EXOTIC EXPROPRIATIONS:

GOVERNMENT ACTION AND COMPENSATION

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TO THE FIRST ANNUAL MEETING OF THE
BRITISH COLUMBIA EXPROPRIATION ASSOCIATION
OCTOBER, 1993

I. INTRODUCTION

As can be discerned from this paper's title, what follows is concerned with the outer reaches of what in law can be characterized as an expropriation. We will explore the territory of the "exotic expropriation". It may be conveniently defined as an act by some level of government, which is, on legal analysis but not startlingly so, a taking giving rise in the citizen to a right to compensation.

This paper is prompted by a number of legal threads.

An initial source was the article by Professor E.C.E. Todd published in the *Advocate* in 1981: *Compensation for Injurious Affection without Expropriation within the Context of Municipal Law*[1].

There, Professor Todd is dealing with the law of injurious affection *simpliciter* - that is, injurious affection to land not consequent upon an expropriation of a portion of that land, but, by way of illustration, arising out of the construction of some public work in the immediate vicinity.

He refers to a provision of municipal legislation in British Columbia to the effect that land is deemed not to be taken or injuriously affected by the passage of a zoning bylaw and no compensation in consequence is payable to an affected owner.

Professor Todd continues:

> "Although British Columbia municipalities are thus protected by specific legislation from potential liability to pay compensation for injurious affection to property arising out of the exercise of zoning powers, what about the exercise of other statutory powers where there is no specific legislative protection? This question and the intriguing possibility of opening a Pandora's box of municipal

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[1] Todd, Eric C.E. *Compensation for Injurious Affection without Expropriation within the Context of Municipal Law* (1982) 40 *The Advocate* 31.

liabilities, are prompted by the very important decision of the Supreme Court of Canada in *Manitoba Fisheries Ltd.* v. *The Queen.*"[2]

A "Pandora's box of municipal liabilities" undoubtedly chills the souls of those acting for local government in British Columbia - it also evokes thoughts of "exotic" remedies for those acting for frustrated citizens in search of non-traditional recourse; the traditional having been abandoned as fruitless.

The second thread involves the law of injurious affection *simpliciter* itself as stated by the Supreme Court of Canada in *St. Pierre* v. *Ontario (Minister of Transportation).*[3] Determining the circumstances when government must compensate for loss arising out of injurious affection *simpliciter* is a challenging and exceedingly important task given the potentially broad class of compensable claims.

A final source arises from the growing frustration of many owners of lands otherwise suitable for development. This frustration has increased dramatically in latter years with citizens' groups successfully encouraging local governments to virtually sterilize undeveloped tracts of land. In effect, appropriating to the neighbourhood, as an amenity, open space owned by private citizens. At what point do such actions at law give rise to a right in the frustrated owner to compensation?

These illustrations of the issue let us reduce it to a compendious question: When does government action affecting property give rise to a private right to compensation?

This question embraces both the issue of when government regulation becomes a compensable taking and that of when a government work founds a claim for compensation for injurious affection *simpliciter*. The latter is not an "expropriation" but it bears many of the same *indicia* and can conveniently be considered under the rubric "exotic expropriations".

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[2] *Manitoba Fisheries Ltd. v. R.* (1978) 88 D.L.R. (3d) 462 (SCC).

[3] *St. Pierre v. Ontario (Minister of Transportation and Communications)* [1987] 1 S.C.R. 906.

II. "NO TAKING WITHOUT COMPENSATION"

(i) The Rule

We begin with the leading Canadian authority: *Manitoba Fisheries Ltd.* v. *The Queen.*[4]

Arguably it represents one of the most liberal applications of the rule as later courts have often distinguished it in an effort to limit the breadth of claims its reasoning might otherwise support.[5]

The facts can be summarized as follows.

The plaintiff owned and operated a profitable fish exporting business. In 1969 Parliament enacted the *Fresh Water Fish Marketing Act* which effectively gave a statutory corporation the exclusive right to carry on such businesses. Until the creation of the statutory corporation, persons wishing to purchase fresh water fish from Manitoba could purchase such fish from the plaintiff or other firms. With the adoption of the Act, such purchases could be made only from the statutory corporation or its agents. The Act contemplated arrangements whereby compensation could be paid to the owners of plant and equipment rendered redundant by the statutory monopoly. It was conceded that the implementation of the legislation had the effect of putting the plaintiff out of business.

On these facts no compensation was paid to the plaintiff and it commenced action against Canada claiming compensation for loss of its business, including the loss of its goodwill.

Mr. Justice Ritchie delivered the judgment of the court. He began by considering the impact of the legislation on the plaintiff. He noted the conclusion of the Federal Court of Appeal on the effect of the legislation. Quoting from Mr. Justice Urie's judgment in that court:

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[4] *Manitoba Fisheries, supra* note 2.

[5] See for example, *Cream Silver Mines Ltd. v. British Columbia* (1993), 75 B.C.L.R. (2d) 324 (C.A.).

> "Unfortunately, implementation of the legislation had the effect of putting the appellant out of business but that result did not occur due to any deprivation of property of the appellant by the respondent. As earlier stated, the crown did not acquire, possess or use any property of the appellant, either tangible or intangible, unless it could be said that the fishermen who supplied the appellant with their fish or the customers to whom the appellant sold its fish and fish products had become their property. Obviously that could not be so because either the fishermen or the customers could, if they so desired, do business with anyone they wished. They were not the exclusive property of the appellant or anyone else, as the admittedly highly competitive nature of the business indicates. What the appellant lost was not property but was its right to carry on the business in which it had been engaged, without a licence. If that loss included whatever goodwill the appellant had, it was not taken by the corporation."[6]

The Supreme Court of Canada disagreed:

> "In my view the appellant's suppliers and customers whom it had acquired and cultivated over the years constituted one of its most valuable assets as of April 30, 1969, and on the following day that asset was completely extinguished and the suppliers and customers were left with no choice but to do business with the fresh water fish marketing corporation which was created as of that date by the federal authority for the express purpose of enjoying a monopoly of the market in which the appellant had formerly prospered."[7]

The court held that the goodwill of the plaintiff's business, although intangible in character, was part of the *property* of the business "just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill".[8]

The goodwill of the plaintiff's business was "property" and it had been lost with the advent of the legislation. Could it be said, however, that Canada, or its statutory corporation, *acquired* that property?

The courts below answered in the negative. The Supreme Court of Canada said that this conclusion overlooked the admission to the effect that before the legislation the plaintiff's customers could purchase fish from it and after the legislation they could only purchase from the statutory corporation or its agents. The Crown effectively acquired the

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[6] *Manitoba Fisheries, supra* note 2 at 465.

[7] *Ibid.* at 465, 466.

[8] *Ibid.*

plaintiff's property, that is the goodwill of the plaintiff's business. It diverted the plaintiff's customers - the stuff of goodwill - to the statutory corporation.

