰ and as such could not be compensated unless the Act specifically provided for such compensation. Further, the inconvenience is a necessary consequence of a lawful act of the company and is the same in kind although different in degree to that suffered by every inhabitant.¹¹ This concept is derived from the public nuisance cases which held that the injury had to be one felt by the claimant alone beyond the public nuisance (for example if the construction weakened a foundation or blocked drains).

8. Ibid, pp. 362-363; 114 E.R., p. 144.

9. (1836) 5 AD. & E. 163; 111 E.R. 1127.

10. Ibid, p. 179; 111 E.R., p. 1133.

11. Ibid.

In nineteenth century England, there were numerous Private Bills to authorize the activities of the taking of land and the activities of Railway Companies. These bills generally had similar clauses and the legislation required the authority to compensate any owner for damage sustained as a result of the exercise of such power. As we have seen, in the early cases the Courts were looking for some damage to the land itself and that damage had to be different in kind from that suffered by the general public.

One of the early cases to review such a Private Bill clause was The Queen v. Eastern Counties Ry.¹² The grade of the road adjoining the claimant's property had been lowered to accommodate the railway. As a result, in order to safeguard his cattle, the claimant had to fence his land. He also had to lower his land to restore access. Although none of the owner's land was taken the issue was whether the statute authorizing the Railway company to lower the grade of the road required compensation to be paid.

In Eastern Counties Ry., the hurdle in the previous cases (London Dock and Bristol Dock) was overcome. The Court held that the landowner endured a damage which was different in kind from that which other members of the public had suffered. These actual injuries were injuries to his land. Firstly, his land had to be physically lowered to re-establish access and secondly a fence had to be built. Chief Justice Denman took a more permissive or broader view than he had previously held. Rather than saying, as he did in the London Dock case, that the foreseeable damage is not compensable unless specifically provided for in the enabling statute, His Lordship said that because the powers entrusted to the company were so

12. (1841) 2 Q.B. 347; 114 E.R. 136 (Q.B.).

enormous and could be carried out without the consent of the affected landowners, injury which can be shown to result from the works should be compensated.¹³ Here, the injury was expressly caused by the execution of the work which was within the powers conferred upon the company. The reason this claim succeeded was because access was cut and the grade was lowered immediately adjacent to the claimant's land. As a result, the claimant suffered special damage beyond what the general public suffered and an action would lie at common law.

2. After the Land Clauses Consolidation Act

The flurry of Private Acts authorizing expropriation led the British Parliament in 1845, to pass the English Land Clauses Consolidation Act¹⁴ which dealt with the acquisition of real property without the consent of the owner. The Railway Clauses Consolidation Act¹⁵ was also passed in the same year. Section 68 of the former Act speaks of compensation for land "injuriously affected" by the execution of a work. Sections 6 and 16 of the latter Act speak of compensation for damage sustained by landowners "by reason of the exercise of the powers" in any special Act. The purpose of these statutes was to achieve greater uniformity and subsequent Private Acts would merely refer

13. Ibid, p. 359, 114 E.R., p. 143.

14. 8 & 9 Vict., c. 18 (1845).

15. 8 & 9 Vict., c. 20 (1845).

to these two Acts to incorporate their provisions.¹⁶ However, the Courts were now faced with interpreting provisions which specifically provided for compensation for "injurious affection".

As stated above, if the work was authorized by a statute, there was no claim possible at Common Law since the statutory authority was interpreted as providing a statutory immunity. Even when compensation claims were introduced, they were interpreted restrictively until the breakthrough in the Eastern Counties Ry case.

Shortly after the introduction of the Land Clauses Consolidation Act the Courts perceived a necessity to place restrictions on the interpretation of the statutes, and more specifically, on the words "injuriously affected". As a result of a series of decisions, three rules were developed to restrict the claims which could succeed. As will be shown later, these rules greatly influenced the development in Canada of the law of injurious affection where no land is taken. The three rules are: (1) The Actionable Rule, (2) The Nature of the Damage Rule and (3) The Construction Rule. Each will be discussed in turn.

1. The Actionable Rule

The first restriction which later became known as the Actionable Rule was developed in the case of Caledonia Railway Company v. Ogilvy.¹⁷ In 1835, Ogilvy purchased an estate and built a residential house. Ten years later, the Caledonian Railway Company put a railway line through his property.

16. see The Queen on the Prosecution of Thomas Flight v. The Vestry of St. Luke's Chelsea (1871) 6 L.R. 572 at p. 574.

17. (1856) 2 Macq. 229 (H.L. Scot.).

Ogilvy claimed compensation but the "most remarkable item" of his claim was "for injury done to the amenity of the property as a residence" because of the proximity of the railway to the house and the "inconvenience, interruption and delay" in reaching the high road as a result of the crossing.¹⁸ The Company's contention was framed in the sense of the London Dock case. Its defence was that the damages claimed were for an injury not recognized as entitling the claimant to compensation, that the enabling legislation authorized the construction of the railway across the public road forming the chief access to Ogilvy's property, and that the injuries were a necessary consequence of an authorized act.

At the trial Ogilvy was able to get damages for the land taken and the level crossing and severance. On appeal, the House of Lords did not allow the claim for the level crossing. The damage from the level crossing was a damage without compensation.

With reference to the claim for the level crossing, both Lord Cranworth L.C. and Lord St. Leonards reiterated the concern first expressed by Lord Ellenborough in the Bristol Dock Company case, namely the likely proliferation of claims if this claim were permitted. Lord Cranworth feared that if the claim was permitted, every person who is stopped at the level crossing would be entitled to an action.¹⁹ Lord St. Leonards expressed the same concern in this way:

...but there is no compensation to be had for that. And if there were, I ask where are we to stop?²⁰

and

18. Ibid, p. 230.

19. Ibid, p. 235.

20. Ibid, p. 250.

My Lords, in England the universal opinion has been that no such remedy lies. If such remedy did lie, most unquestionably you would have had thousands of instances in which it would have been applied for, because daily and hourly men are sustaining damage and inconvenience from acts done under the authority²¹ of Acts of Parliament by railway companies. That is undeniable;

Ogilvy relied on the Eastern Counties Railway case, but the House of Lords felt the principle in the case at bar was the same as in the London Dock Company and Bristol Dock Company cases. Accordingly, the House of Lords dismissed Ogilvy's claim for damage as a result of the level crossing because this alleged damage was the natural consequence of the creation of the railway which was authorized by an Act of Parliament and because the injury sustained by Ogilvy was no different from that suffered by the general public.²²

Lord Cranworth imposed a severe restriction upon the phrase "injuriously affected". A statute which gives compensation for injuriously affecting lands:

"certainly does not entitle the owner of lands which he alleges to be injuriously affected, to any compensation in respect of any act which, if done by the Railway Company without the authority of Parliament,²³ would not have entitled him to bring an action against them."

Thus the damage must result from an act which was actionable at Common Law in the first instance but which, in the particular case, was rendered lawful by the statute. In other words the procedure set up in the statute for compensation is a substitute for the common law action which would have existed but for the statutory authority which authorized the works. In this

21. Ibid, p. 246.

22. Ibid, pp. 248-251.

23. Ibid, p. 235.

case, Lord Cranworth said that "no right of action would have existed if the making of the railway had not been authorized by Parliament."²⁴ This limitation came to be known as the "Actionable Rule".

The Actionable Rule was further developed in Henry Ricket v The Directors etc. of the Metropolitan Railway Company.²⁵ Henry Ricket was the occupier of a public house called the "Pickled Egg". The Metropolitan Railway Company was constructing a railway and for twenty months blocked access to Ricket's "Pickled Egg" except by pedestrians. Ricket claimed that his business was injured because of the obstructions. He claimed compensation pursuant to Section 68 of the Land Clauses Consolidation Act and Sections 6 and 16 of the Railway Clauses Consolidation Act. Henry Ricket was no more successful than Ogilvy but this time the majority decision was balanced by a strong dissent by Lord Westbury.

Lord Cranworth denied Ricket's claim expressing the same policy concerns he had expressed eleven years earlier:

Any other construction of the clause would open the door to claims of so wide and indefinite a character²⁶ as could not have been in the contemplation of the legislature.

and later:

Such a claim, if sustainable, would admit of no limit.²⁷

24. Ibid, p. 237.

25. [1867] L.R. 2 H.L. 175.

26. Ibid, p. 198.

27. Ibid, p. 198.

Lord Chelmsford denied Ricket's claim referring to a statement of Lord Campbell in Re Penny and South Eastern Railway Company:

unless the particular injury would have been actionable before the company had acquired their statutory powers it is not an injury for which compensation can be claimed.²⁸

Both Lord Chelmsford L.C. and Lord Cranworth agreed that the damage to be the subject of compensation must be different from that suffered by the general public. Further, although the owner may suffer damages different in degree to that suffered by the general public, if the damages are the same kind as that suffered by the general public it would not be the subject of an action at Common Law. An obstruction is the same kind of damage for all the public and therefore not actionable at Common Law. In order to be actionable at common law, the damages must be different in kind from that suffered by the general public. Both Lord Chelmsford and Lord Cranworth applied Lord Denman's principle from the London Dock case: that any activity is impossible without consequences and "compensation for remote consequences resulting from a company's works was not intended."²⁹

Lord Cranworth also imposed an additional restriction on claims of this nature by saying that the injury must be to the land itself such as loosening of a foundation or the obstruction of light or access. It must not be merely a personal or business loss. The injury to the land must be one that would be suffered by any owner of the property regardless of the use to which he might put the property. This concept, as will be shown later, formed the basis of what became known as the Nature of the Damage Rule.

28. Ibid, p. 187.

29. Ibid, p. 195 & p. 200.

Thus, the majority (Lord Chelmsford L.C. and Lord Cranworth) denied Ricket's claim by restricting compensation to claims which would have existed at Common Law, that were damages to the land itself, and were not a remote consequence of the act authorized by the statute.

Lord Westbury dissented. He found it "painful to observe the conflicting decisions" which were "impossible to reconcile by any sound distinctions" and he also felt that these conflicting decisions tended to "neutralise each other".³⁰ In Lord Westbury's view the claim was based on contract and, as a result, it was not necessary that an action lie at common law in order for a claim to succeed. Imposing this requirement, he felt, was the error in previous judgments. Lord Westbury felt that the statute is a contract between the Railway Company and the Legislature requiring that the damage caused by the Railway Company be minimal and interested parties be compensated. The test for allowable claims, in his view, was two pronged: it was necessary to prove, firstly, special damage or individual particular loss to the occupant of the property occasioned by the construction of the railway or its incidental works, and secondly that the complainant is a party interested within the meaning of the statute.³¹ An interested party is one who sustained loss as a result of the contract between the Railway Company and the Legislature.

Although Lord Westbury agreed with the majority that compensation could not be claimed for damage which all of the population suffers or for damage resulting from the use of the railway as opposed to its construction,³²

30. Ibid, p. 201.

31. Ibid, p. 203.

32. Ibid, p. 203.

he could not agree that the works under the statute did not injuriously affect the "Pickled Egg" for the use to which it was being put by the owner. The owner's interest in a property is reflected in its value, and since he felt the loss of profits devalued the property, damaging the owner's profits effectively damaged his interest in the property.

It is interesting to note that in Lord Westbury's test he did not require that the injury be a physical injury to the property itself (the nature of the damage rule as expressed by Lord Cranworth), rather the injury could be injury to the occupant of the property. Although Lord Westbury would have allowed Ricket's claim as the occupant of the property, owners of stage coaches would be denied compensation presumably because their properties were moveable as opposed to immoveable and section 16 of the Railway Clauses Act permitted damages to "lands".

2. The Nature of the Damage Rule

The restriction of the Nature of the Damage Rule was first developed by Lord Cranworth in Ricket when he said the injury must be to the land itself, for example loosening of a foundation.³³ However, the restrictive nature of the rule was greatly weakened in The Chairman, etc. of the Metropolitan Board of Works v. Owen McCarthy.³⁴ Owen McCarthy carried on a building materials supply business twenty feet from a draw-dock leading to the Thames River. He had no easement or special right to use the dock other than as a member of the public. But, because of its proximity, he used it in his business. Under the Thames Embankment Act a solid embankment was installed,

33. Supra, p. 12.

34. [1874] L.R. 7 H.L. 243.

thus permanently blocking the dock. Accordingly, access through the dock to and from the Thames was destroyed. McCarthy claimed that, as a result his premises were diminished in value. Owen McCarthy fared better than either Ogilvy or Henry Ricket. His counsel, Mr. Thesiger, defined the right to compensation in his argument, as follows:

The principle to be deduced from a consideration of all the cases is this, that where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his own property, he is entitled to compensation if, by reason of such interference, his own property is injured. The word "physical" is here used in order to distinguish the case from cases of that class where the interference is not of a physical, but rather of a mental nature, or of an inferential kind, such as those of a road rendered less agreeable or convenient, or a view interfered with, or the profits of a trade, by the creation of a new highway or street, diminished in the old one. And in like manner the words "a right, public or private, which the owner of property is entitled to make use of," apply to this case and distinguish it from such cases as The Hammersmith Railway Company v. Brand. There no right, public or private, was interfered with, and the claim for compensation was made in respect of the injury to the enjoyment of the property, which injury was the foreseen and inevitable consequence of the railway authorized by Parliament to be constructed. An absolute taking of the land, or an injury to the structure of the house, is not necessary to found a claim for compensation. If the house is permanently diminished in value, the property is "inj³⁵juriously affected," and the claim for compensation arises.

The Court, by and large, accepted this definition. Lord Chelmsford found that because of its access to the river, the property had a value it would not have had without the access. Consequently, destruction of the access meant that the owner, irrespective of how he used the property, suffered a damage different (in kind) from that sustained by the public generally. Thus compensation was payable even though there was no physical

35. Ibid, pp. 249-250.

damage to the land itself. The land had depreciated and compensation was payable. This approach considerably relaxed the restriction which required physical damage to the land itself. Now depreciation in value as a result of the works without physical damage could form the basis of a claim for compensation.

3. The Construction Rule

The Construction Rule has its basis in The Directors etc of the Hammersmith and City Railway Company v. G.H. Brand and Mary C. Louisa.³⁶ In that case, a railway was built within twelve feet of Mrs. Brand's house. The claim was based on the fact that the value of the house had depreciated as a result of vibrations caused by engines using the tracks. There was no structural damage to the house. The Court refused Mrs. Brand's claim on the basis that the sections of the Railway Clauses Consolidation Act³⁷ were headed with the words "And with respect to the construction of the Railway". Since the heading referred only to damages caused during the construction and did not include damages arising after construction was complete - i.e. during the use of the railway track, Mrs. Brand's claim was not permitted by the statute. The statute took away Mrs. Brand's action at Common Law. She was left without a remedy. The principle in the Brand case later became known as the Construction Rule.

Similarly, in Ogilvy the interruption and delay was caused by the trains and not the tracks themselves (in other words by the use of the works and not by the works themselves). This is one of the reasons Ogilvy's claim

36. [1869] L.R. 4 H.L. 171.

37. Supra, p. 7.

failed although the case is not known as the basis for the Construction Rule.

Looking back at Lord Westbury's dissent in Ricket, he would allow a claim if the owner's (Mrs. Brand's) interest is lessened as a result of the railway. He likely would have dissented in Brand as well.

3. The Policy

As will be seen, in spite of Chief Justice Denman's confidence in the ability of the judiciary to deal with the issue when difficult cases arise,³⁸ the floodgates theory keeps on surfacing in decisions throughout the years and seems still to exist today. In any society it is, ultimately, policies which decide the limits of liability. When new claims arise, the Courts must decide whether, in allowing the claims, they are crossing some critical line which they ought not to cross. The policy arguments against allowing the new claims are: firstly that to allow them would lead to a proliferation of claims; secondly, that to do so would impose liabilities on defendants which are out of proportion with the activity; and, thirdly, that if such claims are to be allowed, they should clearly be allowed by the legislature after sufficient research and public debate as to the consequences.

38. Loc. cit., note 8.

CHAPTER III - CANADIAN CASELAW PRIOR TO 1968

In 1968, the legislature in Ontario, for the first time, established statutory provisions to deal directly with injurious affection where no land is taken.³⁹ Prior to the 1968 statute, the Canadian caselaw on injurious affection is dominated by four cases which introduced into Canada the restrictive rules developed by the British Courts.

Canadian Pacific Railway Company v. Alberta Albin⁴⁰ involved the construction of a subway which resulted in the lowering of the grade in the street right in front of Albin's store. This practically destroyed the access to the store. The case is of interest because the issue was whether there could be a claim for loss of business in addition to full compensation for loss of value of the property both of which are now specifically included in the definition of "injurious affection" in the 1968 statute. The Supreme Court of Canada held, with two dissenting judgments, that Albin was not entitled to be compensated for business loss in a case where no land is taken. The Court held that Albin had the right to be compensated for the depreciation in value of her property because there was a physical interference with a right the owner was entitled to enjoy in connection with her property which diminished its value. Anglin J., speaking for the majority, held that profits of a business are only to be considered in so far as they affect the value of

39. Expropriations Act, R.S.O. 1980 c. 148, s. 1 (1) (e) (ii).

40. (1919) 59 S.C.R. 151.

the property as a marketable item for any use to which the property can be put.⁴¹ In separate reasons, Mignault J. also denied the claim for business loss as a permitted claim where no land was taken.⁴² The two dissenting justices (Idington J. and Brodeur J.) would have allowed the claim for business loss. They relied on two cases⁴³ which are the basis in compensation law for a long held principle that it was the value of the land to the owner which was to be compensated rather than the value to the taker or the market value. Both of these cases involved a taking of some land rather than injurious affection where no land was taken. The principle of value to the owner has since been eliminated by the Supreme Court decision in 1967 of National Capital Commission v. Hobbs.⁴⁴

Incidentally, in Albin no mention was made of a decision of the Supreme Court of Canada two years earlier in The Corporation of the City of Toronto v. The J.F. Brown Company⁴⁵ in which four out of the five justices were the same as in the Albin case. The J.F. Brown case involved a claim for depreciation in the value of the J.F. Brown Company's property as a result of the construction by the City of Toronto of public lavatories underground with entrances in front of Brown's property. The arbitrator found that the mere presence of the lavatory was sufficient to depreciate the

41. Ibid, pp. 160-161.

42. Ibid, p. 173. Mignault J., however, said he could not appreciate the reason for the distinction between cases where land is taken and those where no land is taken and that no loss of business is allowed where no land is taken.

