

Regulatory Expropriations: Takings without Compensation?

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March 12, 2003

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Introduction

Expropriation is a very intrusive power held by government. While potentially devastating to individuals, the power is also necessary in a functioning society. In a democratic system, the political process provides some degree of checks and balances against governments acting unreasonably, but the legal system also enforces certain rules and procedures for expropriation.

The procedures and authority for direct expropriation are usually based on statutes. Each jurisdiction has laws that state how the government can expropriate property and when it has to compensate the owner. For example, each province has its own expropriation statute which handles the usual land and easement situations and similarly, the federal government's Aeronautics Act similarly deals with airport related expropriations. In most cases involving government expropriations, the applicable statute governs the rights of the land owner to compensation.

When the government is not directly expropriating land through the appropriate governing statute, but instead passes regulations that indirectly extinguish the property rights, the common law fills in the gaps of the statutes. The idea is that unless the legislature clearly intended to expropriate land, the property owner should be compensated. These regulatory expropriations have had a mixed history in Canada and, in spite of the ideas of fairness prevalent in the common law, the law has developed in deference to legislatures and with few successful claims to compensation by property owners. Since the leading case, *Manitoba Fisheries Ltd. v. Canada*,¹ was decided, which gave a broad view of 'property' and when it is 'taken' through statute, the courts have limited when compensation for regulatory takings is appropriate.

¹ *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 S.C.R. 101.

When property loses value through regulation but is not expropriated, the claim for compensation is for injurious affection. This concept will not be covered in this paper since it is not strictly speaking 'takings' and in many cases, for instance in municipalities, statutes block citizens from claiming compensation for the drop in property value arising from regulation.

The Requirements For Expropriation

The law has developed so that there are three requirements before compensation is required for expropriated land. The common law attempts to balance the intrusion into the rights of the individual with the authority of the state. It is unfair for the individual to bear an unreasonable burden in order to provide a benefit to society and so the rules for compensation form a compromise between the individual and society.

According to the case law, the three requirements that set out when regulatory acts result in the expropriation of property are 1) the loss of virtually all the rights held by the individual, 2) the transfer of these rights to the expropriating authority and 3) a the lack of a clear intent not to compensate for the rights in the governing legislation. Variants of these rules has been stated in several cases and commentaries.² These three requirements clearly restrict when the government will have to pay compensation. In fact, there appear to be only three recent cases in Canada where regulations have been found to expropriate property: *Manitoba Fisheries, Tener v. The Queen*³ and *Casamiro Resource Corp. v. B.C.*,⁴ with the later two cases having almost identical facts. In all the remaining cases, compensation has been denied on the basis of one of the three rules. The most common grounds to deny compensation is the first rule, when the court finds that only a subset of the property rights have been removed. Each of the three rules will be examined in detail in light of recent decisions to show how it is being applied.

Extinction of Rights

The first step in determining if something has been expropriated is to examine what has been lost or taken as a result of the regulation. This is one of the most difficult aspects of the analysis because it goes to the heart of the concept of 'property'. The rights in property are usually described as a 'bundle of rights' and, in terms of real property, usually include the right to occupy the land, put it to reasonable use and alienate it. Government regulations work by restricting this bundle of rights. The issue is determining how rights can be restricted before the land is considered 'taken'. Holmes in *Pennsylvania*

² see for example: R.J. Bauman, "Exotic Expropriations: Government Action and Compensation" (1994) 52 Advocate (Van.) 561. and *Nilsson, infra*, note 6, at para. 35.

³ *The Queen in right of British Columbia v. Tener et al.* (1985), 17 D.L.R. (4th) 1 (S.C.C.).

⁴ *Casamiro Resource Corp. v. British Columbia (Attorney-General)* (1991), 80 D.L.R. (4th) 1 (B.C.C.A.).