Having chosen to view the facts in that light, it remained for the court to consider whether the federal statute could be construed as negativing the plaintiff's claim for compensation for loss of its property. Mr. Justice Ritchie held:

> "There is no express language in the Act providing for the payment of compensation by the federal crown but the appellant relies upon the long established rule which is succinctly stated by Lord Atkinson in *Attorney General* v. *De Keyser's Royal Hotel, Ltd.* ... where he said:
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> > "The recognized rule for the construction of statutes is 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."[9]

It is important that this conclusion ignores that part of the federal legislation which contemplated Canada entering into agreements with Manitoba for the payment of compensation to the owners of plant and equipment rendered redundant by the statutory monopoly. That was of no moment, one presumes, because the plaintiff was not claiming against Manitoba for compensation for the loss of plant and equipment.

In the result the court concluded:

> "It will be seen that in my opinion the *Fresh Water Fish Marketing Act* and the corporation created thereunder have the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid. There is nothing in the Act providing for the taking of such property by the government without compensation and as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule 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": per Lord Atkinson and Attorney General v. De Keyser's Royal Hotel, *supra*."[10]

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[9] *Ibid* at 467.

[10] *Ibid* at 473.

A number of significant points arise out of *Manitoba Fisheries Ltd.* which will be relevant to our consideration of the developing rule:

(1) The court took a somewhat expansive view of "property", the loss of which could give rise to a claim for compensation;

(2) Similarly, the court took a broad and beneficial (to the citizen) approach to the issue of whether the plaintiff's property had indeed been *acquired* or *taken* by Canada or its statutory corporation;

(3) The court appears to view the rule - no taking without compensation - as one of statutory construction. That is, unless the words of the statute clearly so demand, it is not to be construed so as to take away the property of a citizen without compensation;

(4) Finally, the court did not view just any reference to compensation in the statute as displacing the presumption. In particular, the court could have construed the statute's reference to compensation for plant and equipment rendered redundant by the legislation as impliedly precluding compensation for the loss of other types of property, such as the plaintiff's goodwill. It did not.

It is the threshold point - whether the rule is one simply of statutory construction or rather one of substantive law -which is of fundamental interest here. Indeed, at least one observer views *Manitoba Fisheries Ltd.* as possibly creating, or at least recognizing, a substantive common law right to compensation.[11]

That possibility is categorically denied by Professor Todd:

"It has never been suggested that there is a common law right to compensation ..."[12]

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[11] Barton, Barry "Notes of Cases - *The Queen v. Tener*" 66 Canadian Bar Review 145.

[12] Todd, Eric C.E. *The Law of Expropriation and Compensation in Canada* (Scarborough: Carswell, 1992) at 35.

In arriving at that conclusion, he is certainly supported by high authority. In *Sisters of Charity of Rockingham* v. *The King*[13] Lord Parmoor for the Judicial Committee of the Privy Council, on appeal from the Supreme Court of Canada, said, in oft-quoted words:

> "Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute."[14]

Sisters of Charity predates two leading House of Lords cases on point.

The first is *Burmah Oil Co. (Burmah Trading) Ltd.* v. *Lord Advocate*[15] and the second is *Belfast Corp.* v. *O.D. Cars Ltd.*[16] In *Burmah Oil* the appellants' oil installations near Rangoon were ordered destroyed by the British GOC Burmah in the face of an imminent Japanese attack on the City. The destruction was carried out in order to deny to the enemy useful industrial installations.

Importantly, the House of Lords held that the destruction, while carried out lawfully, was not carried out pursuant to any extant statutory authority. Further, it was concluded that the demolition, in the circumstances, was a lawful exercise by the sovereign of the royal prerogative in relation to war but that compensation was payable to the appellants.

Lord Reid, writing for the majority, accepted Lord Darling's view in *Crown of Leon* v. *Admiralty Commissioners*[17]:

> "The rule undoubtedly is that the King, acting in regard to what is called prerogative "regale et legale", has the right on behalf of his subjects to take their property for the defence of the realm and to protect the interests of the subjects,

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[13] [1922] 2 A.C. 315 (P.C.).

[14] *Ibid* at 322.

[15] [1964] 2 All E.R. 348 (H.L.).

[16] [1960] 1 All E.R. 65 (H.L.).

[17] [1921] 1 K.B. 595.

> compensation of course being fairly made. Nowadays compensation is made by reason of exact provisions, but it ought always to be made, because what is taken for the general good should be paid for by the general community."[18]

This view does not characterize the rule as one of statutory construction, indeed there was no statute that required construction in *Burmah Oil*.

Lord Reid cited *Grotius* with approval, to the following effect:

> "I have said elsewhere that the property of subjects belongs to the state under the right of eminent domain; in consequence the state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in the case of direct need ... which grants even to private citizens a measure of right over other's property, but also for the sake of public advantage ... but, we must add, when this happens, the state is bound to make good at public expense the damage to those who lose their property."[19]

Again, this speaks of a substantive rule requiring compensation.

In *O.D. Cars Ltd.* the House of Lords was dealing with land use regulations enacted by Northern Ireland. The regulations touched on the height and character of permissible development. They were reviewed as to their validity in the face of Northern Ireland's constitutional prohibition against taking any property without compensation. The case will be discussed in more detail later, but for now the following conclusion of Lord Radcliffe (Lord Cohen and Lord Keith of Avonholm concurring) is important:

> "I do not see how you can give a meaning to this phrase, "taking without compensation" except by reference to the general treatment of the subject in the law of England and Ireland before 1920. A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking". Aspects of this principle are found in the rules of statutory interpretation devised by the courts which require the presence of the most explicit words before an acquisition could be held to be sanctioned by an act of parliament without full compensation being provided or imported an intention to give compensation and machinery for

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[18] *Burmah Oil, supra* note 15 at 357.

[19] *Ibid* at 359.

> assessing it into any act of parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed *in specie*, was regarded as an important guarantee of individual liberty."[20]

Interestingly, Lord Radcliffe viewed the statutory rule of construction as simply one aspect of the principle "no taking without compensation".[21]

To the same effect is the formulation of the rule in the more frequently cited, but earlier, decision of the House in *Attorney General* v. *De Keyser's Royal Hotel.*[22]

Lord Atkinson in his speech again speaks of the principle, "no taking without compensation", with the rule of construction as simply being a means of ensuring the operation of the principle:

> "Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognized rule for the construction of statutes is 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."[23]

The thesis being mooted here is advanced by the British Columbia Court of Appeal decision in *Medical Association (British Columbia)* v. *British Columbia.*[24]

The facts are conveniently summarized in the headnote to the report of the judgment at trial:

> "The British Columbia Medical Association had a contract with the Medical Services Commission whereby it would provide medical services in accordance with an agreed fee schedule. Each year the fee schedule would be negotiated by

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[20] *Belfast Corporation, supra* note 16 at 72.