43. Dodge v. The King (1906) 38 S.C.R. 149
Postoral Financial Association v. The Minister [1914] A.C. 1083.

44. [1970] S.C.R. 337.

45. (1917) 55 S.C.R. 153; affirming (1916) 36 O.L.R. 189 (C.A.).

company's property in value. The majority of the Court felt that the owner cannot claim business loss as such but only as it depreciates market value. The Supreme Court of Canada however found that the J.F. Brown Company "was deprived of the value inherent in a corner lot".⁴⁶ Davies J. in a strong dissent would not allow loss of trade arising from use of works constructed in accordance with statutory authority. The J.F. Brown case was, however, interpreted in later cases as being support for the proposition that it is damage for the existence of the works which is compensable whether or not those works are ever used.

The four conditions which later came to dominate the law in the area were first enunciated in Canada by Angers J. of the Exchequer Court of Canada in Autographic Register Systems Ltd. v Canadian National Railway Company.⁴⁷ The CNR built a subway in front of the plaintiff's building to eliminate a level crossing. No land owned by the claimant was taken. Angers J. set out four conditions required to give rise to a claim for injurious affection when no land is taken, namely:

- (a) the damage must result from an act rendered lawful by statutory powers of the company;
- (b) the damage must be such as would have been actionable under the common law, but for the statutory powers;
- (c) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
- (d) the damage must be occasioned by the construction of the public work, not by its user.⁴⁸

46. Ibid, p. 176.

47. [1933] Ex. C.R. 152.

48. Ibid, pp. 155-156.

These four conditions were derived from the restrictions developed by the English cases referred to above. The Court held that compensation can be claimed for loss in market value or depreciation.

In 1962 in The Queen v. Loiselle,⁴⁹ the Supreme Court of Canada dealt with the issue for the last time before the coming into force of the new Ontario Expropriations Act.⁵⁰ As part of the construction of the St. Lawrence Seaway, Highway No. 3 was closed and diverted at a point 80 feet from Edgar Loiselle's garage and service station with the result that the garage was now at the very end of a cul-de-sac and about 1500 feet from the relocated highway. Mr. Justice Abbott speaking for the Court referred to the four conditions set out by Angers J. in Autographic Register Systems as being "now well established".⁵¹ It was conceded that conditions one and four were met. The Court held that condition two was met on the basis that there was a physical interference with a right which the owner was entitled to enjoy and such interference diminished the property's value as commercial property. Because the only right referred to in the case is the right to use the property for commercial purposes for which it "was well located" prior to the highway diversion, it is clear that the Court was of the view that diminishing commercial potential was compensable.

49. [1962] S.C.R. 624; 35 D.L.R. (2d) 274.

50. R.S.O. 1980, c. 148.

51. Loc. cit., note 49, S.C.R. p. 627; 35 D.L.R. (2d) p. 274.

The importance of these four cases is that they established in Canada the four conditions as developed by the English Courts. These four conditions are the basis for the current statutory definition of "injurious affection" in the Ontario Expropriations Act.⁵² Chapter V, will examine how the Land Compensation Board and the Courts dealt with these conditions once they were put into statutory form.

52. Loc. cit., note 50.

CHAPTER IV - HISTORY OF ONTARIO EXPROPRIATION STATUTES AND INJURIOUS AFFECTION PROVISIONS

Before January 1964, when The Expropriations Procedures Act⁵³ came into force, the statutory provisions relating to expropriation procedures, the power to expropriate and the rules of compensation in Ontario were spread over thirty statutes. The Expropriations Procedures Act resulted from the Report of the Select Committee of the legislature on Land Expropriation (February 19, 1962). This Act codified the procedure and the rules for compensation. However, for the power to expropriate, one still had to look to numerous statutes such as the Highway Improvement Act or the Municipal Act of the time.

In 1968, as a result of the 1967 Ontario Law Reform Commission report on the Basis for Compensation on Expropriation⁵⁴, the Expropriations Procedures Act was repealed in favour of the Expropriations Act, 1968-69⁵⁵. This Act still only dealt with the procedural aspects and the rules for compensation.

The Ontario Law Reform Commission, in its 1967 Report was of the view that the Act as it stood (Expropriations Procedures Act) clearly left "room for the giving of damages where no land is taken"⁵⁶ for the Act provided

53. Expropriations Procedures Act, 1962-63, S.O., 11-12 Eliz.II c. 43.

54. Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation (1967).

55. Expropriations Act, 1968-69. R.S.O. 1980, c. 148.

56. Loc. cit., note 54, p. 47.

that "where land is... injuriously affected by an expropriating authority in the exercise of its statutory powers the expropriating authority shall make due compensation... for any damage necessarily resulting from the exercise of such (statutory) powers".⁵⁷

In referring to the four conditions which were laid down in Autographic and Loiselle the Report concluded:

The first two conditions place the expropriating authority in much the same position as a private person. It imposes on the authority liability for wrongs, such as nuisances and trespasses, for which it would have been liable had it not been for the statutory powers.⁵⁸

and then the Commission asked:

Of the four conditions necessary to establish a claim for damages for injurious affection where no land has been taken, the last two may be open to question. These excluded damages for personal injury or an injury to business or trade, and also damage occasioned by the use of the work. Damages to a trade or business are recoverable where there is a partial taking. They are also recoverable on partial takings where the damage is caused by the use of the work. Should the law with respect to liability where there is no taking be put on the same basis as where there is a partial taking? Is there any merit in the present inconsistency? The two questions will be dealt with separately.⁵⁹

The Report recommended that expropriating authorities be liable for personal and business damages when no land is taken if, in the absence of statutory authority, liability would have existed. This recommendation was made on the basis that the owner has suffered a loss for which he should be indemnified and further on the basis that there is no justification to treat

57. Loc. cit., note 53, s. 6(1).

58. Loc. cit., note 54, p. 48.

59. Ibid.

an owner whose land has been partially taken differently from one from whom no land is taken.⁶⁰ The point here is that, in the case of a partial taking, when some of an owner's land is taken he can claim personal and business damages so why not when no land is taken? Consideration was not given to whether there is any justification for treating them differently. This recommendation was implemented in the statute⁶¹ which followed the Report.

In cases where there is no taking, the 1967 Ontario Report recommended that "expropriating authorities remain liable for damages caused by the construction of the work and remain exempt from liability where damage is caused by the use of the work"⁶² until a study is conducted showing what the cost of imposing liability for the use of the work where no land is taken is likely to be.

As a result of the 1967 Ontario Law Reform Commission Report on The Basis for Compensation on Expropriation⁶³ and the 1968 Royal Commission Inquiry into Civil Rights headed by the Honourable J.C. McRuer,⁶⁴ the Expropriations Act, 1968-69⁶⁵ was enacted. This statute reconfirmed in Section 21 that an owner is entitled to damages for injurious affection where no land is taken. (see Appendix A) For the first time, there was a statutory definition of "injurious affection" where the statutory authority "does not

60. Ibid, p. 49.

61. Expropriations Act R.S.O. 1980, c. 148, s. 1 (1) (e) (ii) (b).

62. Loc. cit., note 54, p. 49.

63. Loc. cit., note 54.

64. The Honourable J.C. McRuer, "Royal Commission Inquiry into Civil Rights", First Report, (1968).

65. R.S.O. 1980, c. 148.

acquire part of the land of an owner". In a case where no land is taken the Expropriations Act 1968-69 defines "injurious affection" as

- (A) such reduction in the market value of the land of the owner,
and
- (B) such personal and business damages

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute.⁶⁶

This statutory definition codifies the first, second and fourth principles as enunciated in Loiselle and Autographic and repudiates the third principle. In other words, the Actionable Rule and the Construction Rule were codified and damages would now extend to personal and business damages rather than being restricted to damages to the land itself. The statutory definition also accepts the two recommendations of the Ontario Law Reform Commission of 1967.

A close examination of the statutory definitions of "injurious affection" when land is taken versus when no land is taken (see Appendix A) reveals that for a claim for loss in market value when no land is taken, there are two significant requirements which do not exist when some land is taken from the claimant. These two significant requirements are: the actionable rule (that the work of the authority would be actionable were it not for the statutory authority) and the construction rule (that the loss must arise from construction and not the use of the works). In other words, for a claim of loss in market value when no land is taken the issue can be phrased

66. R.S.O. 1980 c. 148 s. 1(1)(e)(ii). See Appendix A; See also Appendix B for identical provisions in New Brunswick and Nova Scotia.

as: is there an actionable nuisance caused by the construction alone which results in a loss in market value.

Further the examination of the two sections reveals that for a claim for personal and business damages when no land is taken from the claimant, the construction rule is the only significant requirement which does not exist where some land is taken.

In Chapter VII, I will discuss whether these significant differences ought to remain in effect.

CHAPTER V - THE LAND COMPENSATION BOARD

The Expropriations Act 1968-69⁶⁷ set up a quasi-judicial board to be known as the Land Compensation Board. This Board had jurisdiction to determine compensation for land expropriated or injuriously affected. As stated previously, the new statute, for the first time, contained a statutory definition of "injuriously affection". According to that statutory definition, in the case where none of the claimant's land is taken, in order to succeed in a claim for injurious affection three conditions must be met: - there must be (1) construction of a work (2) by a statutory authority (3) for which the statutory authority would be liable if the work were not under the authority of a statute (The Actionable Rule). In this event the owner from whom no land was taken can claim (1) the reduction in market value, (2) personal damages and (3) business damages provided the same are caused by the construction of the work and not its use (The Construction Rule) - See Appendix A for provisions of Ontario statute and Appendix B for identical and similar provisions in statutes in other Provinces.

How did the newly constituted Land Compensation Board and the Courts deal with this provision since its coming into force? Although the statute came into force in 1968 it was not until March 2, 1972 that the Land Compensation Board was asked to determine compensation in respect of a claim for damages for injurious affection where none of the claimant's land was expropriated. In fact, in this case, no land at all was expropriated. The

67. Op. cit., note 55.

case was Four Thousand Yonge Street v. Metropolitan Toronto.⁶⁸ The work was the construction of a sanitary trunk sewer during the years 1965 and 1966. The claimant alleged that, because of the construction of the West Don trunk sewer, the rivershore near its building eroded and it was required to do limestone work and construct concrete gabions on the riverbank. The Land Compensation Board, "unable to find any precedent to guide it",⁶⁹ found that the erosion was caused by a combination of the action of the water moving down the river before the construction and the actions carried on during the construction which increased the undercutting by increasing the intensity of the water against the south bank. The damages caused were considered personal damages. On the basis that there was evidence on which the Board could so find, the Ontario Court of Appeal⁷⁰ confirmed the decision.

On August 11, 1972, the Land Compensation Board had a second look at determining injurious affection from construction of a project where no land at all is taken.⁷¹ In this case the authority, having entered the land through a written permission and easement, widened, straightened and reconstructed a creek running through the claimant's land. The claimant's land being vacant, he could not claim personal or business damage. His claim was for loss in market value. The claimant was arguing that, as a result of the works, the lands were virtually unusable and unsaleable and therefore had no value. Accordingly, he argued that he was entitled to the full value of his land as compensation.

68. (1972) 2 L.C.R. 191.

69. Ibid, p. 192.

70. (1973) 3 L.C.R. 299 at p. 301.

71. Fried v. Minister of Transportation and Communications (1973) 3 L.C.R. 262.

Since this case is an example of the extent of claims under the statute, it is important to take a closer look at the argument advanced by the claimant. The claimant's argument was somewhat unique. He admitted that the land "was too small for redevelopment by itself".⁷² Nevertheless, he argued that there was a development going on to the North by New Peel and that were it not for the activities of reconstruction of the creek by the Minister of Transportation and Communication, New Peel would probably have had to improve the creek (as a condition of rezoning its land). In order to do so, New Peel, of course, would have had to acquire the claimant's land. What the claimant was really saying was the reconstruction of the creek by the Minister of Transportation and Communications essentially removed the bargaining position of the claimant vis-a-vis New Peel. In effect, New Peel no longer needed to do the work since the Minister of Transportation and Communications had already done it. New Peel accordingly, did not need to acquire the claimant's property. Consequently, the claimant argued his property was rendered valueless. The Board agreed and simply applied the per acre value paid for lands adjoining the subject property and awarded the sum so calculated as the reduction in market value of the property. The Board was saying that the reduction in market value was equal to the amount a developer to the North of the claimant would have had to pay if it was required to acquire specifically the claimant's land. It is the price New Peel would have had to pay the claimant if it had to acquire the claimant's land bearing in mind that New Peel did not possess the power of expropriation. It can readily be seen that New Peel would have had to pay the claimant's asking price. This is what was known as value to the owner which had been eliminated as a test of market

72. Ibid, p. 276.

value.⁷³

Further, the statute speaks of a reduction in market value and in order to determine the reduction in market value as a result of the construction, one should consider the value at two points in time - i.e. before and after the construction. The Board never spoke of the value of the property after the construction. Because the Board said the loss in value equals the value before construction, the Board, by implication, must be saying the property had no value after the construction. This could be only because the owner could no longer obtain a "hold out" value after the construction.

The Board seemed completely to lose sight of the fact that the land "was too small for redevelopment by itself". Surely, if it was too small for redevelopment by itself before the construction it was also too small for redevelopment by itself after the construction. Further, by implication in the Board's reasoning, the subject property had no market other than to one person (New Peel). In addition, by implication, the damages, if any, would be caused only if New Peel required the creek as widened and straightened by the Minister of Transportation and Communications. The damages would not be caused by the widening and straightening of the creek. The only consequence of the construction was possibly to eliminate one potential purchaser. The Board did not consider these facts.

Notice that the Board was saying that land which admittedly had no developable value itself suddenly became valuable and its value was neither the value to the taker nor the value to the owner (a test now rejected in

73. Op. cit., note 44.

law), but the value (or potential cost) to a third party (New Peel). The questions, of course, which beg to be answered are: what if there was no New Peel development, or what if New Peel refused to develop if it had to acquire the claimant's land at a hold out price, or what if the municipality had not required the work as a condition of New Peel's development, or what if a better drainage system was discovered which did not require the use of the claimant's land? One could argue that instead of a "windfall" to New Peel (as the Board found) it was a "windfall" to the claimant that New Peel was in fact, at that time, carrying out a development nearby. Apart from perhaps having a value if joined with contiguous property, the land of the claimant would only have value if, as and when the New Peel development would proceed and then only if New Peel had to acquire the specific land for drainage for its development. There are, in my view, simply too many unknowns and variables to attach a value to the land based on these contingencies.

The Land Compensation Board's decision in Fried is a most interesting one. We have a piece of land which admittedly had no developable value before the New Peel development and had no apparent value without the New Peel development, having a value because of that development and the Minister of Transportation and Communications was required to pay that value because its work may have eliminated a potential purchaser. Suppose the Minister had not carried out the work and the municipality permitted the New Peel development without requiring the betterment of the sewer, the alleged "damage" would have been the same because New Peel would not have had to acquire the land, but because there would have been no "work" there could be no possible claim. The catalyst to the "hold out" value is the New Peel development and the conditions surrounding it. However that development is totally independent. The works without the New Peel development caused

absolutely no loss in value. The New Peel development without the works caused absolutely no loss in value. It is difficult to see a logical connection in the way the Board tried to connect them. At best the alleged loss of a buyer can be said to be a remote result of the work and it seems highly questionable whether the loss of a potential buyer is properly compensable as injurious affection. This decision, however, was not appealed.

Less than two months later the Board (two out of three members being the same as in the Fried case) again considered a project involving a third party.⁷⁴ In another example demonstrating the extent of potential claims under the statute, the municipality closed streets and changed street patterns. Apartment buildings were constructed in the vicinity. The owners of a neighbouring property alleged a loss due to the works. In this case the claimants said the construction of apartment buildings near their property which caused their loss was a direct result of street closings and changes in street patterns. The Board once again held the authority responsible for the damages as being the natural and probable consequence (as opposed to direct damages) of the construction (the road closing and change in street pattern). The damages were assessed as a business loss.

This time, however, the Municipality appealed the Board's decision. The Court of Appeal⁷⁵ found that the damages flowed from the construction of the apartment buildings, not from the road closings. Since the apartment buildings were constructed on private land in conformity with the official plan and zoning bylaw there is no right of action for damages resulting from

74. Rotenberg et al. v. Borough of York (1973) 3 L.C.R. 204.

75. (1974) 4 O.R. (2d) 457, (1974) 6 L.C.R. 77.

the construction of the apartment buildings.⁷⁶ In other words, the road closings and change in road patterns were not the direct cause of the claimant's damages. The Court of Appeal decision seems to be a more realistic approach to the case where no land is taken, refusing to extend claims to remote results not directly caused by the works. Based on the Court of Appeal decision in Rotenberg, the Land Compensation Board decision in Fried if appealed, may also have been reversed by the Court of Appeal on the basis that the damages (if any) were caused by loss of a buyer and not by the works.