Coal Company v. Mahon states it is a matter of degree, since “property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁵

There are several cases that attempt to find a line where regulation of the bundle of rights to property has resulted in expropriation of the land. Most of the actions claiming compensation for regulatory losses fail because it is found that the individual still possesses enough rights in the land after the regulation for it not to be considered 'taken'. The principle of regulatory expropriation is best described by Marceau J. in *Nilsson v. Alberta*,⁶ which was quoted with approval by the Nova Scotia Court of Appeal in *Marina Real Estate Ltd. v. Nova Scotia*,⁷ as being when a regulation is of “sufficient severity to remove virtually all of the rights associated with the property holder’s interest.”⁸ This narrow interpretation of property rights allows severe restrictions on the use of land without triggering 'taking' and compensation.

Marina Real Estate illustrates the extent of the allowable regulation without compensation. In that case, landowners had their plots classified as 'beach' and were denied permits to build single family homes on their land. It was held that since the owners could still use the land for camping and other low intensity uses, as they had been doing for years previous to the reclassification, they still had their property rights. Since their property was not taken, compensation was not required. The individuals still had title to the land and they could continue to use the land. They were not prohibited from using the land as they had been doing before the regulation, so no 'land' was taken as required for compensation under Nova Scotia's expropriation statute. The unanimous court emphasized that loss of

⁵ *Pennsylvania Coal Company v. Mahon* (1922) 260 U.S. 393 (US Supreme Court) at para. 16.

⁶ *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999), 24 R.P.R. (3d) 237 (Alta. Q.B.).

⁷ *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S.C.A.).

⁸ *Nilsson, supra*, note 6 at para. 48.

economic value was not sufficient evidence that land had been expropriated and the economic losses were separate from any property losses. It was clear that the land in question had lost significant economic value as a result of the regulation of home building but economic loss does not necessarily imply a loss of the rights to the land.

“The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the Expropriation Act. In my view, this distinct treatment supports the conclusion that decline in value of land, even when drastic, is not the loss of an interest in land.”⁹

In contrast, in *Tener*, the regulation was found to have taken the property rights of the plaintiff, the owner of a mineral grant. Here, the provincial park surrounding the mineral claim was reclassified, allowing the Minister of Parks to deny a mining licence to the plaintiff. Without the licence, the holder of the rights to the mineral grant could not access or remove the resources. The Supreme Court of Canada held that regardless that *Tener* still held title to the mineral grant, the plaintiff could not put the grant to any reasonable use under the new regulatory scheme and hence the grant was taken by the government. In the *Tener* decision, the majority and minority opinions had different ideas on what rights were actually taken through the regulation but the majority result fits the principle suggested earlier on when regulation results in expropriation. The majority suggests that the property right taken by the government is the right to access the minerals via the surface. Since access to the minerals is absolutely required for any use of the grant, the land has been de facto expropriated. The minority opinion identified the rights held by the plaintiff as *profit à prendre* which they held were completely extinguished through the regulations and hence deserving compensation. The majority view fits the facts better than the minority and its view, while more controversial, appears to be the more correct use of the principles of regulatory expropriation. In *Tener*, the regulation has removed all the rights to the reasonable use of the property.

⁹ *Mariner Real Estate, supra*, note 7 at 724.

Comparing the *Marine Real Estate* and *Tener* cases, the importance of the description of the rights is clear. In *Marine Real Estate*, the court found that the plaintiff held a large bundle of rights which had been partially restricted through the regulation. In contrast, the minority in *Tener* found that a small bundle of rights, the right to remove the minerals, had been extinguished. This suggests that the broader the rights held before the regulation, the more intrusive the regulation can be before compensation is required. From the reverse direction, in order for there to be compensation, the court has to find a narrow description of the rights held by the land owner and hence the regulations will have a large effect on these rights. In summary, cases will depend on both the rights held by the owner and the restriction imposed by the regulation. If the regulation interferes with all reasonable use of the land, then the land is considered taken and the analysis continues to the further tests for expropriation.

State Acquisition of Rights

The common law rules on expropriation require that compensation is only necessary when property has been transferred from the owner to the government authority. The extinction of rights to land are not enough unless the rights have been acquired by the authority. This principle has changed over time from a restrictive description of physical possession to the much broader idea of 'value'. The courts now have appeared to have backed off from this broad description of looking for a transfer of 'value' and are rather, examining the transfer of property rights.