[21] See also *France Fenwick and Company, Limited* v. *The King* [1927] 1 K.B. 458.

[22] [1920] A.C. 508 (H.L.).

[23] *Ibid* at 542.

[24] [1983] 5 W.W.R. 416 (B.C.S.C.), aff'd (1984) 58 B.C.L.R. 361 (B.C.C.A.), leave to appeal to S.C.C. refused (1985), 61 B.C.L.R. xxxii (S.C.C.).

> 31st March. If no agreement was reached by that date, the doctors would be at liberty to "balance bill", or charge their patients the difference between the payments they were receiving under the existing fee schedule and the fees listed in the revised schedule submitted by the B.C.M.A. When the British Columbia legislature passed Bill 16 prohibiting balance billing, the plaintiffs brought action claiming compensation for the expropriation of their property rights."

The action was dismissed at trial. A similar result obtained in the Court of Appeal. Both judgments are important in the discussion which will follow on aspects of the rule, but here, Mr. Justice Lambert's analysis in the Court of Appeal is relevant. His Lordship cites *De Keyser's Royal Hotel* and *Manitoba Fisheries Ltd.* and concludes that those cases "indicate that the rule is, at least in one aspect, a rule of statutory construction".[25]

He then suggests that the rule may have another aspect than simply its aspect as a rule of construction. He cites *Burmah Oil* and *O.D. Cars Ltd.* and concludes:

> "I think the rule may be divided into three parts. The first is that the property of the subject cannot be taken by the Crown without some form of authorization. The second is that the authorization must be clear. If there is any ambiguity about whether the Crown may take the subject's property, the authorization must be construed in favour of the subject. The third is that, even if the authorization clearly permits the taking of the subject's property there is a presumption, based on justice and fairness, that the Crown will pay compensation to the subject. That presumption can only be rebutted by a clear contrary intention in the authorization.
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> I have used the word "authorization" in order to indicate the generality of the rule, in all three parts, but in the usual cases the authorization will be contained in some form of legislative enactment. In such cases, the rule, in its second and third parts, could properly be described as a rule of statutory discretion. It is an aid in determining the intention of the legislature.
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> The rule is not a purely mechanical matter of examining the legislation and asking whether there is an express, written reference to the fact that the taking is to be without compensation, in words that say "without compensation of any kind", or some equivalent; and that, failing such words, compensation must be paid.
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> Rather, it is the intention of the legislature that is being sought. The legislature will not be presumed to have countenanced an injustice, unless the contrary

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[25] (1984) 58 B.C.L.R. 361 (B.C.C.A.) at 364.

intention appears. But the rule does not override the legislative intention. It is not a device by which the courts can enable a claimant to outwit the legislature."[26]

Against this backdrop, the decision of the British Columbia Court of Appeal in *Cream Silver Mines Ltd.* v. *British Columbia*[27] is daunting.

Cream Silver Mines is the latest in a line of resource use cases which consider the rule. The leading authority is, of course, *Tener* v. *The Queen*[28] (of which more, later).

The resource use cases proceed tortuously through a gauntlet of B.C. statutory enactments including the *Mineral Act*, the *Park Act*, the *Mineral Tenure Act* and the *Ministry of Transportation and Highways Act*.

At the risk of misleading, the effect of the statutory scheme, as it applied in *Cream Silver Mines,* can be summarized as follows:

1. The claimants in these cases enjoy various species of rights to explore for and extract minerals. These range from Crown granted mineral claims to, in *Cream Silver Mines*, bare mineral claims, also known as recorded or located claims. The former are "land", the latter are not, at least for the purposes of section 11 of the *Park Act*.[29]

2. At least with respect to bare mineral claims, there has never been any absolute right of access to the claim area for the purpose of winning the ore. The common

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[26] *Ibid* at 365, 366.

[27] *Cream Silver Mines, supra* note 5.

[28] 114 D.L.R. (3d) 728 (B.C.S.C.), rev'd 133 D.L.R. (3d) 168 (B.C.C.A.), aff'd (1985) 17 D.L.R. (4th) 1 (S.C.C.).

[29] See *Cream Silver Mines Ltd. (N.P.L.) v. British Columbia* (1986), 27 D.L.R. (4th) 305 (B.C.S.C.).

thread of the various statutes regulating these claims is that a minister of the Crown has some power to refuse approval to a claimed right-of-way.[30]

3. Beginning at least as early as 1965, British Columbia began to more aggressively regulate activities, including the exploitation of mineral claims, within provincial parks. This lead to policies refusing park use permits for prospecting and mining in class "A" parks and only permitting it in class "B" parks if it was not "detrimental to the recreational values of the park concerned".

4. In 1973 these policies changed such that the issuance of park use permits, even within class "B" parks, was much more problematic.

5. In 1988 by Orders in Council reclassifying Strathcona Park as a class "A" park and the enactment of section 17 of the *Mineral Tenure Act* S.B.C. 1988, c. 5, the claimants no longer had any expectation of being permitted to explore or develop their claims.

Madam Justice Southin in *Cream Silver Mines* reduced the question to this:

"If the legislature of British Columbia should enact a simple act:

> Notwithstanding any other Act, no holder of any mineral claim, as defined in the *Mineral Tenure Act*, in any park in British Columbia may explore, develop or mine in the area covered by such claim

would the Crown thereupon be required to pay compensation?"[31]

Her Ladyship noted specifically that the *Park Act* provided for the expropriation of *land* and incorporated a scheme for determining compensation therefor.

Would the rule - "no taking without compensation" - supply the omission of the legislature and imply a right to compensation for the taking of personal property, that is the claimants' bare mineral claims?

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[30] *Cream Silver Mines, supra* note 5 at para. 6.

[31] *Ibid* at para. 11.

The claimants, of course, said "yes". The Court of Appeal, somewhat categorically, said "no".

Madam Justice Southin said this of the claimants' efforts to invoke the rule:

> "To my mind, the respondent is thus attempting to turn a rule of statutory construction into a positive rule of law by giving to such words as "taking" and "property", as those words appear in the authorities referred to in *Manitoba Fisheries Ltd.* v. *The Queen*, the status to which they would be entitled were they contained in legislation. If the argument were accepted the Crown would be, in law, obliged to pay compensation for all "takings", for all types of "property" no matter what the legal nature is of that property and no matter how the "taking" occurs, unless the enabling legislation expressly denies compensation.
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> Acceding to that argument would be an impermissible intrusion by the courts into the domain of the legislature under the guise of applying a rule of construction which owes its origin to far different times from our own. Here, over the last 36 years, the legislature has evinced an intention to put the question of development within parks into ministerial control and it has evinced no intention to impose, except as expressly provided in the *Park Act*, any burden on the public purse from the exercise of that control no matter what form that control may take."[32]

But the claimants' argument which the Court of Appeal seems to characterize as extreme, is surely supported by the cases, in particular, *Manitoba Fisheries Ltd.* In that case, "land" was not taken, goodwill, a type of personalty, was. In taking it, the Crown did not invoke the formal machinery of statute. More or less indirectly, through the statutory scheme, it diverted or captured the claimant's business asset. The Supreme Court of Canada applied the rule and compensation was awarded. In the absence of express words the legislature is deemed not to have taken property without compensation.