In 1962, Neil and Pauline Larson, in contemplation of marriage, acquired a motel property. The City of Windsor, together with the Province of Ontario, constructed the E.C. Row Expressway on lands abutting the Larson's motel property. Dougall Road, on which the motel was situated, was widened and a median strip was constructed down its centre. An overpass for the expressway was built at Dougall Road and an earth embankment was built on lands immediately beside the motel property. Although properties in the area were expropriated, the Larson's property was left intact (Larson v. City of Windsor).⁷⁷

The Board was of the view that the median strip created problems of access and egress and discouraged prospective customers. In addition, the Board was of the view that the concrete overpass and elevated roadway detrimentally affected the property in a visual manner by detracting from the appearance of a place where people would like to stop for a rest. In addition there was noise, dust and disturbance from the heavily travelled high speed expressway. The Board found that the words "construction of the works" meant

76. Ibid, p. 460; (1974) 6 L.C.R. p. 80.

77. (1979) 17 L.C.R. 349.

not only during the "course of" the construction but also the completed "fact of" construction⁷⁸ and then found that the completed fact of construction of the expressway resulted in a loss in market value of Larson's property of \$80,000.

The City appealed but the Divisional Court⁷⁹ dismissed the appeal stating that it saw "no difference in principle between a barrier that allows access for traffic from one direction only and the creation of a cul-de-sac road that has substantially the same effect".⁸⁰ The Divisional Court found that "a private right of access had been interfered with"⁸¹ The Court referred to the median and not the noise factor or overpass because the valuation the Board accepted was based primarily on damages caused by the median.⁸² This case is important because it deals with the policy issue of the use of medians to control traffic.

The most recent Ontario decision directly on this issue is St. Pierre v. Ministry of Transportation and Communications⁸³ In 1961, Larry St. Pierre and his wife acquired approximately 125 acres of land about one

78. Ibid, p. 371.

79. 29 O.R. (2d) 669; (1981) 20 L.C.R. 344.

80. Ibid, p. 674; (1981) 20 L.C.R. p. 349.

81. Ibid.

82. Loc. cit., note 79, p. 677; (1981) 20 L.C.R. p. 352.

83. (1981) 21 L.C.R. 68.

mile from the London city limits for the purpose of construction of a retirement home. The home was built in 1961-62. Prior to June 1976 the Minister of Transportation and Communications acquired from the owners of the land immediately to the east of St. Pierre's property, a strip of land approximately 250 feet wide for the purpose of constructing Highway 100. Construction of the highway commenced in June 1976 and the highway opened to traffic in the early autumn of 1977.

The claim was for reduction in market value and the Board found a reduction in value of \$35,000.

The Divisional Court⁸⁴ upheld the Board's decision thereby confirming its decision in Larson. Although the Court referred to the four rules in Loiselle as being correct, it found, contrary to one of them, that "any suggestion that compensation will be confined to a violation of specific right traditionally recognized by law is, with respect, erroneous".⁸⁵ The Court treated any reference to a right as the right to use one's property without interference.

The Divisional Court in both Larson and St. Pierre were holding that Brown was still good law in Ontario in that it was not the use of the lavatories (the road in Larson and St. Pierre) which led to the damages but their (its) mere existence or "the completed fact of construction"⁸⁶

84. (1983) 25 L.C.R. 250.

85. Ibid, p. 253.

86. Infra., p. 76. (per Chief Justice George Challies).

The closing words of Smith J. are of interest:

In each case, it is a question of fact and often one of degree of interference, as already stated, to be decided in light of established legal principles. Once land is injuriously affected, and not in a trivial manner, with a consequent decrease in value being found to have been caused arising from a limit being placed upon the user of that land, then the matter of compensation must be addressed.

In some cases, it is a question of access, in others of recreation. In this case, the word aesthetic was used to describe the nature of the affection. It was said that there was not a right to a view. The words view and aesthetic were used but possibly for want of better ones. The claimants' real complaint on the evidence encompasses a great deal more. It is wrong to insist upon the characterization of "a right to view". This is not to say that the law will dismiss out of hand that part of the enjoyment of land which lies in the area of the mental, the aesthetic or the artistic. To the contrary, an exclusion of that sort would be quite arbitrary. In The Queen v. Bernier et al. (1975), 8 L.C.R. 198, Decary J. took into account the character of locale and the sensitivity of the plaintiff. Loss of access to the sea and loss of the possibility of admiring it were denials of the amenities that formed part of the way of life and customs of the inhabitants of the area. Without conceding that such a loss would always be compensable, the case at least affords an illustration of the approach that commends itself to me. It is always a question of substantial interference with enjoyment with all that enjoyment implies.⁸⁷

These words appear to indicate that the Divisional Court was leaning towards the old concept of value to the owner as being the market value of the lands. Further, the Court confirmed the Board's decision to grant the claimant \$35,000 "for the reduction in market value of their residence". Yet nowhere in Section 21 nor in the definition of "injurious affection" is there a reference to value to the owner. The only "value" to which the sections refer is "market value" which is something quite different from value to the

87. Loc. cit., note 84, p. 254.

owner. A value of a particular property to its owner may be something much higher than a willing buyer would pay to a willing seller (market value) being the same owner. Market value is the value to both buyer and seller. Value to the owner is the value to only one of them.

The Minister appealed. All three justices of the Court of Appeal allowed the appeal. The Ontario Court of Appeal⁸⁸ found that it was undoubted that the claimant's land was reduced in value. The issue was whether this loss was compensable. The thinking of the Court of Appeal in this decision demonstrates the difficult balancing act between the rights of owners (including the public as owner) to use their property as they wish and their obligation not to be a nuisance to their neighbour.

To succeed, the Court of Appeal held, the claimants would have had to show that they had an action at Common Law for the recovery of the undoubted reduction in market value and secondly the claimants would have had to show that the reduction in value resulted from the construction and not the use of the works.

For an action at Common Law the claimant "would have had to show a physical interference with a right which the owner was entitled to use in connection with his property".⁸⁹ The owner does have a right to use his land free of any nuisance emanating from adjacent land. But Mr. Justice Weatherston felt "it (was) not sufficient for the claimant(s) merely to show an undefinable loss in the enjoyment of their property"⁹⁰ and "the loss of

88. (1984) 28 L.C.R. 1.

89. Ibid, p. 4.

90. Ibid, p. 5.

privacy and of the view over a rural landscape... would not have been actionable at common law, and so are not compensable."⁹¹ Houlden J.A. said that the Minister's construction of Highway 100 was not an unreasonable or excessive user by the Minister of his lands so as to constitute a private nuisance. Therefore the claimant had no cause of action in nuisance at common law. Note that Houlden J.A. is not necessarily saying that generally the use of lands for a highway is reasonable. What he is saying is that such use of the specific land is reasonable - i.e. the land being owned by the Minister of Transportation and Communication, its use as a highway is not unreasonable.

Mr. Justice Houlden noted the difficulty in defining what precisely would constitute a nuisance:

What conduct amounts to a nuisance at common law is 'incapable of exact definition'⁹²

He also quoted with approval from Prosser's Handbook on the Law of Torts:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance". It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement⁹³ that it is incapable of any exact or comprehensive definition.

Mr. Justice Houlden went on to point out the difficulty in balancing the right of the private landowner against the rights of the public generally:

91. Ibid.

92. Ibid, p. 8.

93. Prosser, Handbook on the Law of Torts, (4th ed. 1971) at p. 571; 28 L.C.R. p. 8.

What is the interference with the St. Pierres' property that has occurred in the present case? It seems to me that it is this: the neighbourhood has changed. The St. Pierres no longer enjoy the peace and seclusion that they formerly enjoyed; they are now subject to the noise from traffic on Highway 100. Their view has been interfered with. They no longer look out over rolling countryside; instead, they now look out onto a major traffic artery.

Does this give rise to a cause of action in nuisance? Regrettably, I do not think it does. Public highways have to be erected, and, unhappily, their construction frequently interferes with the aesthetic amenities formerly enjoyed by the owners of adjoining properties.⁹⁴

Even after this emphatic statement from the Ontario Court of Appeal, the battle raged on. The Ontario Municipal Board which had taken over hearing these matters from the Land Compensation Board⁹⁵ continued to allow such claims where no land was taken. In Edgcumbe et al. v. Regional Municipality of Hamilton Wentworth⁹⁶ the work involved the construction of a landfill site. The site was selected after the appropriate studies were carried out and Environmental and Ontario Municipal Board hearings were held. The claimants' argument was that when they purchased their property "it was in a very secluded pastoral surrounding" being on a dead end gravel road with minimal traffic and "there were no reasons at that time (when the property was purchased) to fear that the existing conditions would be altered".⁹⁷ The claimants claimed loss in market value as well as personal and business damages. A strong argument was made that the landfill site was under construction while being filled. This would mean that filling the site is

94. Loc. cit., note 88, pp. 8-9.

95. An Act to amend the Expropriations Act, 1983 S.O. c. 47, s. 1.

96. (1985) 31 L.C.R. 60.

97. Ibid, p. 62.

part of the "construction" and not the "use" of the site. The Board held that the landfill site was already constructed when filling it up with waste commenced.

Having restricted claims to those occurring before the opening of the site the Board found that the construction of the landfill site caused a loss in market value of \$30,000. The St. Pierre case was distinguished. The Board found that, unlike St Pierre where Mr. Justice Houlden found that an apprehension of loss was not compensable, the evidence in Edgcumbe indicated an actual loss in market value as well as a loss of enjoyment.⁹⁸ To the Board the work "changed the enjoyment by these owners of their property and the evidence reflected that the market reacted by making the claimant's land less saleable and, therefore, there is a lowering of market value".⁹⁹ The loss in market value was based on the evidence of purchases and resales by the County of Peel of property near a landfill site. The report does not indicate if the particular site was being used or if the filling had commenced when the resales were made. If so, it could be argued that, on the Board's finding in Edgcumbe, the loss in market value in the comparable properties was due to the use of the landfill site. Suppose the landfill site was never used after it was constructed, would there have been a loss in market value and if so would the loss have been less? Is there a loss in market value from the mere existence of the landfill site? The answers to these questions are not clear from the decision.

98. Ibid, p. 68.

99. Ibid.

Although the Board did not make any award for personal damage, it was sympathetic to the claim. However, on the basis that the award of loss in market value should make it possible for the claimant to relocate without any loss of investment, no award was made for personal damage.

On February 2, 1984 the Supreme Court of Canada granted leave to appeal the Court of Appeal decision in St. Pierre.¹⁰⁰ If the Supreme Court of Canada reverses the Ontario Court of Appeal decision, it may be that, because of the liability to which public projects would expose them, authorities and municipalities will pressure the Ontario legislature to amend the Expropriations Act.¹⁰¹

It is hoped that the decision of the Supreme Court of Canada will go a long way towards finally settling the law in Ontario of what precisely is meant by the words "construction and not the use of the works", what falls within the heads of damage of loss in "market value" or "personal or business" damages, as well as the effect of the actionable rule.

100. (1984) 28 L.C.R. 320; The appeal was heard by the Supreme Court of Canada on March 26, 1986 and Judgment was reserved.

101. Infra, pp. 80 et. seq.

CHAPTER VI - INJURIOUS AFFECTION - HEADS OF DAMAGE

Under the legislation, there are three heads of damages for injurious affection where no land is taken. They are: (1) the reduction in market value of the land; (2) personal damages and (3) business damages. In order to be compensable, the loss in market value or the personal or business damage must (1) result from the construction and not the use of the works, (The Construction Rule) and, (2) be the result of a work for which the authority would be liable were it not for the defence of statutory authority (The Actionable Rule).¹⁰² This chapter will not deal with the two conditions (which will be addressed later¹⁰³) but will be restricted to a discussion of the types of claims which have been successful under one or more of the three heads of damage. The purpose is to indicate the types of claims one can expect will be advanced under the words "injurious affection". The cases discussed in this chapter are not restricted to a situation where no land is taken. There are examples in this chapter drawn from partial takings as well - i.e. when some land of the claimant is taken.

102. See Appendix A; Supra, p. 27.

103. Infra, Chapter VII, pp. 68 et. seq.

1. Interference with Access

Public works such as realignment of roads, lowering of grades, closing roads etc. can affect access to land. There are several cases which held that the closing of a portion of the road leading to the claimant's property lowered market value.¹⁰⁴

One of the earliest reported cases in Ontario dealing with issue of injurious affection where no land is taken is based on interference with access. In Yeomans v. The Corporation of the County of Wellington,¹⁰⁵ the building in question was located on a small island within a few feet of the original road allowance. As improvements were made to the bridges across the branches of the river, the road in front of the claimant's property had to be raised to the level of the bridges, widened and protected with railings. As a result, a large part of the access to the road was cut off. The learned Trial Judge, Gwynne J. held that where ingress and egress are cut off, the owner is entitled to compensation.¹⁰⁶ On appeal,¹⁰⁷ Moss C.J.A. reviewed all of the old British cases and several American cases and held that the particular section of the Municipal Act¹⁰⁸ allowed for compensation for injurious affection although the claimant could not sue in trespass. Applying the test in McCarthy, it was conceded that the alteration of the road would be

104. Re Taylor and Village of Belle River (1910) 1 O.W.N. 609 confirmed C.A. Re Neal and Town of Port Hope (1914) 7 O.W.N. 264. In re Tate and City of Toronto (1905) 10 O.L.R. 651.

105. (1878) 43 U.C.Q.B. 522; (1879) 4 A.R. 301 (C.A.).

106. (1878) 43 U.C.Q.B. 522.

107. (1879) 4 A.R. 301.

108. Municipal Act 1873, s. 373 (R.S.O. ch. 174).

actionable were it not for the statutory authority. While the law prohibits an action (in trespass) it is not so unjust as to refuse compensation. As a matter of public policy, Moss C.J.A. felt that individual rights should not be sacrificed for the public good without compensation.¹⁰⁹

It was twenty-five years until the next major reported decision on the issue in Ontario. That was the case of In Re Tate and City of Toronto.¹¹⁰ In that case, the City closed a road which did not abut the claimant's property but went to Bathurst Street (a main thoroughfare) from directly across the claimant's house. The claimant's access to Bathurst Street was not cut off but now he had to go a short distance one way or the other from his property (instead of going straight across) to a street going in the direction of the closed road. Access was, accordingly, not eliminated but just more inconvenient. The arbitrator found that the loss of access to the claimant's house through the closed street injuriously affected the claimant's house by depreciating it in value. An appeal was dismissed by Osler J.A. who, speaking for the Court, said: "I think the case is not in principle distinguishable from the McCarthy case."¹¹¹

This reasoning indicates that, to Osler J.A., the closed road in Re Tate was the same as the river in McCarthy. It is respectfully submitted that the cases could be distinguished on the facts. In McCarthy, the two kinds of access were not contiguous to the claimant's land. One form (the road) was contiguous and led to the other (the river) which was twenty feet away. The

109. Loc. cit., note 107, p. 315.

110. (1905) 10 O.L.R. 651.

111. Ibid, p. 654.

dock was a means of access to the river and it was the dock that was affected not the river. There is no mention of another dock and even if there were, the embankment (the works) would probably have blocked it as well. The claimant's access to the river in McCarthy was permanently cut off and destroyed by the construction of the embankment. In the Tate case, while access to Bathurst Street through the closed street was cut off, there was still access to Bathurst Street although, perhaps, a less convenient access. To make the facts of the two cases the same either access to Bathurst Street would have had to have been eliminated (i.e. no access at all) or the river (in McCarthy) would have to have been accessible from another, but less convenient, dock. Neither of these was the case.

One year earlier, there had been a Supreme Court of Canada decision (His Majesty the King v. George MacArthur¹¹²) involving interference with access and a less convenient route. Nesbitt J., writing in that case for the whole Court, felt that claims should be restricted to claims for damages to land. His Lordship felt that, to extend claims to members of the public would unduly hamper the prosecution of public works and the consequent development of the country.¹¹³ His Lordship then went on to express the same fear which was expressed years previously:

112. (1904) 34 S.C.R. 570.

113. Ibid, p. 576.

It was never intended that where the execution of works, authorized by Acts of Parliament sentimentally affected values in the neighbourhood, all such property owners could have a claim for damages. In most of our large cities values are continually changing by reason of necessary public improvements made, and if, although no lands are taken, everybody owning lands in the locality could, by reason of the changed character of the neighbourhood or interference with certain convenient highways, claim compensation by reason of a supposed falling of the previous market value of property in the neighbourhood, it would render practically impossible the obtaining of such improvements.¹¹⁴

Although MacArthur was concerned with the effect of a less convenient access, Osler J.A., one year later, at the very end of his decision in Tate merely dismissed the MacArthur decision by saying: "I have read the case of The King v. MacArthur but I do not think it governs the case before us."¹¹⁵ He did not explain why. It is respectfully submitted that, Tate is more similar to MacArthur than to McCarthy (to which Osler J.A. likened Tate). In MacArthur as in Tate access was not cut off to Bathurst (Prescott) but was made less convenient, whereas in McCarthy access to the River Thames was destroyed.

The distinction is important because it is one thing completely to deny access and it is quite another to interfere with access. If MacArthur is a good decision then the issue becomes, at what degree is interference with access tantamount to total denial of access which would be compensable. The 1910 case of Re Taylor and Village of Belle River¹¹⁶ might shed some light on this issue. In that case a road leading directly to the claimant's hotel was closed up so that patrons arriving from the west had to take a detour of 185

114. Ibid, pp. 576-577.

115. Loc. cit., note 110, p. 656.

116. (1910) 1 O.W.N. 609 (C.A.).

feet to get to the hotel. The arbitrators found that the property was injured. On appeal¹¹⁷ Mullock C.J. did not refer to MacArthur but found that "where the premises are so situated with respect to a highway that their value is substantially diminished by the closing thereof, the right to compensation arises"¹¹⁸ On further appeal¹¹⁹ Moss C.J.O., speaking for the Court, dismissed the appeal saying the road which was closed was a "most important means of access...the existence of which was a material factor in (the property's) value".¹²⁰ The Court refused to follow MacArthur because the existence of the closed road was a material factor in the value of the property and the injury was not in common with the public.

Another later case Re Neal and Town of Port Hope¹²¹ also allowed compensation for interference with access on the basis that it diminished the market value of the property in question.