The requirement for the physical possession of property by the government comes from some of the early cases on expropriation. For instance, in *France Fenwick and Co. v. R.*, it was held that compensation is only required in cases, "where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the

Government.”¹⁰ This view of expropriation was probably more acceptable before the government was involved in widespread regulation that is common today. It was more obvious at that time when property was expropriated because the government was not restricting the uses of land to the same degree it is now. To be considered expropriated, the government had to gain whatever the individual had lost through the regulation.

This view of the law has been challenged since that time. The recent Supreme Court case of *Tener* exemplifies the new position because the majority did not attempt to connect loss of rights directly to a gain of those rights by the government. The plaintiff in that case was held to have lost the right of access to the minerals while the government enhanced the value of the park by eliminating a threat to it.

For the majority, Estey J wrote:

“Here, the action taken by the government was to enhance the value of the public park. ... Here the government wished, for obvious reasons, to preserve the qualities perceived as being desirable for public parks, and saw the mineral operations of the respondents under their 1937 grant as a threat to the park. The notice of 1978 took value from the respondents and added value to the park. The taker, the government of the province, clearly did so in exercise of its valid authority to govern. It clearly enhanced the value of its asset, the park.”¹¹

After *Tener* was decided, commentators and lower courts read this decision as allowing compensation in a much larger set of cases than before. Namely, by requiring that only economic benefit flow from the land owner to a public asset, a plaintiff who has suffered through regulation does not have to show that the government gained possession of the rights taken. For example, in *Mariner Real Estate*¹² at the trial level (reversed on appeal), the trial judge applied *Tener* and stated,

“In this case the government has received a similar benefit [as in *Tener*]. Government action was taken to protect and enhance beach lands in trust for the

¹⁰ *France Fenwick and Co. v. R.* [1927] 1 K.B. 458 per Wright J. at 467.

¹¹ *Tener*, *supra*, note 3 at 12.

¹² *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1998) 165 D.L.R. (4th) 727 (N.S.S.C).

use and enjoyment of the public in general. Thus, the government for the benefit of all Nova Scotians acquired an interest in land from the plaintiffs.”¹³

This application of *Tener* examines the flow of a benefit from the plaintiffs to the government rather than a transfer of rights to property.

When the Nova Scotia Court of Appeal reversed *Marina Real Estate*, the court firmly rejected this interpretation of acquiring land by the government. The decision relied on the analysis by both the majority and minority opinions in *Tener* of the de facto transfer of rights to the crown. Cromwell J.A. wrote for the court of appeal:

“The respondents submit (and the trial judge held) that *Tener* stands for the proposition that where regulation enhances the value of public land, the regulation constitutes the acquisition of an interest in land. I disagree.

In my respectful view, *Tener*, is, at best, equivocal on this point. ... [T]he effect of the regulatory scheme [in *Tener*] was not only to extinguish the mineral rights of the respondents, but to re-vest them in the Crown. Similarly, Wilson J. held that the effect of the denial of access was to remove an encumbrance from the Crown’s land. ... I do not think, with respect, that his statements to the effect that the reacquisition enhanced the value of the park takes away from his holding that the Crown re-acquired in fact, though not in law, the mineral rights which constituted land under the applicable definition.”¹⁴

The Nova Scotia Court of Appeal also relied upon *Steer Holdings Ltd. v. Manitoba*¹⁵, affirmed by the Manitoba Court of Appeal, that had similarly found that a public benefit arising out of a regulation was not enough to indicate that a transfer of rights had taken place. In this case, the complainant was prohibited from bridging across a creek to connect two halves of the property. The change in building regulations by the province decreased the value of the land significantly. The trial judge stated the following:

“In both [*Tener* and *Manitoba Fisheries*], ... a liberal interpretation was given to what kind of property rights might become the object of a claim for

¹³ *Ibid*, at 740.

¹⁴ *Mariner Real Estate*, *supra*, note 7 at 730.