Madam Justice Southin showing a distaste for an "intrusion by the courts into the domain of the legislature" would in effect *reverse* the rule and require express words in the legislation *requiring* compensation.[33]

If the court in *Cream Silver Mines* chose rather to base its decision on the ground that by expressly recognizing compensation for the expropriation of *land*, the presumption

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[32] *Ibid* at paras. 19 and 20.

[33] *Ibid.*

calling for compensation in the event of *other* takings has been displaced, its reasons would at least accord with the face of the rule if perhaps not its spirit.

The decision in *Cream Silver Mines* demonstrates the importance of resolving the threshold issue: Is the rule merely an axiom of statutory construction or does it speak to our substantive common law?

In Madam Justice Southin's view, only the latter conclusion would support recovery in cases like *Cream Silver Mines*.

(ii) **The Rule Parsed**

It is timely to restate the rule as set out in *O.D. Cars Ltd.*, to paraphrase:

> The title to property or the enjoyment of its possession is not to be compulsorily acquired from a subject unless full compensation is afforded in its place. Acquisition of title or possession is "taking". Aspects of this principle are found in the rules of statutory interpretation which require the presence of the most explicit words before an acquisition could be held to be sanctioned by an act of parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any act that did not positively exclude it.

Two critical words in this formulation of the rule invite discussion:

(a) What is "property"?;

(b) What amounts to a "taking"?

(a) **What is "Property"?**

In *Manitoba Fisheries Ltd.* we have already seen the goodwill of a business characterized as "property" for the purpose of the rule. The intangible nature of goodwill did not prevent a finding that it was "property" as much as "the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill".[34]

Similarly, in a case relied on by the court in *Manitoba Fisheries Ltd.*, *Ulster Transport Authority* v. *James Brown and Sons, Ltd.*[35], the goodwill of a furniture removal business was held to be property for the purposes of applying Northern Ireland's constitutional prohibition against taking any property without compensation.

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[34] *Manitoba Fisheries, supra* note 8

[35] [1953] NI 79.

Interestingly, although the Court of Appeal did not find it necessary to decide the issue, the Divisional Court in *Ulster Transport Authority* was of the view that the right to exercise a lawful trade was "property" for the purposes of the constitutional protection.[36]

Both of these cases support a broad and beneficial view of what "property" is for the purposes of the rule.

There are some limits, however, to the concept.

In the *B.C.M.A.* case[37] it will be recalled that the legislation dealt with the contractual rights of medical doctors in British Columbia to balance bill their patients.

In the Supreme Court, Wallace, J. (as he then was) held that the contractual right to balance bill was not a property right analogous to a chose in action. It is simply a right for doctors to enter into contractual relations with third parties, *ie.* their patients. It is a "privilege" or "liberty"[38].

In Mr. Justice Wallace's view a "right" could only be a chose in action, and hence "property", if it has attached to it a right of proceeding in a court of law to procure a legal or equitable remedy, such as the payment of a sum of money:

> "Without examining in detail all the miscellaneous rights which come within the term "chose in action" it is clear that they all have in common the existence of a correlative duty or liability of the defendant to the litigation."[39]

Two other decisions assist in defining the limits of "property".

The first is a gloss on the fact situation in *Manitoba Fisheries Ltd.*

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[36] *Ibid.*

[37] *Medical Assoc. (B.C.), supra* note 24.

[38] *Ibid* at 421.

[39] *Ibid* at 420.

In *Keystone Bingo Centre Inc.* v. *Manitoba Lotteries Foundation et al*[40] the issue again concerned the loss of goodwill upon the adoption of government regulations.

Compensation was denied on the ground that the operation giving rise to the goodwill was illegal.

The second, *Sanders* v. *British Columbia (Milk Board)*[41] harkens back to Wallace, J.'s discussion of "privilege" in *B.C.M.A.* In *Sanders* the issue concerned regulations which required milk producers to surrender a percentage of their milk quota, without payment, upon the sale of any or all of the quota.

The Court of Appeal accepted Cory, J.A.'s analysis in *National Trust Co.* v. *Bouckhuyt*[42] when dealing with a tobacco production quota. Noting that the Tobacco Board regulated every aspect of the quota and the industry, Mr. Justice Cory continued:

> "... the *BPQ* is thus no more than the manifestation of permission to do that which is otherwise prohibited by statute and regulation; the *BPQ* represents the granting of a privilege. It is by its nature subject to such discretionary control and is so transitory and ephemeral in its nature that it cannot, in my view, be considered to be property.
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> The notion of "property" imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right. This is distinct from a revocable licence, which simply enables a person to do lawfully what he could not otherwise do ..."[43]

This qualification has important implications to the application of the rule in government regulatory schemes affecting licenced operations such as liquor sales, taxi businesses and the like. This kind of approach certainly does not auger well for the Divisional Court's view

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[40] (1989), 60 Man. R. (2d) 191 (Q.B.), aff'd, (1990) 76 D.L.R. (4th) 423 (Man. C.A.), leave to appeal to S.C.C. refused [1991] W.W.R. 1 xv (note) 79 D.L.R.

[41] (1990) 43 B.C.L.R. (2d) 324 (S.C.), aff'd (1991) 53 B.C.L.R. (2d) 167 (B.C.C.A.).

[42] (1987) 39 D.L.R. (4th) 60 (H.C.), rev'd (1988) 34 D.L.R. (4th) 543 (Ont. C.A.).

[43] *National Trust Co., supra* note 41 at 175.

in *Ulster Transport Authority* which would see the right to carry on a lawful trade at common law as "property".

(b) **What is a "Taking"?**

Herein lies possibly the most challenging aspect of the rule. When can a scheme of regulation or prohibition be termed a "taking"? Is a "taking" limited to a real *transfer* of possession from the citizen to the state? Or does the *effect* of the legislation assist us in supporting a finding that a "taking" has occurred?

Again, we have seen a liberal approach to the concept of "taking" in *Manitoba Fisheries Ltd.*

The effective *diversion* of goodwill from the company to the statutory corporation was a "taking" of property.

The Supreme Court of Canada resisted a strict, legalistic approach to characterizing a "taking" and distinguished the decision in *France Fenwick and Co. Ltd.* v. *The King*[44]. There, the court distinguished a negative prohibition from a "taking":

> "A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the state."

In a like expansive vein is *Burmah Oil Co.*[45], where the House of Lords concluded that the ordered demolition of a citizen's property nevertheless qualifies as a "taking".