The Belle River and Port Hope cases seem to be saying that, to be compensable, the access which is interfered with must be an integral part of the market value of the property. The loss is not suffered by the general public but only by the owner of the property in question because the access is part of the market value of his property.

Since the cases seem to juxtapose MacArthur against a line of cases where compensation was allowed, a closer examination of what Mr. Justice

117. Ibid.

118. Ibid, p. 611.

119. (1910) 2 O.W.N. 387.

120. Ibid, p. 388.

121. (1914) 7 O.W.N. 264.

Nesbitt decided in MacArthur is justified. In that case the route of the Cardinal Canal was changed with the result that there was now only one bridge in the centre of the village. Since access to the next village was, as a result, less convenient, MacArthur claimed his property depreciated in value. The real ratio for not allowing MacArthur's claim lay in the fact that he still had access to Prescott although by a less convenient route. The inconvenience he suffered was the same as that suffered by any other person wishing to use the highway which was cut off.¹²²

The cases which go against the authority of MacArthur do so on the basis that the access interfered with, even though there is another access, is part of the market value of the property in question. Such access would, however, also be part of the market value of other properties in the area of the claimant's land. Under the authority of MacArthur no compensation would be paid because the claimant's land "suffered no special damage distinguishable from that which all these special lands suffered".¹²³ Nesbitt J. in MacArthur would have allowed the claim if MacArthur's property, regardless of its use, suffered a loss in market value because of the interference with access and that loss was special to his land as distinct from neighbouring land. Whatever the reasoning for not following MacArthur, with the exception of Re Shragge and City of Winnipeg,¹²⁴ MacArthur has not been followed.

122. Loc. cit., note 112, p. 575.

123. Ibid, p. 577.

124. (1910) 20 Manitoba Reports 1.

In the 1960's, improvements to highways were done pursuant to the Highway Improvements Act.¹²⁵ Sometimes, the improvements affect direct access to a highway. In Re Thomson Lumber and Building Materials Ltd. et al. and Minister of Highways¹²⁶ the Court found that interference with access affected a right or interest in land. In Norway Pines Cabins v. Minister of Highways for Ontario,¹²⁷ heard two years later, traffic control islands had been erected within the road allowance. The Court held that every landowner abutting a highway had a right of access to the highway as well as the common right of passage he shares with other members of the public once upon the highway. The Court of Appeal (Laskin J.A., as he then was, speaking for the Court) held that the right of access had not been expropriated but interference with access, although not a complete frustration of access, was injurious affection.¹²⁸ The Court said however:

In view of the terms in which the question presented to us has been couched, it is unnecessary to develop the proposition that the right to compensation does not depend on proof of complete frustration of access, which appeared to be the situation in the Thomson Lumber case. It is enough to say that where interference with access is shown, its degree and extent relative to the abutting land go to quantum.¹²⁹

The cases based upon less convenient access fall within the category where the injury suffered is the same in kind for the whole public although it may be different in degree for a particular owner.

125. R.S.O. 1970, c. 201; renamed in R.S.O. 1980 c. 421.

126. [1964] 2 O.R. 175.

127. [1967] 1 O.R. 12; (1966) 59 D.L.R. (2d) 234.

128. Ibid, pp. 17-18; 59 D.L.R. (2d) pp. 239-240.

129. Ibid, p. 18; 59 D.L.R. (2d) p. 240.

2. Obnoxious Uses - Nuisance

Obnoxious use involves the use by one owner of his lands in such a way that it is a nuisance to his neighbour. An early example of obnoxious use was Chadwick v. City of Toronto¹³⁰ where a pumping plant was originally powered by steam power but subsequently was changed to electric power. The electric pumps caused a vibration and a humming or buzzing noise. Middleton J., whose judgment was confirmed on appeal, found that the noise constituted a nuisance which interfered with the "ordinary physical comfort of human existence" thereby depreciating the value of the plaintiff's house. Although the statute authorized the waterworks, it did not justify the commission of an offence.¹³¹

The landmark case in nuisance as it relates to injurious affection is Re J.F. Brown Co. and Toronto.¹³² The City of Toronto had constructed a public lavatory underground in front of the plaintiff's building. There were two entrances (to the lavatory) by stairways fifty feet apart and eight feet from the plaintiff's building. The two stairways had metal hoods over them. Halfway between these stairways was a structure of inconspicuous appearance used as a breather. The plaintiff's claim was that the structure used as a lavatory being placed near its property caused a loss in value of his property. The arbitrator agreed and valued the loss at \$9,000. The award was confirmed on appeal. With a strong dissent from Mr. Justice Davies, the Supreme Court of Canada agreed that the value of the building had been diminished and the plaintiff was to be compensated for such loss in value. In

130. (1914) 32 O.L.R. 111 (C.A.).

131. Ibid, p. 113.

132. (1916) 36 O.L.R. 189 (C.A.) affirmed 55 S.C.R. 153; Op. cit., note 45.

dissenting, Mr. Justice Davies said that the damages, if any, arose because of the use of the structure and not its mere existence and, further, loss in trade was not a damage which could be allowed under the statute. The majority, however, felt that the market value of the property had been affected by the lavatory.

3. Fear or Apprehension

There is a series of cases concerning a fear or apprehension on the part of a landowner because of the existence of some public use on property close by.

Three cases heard by the Alberta Land Compensation Board involved sewage lagoons. In Falcon Industrial Properties Ltd. et al. v. Village of Crossfield¹³³ the Board found that the sewage lagoon, being "exposed and in clear view"¹³⁴ injuriously affected the value of the remaining land whose highest and best use was its potential use as a country development. In Masnyk v. County of Lethbridge No. 26,¹³⁵ the Board accepted that the land decreased in value because of the stigma attached by the buying public to the existence of a sewage lagoon. In Holt v. Town of Ponoka,¹³⁶ the same Board

133. (1979) 18 L.C.R. 257.

134. Ibid, p. 268.

135. (1977) 11 L.C.R. 356.

136. (1981) 21 L.C.R. 160.

again awarded injurious affection for the reduction in market value of the remaining land as a result of a sewage lagoon.

In Shuttleworth v. Vancouver General Hospital¹³⁷ the owner of land across from the hospital claimed that his land had depreciated in value as a result of apprehension of contagious disease from the isolation hospital constructed on hospital property. The claim was based on the fear of infection as a result of living in close proximity to the hospital. The court held that the "plaintiff must go further and "prove not only wide-spread belief (of infection) but that such belief must be well founded in fact".¹³⁸ Murphy J. of the Supreme Court of British Columbia found that the claimant had not proved that diseases could in fact be communicated over the distances involved. Therefore, although there may have been a belief or fear of infection, there was no proof that the belief or fear was well founded in fact. Mr. Justice Murphy felt that the only reason advanced for the depreciation in value was the fear of infection which did not constitute a ground for an action such as this. For depreciation to found an action, it must be occasioned by a legal wrong - "the act complained of must be both tortious and hurtful".¹³⁹

In Kennedy v. The Queen in Right of Ontario,¹⁴⁰ the plaintiff claimed his property lost value as a result of the construction by the Province of a correctional camp in the proximity of his home. The Court found

137. [1927] 1 W.W.R. 476.

138. Ibid, p. 479.

139. Ibid, p. 480.

140. (1971) 13 D.L.R. (3d) 442.

that the camp was being operated with reasonable care and it was not unreasonable for the camp to be established where it was. The Court said:

Now did the establishment of Camp Oliver, where it was located, or the manner in which it was operated, constitute an actionable nuisance? Did it unduly interfere with the use or enjoyment of the plaintiff's land? Many things may amount to a nuisance in fact, but whether they are actionable as the tort of nuisance is what matters. There would appear to be no exact definition of an actionable nuisance. One must consider the nature of the interests to be protected and the conduct which interferes with such interests. For what use and enjoyment of their lands and to what extent may the plaintiffs successfully claim the protection of the law. The answer is, in my opinion, for such use and enjoyment as is reasonable and to a degree which is reasonable under the circumstances. Likewise, the defendant may not make an unreasonable use of his lands, under the circumstances, to the detriment of the lands of the plaintiffs.¹⁴¹

The Western cases seem to be saying that for a perceived fear to result in a successful claim, the act complained of must be tortious, wrongful and unreasonable. It is not good enough that there be an alleged nuisance or a subjective fear. The nuisance must be actionable. The test is one of give and take and what is reasonable in the circumstances of the particular locality. What may be a nuisance or an actionable nuisance in one area may not be in another. In addition, the discomfort must be substantial, not subjective. The interference must be of such a degree that it would affect any person occupying the plaintiff's lands and not merely or specifically the plaintiff. In Walker et al. v. Pioneer Construction,¹⁴² Morden J. (as he then was) held that unsightly appearance, potential danger, odours, dirt, etc. during daytime did not constitute an actionable nuisance where there is a

141. Ibid, p. 445.

142. (1976) 8 O.R. (2d) 35.

mixed industrial and residential use but the noise during the evening does constitute a nuisance. In Muirhead v. Timbers Bros.,¹⁴³ Rutherford J. held that given the mixed use and character of the locality, the gravel and quarry operations were a reasonable use. The dust was not unreasonable but the noise and dust from the crusher machine closest to the claimant's house, because it was in contravention of the municipal by-law, constituted an unreasonable interference with the plaintiff's enjoyment of his land.

In J.F. Brown, the claim was not based on any fear or apprehension but on a reduction in market value. The act complained of (construction of the lavatories) was not tortious, wrongful or unreasonable. It appeared to be a reasonable use of public land in the location. The Supreme Court of Canada, however, held that the loss in market value was compensable.

4. Loss of Enjoyment

As shown in the discussion of the St. Pierre case, the cases leading up to St. Pierre as well as Edgcumbe, loss of enjoyment is one of the most difficult claims to deal with both from the point of view of proof and from the point of view of damages. For example, in Cameron v. Credit Valley Conservation Authority,¹⁴⁴ the claimants lost some privacy and the Board arbitrarily granted damages to each of them even though "there was

143. (1977-78) 3 C.C.L.T. 1.

144. (1977) 11 L.C.R. 63.

not specific evidence to establish the quantum of damages in each case".¹⁴⁵ In the recent decision of Toad Hall Farm Inc. v. Ontario Hydro,¹⁴⁶ the Board felt that because the claimants intended to use the property for residential purposes, their use and enjoyment included the aesthetic qualities of the terrain (i.e. the general view). It was felt that the unsightliness of the hydro line caused a diminution in market value. An appeal was dismissed because there was evidence on which the Board could find there was injurious affection by way of reduction in market value. Although the decision of the Divisional Court to dismiss the appeal was unanimous, Smith J. felt it necessary to state:

I wanted to make it clear that, in my view, unsightliness or the lessening of aesthetic qualities of property without more or standing alone are not compensable under the relevant section. In the total absence of evidence of a reduction in market value, it would be wrong for the board to make an¹⁴⁷ award in respect to such aesthetic qualities or unsightliness.

5. Designation of Lands

The cases in this section will demonstrate that sometimes a claim of injurious affection can arise even though there is no physical work at all. For example, pursuant to Section 5 of the Highway Improvement Act¹⁴⁸ (now s.5

145. Ibid, p. 72.

146. (1983) 25 L.C.R. 373.

147. (1985) 32 L.C.R. 133, at p. 134.

148. R.S.O. 1970, c. 201.

of the Public Transportation and Highway Improvement Act¹⁴⁹⁾ the Minister of Highways could designate land as part of the King's Highway. To do so, a plan of intent is registered as part of a deliberate departmental policy. The purpose is to prevent further development and to inform persons interested in the land of the proposed highway.

In the case of McFarlane et al. v. The Queen in right of the Province of Ontario represented by the Minister of Highways,¹⁵⁰ the Minister of Highways had caused such a plan to be registered showing the route of a proposed highway to intersect the plaintiff's land. Evans J.A., speaking for the majority of the Court of Appeal, (Keith J. dissenting in part) found that the registration of the plan was a tort. There was no authority for its registration. The Minister was not obliged to register the Order in Council which included a plan. However, having chosen to do so, if the result is to affect the claimant's property, the claimant has an action in tort as the registration of the plan is not in the exercise of a statutory authority. The general public having knowledge of the proposed road, the unmarketability of the land resulted from such knowledge and not from the registration of the plan. Evans J.A. found that although the plaintiffs had been wronged, they suffered no real pecuniary loss as a result. He therefore concurred with the nominal damage assessed by the trial judge.¹⁵¹ Keith J. dissented in part. He felt that the plaintiffs never had a cause of action in the first place and that the entire action was "misconceived from the beginning". He found that there was authority for the registration of the Order in Council under the

149. R.S.O. 1980, c. 421.

150. [1974] 5 O.R. (2d) 665.

151. Ibid, p. 670 and p. 673.

Registry Act.¹⁵² The registration merely reconfirmed and ensured that what was done by publishing the Order in Council in the Ontario Gazette would come to public notice.¹⁵³

In Armitage v. Liptay,¹⁵⁴ the court held that such a designation affected the vendor's title and not merely the use of the lands (like zoning).

The MacFarlane and Armitage cases, when viewed together, result in the proposition that the designations could, at the time, result in successful damage claims against the Ministry if damages could be proved. Presumably, those damages would have to be the lowering of market value.

Probably as a result of the decision of the majority of the Court of Appeal in MacFarlane that there was no authority for the Minister to register designation plans, in 1973 section 5(2) was added to The Public Transportation and Highway Improvement Act.¹⁵⁵ This sub-section made the registration of such plans mandatory. One would have thought that the legislature had, by the amendment, closed the door on such claims. After the amendment it was abundantly clear that there was a statutory authority for registration of such designation plans. This, however, was not to be. Unable to claim that such a designation was a tort (that door having been closed by s.5(2) which was added to The Public Transportation and Highway Improvement Act in 1973), the owner in Bethell Concrete Products Ltd. v. R¹⁵⁶ claimed the

152. Ibid, pp. 683-684.

153. Ibid, pp. 684-685.

154. [1976] 12 O.R. (2d) 543.

155. S.O. 1973, c. 67, s. 4.

156. 3 M.P.L.R. 308.

designation was an expropriation. Although the Ontario Divisional Court found that there had been a taking of an interest in land without the owner's consent, the Court found that such taking was not done by an expropriating authority. Montgomery J., speaking for the Court, found that the Lieutenant Governor, who designates the highway (and accordingly had effected the "taking"), has no such power (to expropriate), the power to expropriate being exclusive to the Minister. If this were pursued as injurious affection rather than as an expropriation, the claim may have been more successful. The Act, when it speaks of injurious affection speaks of it being caused by a statutory authority and not an expropriating authority. A statutory authority is a person having the power to cause "injurious affection" or the power to expropriate.¹⁵⁷ There is no requirement of the power to expropriate.

Nevertheless, the reason these cases are interesting is that if the Minister (rather than the Lieutenant Governor) were the one doing the designations, Bethell Concrete may be authority for such a designation being held to be an expropriation. Applying a similar argument, land use controls and enactments such as the Niagara Escarpment Planning and Development Act¹⁵⁸ would be even closer to injurious affection or expropriation.

157. Supra, p. 1, Appendix A, s. 1 (1) (m).

158. R.S.O. 1980, c. 316.

6. Business Loss

This is the area where the potential claims are the greatest in terms of dollars. When an authority does some work in a business area the potential claims are enormous. There are always some businesses which gain and some, unfortunately, which lose. This situation is well displayed in Bills Variety v. City of Galt.¹⁵⁹

On September 7, 1971, the City of Galt (now the City of Cambridge) closed a portion of Elgin Street which was used quite extensively by through traffic. The City had a long term scheme to develop the next street as a main artery and therefore planned an underpass under the Railway at that street. As a part of approving that underpass, the Railway Transport Committee required that the underpass on the next street (Elgin Street) be closed. This was done, but the by-law authorizing the closing was passed after the commencement of the action. The claimants claimed that as a result of the closure of Elgin Street at the railway tracks (because the underpass was removed) they lost a good deal of business which came from the residential subdivision on the other side of the tracks. In addition, they alleged they lost business from the fact that there was less vehicular traffic on Elgin Street. The claim was a claim in damages, not based on the Municipal Act or Expropriations Act.¹⁶⁰ The Defendant admitted it was responsible for common law damages from the date the road was closed until the date of registration of the by-law.¹⁶¹ The losses were assessed as damages by Osler J. pursuant to

159. (1975) 8 L.C.R. 97.

160. Ibid, p. 101.

161. Ibid, pp. 97-98.

the principles set out in the Expropriations Act. Unfortunately, the question of whether there could be any claim at all if the closing by-law was passed before the closing of the underpass does not seem to have been addressed.

In Hamilton Car Parks Ltd. v. City of Hamilton,¹⁶² the City of Hamilton had an urban renewal report prepared on the downtown of Hamilton. As part of the urban renewal, the City reconstructed the sidewalks and renewed the pavement adjoining the claimant's premises. He claimed that the work continued for one month and, for about one week of that month, access to his premises was completely cut off and for the remainder of the month, access was difficult. Although there was alternate access through an alleyway, the claimant's revenue for the time span involved had decreased from the revenue for the same time period for the previous year. The Land Compensation Board held that there is a private right of access and the claim was compensable.

In another case involving interference with normal access (Lawson Lighting Ltd. v. Regional Municipality of Waterloo¹⁶³) the Regional Municipality of Waterloo converted the street in front of the claimant's property from a two lane two way street to a four lane arterial road. The road was open only to local traffic during construction and the sidewalk was removed. The Land Compensation Board found that the construction caused considerable disturbance to the claimant's business by curtailing pedestrian and vehicular traffic and allowed 60% of the losses claimed as attributable to the reconstruction.

162. (1977) 10 L.C.R. 362.

163. (1978) 14 L.C.R. 129.