¹⁵ *Steer Holdings Ltd. v. Manitoba* (1992), 21 R.P.R. (2d) 298 (Manitoba Q. B.).

compensation when effectively confiscated by legislation. Nonetheless, both reinforced the concept that a mere prohibition or dissipation of value is not necessarily a taking,...”¹⁶

These authorities show that a decrease in economic value of property is not enough to trigger a taking and requiring compensation.

In all the recent claims for compensation when regulations appear to expropriate economic value, the plaintiffs rely on *Manitoba Fisheries*. This case appears to provide for compensation for the economic loss when the plaintiff's corporation was put out of business by the *Freshwater Fish Marketing Act*¹⁷. In light of the numerous cases that have distinguished *Manitoba Fisheries*, it is clear that the case stands for a much narrower interpretation. In the case, the Act allowed for compensation, “for any such plant or equipment that will or may be rendered redundant,”¹⁸ valued on the basis of ongoing business. The court found that 'goodwill' was as much a part of an ongoing business as the buildings and other assets and was 'taken' by the government when the government's new corporation took over the customers. It appears that 'goodwill' was considered a independent item of property which was transferred to the government; it is not the value of any other piece of property. Since this piece of property had been transferred from the plaintiff to the government, compensation was required. The *Manitoba Fisheries* case can be distinguished from the majority of claims for compensation because here a piece of property, the 'goodwill', was taken, as opposed to causing a drop in the value of a piece of property.

The requirement of a transfer of property rights is tested in cases where the benefit of the regulation is directed at an identifiable third-party. The case of *A & L Investments Ltd. v. Ontario*¹⁹ handles this

¹⁶ *Ibid*, at para. 34.

¹⁷ Freshwater Fish Marketing Act, R.S.C, 1970, c. F-13.

¹⁸ *Ibid*, at s25(2)(c).

¹⁹ *A & L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127 (Ont. C.A.).

situation by upholding the requirement and denying compensation. In this case a provincial act had the effect of retroactively lowering rents payable by tenants. Several landlords sued for compensation, claiming the regulation expropriated their rights. Ignoring the issue discussed earlier of whether the plaintiffs were entitled to a diminution in value, the court held that the transfer of rights has to be to the benefit of the state. Writing for the court, Goudge J. describes the rule and holding.

“What emerges from this analysis is that for the presumption of compensation to apply, the rule of statutory interpretation discussed in *Manitoba Fisheries* requires that the legislation must create what is in essence an expropriation of the plaintiff’s property by the state. The state must acquire the property taken from the plaintiff either for its own use or for the purpose of destruction. The rationale for a such rule is clear: where the state acquires for itself the property of a citizen it is sensible and fair to presume that the state will pay for it unless stated otherwise in the legislation.

In my view, the plaintiffs’ claims in these actions cannot be fitted within the description required by the rule. While the property rights of the plaintiffs voided by the 1991 Act may, in one sense, be said to have been taken from the plaintiffs, in no sense can they be said to have been acquired by the Crown. The Crown transferred no property from the plaintiffs to itself by means of this legislation.”²⁰

The current law on the taking of property by the government is that rights to the land have to be transferred to the state, not merely extinguished, through the effects of the regulation. The unanimous Ontario Court of Appeal in *A & L Investments* summarizes the idea of this transfer of rights by writing that, “[t]he limitation on the subject’s property rights must be balanced by a corresponding acquisition by the state.”²¹

Intent Not To Compensate

The third requirement for compensation involves legislative intent. A regulatory expropriation does not require compensation if the statute clearly intends not to compensate. The principle arises out of a

²⁰ *Ibid*, at 134.

²¹ *Ibid*, at 134.

compromise between fairness to the property owner of the land being taken and parliamentary supremacy. It is unfair to an individual property owner to have to bear a disproportionate share of the burden to allow for a public benefit by having their land taken away without compensation. Parliament and the provincial legislatures have supremacy to enact any laws that are in accordance with the constitution.