Finally in this line, is the decision in *Tener* v. *The Queen*[46].

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[44] *France Fenwick, supra* at note 21.

[45] *Burmah Oil, supra* at note 15.

[46] *Tener, supra* at note 28.

The Supreme Court of Canada decision again speaks to an imaginative and fluid concept of "taking".

There, it will be recalled, the provincial regulatory scheme prohibited the claimants from accessing their Crown granted mineral claims within Wells Gray Provincial Park.

Was there a "taking"? Mr. Justice Estey, for himself and four others (the Bench consisted of seven Justices) held that the denial of access amounted to a *recovery* by the Crown of the right granted to the claimants as part of the bundle of rights making up the Crown granted mineral claim.

Mr. Justice Estey drew an important distinction between the situation in *Tener* and the situation pertaining with traditional land use controls like local government zoning regulations. The latter, to the extent they are truly regulatory, do not represent a "taking" of property.

But in *Tener* the "regulation" was more than that - one had to be alive to its effect, undoubtedly intended by the legislator:

> "Here, the action taken by the government was to enhance the value of the public park. The imposition of zoning regulation and the regulation of activities on lands, fire regulations limits and so on, add nothing to the value of public property. 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. The respondents are left with only the hope of some future reversal of park policy and the burden of paying taxes on their minerals. The notice of 1978 was an expropriation and, in my view, the rest is part of the compensation assessment process."[47]

Similarly, Madam Justice Wilson, in a minority opinion, stressed the enhancement to the Crown's interest worked by the prohibition. She viewed the mineral claims as profits *à prendre*. At page 25 of the D.L.R. report she writes:

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[47] (1985) 17 D.L.R. (4th) 1 (S.C.C.) at 12, 13.

> "By depriving the holder of the profit of his interest - his right to go on the land for the purpose of severing the minerals and making them his own - the owner of the fee has effectively removed the encumbrance from its land. It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense. Indeed, this case seems stronger than Manitoba Fisheries in as much as the doctrine of merger would appear to operate so as to make the respondent's loss the appellant's gain."

Note especially the court's obvious reluctance to let legal technicalities dictate whether a taking has occurred. It would much rather look at the effect of the regulation than whether any formal statutory machinery of taking has been invoked by the state.

This approach is to be contrasted with a more traditional (and conservative) analysis in cases like *La Ferme Filiber Ltée* v. *R.*[48]. Here, the claimant operated a hatchery devoted to the stocking, rearing and selling of rainbow trout. For this purpose he had always obtained the licences required by the applicable legislation. In 1978, however, an amendment to the regulations prohibited the rearing of rainbow trout within a large area that included the claimant's operation.

In the resulting claim for compensation the court rejected the expropriation argument:

> "An expropriation implies dispossession of the expropriated party and appropriation by the expropriating party; it necessarily requires a transfer of property or rights from one party to the other. There is noting of that kind here. Defendant has not acquired anything belonging to plaintiff."[49]

This was not a case like *Manitoba Fisheries Ltd.* where at least there was an indirect appropriation and benefit to the state.

The court was obviously motivated by a "floodgates" concern:

> "If the legal proposition on which this action is based were to be admitted, and the adoption or amendment of a regulation such as that in question here were to be regarded as constituting a disguised act of expropriation with respect to anyone

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[48] [1980] 1 F.C. 128 (T.D.).

[49] *Ibid.* at 130.

> whose commercial activities were interfered with thereby, it is easy to imagine the proliferation of claims that would follow. There is no doubt that the establishment or amendment of a regulation of this kind may create extremely unfortunate situations, and the action appears to provide a striking example of this. If, however, in such special cases, though government has not made any exceptional provision for the payment of compensation, there is no legal principle which I know of which can force it to do so."[50]

This policy argument, it will be seen, will also play an important role in delimiting the class of successful claims for injurious affection *simpliciter*.

These cases draw a distinction between legislative schemes which are essentially regulatory and those which go so far that they will be construed as "taking" a citizen's property. The latter can be aptly called "regulatory takings" a phrase popular in the American jurisprudence.[51]

When does regulation become expropriation? Not surprisingly, in a discipline fond of continuums, it is a question of degree and one supposes that one will know it when one sees it.[52]

Certainly in cases like *Tener* the line between regulation and confiscation was clearly crossed where the mineral claims were rendered valueless.

A similar fact situation resulted in the same conclusion in *Casamiro Resource Corp.* v. *British Columbia (Attorney General)*[53], another in the resource use line of cases.

Madam Justice Southin delivered the judgment of the court:

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[50] *Ibid. at* 130 and 131.

[51] For discussion of these cases, see Richard Schwindt, *Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests* Victoria: (British Columbia, 1992).

[52] *Belfast Corp., supra* note 16 at 71.

[53] (1991) 55 B.C.L.R. (2d) 346 (C.A.).

"The diminution of rights does not always amount to a taking which as a matter of law is equivalent to expropriation. Whether in any given case the acts done by government are so equivalent is a question of mixed fact and law. Here, as I have already said, the grants have been turned into meaningless pieces of paper. By legislative act they could be turned back into pieces of paper with meaning but no such legislative act has occurred."[54]

[54] *Ibid.* at 356.

III. LAND USE CONTROLS AND THE RULE

Subsection 972(1) of the *Municipal Act*, R.S.B.C. 1979, c. 290 provides:

> "Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan, a rural land use bylaw or a bylaw under this Division or the issue of a permit under Division (5)."

On first reading, the section begs the intriguing question - is it the law, that, but for the statutory protection, municipalities in British Columbia would be deemed to take or injuriously affect property in the exercise of their jurisdiction to regulate land use? The jurisdiction to regulate land use is broad[55] and it is self-evident that its exercise will either enhance or diminish property values.

Similarly, the exception to the statutory protection is of interest, that is:

> 972(2) Subsection (1) does not apply where the rural land use bylaw or bylaw under this Division restricts the use of land to a public use.

Rather than modifying the result at common law, it would seem that section 972 tends to codify it.

The line between regulation and taking/confiscation is aptly demonstrated in the zoning context and it was illustrated in the Supreme Court of Canada decision in *Tener*[56].

This aspect of the rule was directly addressed in the Manitoba Queen's Bench decision in *Steer Holdings Ltd.* v. *Manitoba.*[57]

The facts can be summarized by reference to the headnote:

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[55] *Municipal Act*, R.S.B.C. 1979, c. 290, s. 963.

[56] *Tener, supra* at note 28.

[57] (1992) 8 M.P.L.R. (2d) 235 (Man. Q.B.)., affirmed (1992) 48 L.C.R. 241

> The plaintiff owned a parcel of undeveloped, commercially zoned land, which had a creek and creek valley running through it. The plaintiff had entered into extensive negotiations with both the municipal and provincial governments regarding a sale of the lands. As an alternative, the plaintiff proposed to construct a commercial development on the lands. When the parties were close to an agreement involving a land swap, the provincial legislature enacted a number of amendments to the City of Winnipeg Act. One of the added provisions, section 624.1, prohibited the issuing of a building permit for any construction which would span a watercourse. Both the City and the Province stopped negotiations regarding either a purchase of the lands from, or a land swap with, the plaintiff. The plaintiff brought an action seeking compensation for what it claimed was an effective confiscation of its lands by virtue of the legislative amendments.