In 1978, the Nova Scotia Expropriations Compensation Board in the case of Ben's Ltd. v. City of Dartmouth¹⁶⁴ considered a similar claim. The City took a strip off the front of the claimant's property to widen and reconstruct the street because of increasing traffic pressure. The Board found that the interference with access would have been actionable at common law, it not being necessary that there be total deprivation of access. In this case, the Board found that the interference was the proximate cause of the business damage and was compensable.¹⁶⁵

In Norway Pines, Laskin J.A. (then in the Ontario Court of Appeal) made the following observation concerning right of access:

"This private right is subject to required accommodation to traffic regulations governing the public use of the highway; but, undoubtedly, it could be a matter of dispute in particular cases whether regulations by the highway authority have resulted in such interference with the private right of access as to support a claim for damages and an injunction."¹⁶⁶

Later in the same decision His Lordship said "...the right to compensation does not depend on the complete frustration of access...It is enough to say that where interference with access is shown, its degree and extent relative to the abutting land go to quantum."¹⁶⁷

164. (1978) 14 L.C.R. 357.

165. Ibid, p. 366; see also. Zadworski v Ministry of Transportation and Communications (1973) 4 L.C.R. 100.

166. Op. Cit., note 127, 59 D.L.R. (2d) p. 237; (1967) 1 O.R. p. 15.

167. Ibid, 59 D.L.R. (2d) p. 240; (1967) 1 O.R. p. 18.

In light of Norway Pines, cases such as Bill's Variety, Hamilton Car Parks and Ben's Ltd. indicate that almost any conceivable improvement to the environment or to a public project which the municipality is obliged to carry out pursuant to the Municipal Act¹⁶⁸ may result in claims being advanced.

In fact, Mr. R.B. Robinson Q.C. in his report¹⁶⁹ had the following to say:

Public authorities now (as a result of Zadworski) fear that when they must reconstruct a roadway, or dig it up to install a public service they will be met with claims of adjoining owners for business disturbance during construction, even though the owners may well be benefited by the work when it is completed.¹⁷⁰

The Ontario Legislature has not reacted to Mr. Robinson's comment and, as a result, the Municipalities are still exposed as Mr. Robinson feared.

7. Noise

In Brennan v. Municipality of Metropolitan Toronto,¹⁷¹ because some lands were taken, claims were allowed for both construction and use.¹⁷²

168. R.S.O. 1980, c. 302.

169. R.B. Robinson, Q.C., "Report on the Expropriations Act" (October 1974).

170. Ibid, p. 32.

171. (1975) 8 L.C.R. 31.

172. Expropriations Act R.S.O. 1980, c. 148, s. 1(1) (e) (i) (see Appendix A).

However, the importance of the case is that the owner claimed the cost of an air conditioning system required to keep the house cool. He required the air conditioners for this purpose because he had to keep the windows closed as a result of noise and dust. He also claimed the cost of sound deadeners. The Board held that the damages were not too remote and that the interference with the claimant's use and enjoyment of her property were sufficient to warrant an action in nuisance. The potential financial liability on authorities for a disturbance with the amenities of life such as noise is demonstrated by the fact that the Board found that where the nuisance is a disturbance with the amenities of living "no actual financial loss or physical injury need be proved".¹⁷³ The onus will be satisfied with "a reasonable and rational estimate of compensation for the damages sustained".¹⁷⁴ In a later decision of Cameron et al. v. Credit Valley Conservation Association,¹⁷⁵ one of the claims being for noise, there was no specific evidence of quantum of damages. The Board was satisfied nonetheless that the damages must be assessed and went on to assess them. In this regard, it is noteworthy that, in a recent decision in an action based on aesthetic qualities,¹⁷⁶ the Ontario Court of Appeal, said: "In the total absence of evidence of reduction in market value it would be wrong for the Board to make an award in respect to such aesthetic qualities or unsightliness."¹⁷⁷ Why should noise be any different since, like unsightliness, it is a nuisance to one of the human senses?

173. Loc. cit., note 171, p. 41.

174. Ibid, p. 42.

175. (1977) 11 L.C.R. 63.

176. Toad Hall Farm Inc. v. Ontario Hydro (1985) 32 L.C.R. 133; Supra, p. 57.

177. Ibid, p. 134.

In Simpson v. Ontario Hydro,¹⁷⁸ the Board allowed a claim for nuisance based on the argument that the totality of the nuisance of sight, sound and anxiety are personal damages which are actionable at common law. The Divisional Court¹⁷⁹ agreed that all of these items except unsightliness support an award for injurious affection.

The Ontario case of Adams et al. v. Minister of Transportation and Communications¹⁸⁰ involved a claim for noise resulting from use of the highway because it resulted from a taking of some land from the claimant. The Divisional Court agreed that there was evidence of noise from the increased use of the highway and held that "use" included use by members of the public and was not restricted to use by the statutory authority.¹⁸¹ The other side of this argument is put forth in the New Brunswick case of Cormier et al. v. Minister of Transportation,¹⁸² where as a result of a taking of some land from the claimant there was a claim for damages resulting from noise. The New Brunswick Property Compensation Board refused to allow any damages saying "the construction of Wheeler Blvd. had, and will continue to have, a beneficial effect on the whole of the general area, including the remnant of the claimant's land, that would far outweigh any slight noise that might be caused by the use of Wheeler Blvd."¹⁸³

178. (1978) 13 L.C.R. 376.

179. (1979) 17 L.C.R. 321.

180. (1981) 20 L.C.R. 24.

181. Ibid, p. 27.

182. (1979) 17 L.C.R. 378.

183. Ibid, p. 384.

In a very interesting commentary on the appraiser's approach to noise damage, James V. Hyde¹⁸⁴ favours looking at noise only as it affects market value. He points out:

Critically and after all, from the appraiser's perspective, it is people who make value. They tell the appraiser by their sales and purchases of property what they, the people in the market, think of the prevailing circumstances. Only by relating these actual sales to a subject property can we as appraisers and in turn the courts, tell if noise actually damages a particular property through a reduction in its value. If there is no reduction, then it must be agreed, noise or not, for that particular instance there is no noise damage from the appraiser's perspective¹⁸⁵

...

The point I am trying to make is that from an appraiser's approach to noise damage, it has to be recognized that the mere existence of sound decibels does not always adversely affect value or at least, to the extent of a possible cost-to-cure. We, as appraisers, must go to the market place and ascertain if noise in fact does adversely affect the market value and to what extent. People make value and obviously what is noise to one person or group of persons may be music to the next. Also, the benefits to a particular property resulting from a public facility may offset the damages from noise, a factor which only the appraiser through market analysis (not a sound engineer and his decibel rates) can evaluate.¹⁸⁶

Ultimately, whatever the effect of all the above heads of damage (except business loss), the damage, if any, is reflected in loss in market value. Mr. Hyde's discussion on noise probably reflects the most rational way of dealing with the issue of loss in market value generally. The reason for this is because, in the final analysis, the market will tell you whether or not you have suffered a loss in market value which would be an injury to whomever owned the property. Other than personal or business damage, it is loss in market value which should, if anything, be compensated.

184. James V. Hyde, "The Appraiser's Approach to Noise Damage", Right of Way, (Sept. 1976), p. 24.

185. Ibid, p. 25.

186. Ibid, p. 24.

CHAPTER VII - MODERN TREATMENT OF THE THREE RULES

As seen above, the actionable rule, the construction rule and the nature of the damage rule were three restrictive rules which were developed by the British courts and adopted into the law in Canada by the cases of Loiselle and Autographic.

1. The Nature of the Damage Rule

Ontario has (in the 1968 amendment) eliminated the nature of the damage rule but the actionable rule and the construction rule are specifically enunciated in the statutory definition of injurious affection where no land is taken.¹⁸⁷ These two remaining rules will now be discussed.

187. Expropriations Act s. 1(1)(e)(ii).

2. The Actionable Rule

The actionable rule was developed by the British Courts as a means of confining the extent of liability of Railway Companies for the damages caused by their activities. Many judges were not prepared to abolish the rule in spite of the observation of Lord Denman in Eastern Counties Ry in 1841 that "If extreme cases should arise, we shall know how to deal with them..."¹⁸⁸ The rule remained unquestioned for many years because, as Lord Cranworth said in Ricket, if the claim (in that case) should succeed, it "would open the door to claims so wide and indefinite a character as could not have been in the contemplation of the Legislature".¹⁸⁹

The rule, as stated previously, puts statutory authorities and private landowners in the same position with respect to liability for a nuisance to neighbouring land. As a principle of equality it seems to be fair. But is it too restrictive? In the words of the British Columbia Report:¹⁹⁰

Are there situations where a person suffers loss for which he ought to be compensated, although the activities which cause the loss would not have been actionable in the absence of statutory authority?¹⁹¹

188. Op. cit., note 8.

189. Op. cit., note 26.

190. Law Reform Commission of British Columbia, "Report on Expropriation" (1971).

191. Ibid, p. 161.

The Honourable J.V. Clyne in the Clyne Report¹⁹² was of the view that the actionable rule was sound and would "limit compensation to those situations which are proper and reasonable".¹⁹³ P. Nichols, the author of the leading American text¹⁹⁴ on the law of expropriation, was of the same view arguing that the public landowner should not have a greater liability than a private landowner:

In no state was it provided that an owner should be recompensed for every damage to his real estate, but only when the damage was inflicted for the public use. Private owners lawfully may and constantly do make use of their land for purposes which unfavourably affect the value of neighboring land. The erection of a power house, a garage, a factory, an apartment house or even a dwelling house of inferior quality in a desirable residential section may distinctly depreciate values in the vicinity, and yet the owners of property so affected have no remedy. It would be a strange perversion of legal principles if the right of the owner to recover damages depended upon his ability to show that the offending structure was erected for the good of the public rather than for the profit of some individual, and if compensation was awarded one man because a public hospital was built next door to his house, and denied another for a precisely similar injury if it appeared that the use of the hospital next to his premises was limited to a particular class, and so the damage could not be said to have been inflicted for the public use (or if the construction and operation of a public railroad near one's premises was an actionable injury and the use of a perhaps more offensive private railroad was not).¹⁹⁵

On the issue of abolishing the actionable rule, the British Columbia Report¹⁹⁶ was "simply not prepared to reach a final conclusion" and reasoned "the economic consequences to the community would have to be carefully

192. J.V. Clyne, "The Report on the Royal Commission on Expropriation" (1964).

193. Ibid, p. 118.

194. Nichols, Philip, The Law of Eminent Domain, Revised Third Edition, by Julius L. Sackman, 1978, Recompilation by Patrick J. Rohan, New York, Matthew Bender, 1985.

195. Ibid, Volume 2A, section 6.27[1], p. 6-194.

196. Loc. cit., note 190.

investigated before such a recommendation could be made and such an investigation should cover the whole question of economic loss falling on the individual citizen as a result of state intervention".¹⁹⁷

The Ontario Report¹⁹⁸ was likewise not willing to recommend abolishing the actionable rule. It reasoned that "until such time as an extensive study has been made of immunity from liability because of statutory powers, the (Law Reform) Commission believes that placing the authority in the same position as a private person is a satisfactory, if temporary, solution".¹⁹⁹

On the other side of this debate is a leading Canadian writer on the topic, Eric C.E. Todd.²⁰⁰ He has taken the opposite view and gives several reasons for discarding the actionable rule: (1) historically, there was no intention to limit the liability of railway companies to that of private landowners; (2) the rule perpetuates the stronger bargaining position of large landowners when the legislature intended by the Clauses Consolidation Acts²⁰¹ to give the same rights to all landowners; (3) the Nichol's argument overlooks the public policy that it may be preferable that the general public rather than a private landowner should bear the burden of a loss which occurs without fault on the part of either; and (4) abolishing of the rule will not lead to

197. Ibid, p. 163.

198. Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation (1967).

199. Ibid, p. 48.

200. Todd, Eric C.E., "The Mystique of Injurious Affection in the Law of Expropriation" (1967) U.B.C. Law Review 127 at 144.

201. Supra, notes 14 and 15.

any more improper and unreasonable claims than where some land is taken.²⁰²

The major difficulty with abolishing the rule is that the door may be opened to unreasonable and unrealistic claims. The fear of such claims is precisely why the British Columbia Royal Commission on Expropriation²⁰³ recommended that the economic consequences be investigated before abolishing the rule. The British Columbia Report sought to justify the rule on the basis that it will limit claims to those which are proper and reasonable. In considering the case where land is taken, Professor Todd, referring to the British Columbia report, observed:

"The report fails to explain how improper and unreasonable claims to injurious affection are limited in cases where some of the claimant's land is taken."²⁰⁴

He submits that

"ill founded claims can be dealt with adequately by the application of the general rules relating to the remoteness of damage and the discretion in awarding costs."²⁰⁵

Professor Todd acknowledges, however, that "anyone with experience in expropriation cases will testify to the fact that improper and unreasonable claims are, to say the least, quite common".²⁰⁶ If that is the case, then why run the risk of extending such improper and unreasonable claims to injurious affection claims where no land is taken? In the case where land is taken, improper and unreasonable claims may not be limited but tolerated. It may be

202. Loc. cit., note 200, pp. 144, 145, 146; see also Todd, Eric C.E., Law of Expropriation and Compensation in Canada, The Carswell Company Limited (1976), p. 299.

203. Loc. cit., note 190.

204. Loc. cit., note 200, p. 146.

205. Ibid.

206. Ibid.

that the reason why "improper and unreasonable" claims are perhaps tolerable where land is taken and not tolerable where no land is taken is that, in the case where land is taken, the authority knows in advance exactly who and, more importantly, how many owners of land are affected and as a result knows who may have "unreasonable and improper" claims. Where no land is taken, there is no limit to the number of claimants or owners an authority can face nor does there appear to be any limit on how far removed the claimants or owners could be from the public project.

The rule does not make the authority immune from all claims. It is reasonable to have the authority subject to claims it would not be protected from were it not a statutory authority. On the other hand, the public should not be unreasonably restricted in the use of public land. Furthermore, a public authority should not be responsible for damages just because it is a public authority. If the rule were abolished, because of potential claims, the public authority may be restricted in the use of public property and may be responsible for damages for which it would escape responsibility were it a private owner and not a public authority.

With the urban environments of today, people live much closer together and much closer to public corridors than they did 100 years ago when the railways were under construction through the countryside. Then the houses were on large tracts of land and well set back from roads. In today's urban fabric, buildings are closer together, closer to roads, building lots are smaller, and there are far more public projects that are both possible and required. Surely, the choice of living in the urban core, in a suburb, or in the countryside exposes one to differences and one's choice must be made taking into account those differences.

The different environments will require different levels of public support and infrastructure and the closer people live to a public project the more likely it is that the work will affect them. It is difficult enough for public bodies to carry out projects knowing that they are exposing themselves to claims which are permitted against a private owner, the total of which is unknown when the project is undertaken. If the authority could, as a result of a public project, be exposed to liability beyond the liability of a private person constructing the same project, the unknown costs of such projects may increase so dramatically as to burden the taxpayer (or the consumer) to the point that many very useful and needed projects would never get done.

If an owner cannot claim damages if caused by a private landowner, he should not be able to claim the very same damages just because it results from a public work. Why should the public (the taxpayer) as landowner be in any worse position or be any more restricted in use of its lands (public lands) than a private landowner would be? In order to live in an urban setting today, one must realize that there are advantages and disadvantages. Some of the disadvantages are the possible negative effects of public works required for the general benefit of the public or things which make the urban setting different from a rural setting and which are required as part of the urban fabric.

In summary, in my view, the actionable rule should remain in place where no land is taken. Without the rule, authorities could face too much exposure and the end result might very well be that many worthwhile projects would never be undertaken.

3. The Construction Rule

Should an owner who suffers damages as a result of the use of the public work as opposed to its construction be indemnified for such loss where none of his land is taken?

The Ontario Law Reform Commission in its Report²⁰⁷ recommended that "in cases where there is no taking, expropriating authorities remain liable for damages caused by the construction of the work and remain exempt from liability where damage is caused by the use of the work".²⁰⁸ The Commission felt

that the cost of imposing such a liability is such an unknown and might be so great that the burden on the public purse would be unacceptable. In addition, it might prevent the carrying out of numbers of projects which are essential from the community point of view. For example, the use of a newly completed ten-lane highway in Metropolitan Toronto might cause damage in varying degrees to land not only immediately adjacent to the highway but those 100 yards, a quarter mile away. When one considers a wide swath of potential claimants along both sides of the highway for so long as the highway²⁰⁹ is used, it is clear that potential liability could be great.

On the other hand, both the Clyne Report²¹⁰ and the British Columbia Report²¹¹ concluded that the rule should not apply. The British Columbia Report preferred the position taken by the Clyne Commission²¹² that "there is no rational basis for limiting compensation to injurious affection resulting

207. Loc. cit., note 198.

208. Ibid, p. 49.

209. Ibid.

210. Op. cit., note 192, p. 118.

211. Op. cit., note 190, pp. 164-165.

212. Ibid, p. 165.

from the construction of works and not from their maintenance and continued operation..."²¹³ Professor Todd was far more critical of the construction rule than the British Columbia Report. He said: "It is submitted that the construction rule was wrong in its inception and has never been relevant to claims for injurious affection outside the framework of railway legislation. The rule is not justifiable even in railway cases and should be abrogated by Dominion and provincial legislation codifying the law of expropriation."²¹⁴

The construction rule had its beginnings in the Brand case where the company constructed a railway line twelve feet from Mrs. Brand's house and she claimed compensation for damages caused by vibrations. In a 2-1 decision, the House of Lords denied her claim on the basis that the heading of the section in issue being "And with respect to the construction of the Railway..." (emphasis mine) indicated that the legislature intended to provide for compensation for damages resulting from the construction of the railway and not for damages resulting from its operation.

Chief Justice George Challies indicated that the test distinguishing damages caused by construction from damages caused by use of the works is as follows:

The test of whether property is actually damaged by operation or use is to consider whether the works, as constructed, if left unused, would interfere with the actual²¹⁵ enjoyment of the property; if not, no compensation is payable.