The common law rule is stated by Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.* where he said that, “unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.”²² This rule has been quoted in various forms in all the regulatory expropriation cases but there has been some variation to interpretation.

The law differentiates property that has been clearly expropriated and de facto expropriation through regulation. With the former, there is no common law right to compensation. Any claim for compensation has to be based on a statutory right.²³ For example, if land is taken, the Expropriation Act of Ontario, states that, “the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.”²⁴ In contrast, for de facto expropriation, the assumption is made through statutory interpretation that compensation was intended unless clearly indicated otherwise. In *Manitoba Fisheries*, goodwill was found to be taken because of the regulation and the legislation did not deny compensation for this type of property so compensation was required. While this distinction appears arbitrary, it has been consistently followed by the Canadian courts.

²² *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508 (H.L.) at 542.

²³ See Eric Todd, *The Law of Expropriation and Compensation in Canada* (Scarborough: Carswell, 1992) at 35.

²⁴ Expropriation Act. R.S.O. 1990, c. E.26, s. 13 (1).

In the regulatory expropriation cases, a clear intent not to compensate has been found when a statute enumerates which rights will be expropriated with compensation by assuming the list is exclusive. In *B.C. Medical Association v. B.C.*²⁵, the government legislated changes to the doctors' payment scheme that removed a more profitable method of billing. The B.C. Medical Association claimed compensation for the loss because the legislation only imposed the new scheme without mentioning any transition from the more profitable payment package. The B.C. Court of Appeal held that by specifying the new compensation scheme, the legislation had clearly not intended any further compensation. In *Cream Silver Mines Ltd. v. B.C.*²⁶, it was similarly found that the plaintiff's property rights were not on the enumerated list of the governing statute. The plaintiff owned a 'recorded claim' which was held not a right to land but chattel, being the "statutory creation with no life apart from statute,"²⁷ distinguishing this case from the land interest of the mineral claims in *Tener* and *Casamiro*. In *Cream Silver Mines*, the B.C. Court of Appeal stated that,

"Here, neither the statutes under which the Orders in Council were passed, nor the Park Act, nor the Mineral Tenure Act, S.B.C. 1988, c. 5, provide any scheme of compensation upon the expropriation of a recorded mineral claim located within a park, even if the refusal of a permit is an expropriation or taking."²⁸

Since the various statutes allowed for expropriation and compensation of other property within parks and did not include recorded claims, the court held that compensation was not warranted. In *Tener* and *Casamiro*, the mineral claims were interpreted as being 'land' under the Parks Act which provided for compensation.

The distinction between *Manitoba Fisheries* and *Cream Silver Mines* is subtle but can be made by looking at the intent of the legislature that enacted the statutes. In *Manitoba Fisheries*, the governing

²⁵ *B.C. Medical Association et al. v. The Queen in right of B.C.* (1985), 15 D.L.R. (4th) 568.

²⁶ *Cream Silver Mines Ltd v. B.C.* (1993), 75 B.C.L.R. (2d) 324 (B.C.C.A.).

²⁷ *Ibid*, at para. 5.

²⁸ *Ibid*, at para. 14.

legislation provided for compensation for, “plant or equipment”²⁹ made redundant and this list was interpreted to include the goodwill of the business as an ongoing concern. In contrast, for *Cream Silver Mines*, the list, “(a) land, or (b) the rights of a recorded holder of a mineral title in or on a recreation area”³⁰ was found to be exclusive and did not include a recorded claim. In *Manitoba Fisheries*, the court was probably persuaded by a letter from the Federal Minister of Fisheries who wrote that the assets should be valued on the basis of an ongoing venture, which would include the intangible aspects of a business such as goodwill. In *Cream Silver Mines*, the plaintiff had earlier doubted if a record claim would be considered land under the statutes and over 10 years previous to the main action, had requested and failed in a declaration to have a recorded claim classified as 'land'.³¹ Since the plaintiff had not appealed the declaration and the government had not amended the relevant statutes, it seems reasonable that the court found the property excluded from compensation under the statute. When determining if a statute bears compensation, statutory interpretation is required along with indications of the intent of the legislature.