The action was dismissed. Although Mr. Justice Kroft recognized that the legislation (akin to zoning although enacted by the province) diminished the plaintiff's potential for economic gain he did not view it as *taking* the property of the plaintiff.

The court viewed a "taking" as requiring not only an element of loss but, as well, an element of acquisition:

> "What Manitoba Fisheries ... and Tener ... did, aside from confirming that these principles are the law in this country, was to make certain that when we speak of "property", we should not apply a narrow or restricted interpretation, including only title to land, interest in land, or tangible personalty. Rather, we should accord a meaning which includes more intangible kinds of property rights and benefits. These two decisions also dealt on the meaning of "taking". For there to be a statutory taking which gives rise to a claim for compensation, not only must the owner be deprived of the benefit in its property, there must also be a resulting enhancement or improvement conferred upon whatever entity the legislature intended to benefit. Something must not only be taken away, it must be taken over."[58]

The court reiterated the notion that a mere prohibition or dissipation of value is not necessarily a compensable taking. It stressed that the plaintiff company could still develop its lands for uses permitted under the zoning bylaw, albeit subject to the prohibition against spanning the creek. This was not a case, then, that saw the complete sterilization of the plaintiff's lands, a situation which would dictate a different result.

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[58] *Ibid.* at 243.

The decision is undoubtedly welcomed by those who champion a proactive use of the zoning power. It supports the view that zoning is a powerful (and an inexpensive) tool in the greening of our neighbourhoods.

From the perspective of owners and developers it is an unfortunate precedent. The court too easily overlooks the serious diminution to the plaintiff's property value. Before promulgation of the legislation, the City offered to purchase the lands for $400,000 in light of their development potential. Afterwards, the highest City offer was $48,000.[59]

The decision also ignores the reality that the City's interests were enhanced by the legislation at the expense of the plaintiffs. The fact is that the legislation protected the creek amenity which the City was negotiating to acquire.

If the City chooses not to expropriate the plaintiffs' title the result is that it has preserved the amenity for the community totally at the cost of the private land owner. As Rogers notes in his text *The Canadian Law of Planning and Zoning*:

> "It has been said that the authority to impose restrictions on the use of property is confiscatory in nature to the extent that it interferes with common law rights ... It has been called "quasi expropriation without payment" ... When a zoning bylaw takes away property rights, in effect it is confiscating such rights without compensation ... The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return. Although the courts have inveighed against this seeming injustice they have seldom invalidated municipal regulations having this effect. It is well settled that owners may be compelled to surrender some value or future value of their land to the local authority and no price has to be paid."[60]

The citizen's silver lining is the argument, in the event of a formal expropriation, that the lands must be valued ignoring the restrictive legislation which is simply part of the machinery of the expropriation.[61]

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[59] *Ibid.* at 242.

[60] Rogers, Ian F. *The Canadian Law of Planning and Zoning* (Scarborough: Carswell) at 124.

[61] See *Hauff v. Vancouver (City)* (1980), 12 M.P.L.R. 125 (B.C.S.C.), aff'd (1981), 28 B.C.L.R. 276 (C.A.) and *Kramer v. Wascana Centre Authority*, [1967] S.C.R. 237.

We have seen that "regulation" can be become "taking" and that it is a question of degree. In the land use control scenario, the cases provide some guidance for the required line drawing.

It is settled that diminution in value precipitated by a down zoning is not *per se* compensable. This is so at common law and pursuant to the enabling statutory authority in British Columbia.

The extent of a permitted non-compensable down zoning is expansive. For example, a freeze on development, at least where some uses of lands are still permitted, has been held to be a valid exercise of the power to regulate land use under the *Ontario Planning Act*[62], and a refusal to rezone developable lands because of a desire to eventually acquire the lands for park purposes is not bad faith invalidating the bylaw.[63]

There are limits, however. In British Columbia there is consistent authority striking down municipal attempts to effectively zone private lands for public uses.[64]

It seems that the land owner in such a situation has two possible remedies. The first is a proceeding to quash the offending bylaw on the basis of the authority just noted. The second, and never apparently resorted to, is to file a claim for compensation under section 544 of the *Municipal Act* and the *Expropriation Act*. This seems to be the remedy expressly contemplated by the exception set out in section 972 of the *Municipal Act*. Note that this latter remedy is restricted to a clear case of zoning for "public use", it would not be available in the event of a development moratorium where some uses, although limited, are still permitted of the

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[62] See *Soo Mill & Lumber Co. v. Sault Ste. Marie (City)* [1975] 2 S.C.R. 78 and *Sanbay Developments Ltd. v. London (City)* [1975] 1 S.C.R. 485.

[63] See *Calgary (City) v. Hartel Holdings Ltd.* [1984] 1 S.C.R. 337 and *Serendipity Ventures Ltd. v. White Rock (City)* (1988) 39 M.P.L.R. 1 (B.C.S.C.), aff'd (1990) 43 B.C.L.R. 90 (C.A.).

[64] See *North Vancouver Zoning Bylaw Re 4277* [1973] 2 W.W.R. 260 (B.C.S.C.) and *Columbia Estate Co. v. Burnaby (District)* [1974] 5 W.W.R. 735 (B.C.S.C.)

claimants' lands. Such a moratorium does not, at law, amount to a taking of any of the claimants' interest in land.[65]

Success for the land owner in these cases is problematic, especially where a well advised local government camouflages what it is really about in freezing development by permitting what can only be fairly characterized as "tongue in cheek" uses - bare land agricultural uses, for example, for small lots in a highly urbanized setting.

The factual foundation for a successful action can be developed. A case on point is the interesting judgment of Mr. Justice Ruttan in *Rodenbush* v. *North Cowichan (District)*.[66]

There, the petitioners leased lands in the Cowichan River Estuary with the intention of developing a shake and shingle mill together with a log haul out operation. Such industrial development was contrary to a provincial task force study recommending maintaining the *status quo* in the estuary.

The local council responded to the petitioners' plans by down zoning the lands to "Rural Restricted". While this zone prevented industrial development, it did permit some uses of the lands.

On application, the bylaw was quashed on the ground that the municipality had acted to reserve private land for public purposes. In so concluding, Mr. Justice Ruttan was not moved by the fact that some "private" uses of the petitioners' lands were nevertheless permitted by the new zone.