213. Loc. cit., note 192, p. 118.

214. Op. cit., note 200, p. 154.

215. Challies, George, The Law of Expropriation, Wilson & Lafleur Limited, 1963, p. 138.

In Ontario one of the differences between injurious affection where land is taken and where no land is taken is that in the former case the owner can claim loss in market value and damages resulting from both the construction AND the use of the works whereas in the latter case the owner can claim the reduction in market value and damages resulting from the construction AND NOT from the use of the works. The other difference is that where land is taken the actionable rule does not apply when the claim is for reduction in market value. The key difference is, however, the construction rule. It is imperative therefore to understand the difference between what is contemplated by the words "construction" and "use" in the statute. If damages "resulting from the construction" are restricted to those caused by the activity of construction it would be restricted to temporary damages caused by, for example, noise, dust and construction trucks. Such damages would, by definition, cease the moment the construction was complete. Under Chief Justice Chailles' definition "construction" includes the completed fact of the works. As a result damages could include such things as loss of view, apprehended fears and aesthetic qualities. These damages would continue to occur after the construction is complete and would never cease while the work existed. If the potential claims were extended to "use" of the works, there could be claims for both loss in market value and personal and business damages resulting from noise, traffic, dust, and dirt and these claims too would never cease as long as the work existed and was used. To include damages for "use" of the works where no land is taken would widen the net of the type of claim allowed considerably. The result could be an incalculable exposure to claims for any work that is carried out by a public authority.

The issue is whether to give the word "construction" a broad or restricted meaning. Lord Wensleydale in Grey v Pearson²¹⁶ set out the "Golden Rule" of statutory interpretation:

I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified ²¹⁷so as to avoid that absurdity and inconsistency, but no further.

It is clear that the Legislature intended that there be different amounts which could be claimed depending upon whether or not some land was taken. This is clear from the fact that there are separate definitions in the Expropriations Act²¹⁸ of "injurious affection" depending upon whether land is taken or not.²¹⁹ It is also clear from the two definitions that the Legislature intended that a person from whom land is taken be able to claim more than a person from whom no land is taken for the same public work. This is clear because where land is taken claims for reduction in market value are not restricted and where land is not taken such claims are restricted by both the actionable and construction rules. Further where land is taken claims for personal and business damages are restricted by only the actionable rule whereas where no land is taken such claims are restricted by both the

216. (1857) 6 H.L.C. 61.

217. Ibid, p. 106.

218. Op. cit., note 55.

219. S. 1 (1) (e) (i) defines injurious affection where land is taken and s. 1 (1) (e) (ii) defines injurious affection where no land is taken (see Appendix A).

actionable and construction rules. If the word "construction" was given a meaning to include use or expected use, or if the construction rule was abolished (which would be of the same effect) then the only thing to distinguish a case when land is taken from one where no land is taken would be the actionable rule as it relates to loss in market value only (the actionable rule applying to personal and business damages whether land is or is not taken). Further, whether expected use is itself part of "construction" or "use" is not clear. Quaere whether this is the difference intended by the legislature.

In summary, in my view, the construction rule should remain in force where no land is taken and the word "construction" should be clearly defined so that it clearly does not include expected use.

CHAPTER VIII - THE ALBERTA EXPERIENCE

This chapter will chart the experience of the Province of Alberta which had very generous provisions in a statute relating to injurious affection caused where no land is taken. The City Act²²⁰ provided for damages for injurious affection to land not taken "by any work or undertaking constructed made or done by the (authority)".²²¹ On April 11, 1960 section 303a was added²²² to the City Act. Section 303a read as follows:

303a. Notwithstanding any other provision of this Act, where in the exercise by a city of any of the powers conferred on it by this Act the city, in the erection or construction of a city work or structure, causes damage to an owner or other person having an interest in land immediately adjacent to the land upon which the city erects or constructs the work or structure by reason of loss of or permanent lessening of use of the land of that owner or other person, the person sustaining the damage is entitled to compensation therefor and may, at any time after the damage has been sustained and within sixty days after notice has been given in a newspaper of the completion of the work or structure in respect of which the damage is sustained, file with the city clerk a claim for damages in respect thereof, stating the amount and particulars of his claim.

The first reported decision under this section is the decision of Milvain J. in Walter Woods Ltd v Edmonton (City).²²³ In this case, the plaintiff purchased a property from the city in 1947 for \$12,000. The

220. R.S.A. 1955, c. 42.

221. Ibid, ss 299(1) and 303(1).

222. 1960 S.A., c. 15, s. 12.

223. 47 W.W.R. 193.
affd. 42 W.W.R. 370 (C.A.); 39 D.L.R. (2d) 167 (C.A.);
affd. [1964] S.C.R. 250 (S.C.C.); 46 W.W.R. 704.

property had 100 feet frontage on 105th Street. The plaintiff constructed a building on this property at a cost of \$257,465.43. The building was constructed to accommodate a particular business which operated from the site.

As in most urban centres, traffic in Edmonton developed to the point of creating problems in the area. To meet the problem, the city decided to build an overpass. This would lift the traffic on 105th Street over the C.N.R. tracks. The work was completed in December 1960. The effect of the construction of the overpass was that there were a series of pillars down the middle of the street supporting the overpass. As it passed the Woods building, 105th Street was now at the level of the building's top storey windows. Traffic at the street level in front of the building was one way, the road having been split down the middle by the pillars which supported the overpass. There was no doubt that access to the building was interfered with and that the property had been injuriously affected. Did sections 303(1) and 303a of the City Act²²⁴ provide for compensation? Mr. Justice Milvain found that the plaintiff was entitled to \$140,413 of which \$122,500 was the loss in value of the property. In addition, Milvain J. allowed \$50,000 for damages to "the owner" as distinct from damages to the value of the property.²²⁵ Mr. Justice Milvain allowed this additional \$50,000 as damages to the owner because he felt that section 303a was "placed in the Act to provide damage to a person as distinguished from damage caused through depreciation in the value of property and therefore (the section) was designed to overcome the anomaly

224. Loc. cit., note 220.

225. Loc. cit., note 223, 47 W.W.R., pp. 210-211.

discussed in the Albin case."²²⁶ The section was therefore taken as eliminating the third requirement in Loiselle.

The city appealed²²⁷ on the basis that the extra \$50,000 ought not to have been awarded. Although Milvain J. found that section 299(1) authorized "compensation for lands injuriously affected though not expropriated in the exercise of the powers conferred upon the city by the Act",²²⁸ Porter J.A. on appeal said that section 299(1) does "not have any application to the matter in dispute because that section deals with the case in which land is taken".²²⁹ The appeal failed because Porter J.A. agreed that the very purpose of section 303a was to remove the anomaly expressed by Mignault J. in Albin and impose a liability for the very items which could not properly be considered under Albin, namely "damage to a person (business damage) as distinguished from damage caused through depreciation in value of his property".²³⁰ The \$50,000 was clearly not covered by the award of loss in value of the property. The \$50,000 was "to cover the damage to the owner by reason of the loss of and permanent lessening of the use of the Walter Woods Ltd. building, as directed by section 303a".²³¹ A further appeal to the Supreme Court of Canada was dismissed.²³²

226. Loc. cit., note 223, 47 W.W.R., pp. 210-211; The anomaly in Albin v C.P.R. (supra p. 19) was that in the case where land was taken, loss of goodwill and loss of business in so far as they enhance the value of the land to the owner are compensable; in the case where no land is taken no damages are granted for loss of business.

227. Loc. cit., note 223, 42 W.W.R. 370; 39 D.L.R. (2d) 167.

228. Loc. cit., note 223, 47 W.W.R., p. 200.

229. Loc. cit., note 223, 42 W.W.R., p. 371; 39 D.L.R. (2d), p. 168.

230. Ibid., 42 W.W.R., p. 373; 39 D.L.R. (2d), p. 170.

231. Ibid.

232. Loc. cit., note 223, [1964] S.C.R. 250; 46 W.W.R. 704.

Professor Todd points out that as a result of the municipalities' protests after the Walter Woods decision, a new section 303(a)(2) was added to the City Act:²³³

- 303(a)(2) This section does not apply to any damage caused by
- (a) the construction of boulevards down the centre of a highway, street or lane for the purpose of channelling traffic, or
 - (b) the restriction of traffic to one direction only on any highway, street, or lane.²³⁴

Professor Todd points out that claims for loss of business profits were "still possible in situations other than those covered by the new subsection (2) and the potential threat continued to agitate the municipalities".²³⁵

In an interesting comment, Professor Todd points out that the fear of increased costs of public works as a result of section 303a "took on a new significance when the provincial government decided to participate in the financing of major arterial roads throughout the principal cities of the Province. It is understood that the government then began to study the financial implications of section 303a on the cost of arterial roads".²³⁶ As a result, in 1966, the Alberta legislature added a new subsection 3 to section 303a of the City Act as follows:

233. Op. cit., note 200, pp. 165-166.

234. 1965 S.A., c. 10, s. 12.

235. Op. cit., note 200, p. 166.

236. Ibid.

- (3) The amount payable for damages under this section shall not exceed the amount of the difference between
- (a) the appraised value of the property prior to the exercise by the city of any of the powers conferred on it by this Act, and
 - (b) the appraised value of the property after the exercise of the powers referred to,
- together with an amount of not more than ²³⁷ten per cent of the amount of the difference as so determined.

It seems very ironic that a legislature which was intent at first on permitting claims for personal loss where no land was taken decided to limit those potential claims very seriously when the provincial government was about to "participate in the financing of major arterial roads throughout the principal cities of the Province". This is a clear signal that, perhaps, without section 303(3) the provincial government would not, for its part, have participated in the project. It is interesting that the study on the financial implications of section 303a was only undertaken when the province was participating in a project which would have subjected it to payment pursuant to section 303a. The fact that the limitation in section 303(3) was added at that time shows that, although the intent of section 303a to circumvent the anomaly in Albin is laudable, in the end such claims had to be restricted so as to effectively eliminate the generosity of section 303a and permit an important public project to proceed.

This restriction on the generosity of section 303a was confirmed by the Alberta Court of Appeal in Beierbach et al. v City of Medicine Hat²³⁸ where Mr. Justice Clement delivering a unanimous decision for the Alberta Court of Appeal said:

237. 1966 S.A., c. 15, s. 24.

238. (1982) 24 L.C.R. 97.

I am of opinion that the subsequent enactment of s-s. (4) of s. 135 has had a profound effect on the ratio of Walter Woods in respect of the scope of s-s. (1), i.e., s. 303a of the City Act...The "damage to an owner" upon which Milvain J. founded his interpretation of s. 303a of the City Act is now constrained by s. 135(4) of the Act to damage arising from diminution of the appraised value of his property, rather than to loss of business profit unless this may properly be taken into account by the 10% discretionary surcharge which is open under the concluding words of s-s. (4). (emphasis mine)²³⁹

239. Ibid, pp. 103-104.

CHAPTER IX - RIDEAU BUS MALL

The Rideau Bus Mall project in Ottawa provides an interesting situation for considering the application of the law of injurious affection where no land is taken. Until a few years ago, Rideau Street in the City of Ottawa was probably the main east-west arterial road in the City. It leads from the east and becomes Wellington Street which crosses the downtown area right in front of Parliament Hill. As a part of the Rideau Street revitalization project, a portion of Rideau Street which was a four-lane, two-direction road was closed to traffic entirely and became a bus mall. Other than emergency vehicles, only buses are allowed on the bus mall - no other traffic.

Let us now look at the creation of this bus mall in the context of the Ontario Expropriations Act.²⁴⁰ No land was taken for the construction of the bus mall. As we have seen, this makes no difference. Section 21 provides that a statutory authority must compensate an owner for loss or damage caused by injurious affection.

Is there injurious affection? Since no land was taken, Section 1(1)(e)(ii) of the Expropriations Act provides that for there to be injurious affection three conditions must be met. There must be (1) construction of a work (2) by a statutory authority (3) for which the statutory authority would be liable if the work were not under the authority of a statute. If these three conditions exist the statutory authority would have to compensate an

240. R.S.O. 1980, c. 148; Op. cit., note 55.

owner for the loss in market value and personal and business damages provided the same are caused by the construction and not the use of the works.

The construction of the Rideau Bus Mall is clearly the construction of a work. Is there a statutory authority? The bus mall is the responsibility of the Regional Municipality of Ottawa-Carleton which under the authority of its enabling legislation has the power and duty to construct and maintain regional roads and to implement transit.²⁴¹ Since the Regional Municipality of Ottawa-Carleton was created under the Regional Municipality of Ottawa-Carleton Act,²⁴² it is a statutory authority. Hence the construction of the Rideau Bus Mall is the construction of a work by a statutory authority. From the Ontario jurisprudence examined, there is support²⁴³ for the proposition that closing part of a road without statutory authority is actionable at common law. The three conditions mentioned above being satisfied, the only questions remaining are: (1) who are the "owners", and (2) what is the extent of their possible claims.

An "owner" can be virtually anyone who has any interest in land. This can be a fee simple interest or an interest as a tenant.²⁴⁴ Certainly all owners along both sides of the portion of Rideau Street which was changed into a bus mall were affected and could be "owners" as described in the Act.

241. Regional Municipality of Ottawa-Carleton Act R.S.O. 1980 c. 439, Parts IV and V.

242. Ibid.

243. Supra, p. 45-51.

244. Expropriations Act R.S.O. 1980, c. 148, s. 1(1)(h).

Owners on the closed portion of Rideau Street could claim that they no longer have direct access to a highway. Even more important is that their patrons no longer have vehicular access to their stores. The only access is by foot or by bus. It may be that these owners could claim that they have suffered a loss in market value of their properties. They may also have suffered business and other personal damage both during the construction stage and as a result of the completed fact of the construction of the bus mall even though it is never used. Business damages could be such things as loss in rental revenue or loss of business income. Personal damage could be, for example, extra cleaning costs or air conditioning while doors had to be closed to keep noise and dust out.

An owner need not have an interest in land contiguous to the works. Let us look at a location a little more remote from the works. What about the owners and businesses on nearby Sussex Drive or George Street? Were these owners injuriously or detrimentally affected? It may be that their properties lost market value. Perhaps the businesses carried out on these lands lost income during the construction, or perhaps the noise, dust and dirt caused personal damage even though the properties are more remote from Rideau Street. Perhaps the change in traffic pattern which was a direct result of the Rideau Street revitalization project caused a loss in profits because business has been diverted. If these claims are within the statute, what about the owners a block further on York Street? Are they too remote? If not, then what about the owners two blocks further on Murray Street? How far from the Rideau Bus Mall would one have to go before it could be argued successfully that the damages are too remote because the owners' property is too remote?

As for remoteness of the damage itself, suppose you had a business which had very sensitive equipment which was damaged or could not be used because of the vibrations, noise, or dust from the construction. If the business was on the closed portion of Rideau Street would damages such as interest paid while the equipment could not be used be too remote? If not, then what if the business was on Sussex or on York Street or further? Does that make it too remote? If the same operation on York Street lost income and had unusable equipment for which it was paying service charges or interest is the lost income or the wasted service charges or interest too remote?

Suppose Larson's motel was at the corner of Rideau and Sussex, would he have any claims? Access to the site has definitely been affected. Traffic going south no longer has direct access and traffic going west now has a much less convenient access.

It is possible that some owners who are not even in the immediate area have been injuriously affected. For example, "A" lives in nearby Lebreton Flats and works on Rideau Street at the corner of Dalhousie Avenue. Before the bus mall was constructed "A" went to work straight along Wellington Street and continued straight on Rideau Street and returned home in the reverse. After the construction of the bus mall, to get to work by the shortest route, "A" must go east on Wellington, south on Colonel By, east on Daly, north on Waller, east on Besserer, north on Cumberland, and east on Rideau (See Appendix C). Is this more circuitous than before? No one could doubt it. Does it result from the construction of the work? There is little doubt about this either. Perhaps there are many more people like "A" who, to get to and from work, travel from east of the bus mall to west of the bus mall or vice versa and must now use a more circuitous route. Is this a personal

damage which results from the construction of the Rideau Bus Mall?

In planning the bus mall, did anyone contemplate the potential claims which could be made as a result of the construction? Did anyone contemplate who would or could fall into the class of "owner"? More importantly, could anyone have quantified all of the potential claims? If it were possible to have quantified the potential claims for injurious affection, would the Region, knowing of the potential liability, have built the bus mall? These potential claims should be taken into consideration when planning any public project of the magnitude of the Rideau Bus Mall.

It appears that, as a result of the construction of the Rideau Bus Mall, fortunately for the Regional Municipality of Ottawa-Carleton there have not been any claims made against it pursuant to section 21 by owners from whom no land was taken. Except where the person who is injuriously affected is an infant, a mental incompetent or a person incapable of managing his affairs, any claims for compensation for injurious affection pursuant to section 21 must be made within one year after the damage was sustained or after it became known to the owner, failing which the right to compensation is forever barred.²⁴⁵ Since the Rideau Bus Mall was completed more than one year ago, it is most likely that all claims under section 21 are now statute barred.

It is difficult to speculate why no claims were made in this example. Perhaps owners and even lawyers do not realize there are potential claims. Perhaps the reason they do not realize it is that the claim is addressed in Expropriation legislation when it really does not involve an expropriation at all.

245. Expropriations Act R.S.O. 1980, c. 148, s. 22.

CHAPTER X - PROPOSALS FOR REFORM

One of Canada's well known authors on the subject under discussion, Professor Eric C.E. Todd, has made a number of proposals for reform. Basically, his position is that both the actionable rule²⁴⁶ and the construction rule²⁴⁷ should be abolished, and any provable economic loss (whether to land, personal, sentimental or business loss) should be recoverable subject to clearly defined limitations.²⁴⁸ However, speculative, remote or imagined losses should not be compensated.