Critique

The three rules laid out above which guide courts deciding when the government must compensate for regulatory expropriation allow room for improvement, to create a fair compensation scheme and is more transparent for both citizens and government.

The first rule deals with the rights lost by the land owner, but a more practical approach would be to look at the property value. Statutes could override these common law principles and create procedures, and exceptions, for compensating people harshly affected financially by new regulations. Realistically,

²⁹ Freshwater Fish Marketing Act, *supra*, note 17 at s25(2)(c).

³⁰ Park Act, R.S.B.C. 1979 s11(2).

³¹ *Cream Silver Mines Ltd. v. The Queen in Right of British Columbia* (1986) 27 D.L.R. (4th) 305.

in most cases, people are more concerned with the value of their property than the rights they hold in the land. Even though this would separate the idea of expropriation from property law, it would be an improvement over the current system.

The requirement that compensation only flow when regulations result in the transfer of property to the government, the second rule, challenges the fairness that underlies the concept of expropriation compensation. When the government directly expropriates the property of an individual, compensation is warranted so an owner does not have to bear pay the entire costs of a benefit to society. Since government is unlikely to pass laws to only penalize property owners, the government must see some societal benefit to the law. Is it any different to the property owner who has had their property taken whether the rights transfer to the government or the value is spread out for a larger benefit? The elimination of the 'transfer' rule, however, would not necessarily affect many of the cases since in most, the plaintiffs fail to show that their property rights have been extinguished.

One case that might be decided differently if this second rule were eliminated is *La Ferme Filiber Ltée v. The Queen*³². In this case, the plaintiff had a fish hatchery license for numerous years and had established a fish hatchery business. Because of a change to the fishing regulations, the license was not renewed and the plaintiff lost the business. The trial judge held that since the government did not acquire anything as a result of the regulation, compensation was not required. The court did not decide if the hatchery license was property and whether it was 'taken' under the first requirement for expropriation so it is not clear how it would be decided if the acquisition requirement was eliminated. In a more recent decision on similar fact, *Stafford v. B.C.*³³, the trial court found that a hunting license did not constitute an interest in land for the purpose of the Expropriation Act. This suggests that in

³² *La Ferme Filiber Ltée v. The Queen* [1980] 1 F.C. 128.

³³ *Stafford v. British Columbia* [1996] B.C.J. No. 1010 (B.C.S.C.).

licensing cases, the removal of the requirement that the government authority acquire the property would not necessarily result in additional compensation. For these reasons, removing the requirement for plaintiffs to show their property was transferred to the government would increase the fairness of regulatory expropriation but not open the floodgates for compensation claims.

The third rule, creating a presumption for compensation, is the only rule which, on its face, assists the burdened land owner. Even though the rule has been followed narrowly, especially the findings of exclusive lists, the courts have found a balance between parliamentary supremacy and a generous statutory interpretation.

The three rules enunciated have developed slowly over time but seem to be struggled under the increasingly intrusive role of government regulation. This critique suggests that they are unnecessarily harsh on property owners who have borne a disproportionate burden of a government regulation.

Conclusion

Regulating the use of property requires a balance between the needs of society and the rights of the individual. Without the protection of property rights in the constitution, Canadian law has developed in, at times peculiar, directions towards a balance. When government directly expropriates land, statutes provide the only means of compensation. But in situations where government indirectly expropriates land through regulation, a property owner must overcome three difficult hurdles to get compensation. First, the owner must show that the regulation has eliminated all reasonable use of the land by removing virtually all the rights associated with the property. Secondly, the rights must be shown to transfer to the government authority. Lastly, it must be clear from the legislation that the

authority did not intend to deny compensation. These three requirements have restricted successful claims for compensation to only a few cases. In a number of cases where compensation has been denied, judges have commented on the unfairness to impose disproportionate costs for society's benefits on individuals. Without constitutional protection, allowing for parliamentary supremacy, and lacking a common law right to compensation, citizens must trust elected government to act fairly when expropriating property.