He looked, rather, at the reality of the lands and the fact that the bylaw did not permit proper, one assumes economically viable, uses:

> "It is not bad faith merely to cause economic loss to a private owner if the action is carried out in the interest of all the community. But here the action amounts

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[65] See *Genevieve Holdings Ltd. v. Kamloops (City)* (1988), 42 M.P.L.R. 171 (B.C. Co. Ct.).

[66] (1977), 3 M.P.L.R. 121 (B.C.S.C.)

> to confiscation, since the applicants claim the land has no other proper use and this claim has not been challenged."[67]

This then is the stuff of a successful attack on municipal action of this sort. One must draw on the authorities like *Manitoba Fisheries Ltd.* and *Tener* and demonstrate that the legislation effectively, if not *prima facie*, confiscates all reasonable private uses of the lands in question.

As has been noted, there is a very "slender" line of authority available to found such an argument.[68]

It seems as well that such an argument would more readily be appropriate for the Expropriation Compensation Board on an application for the determination of compensation under the *Expropriation Act* (British Columbia) than the Supreme Court on an application to quash the bylaw. The Expropriation Compensation Board is certainly more expert at determining economically viable land use, or the lack thereof.

Since first writing the foregoing, the "slender" line of authority has been significantly enhanced in British Columbia by Mr. Justice Paris' judgment in *MacMillan Bloedel Limited* v. *The Galiano Island Trust Committee* (unreported B.C.S.C. Vancouver Registry No. A920930, July 30, 1993).

MacMillan Bloedel successfully attacked the trust committee's bylaws effectively down zoning the latter's substantial holdings on Galiano Island by removing single family residential as a permitted use in the forestry zone and raising the minimum lot size for subdivision from 20 acres to 20 hectares (approximately 50 acres).

The plaintiff's counsel, with painstaking attention to the development of the evidence, established to the court's satisfaction that the trust committee's true intentions were to sterilize land use. The court concluded:

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[67] *Ibid.* at 66, cf. *Yuen v. Oak Bay* (1992) 8 M.P.L.R. (2d) 263 (B.C.S.C.) (under appeal)

[68] *Rodenbush, supra* at note 66, annotation

"But the purposes which [the trust committee] sought to effect, change in logging practices on the island and the acquisition or preservation of land without expropriation, were beyond their powers. ...
This case is an example of the problem of individual rights and conflict with perceived collective interests. But if collective interests call for some interference with private rights in this case, it must be effected lawfully and by the proper legislative authority. A municipal council (in this case, the Galiano Island Trust Committee) can operate only within the powers delegated to it by provincial legislation."

IV. INTERPLAY WITH INJURIOUS AFFECTION *SIMPLICITER*

It is beyond the scope of this paper to exhaustively review the law of injurious affection *simpliciter*. Other sources offer a much more detailed analysis than will be attempted here.[69]

What will be discussed, however, is the point of cross-over between an exotic *taking* and this species of injurious affection, which by definition, involves no taking of the claimant's property.

The conditions which must be satisfied to found a claim for injurious affection *simpliciter* are well established:

(1) the damage must result from an act rendered lawful by the statutory powers of the person performing the act;

(2) the damage must be such as would have been actionable under the common law, but for the statutory power;

(3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade; and

(4) the damage must be occasioned by the construction of the public work not by its user.[70]

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[69] See Todd, Eric C.E., *The Law of Expropriation and Compensation in Canada*, (2d) (Scarborough: Carswell, 1992), c. 10 and Cosburn, Robert S. "*Injurious Affection with no Taking*". In *Expropriation* (Vancouver: C.L.E., 1992).

[70] *Autographic Register Systems Ltd. v. C.N.R.* [1933] Ex. C.R. 152, *Loiselle v. R.* [1962] S.C.R. 624. The fourth condition is likely not applicable under section 544 of the *Municipal Act*, R.S.B.C. 1979, c. 290 (see *J.F. Brown Co. v. Toronto (City)* (1917) 55 S.C.R. 153.

It is the second condition, the so-called "actionable rule" that invites discussion here.

The interplay between the rule, a "taking" to which it applies, and injurious affection *simpliciter*, is aptly demonstrated by *Tener*.

The Supreme Court of Canada found, of course, that the denial of access to the mineral claims amounted to a taking. The majority in the British Columbia Court of Appeal, however, took a different tack. Mr. Justice Lambert quoted section 11(c) of the *Park Act (British Columbia)* which permitted the Minister to expropriate land for the purpose of the establishment or enlargement of any park or recreation area. He then held that there had not been an expropriation of any land rights of the plaintiff:

> "But the real question is whether there is an expropriation under the *Park Act* if no land rights are acquired by the Crown, even if land rights are taken from an owner. In this case I do not think that the Crown acquired land rights. It owned the surface of the claims. It owned the land and the park. The rights of use and access held by the plaintiffs were not exclusive rights, but rights shared with the Crown. I am particularly influenced in deciding on the meaning that should be attached to the word "expropriate" in subsection (c) of section 11 by the fact that the word is used to confer a power that may be exercised only for the purpose of the establishment or enlargement of a park ... and of course my interpretation is restricted to the use of the word in section 11 of the *Park Act*, where, in my opinion, it means a taking that involves an acquisition of some kind by the Crown. Accordingly, it is my opinion that there was no expropriation in this case, and a scheme constituted by the *Park Act* and the *Ministry of Highways and Public Works Act* did not come into effect."[71]

One person's taking is another's injurious affection.

To the extent that a claim for injurious affection *simpliciter* is more difficult to advance - the four limiting conditions so dictate - the distinction between it and a "taking" may be critical.

Two recent cases on injurious affection are important.

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[71] 133 D.L.R. (3d) 168 (B.C.C.A.) at .

The first must be considered to represent the modern law applicable in Canada, it is the Supreme Court of Canada decision in *St. Pierre v. Ontario (Minister of Transportation and Communications)*.[72]

The second is the British Columbia Expropriation Compensation Board's first consideration of the claim: *Jesperson's Brake & Muffler Ltd. v. District of Chilliwack*.[73]

In *St. Pierre* the issue before the court centred on whether a land owner may advance a claim for compensation when a public highway project in the immediate vicinity of the owner's secluded home effectively destroyed the rural amenities that they had previously enjoyed.

Mr. and Mrs. St. Pierre had built their "destination" home in a quiet rural area near London, Ontario. According to one commentator:

> "Located on 125 acres of rural land, the St. Pierres had built an exquisite house with an exterior of Indiana sandstone and an open concept interior with a finish of imported Black Walnut. So bucolic was the setting that in the adjacent hardwood forest, wild deer would come to be fed by the St. Pierres in the winter."[74]

The province acquired, built and opened an intensively used four lane highway on the property adjacent and to the rear of the St. Pierres' home. At its closest point, the highway right-of-way was 32 feet from the St. Pierres' bedroom window.[75]

None of the St. Pierres' land was taken for the project. They filed a claim for compensation for injurious affection *simpliciter* under section 21 of the *Expropriation Act*

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[72] [1987] 1 S.C.R. 906.