These proposals were made in 1967²⁴⁹ at about the same time as the Ontario Law Reform Commission Report²⁵⁰ was released and a few years before the Expropriations Act²⁵¹ was legislated into law. His approach suggests that the law of injurious affection should, "like the law of negligence, be expressed in general terms bearing in mind the words of Chief Justice Denman in 1841 that 'If extreme cases should arise we shall know how to deal with them'".²⁵² Since the injurious affection sections of the Ontario

246. Supra, p. 69 et. seq.

247. Supra, p. 75 et. seq.

248. Op. cit., note 200, pp. 167-168. These are set out in Appendix D which contains his proposals for reform.

249. Ibid.

250. Op. cit., note 198.

251. Op. cit., note 55.

252. Op. cit., note 200, p. 167.

Expropriations Act in cases where no land is taken still contemplate the Actionable Rule and the Construction Rule, the Ontario Act is not as liberal in its indemnity provisions as Todd would have liked. His rationale for broader compensation was that:

the continued and increasing interaction of urbanization and public enterprise undoubtedly will multiply the occasions where individuals are, under the present rules, left without redress. The public clamour concerning such injustices may, in the foreseeable future, cause a change in the present Draconian philosophy and make such a change not only socially desirable but also politically expedient.²⁵³

The thread running through Professor Todd's approach to compensation for injurious affection where no land is taken is the desirability of adopting "general terms" similar to the principles governing the law of negligence.²⁵⁴ To say that an owner should be compensated for any "provable economic loss" which is not too remote is very much like the tort of negligence where damages resulting from any act of negligence recognized in law are claimable. It may be, however, that expressing liability in general terms may require years of litigation in an effort to determine what falls within the "general" terms and what is or is not "too remote".

In order to understand this contrast, let us examine the anatomy of a negligence action. For such an action to succeed:

1) the law of negligence must cover the situation. For example, as a matter of policy, the law of negligence imposes no liability for failure to rescue, and a claim based on such failure would, accordingly, not succeed. It

253. Op. cit., note 200, p. 168.

254. Op. cit., note 200, p. 167.

could be dismissed on a preliminary motion as not disclosing a reasonable cause of action;

2) there must have been a reasonably foreseeable risk that harm would result from the action;

3) there must have been a failure to act with due care to avoid the harm;

4) the negligence must have caused the loss; and

5) the damages must not be too remote.

Item number one above is, in a sense, the actionable rule of the law of negligence. In a negligence action, if the harmful conduct is not proscribed by the law of negligence, then there can be no claim even if the defendant's actions result in the plaintiff's damages.

There is a basic distinction between injurious affection and negligence. In a negligence action we are concerned with the faulty conduct of the defendant. With injurious affection there is no fault or wrong. On the contrary, the alleged damage results from conduct which is lawful (it is authorized by a statute) and which is for the greater public good. As long as the authority is acting within its statutory powers, it cannot be said that the authority has committed a wrong.

One of the most difficult aspects of expropriation from the perspective of the authority is the difficulty in restricting claims to those that are well founded and reasonable. It is well recognized that, in expropriation matters, unfounded and, indeed unreasonable claims are quite common. This is a crucial problem which must be addressed in assessing the law and practice in this field.

Professor Todd submits that "ill founded claims can be dealt with adequately by the application of the general rules relating to remoteness of damage and the discretion in awarding costs".²⁵⁵ However, the rules of remoteness may not be enough to restrict the claimants to those who have legitimate claims. As the Rideau Bus Mall examples demonstrate, if the law were fully tested it would take many years of litigation to determine which owners or damages would be too remote from the construction of the works.

The exercise of discretion in awarding costs might provide a more fruitful alternative in discouraging groundless claims. However, depending upon how the discretion is exercised, it could also have the opposite effect.

The costs provisions in the Ontario Expropriations Act²⁵⁶ are very generous. These rules permit a claimant to carry his case through to the end the whole time being generally protected from costs being awarded against him regardless of the outcome of his claim. The claimant normally will have his costs paid throughout. As a practical matter, such a situation with regard to costs does not operate to restrict claims to only those which are realistic. Even where claims are justified the costs provisions may operate as a barrier to settlement. In the absence of an urgent need for cash, the claimant may as well pursue the claim without compromise since there is little to lose.

255. Op. cit., note 200, p. 146.

256. Op. cit., note 55, s. 34.

Under the Expropriations Act²⁵⁷ the authority is required to make a formal offer of compensation to an owner within three months from the date of registration of the expropriation plan. Further, section 34(1) of the Act requires payment of costs to the claimant if he or she is awarded 85% or more of the amount offered by the authority. The purpose of this rule is to obtain realistic offers from authorities. If the award is less than 85% of the amount offered by the authority, section 34(2) of the Act gives the Board discretion in any award of costs.²⁵⁸ As a practical matter the Land Compensation Board seemed reluctant to award costs against the claimant. Indeed, where no land is taken, it is unlikely that any offer will be made at all. Accordingly, where no offer is made, any award, even nominal, will be presumed to be 85% of the amount offered and costs against the authority is then mandatory, not discretionary.

This is precisely what happened in Fried²⁵⁹ where the award was about 20% of the original claim and 30% of the reduced claim. Since there was no land taken, there was no record as to a statutory offer made by the authority. The Board, therefore, presumed that the award was 85% of the amount offered.²⁶⁰ The Land Compensation Board made a similar finding in the Rotenberg²⁶¹ case although when the Board's decision was reversed by the

257. Op. cit., note 55, s. 25.

258. Op. cit., note 55, ss. 34 (1) and 34 (2).

259. Op. cit., note 71.

260. Ibid, p. 285.

261. Op. cit., note 74, p. 226.

Ontario Court of Appeal²⁶² the claim was dismissed with costs.²⁶³ The Four Thousand Yonge St.²⁶⁴ case is of the same effect as well. However, in this case the award was \$30,415.95 and the claimant's costs were taxed at \$34,753.51,²⁶⁵ a sum which is more than the award.

There are also cases where, although the award was less than 85% of the statutory offer, the claimant still received his costs.²⁶⁶ Even in a case where the claim for injurious affection was dismissed,²⁶⁷ notwithstanding section 34(2) of the Expropriations Act, the Land Compensation Board found that it had no power to award costs to the authority. In Smegal v City of Oshawa²⁶⁸ the amount offered was \$88,350 and the award was \$114,250. The claimant's costs were taxed at \$33,500. The Taxing Officer's decision concludes with these words:

262. Op. cit., note 75.

263. Ibid, 6 L.C.R., p. 81.

264. Op. cit., note 68, p. 199.

265. (1974) 5 L.C.R. 22, at p. 30.

266. Cosburn Properties Ltd. v Municipality of Metropolitan Toronto (1973) 3 L.C.R. 242; Estate of Ralph Guido et al. v Minister of Transportation and Communications (1976) 9 L.C.R. 335; Chappell v Minister of Transportation and Communications (1979) 16 L.C.R. 41; Russel Road Realities Ltd. et al. v Regional Municipality of Ottawa-Carleton (1981) 21 L.C.R. 245; Hugh's Haulage Ltd. et al. v Minister of Transportation and Communications (1981) 22 L.C.R. 39.

267. Roux v County of Peel (No. 2) (1973) 4 L.C.R. 289.

268. (1973) 3 L.C.R. 18.

I cannot conclude these reasons without pointing out that these costs, which are, at most, the claimants' total costs of the expropriation proceedings, exceed the amount by which the Board's award exceeds the expropriating authority's pre-hearing offer and indeed they are almost exactly 30% of the total value of the expropriated lands. The total costs of these expropriation proceedings to the expropriating authority will doubtless be at least half the value of the lands expropriated. Sometimes,²⁶⁹ it seems the cost of an orderly society is substantial, indeed.

The unrealistic magnitude of some claims and the generation of substantial costs are serious considerations. The largest reported claim,²⁷⁰ although in a case where some land was taken, was for \$22,000,000.00. The statutory offer made by the authority was \$5,000,000.00 and eventually the Alberta Court of Queens Bench awarded \$7,141,608.00. In another case where some land was taken, the Ontario Land Compensation Board heard a claim for \$10,000,000.00.²⁷¹ The Board's award, after 18 days of hearing, was \$59,809.05. In this case the claimant's costs which were ordered to be paid by the authority were taxed at \$84,103.30,²⁷² much higher than the award itself. This was in addition to the authority's own costs. An analysis of the claims and awards of most of the cases to date listed in the Land Compensation Reports under the heading "Injurious Affection - No Land Taken" appears in Appendix E.

269. Ibid, p. 28.

270. Mannix v The Queen in right of Alberta (1983) 27 L.C.R. 13.

271. Johnson et al. v Minister of Transportation and Communications (1973) 3 L.C.R. 386.

272. Re Johnson et al. and Minister of Transportation and Communications et al. (No. 2) (1975) 7 L.C.R. 296.

As a further check against unreasonable claims being made Professor Todd suggests giving the authority the right to purchase the whole interest at the pre-depreciated market value.²⁷³ This may alleviate some of the fears of authorities. Unfortunately, if the authority has to resort to litigation to determine that value, the costs of the litigation (if the authority has to pay them) may destroy any advantage it would otherwise have. In several reported cases, the costs have exceeded the amount of the compensation. Since the authority generally pays the costs when expropriation takes place and since no offer is usually made where no land is taken, it is most likely that costs will be awarded against the authority.²⁷⁴ Assuming the authority pays the whole cost, it is possible that this proposal could significantly increase the cost of the project to society. For example, if the pre-depreciated market value is \$100,000 but the cost of determining this is \$50,000 and the authority elects to purchase the property, then, assuming the authority pays the costs, the following are the possible results: (1) the owner agrees to sell with the result that the authority has just purchased, at a total cost of \$150,000, (without taking its own costs into consideration) a property it does not need and which, it is argued, is worth less than \$100,000 because it has been injuriously affected; or (2) the owner refuses to sell in which case the authority does not have to compensate him for his damages but, in this example, it has spent at least \$50,000 in costs (not including its own costs). In this case the owner from whom no land was taken will not sell but will have added to the total cost of the project.

273. Op. cit., note 200, p. 168.

274. Expropriations Act R.S.O. 1980, c. 148, s. 34; Infra., pp. 94 et. seq.

In the light of these costs and losses what we are trying to do is to find a fair solution to the conflict between the individual and the state so that individual rights are protected and yet public projects which are for the general benefit of the community will continue to be undertaken. Professor Todd, writing about injurious affection in 1967, said "that the subject is one of particular difficulty and presents the very practical problem of determining where to draw the line between public interest and private rights."²⁷⁵ This sounds very much like the confidence expressed by Lord Denman 135 years earlier in the Eastern Counties case when he said: "if extreme cases should arise, we shall know how to deal with them."²⁷⁶

The idea is to find a solution by balancing the right of the individual owner against the public interest in a project for the general benefit of the community. The owner should not lose any of his rights in the enjoyment or use of his property nor should his property lose market value for the benefit of society as a whole without being compensated. On the other hand, the community as a whole has the right to the benefits of the improvement. Presumably, the public authority has the right to use public property for a public purpose. The essence of the tort of nuisance in this context is to look at the result of a particular use to which a property is being put to see if it is so harmful as to be an unreasonable use by the owner. As pointed out above, this has become much more complex because of changes in the urban fabric. The reality is that most people want to live and carry on business in an urban centre. Public authorities must provide the roads, infrastructure and other amenities to accommodate this lifestyle in an

275. Op. cit., note 200, p. 167.

276. Supra, p. 6, (note 8).

efficient manner and with minimal cost to the taxpayer. It could be argued that the incidences of nuisance which an urban property owner and city dweller suffer are part of city life and must be endured. Perhaps he should get no relief because he recoups his damage in the benefit from the ultimate improvement he shares with the public generally knowing that other individuals will also be required to carry a more specific burden, in future, on his behalf.

In trying to arrive at a fair solution to the balancing of the seemingly opposite interests, one must assume that an owner (whether public or private) is entitled to use his land and enjoy all the rights appurtenant to that ownership. The issue concerns the right of the public, as landowner, to use public land for a public purpose and carry out its mandate and obligations without being subject to claims merely because it is the public. The uses to which public land can be put are different from the uses to which private land can be put and the two are not necessarily compatible. As long as a public use is reasonable, one should proceed with caution before permitting a claim where no land is taken. A public use may, by its very nature, be a nuisance to some people although the use may be an enormous benefit to most. An obvious example of such a public use is a subway station and subway line. A property next to the subway station would have a higher and better use after the station is built than before and consequently would have increased in market value as a result of the construction of the subway station. On the other hand for some owners (who may view the construction as a nuisance) a quiet area has suddenly become very busy. Further, if a house previously backed on a quiet area and now the subway line goes along the back yard, the property will have the same highest and best use (housing) but may have a lower market value than before the construction because of the existence of a

subway line contiguous to a residential lot.

In Fleming, *The Law of Torts*, the problem in nuisance law is set out as follows:

In order to merit legal intervention, the annoyance or discomfort must be substantial and unreasonable. "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others... It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends on the principle of 'give and take, live and let live'...

The paramount problem in the law of nuisance is, therefore to strike a tolerable balance between conflicting claims for landowners, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other... Legal intervention is warranted only when excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear... (Reasonableness) is viewed not only from the standpoint of the defendant's convenience, but must also take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, is he using²⁷⁷ it reasonably, having regard to the fact that he has a neighbour?

Let us look at the question "is he (the public authority) using it (the public land) reasonably having regard to the fact that he has a neighbour?" in the context of striking a balance between conflicting landowners one of whom is the public. When a person acquires a piece of property, it is normally acquired for a reason even if that reason is speculation. A public body likewise acquires property for a reason but that reason must be authorized by statute. Public uses of land although necessary to support all other uses of land, are not included within any other use and

277. Fleming, John G., The Law of Torts, Fifth Edition, The Law Book Company Limited, 1977, p. 401.

there is no single area in a municipality zoned for all public uses. To be of value to the urban fabric, public uses must be intertwined with all other uses (residential, commercial, industrial). Therefore, if one chooses to live in an urban environment, one must be willing to accept public works in one's environment which would be a nuisance if in the country.

One must look at the fact that the land is public land and recognize that uses of public lands are different from uses of private lands. A use that would be a nuisance if on private lands would not necessarily be a nuisance if on public lands. The question posed by John G. Fleming could be reversed to be: Is the use to which the public land is being put reasonable given the fact that it is public land?

In the writer's view, in the case where no land is taken injurious affection should mean, subject to certain restrictions, any provable economic loss with economic loss meaning a loss which can be measured in terms of money. The restrictions should be:

- 1) the Actionable Rule;
- 2) the Construction Rule;
- 3) the authority should be responsible for the monetary loss only to the extent that it is caused directly and solely by the public work;
- 4) sentimental loss or other such loss should not be compensable;
- 5) the onus of proof of the economic loss as well as its cause should be on the claimant; and
- 6) serious cost provisions as a check against unfounded and unrealistic claims.

For the reasons stated in Chapter 7, the Actionable Rule and the Construction Rule should be kept intact where no land is taken. To abolish either of these rules would expose the authority to so many claims as to put a stop to many worthwhile public projects. If the economic loss results at least in part from anything other than the construction of the public project then the public authority should not be responsible totally but only in the proportion of its activities being the cause of the economic loss.

Sentimental value cannot be measured on any economic scale in an open market. No one, when purchasing a property, would pay anything for any sentimental value attached to that property by its owner. Sentimental value is a value from the owner's point of view and only from that person's point of view. Sentimental damage or value is in the perception of the owner. While it is not an imagined loss it could be argued that is not an economic loss either.

In National Commission v Hobbs,²⁷⁸ the Supreme Court of Canada specifically laid to rest the possibility of compensation for such damage:

Where it is claimed that a property has a special value to the owner over and above its market value, the owner must adduce the facts necessary to prove this value, which must be such that it can be measured in terms of money. It is not sufficient for a claimant to say that he would pay a certain amount of money rather than be deprived of his property. There must be proof that the land had special advantages that gave it a special economic value for the expropriated party, and no value should be attributed for sentimental attachment. (emphasis mine)²⁷⁹

This decision followed Professor Todd's proposal by three years.

278. [1970] S.C.R. 337.

279. Ibid, pp. 339-340.

In order to permit claims for any economic loss but restrict them to those which are justified, reasonable and realistic, it is suggested that the 85% rule (with respect to costs) not apply in its current form to the case where no land is taken, and, in its place there should be a penalty to discourage improper and unreasonable claims. To accomplish this, I suggest the reverse of the rule which is intended to obtain realistic offers from the expropriating authority. It is suggested that if the owner obtains at least 85% of what he claims his costs should be paid by the authority. However, if the owner does not obtain 85% of what he claims or if the authority has offered more than 85% of what he obtains, then the award should be reduced by the full costs of the authority in defending the claim (including legal and appraisal fees) or, in the alternative, in this event the claimant should at least have to pay his own costs. This cost penalty would surely keep claimants advancing only legitimate and realistic claims. The door would still be open to compensate owners for their economic losses. On the other hand, the costs penalty would discourage improper and unrealistic claims. While I recognize that the above approach may seem harsh and some legitimate claimants may not bother to advance claims for fear of costs being held against them, it may simply be the price of continuing to live within the urban fabric most of us appear to desire.

APPENDIX A

EXPROPRIATIONS ACT R.S.O. 1980, c.148.

1.—(1) In this Act,

(c) "expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers, but does not include the taking of land for the widening of a highway where entry is deferred under section 196 of the *Municipal Act*;

(d) "expropriating authority" means the Crown or any person empowered by statute to expropriate land;

(e) "injurious affection" means,

(i) where a statutory authority acquires part of the land of an owner,

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(ii) where the statutory authority does not acquire part of the land of an owner,

(A) such reduction in the market value of the land of the owner, and

(B) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired;

- (m) "statutory authority" means the Crown or any person empowered by statute to expropriate land or cause injurious affection;

21. A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

25.—(1) Where no agreement as to compensation has been made with the owner, the expropriating authority shall, within three months after the registration of a plan under section 9 and before taking possession of the land,

(a) serve upon the registered owner,

(i) an offer of an amount in full compensation for his interest, and

(ii) where the registered owner is not a tenant, a statement of the total compensation being offered for all interests in the land,

excepting compensation for business loss for which the determination is postponed under subsection 19 (1); and

(b) offer the registered owner immediate payment of 100 per cent of the amount of the market value of the owner's land as estimated by the expropriating authority, and the payment and receipt of that sum is without prejudice to the rights conferred by this Act in respect of the determination of compensation and is subject to adjustment in accordance with any compensation that may subsequently be determined in accordance with this Act or agreed upon.

(2) The expropriating authority shall base its offer of compensation made under subsection (1) upon a report appraising the market value of the lands being taken and damages for injurious affection, and shall serve a copy of the appraisal report upon the owner at the time the offer is made.

(3) The expropriating authority may, within the period mentioned in subsection (1) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to the judge for an order extending any time referred to in subsection (1), and the judge may in his order authorize the statutory authority to take possession of the land before the expiration of the extended time for serving the offer or statement under clause (1) (a) upon such conditions as may be specified in the order.

(4) If any registered owner is not served with the offer required to be served on him under subsection (1) within the time limited by subsection (1) or by an order of a judge

under subsection (3) or by agreement, the failure does not invalidate the expropriation but interest upon the unpaid portion of any compensation payable to such registered owner shall be calculated from the date of registration of the plan.

84.—(1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent. or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing officer of the Supreme Court who shall tax and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 46 (d).

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing officer of the Supreme Court who shall tax and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 46 (d) in like manner to the taxation of costs awarded on a party and party basis

APPENDIX B

Expropriation Act R.S.N.S. c. E-21.

3 (1) In this Act

(h) “injurious affection” means,

(i) where a statutory authority acquires part of the land of an owner,

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(B) such personal and business damages, resulting from the construction or use, or both of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(ii) where the statutory authority does not acquire part of the land of an owner,

(A) such reduction in the market value of the land of the owner, and

(B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of subclause (i), part of the land of an owner shall be deemed to have been acquired where the owner from whom land is acquired retains land contiguous [contiguous] to that acquired or retains land of which the use is enhanced by unified ownership with that acquired;

Duty to Compensate for Injurious Affection

30 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

46 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

"injurious affection" means,

(a) where a statutory authority takes part of the land of an owner,

(i) the reduction in market value thereby caused to the remaining land of the owner by the taking or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(ii) such personal and business damages resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute, or

(b) where the statutory authority does not take part of the land of an owner,

(i) such reduction in the market value of the land of the owner, and

(ii) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purpose of this definition, part of the land of an owner shall be deemed to have been taken where the owner retains land contiguous to that taken or retains land of which the use was enhanced by unified ownership with that taken;

Expropriation Act R.S.P.E.I. 1974, c. E-11.

11. The Minister shall make to the owner of land entered upon, taken or used by him, or injuriously affected by the exercise of any of the powers conferred by this Act, due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the owner may derive from the contemplated work, and any claim for the compensation not mutually agreed upon shall be determined as hereinafter provided.

The Expropriation Act R.S.M. 1970, c. E-190.

Authority to compensate for injurious affection.

24(1) An authority that expropriates land or that in the exercise of its lawful powers causes the injurious affection of land shall pay to the owner thereof due compensation in accordance with this Act for the loss or damage thereby caused

Effect of injurious affection under certain Acts.

24(2) Nothing herein shall be construed as requiring the payment of compensation for the injurious affection of land, where the injurious affection is a result of the application of a provision of The Highways Department Act or The Highways Protection Act and that provision expressly prohibits or denies the right to compensation, rent or other payment therefor

Injurious affection in partial takings

30(1) Compensation for injurious affection where an authority expropriates part of the land of an owner shall consist of the amount of

- (a) any reduction in market value of the remaining land of the owner caused by the expropriation of the part,
- (b) the damages sustained by the owner as a result of the existence and the use but not the construction of the works upon the part of the land expropriated, and
- (c) such other damages sustained by the owner as a result of the existence, but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute

Injurious affection where no land taken.

31(1) Due compensation for injurious affection where an authority does not acquire part of the land of an owner shall consist of the amount of such damages sustained by the owner, including any reduction in the market value of the land, as are the result of the existence, but not the construction or use, of the works and for which the authority would be responsible in law if the works were maintained otherwise than pursuant to the authority of a statute

The Expropriation Act R.S.Nfld. 1970, c.121.

6.—(2) The Minister shall compensate the owner of any land injuriously affected by an act done under this section and in default of agreement between the Minister and the owner the amount of compensation shall be determined and paid in the same manner as nearly as may be and with the same effect as compensation is determined and paid under this Act.

17.—(1) Subject to this Act, the Minister shall pay compensation to the owner of land expropriated and to the owner of any land injuriously affected by the expropriation.

17 (2) Where, in the opinion of the board, it is proper to make an award in respect of the expropriation of land, for the disturbance to the owner or occupier or for any other injurious affection properly the subject of compensation, the board may in addition to the amount awarded in accordance with subsection (1) make an award of such sum as it may fix.

58.—(1) Whenever the Minister thinks it necessary or desirable for the performance of anything authorized to be done by or under any of the Acts in the First Schedule to this Act he may by his employees, engineers, contractors and other servants or any person duly authorized enter upon any Crown land or upon the land of any person whatsoever and may at all reasonable times enter all houses, buildings, tenements or erections upon the land and may do and execute thereon or therein all such works and things as may be required for the purpose of that performance.

(2) The Minister shall compensate the owner of any land injuriously affected by any act done under this section and in default of agreement between the Minister and the owner the amount of compensation shall be determined and paid in the same manner as nearly as may be and with the same effect as compensation is determined and paid under this Act.

FIRST SCHEDULE.

Short Title of Act

The Provincial Parks Act

The Land Development Act

The Industries Act

The Newfoundland Fisheries Development Authority Act

The Housing Act

Expropriation Ordinance R.O.Y.T. 1975, c. E-8.

3 (2) Compensation for disturbance, injurious affection of land or expropriation of land shall be assessed and paid in the manner provided in this Ordinance.

8. (1) Where land is expropriated or is injuriously affected by an expropriating authority in the exercise of its statutory powers, the expropriating authority shall make due compensation to the owner of the land for the land expropriated or for any damage necessarily resulting from the exercise of such powers, as the case may be, beyond any advantage that the owner may derive from any work for which the land was expropriated or injuriously affected.

11. (1) Subject to subsection (2), a claim for compensation for injuriously affected land caused by an expropriating authority where no land was expropriated shall be made by the owner of the land in writing with particulars of the claim within one year after the damage was sustained or after it became known to the owner, and, if not so made, the right to compensation is forever barred.

(2) Where the owner of land that is injuriously affected is an infant, an insane person or a person incapable of managing his affairs, his claim for compensation shall be made within one year after he ceased to be under the disability, or, in the case of his death while under the disability, within one year after his death, and, if not so made, the right to compensation is forever barred.

Expropriation Act R.S.A. 1980, c. E-16.

42(1) When land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.

(2) When land is expropriated, the compensation payable to the owner shall be based on

(a) the market value of the land,

(b) the damages attributable to disturbance,

(c) the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion, and

(d) damages for injurious affection.

56 When part only of an owner's land is taken, compensation shall be given for

(a) injurious affection, including

(i) severance damage, and

(ii) any reduction in market value to the remaining land,

and

(b) incidental damages,

if the injurious affection and incidental damages result from or are likely to result from the taking or from the construction or use of the works for which the land is acquired.

Municipal Government Act R.S.A. 1980, c.M-26.

133 A municipality shall make due compensation to the owners or occupiers of, or other persons interested in, any land taken by the municipality in the exercise of any of the powers conferred by this Act, and shall pay damages for any land or interest therein injuriously affected by the exercise of those powers, and the amount of those damages shall be such as necessarily result from the exercise of those powers beyond any advantage that the claimant may derive from the contemplated work.

180(1) A council of a city may pass by-laws for the purpose of closing the whole or any portion of any street, road, lane or public highway, and the council of any other municipality may do so with the approval of the Minister of Transportation.

(4) Any person who occupies, owns or is otherwise interested in land that sustains damages through the closing of the street, lane, road or highway shall be compensated for the damages as hereinafter provided.

(5) When a claim is made for compensation for damages by the owner or occupier or other person interested in lands alleged to have been injuriously affected by the exercise of any powers of the council under this section, if the council or official is not able to agree with the claimant as to the amount of compensation or damages, the compensation or damages shall be settled and determined by the award of the Land Compensation Board.

307(1) A municipality shall do as little damage as possible in the execution of the powers granted to it by this Part and shall make reasonable and adequate satisfaction to the owners, occupants or other persons interested in the land waters, rights or privileges entered on, taken or used by the municipality or injuriously affected by the exercise of its powers

(2) In the case of disagreement, the compensation or damage shall be ascertained by the Land Compensation Board.

Drainage, Ditch and Dyke Act R.S.B.C. 1979, c. 98

Compensation for land damaged

108. Where land not taken is injuriously affected by the works executed by the commissioners, the damage shall, if not mutually agreed on, be valued and assessed by arbitration as provided in this Part.

RS1960-121-52.

Compensation regarded as part of cost of works

109. Compensation made for land taken or injuriously affected by the works of the commissioners shall be part of the cost of the works.

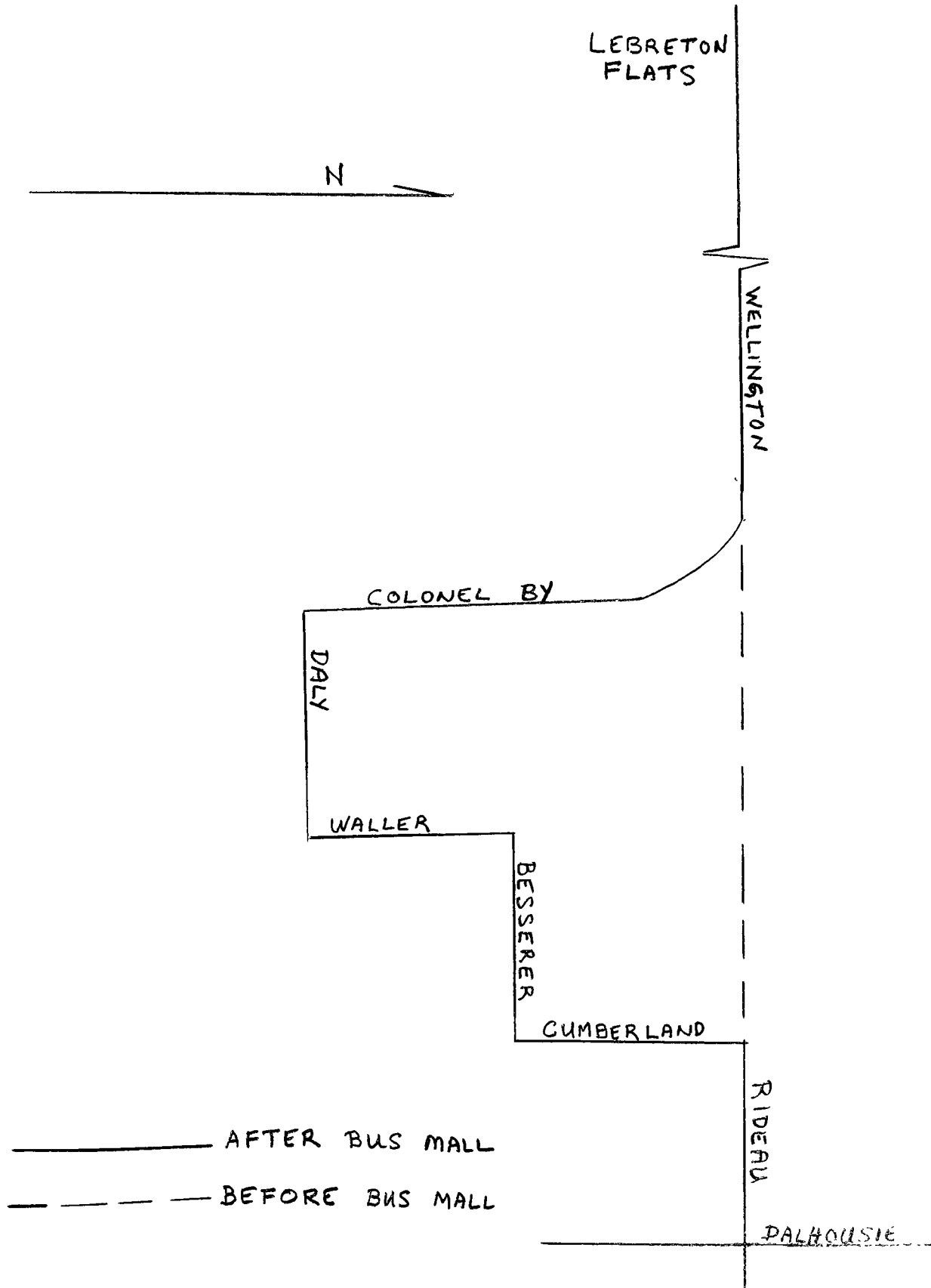
Municipal Act R.S.B.C. 1979, c. 290.

Compensation for property taken or damaged

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 (including interest on the compensation at the rate of 6% a year from the time the real property was entered on, taken or used) necessarily resulting from the exercise of those powers beyond any advantage which the claimant may derive from the contemplated work. A claim for compensation, if not mutually agreed on, shall be decided by 3 arbitrators. The municipality shall appoint one arbitrator, the owner or tenant or other person making the claim, or his agent, shall appoint another, and those 2 arbitrators shall appoint a third arbitrator within 10 days after their appointment; but in the event the 2 arbitrators do not appoint a third arbitrator within the time prescribed, the Supreme Court shall, on application of either party, of which notice shall be given to the other party, appoint the third arbitrator.

(2) If doubt arises as to procedure under this Division, the *Arbitration Act* applies.

APPENDIX C



APPENDIX D

ERIC TODD'S PROPOSALS FOR REFORM

It is submitted that legislative reform of the law of injurious affection should, like the law of negligence, be expressed in general terms bearing in mind the words of Chief Justice Denman in 1841 that "If extreme cases should arise we shall know how to deal with them...."

It is suggested that there should be no distinction between damage to land, personal damage, sentimental damage and business losses. Any provable economic loss should be recoverable. It should be noted that it is not suggested that speculative, remote or imagined losses be compensated but only actual provable economic loss - the onus of proof being on the claimant.

A broad statutory right to full indemnity should be subject to clearly defined limitations, for example:

1. The onus of proof of economic loss should be on the claimant as in an ordinary common law action for damages.
2. The general rules of remoteness of damage should apply.
3. The claim should be made within a specified period, say two years, from the completion and commencement of use of the public work which is the alleged cause of the damage; provided, however, that a claim might be made within the same period after any substantial change in the nature or use of the work.
4. The value of any economic benefit accruing to the claimant as a result of the public work should be set off against his economic damage. The onus of proving any such benefit should be on the authority from which damages are claimed.

5. Where a claimant establishes an economic loss to a real interest, and whether the quantum of such loss is established by agreement with the public authority or by arbitration or judicial adjudication, the public authority should have the right to elect either to indemnify the loss so established or to purchase the entire interest at its pre-depreciated market value as ascertained by agreement or adjudication. In the event that the public authority elects to purchase the entire interest the claimant should have the right to refuse to sell but would thereby forfeit his claim to damages.

APPENDIX E

Four Thousand Yonge Street v Municipality of Metropolitan Toronto

(1972) 2 L.C.R. 191

Claim \$49,651.35

Award \$30,415.95

Fried v Minister of Transportation and Communications

(1973) 3 L.C.R. 262

Claim \$140,000 reduced to \$90,000 at trial

Award \$31,500

Rotenberg v Borough of York

(1973) 3 L.C.R. 204;

(1974) 6 L.C.R. 77 (C.A.)

Claim \$45,000

Award 0

Sam Sor Enterprises Inc. v Municipality of Metropolitan Toronto

(1979) 16 L.C.R. 260

Claim \$200,870

Award 0

Larson v City of Windsor

(1979) 17 L.C.R. 349

Claim \$85,000

Award \$80,000

+ 19,799 business loss during construction

19,799 after
construction

+ 31,631 business loss

0

Byng Hotel (1976) Ltd. v City of Cranbrook

(1981) 21 L.C.R. 153

Claim - approx. \$350,000

Award \$12,500

Bierbach v City of Medicine Hat

(1982) 24 L.C.R. 97

Claim \$134,900

Award 0

Food City v Town of New Glasgow

(1983) 27 L.C.R. 185

Claim \$82,766

Award 0

D. & E. Carnalian Ltd. v Regional Municipality of Waterloo

Claim \$19,555

Award \$18,000

St. Pierre v M.T.C.

21 LCR 68

Claim \$50,000 loss in market value

Award 0 (on appeal)

+ personal damages

0

Meridian Properties Ltd. v City of Calgary

(1985) 32 L.C.R. 265

Claim \$1,110,000

Award \$31,500

Wynot v The Queen

(1985) 31 L.C.R. 322

Claim loss in market value

Award 0

contamination of well

0

Spolitini et al. v City of Calgary

(1985) 31 L.C.R. 346

Claims \$185,000 loss in market value	Award \$60,000
\$ 26,600 increased maintenance	0
+ 10% of \$185,000	0

Edgcumbe et al. v Regional Municipality of Hamilton Wentworth

(1985) 31 L.C.R. 61

Claim \$40,000 loss in market value	Award \$30,000 loss in market value
\$35,000 personal and business damages	0 personal and business damages