[73] British Columbia Expropriation Compensation Board E.C.B. 43/90/034 July 7, 1992, see also *Reimer Mobile Homes Ltd. v. District of Chilliwack* E.C.B. 40/90/035 July 20, 1992.

[74] Brode, Patrick. "Case Comment. Expropriation - Injurious Affection - Nuisance: St. Pierre v. Minister of Transportation and Communications." (1988) 9 *Advocates Quarterly* 497.

[75] *ibid*

(Ontario). For the purpose of our consideration, the statutory definition of "injurious affection" generally accords with the common law applicable in British Columbia.[76]

Whether a compensable claim arose centred on the application of the actionable rule, *viz*: but for the enabling authority could the claimants maintain an action at common law against the highway authority in the circumstances?

The claimants' case was essentially one for loss of amenities - loss of prospect and privacy. The Ontario Land Compensation Board upheld the claim. The Divisional Court dismissed the appeal. The Ontario Court of Appeal reversed and the case came before the Supreme Court of Canada.

The efficacy of the claim at common law required a finding that an interference with amenities of this sort was an actionable nuisance.

The claimants argued that modern cases herald a broader approach to the question of nuisance. Cited in support were:

- *Nor-Video Services Ltd.* v. *Ontario Hydro* (1978), 4 C.C.L.T. 244 - unreasonable interference with television signals detracts from beneficial ownership of property;

- *T.H. Critelli Ltd.* v. *Lincoln Trust and Savings Co.* (1978) 86 D.L.R. (3d) 724, aff'd (1979) 111 D.L.R. (3d) 179 (C.A.) - construction of a tall building in the city causing the accumulation of snow on adjoining building is a nuisance;

- *Schenk* v. *R.* (1981), 34 O.R. (2d) 595 (H.C.) - damage to fruit growing land adjoining the highway by salt from highway maintenance is an actionable nuisance;

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[76] With the possible exception of the "construction" rule in the municipal context in British Columbia, note 70.

- *Windsor (City)* v. *Larson* (1980) 29 O.R. (2d) 669 and *N.R.* v. *Loiselle* [1962] S.C.R. 624 - highway projects interfering significantly with access to claimants' business premises is actionable nuisance.

Mr. Justice McIntyre, delivering the judgment of the court, distinguished all of these cases. In the first three decisions, he held that the action of the public authority substantially altered the nature of the claimants' property itself or at least interfered to a significant extent with the actual user being made of the property, with a resultant loss of value to the property.[77] Similarly, with respect to the access interference cases:

> "The construction of the public works in close proximity to the lands so changed their situation as to greatly reduce, if not eliminate, their value for the uses to which they had been put prior to the construction and could, therefore, be classed as nuisances."[78]

That situation was to be distinguished from the St. Pierres' claim for loss of amenities. Loss of prospect and privacy do not give rise to actionable nuisance.

Prompting this retreat from the Divisional Court's aggressive view that nuisance is not limited to the violation of rights traditionally recognized by law, was Mr. Justice McIntyre's obvious concern that recovery here would seriously impact the government's ability to advance needed public works:

> "Moreover, I am unable to say that there is anything unreasonable in the Minister's use of the land. The Minister is authorized - indeed he is charged with the duty - to construct highways. All highway construction will cause destruction. Sometimes it will damage property, sometimes it will enhance its value. To fix the Minister with liability for damages to every land owner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for public good far outweighs the disruption and injury which is visited upon some adjoining lands. The law of nuisance will not extend to allow for compensation in this case."[79]

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[77] *St. Pierre, supra*, note 72 at 915.

[78] *Ibid.*

[79] *Ibid*, at 916.

It should be stressed that this was said in the face of the admission that the highway works caused a $35,000 reduction in the value of the St. Pierres' home.

The court's concern with the run on the public purse in *St. Pierre* is reminiscent of Madam Justice Southin's fear expressed in *Cream Silver Mines Ltd.*, of a proliferation of claims that would follow a too liberal construction of the "no taking without compensation" rule.

It is submitted, however, that Mr. Justice McIntyre's reasoning in *St. Pierre* offers the check and balance needed to meet the floodgate's concern raised in *Cream Silver Mines Ltd.* In the absence of a formal taking, or a true acquisition of property of the claimant by government, one should balance the degree of interference with the recognized legal rights of the claimant worked by the government's conduct and the social utility of that conduct.

Such an exercise has always been part of the law of nuisance where traditionally courts have looked at the reasonableness of the defendant's conduct.

Having advanced this thesis it is salutary to note that it has essentially been rejected by the British Columbia Expropriation Compensation Board in its decision in *Jesperson's*. There, the Board awarded compensation of $31,500 to a claimant where the construction of a railway overpass in front of the claimant's commercial premises made access thereto more circuitous. The Board distinguished *St. Pierre* as a loss of amenities case, not an interference with access case which the law (see *Loiselle* and *Larsen supra*) has always treated differently. As noted earlier, *Jesperson's* is under appeal to the British Columbia Court of Appeal and further comments should await that decision.[80]

The interesting theory that these cases may support arises from the observation made above - one man's taking is another's injurious affection.

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[80] The writer is counsel in *Jesperson's* and his views should be tested against those of a disinterested observer. CF the Supreme Court of Canada decision in *R. v. MacArthur* (1904), 34 S.C.R. 570.

In *Tener* recall that Mr. Justice Lambert found there to be no taking in the government's denial of access to the claimant's mineral claims. He did, however, find injurious affection *simpliciter*.

The Supreme Court of Canada found a taking on the same facts. One supposes in the circumstances that the taking was really constructive. The closer the facts are to a constructive taking, the more likely should there be a recovery for injurious affection *simpliciter*.

In *St. Pierre* the claimant's rural amenities were sacrificed by the highway construction but those amenities could not be said to have facilitated or enhanced that highway project. Hence there was nothing approaching a constructive taking.

It could be argued that the claimant's direct access to a highway at grade in *Jesperson's* was taken, at least notionally, to facilitate the grade separation over the railway tracks.

Certainly, in light of the four conditions precedent to a successful claim for injurious affection *simpliciter* counsel face an easier task if they can characterize their claim as a taking, whether it be constructive, exotic or otherwise.

EXOTIC EXPROPRIATIONS:

GOVERNMENT ACTION AND COMPENSATION

A PAPER DELIVERED BY
R.J. BAUMAN OF
BULL, HOUSSER & TUPPER
BARRISTERS AND SOLICITORS
VANCOUVER, BRITISH COLUMBIA

TO THE FIRST ANNUAL MEETING OF THE
BRITISH COLUMBIA EXPROPRIATION
ASSOCIATION
OCTOBER, 1993

BULL, HOUSSER & TUPPER
BARRISTERS & SOLICITORS
#3000 - 1055 WEST GEORGIA
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Attention: Robert J. Bauman