MUNICIPAL COMPENSATION FOR INJURIOUS AFFECTION SIMPLICITER: IS CITY HALL GETTING NOTHING FOR SOMETHING

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I. Introduction

This paper expands on one of the themes I explored in *Exotic Expropriations: Government Action and Compensation* (1994), 52 The Advocate 561 (catchy titles are a *sine qua non* in this otherwise dry backwater of jurisprudence).

I will pursue in more detail developments in the law of injurious affection *simpliciter* in the context of local government public works. Injurious affection *simpliciter* is about the shortest way of describing the legal scenario where a public authority is liable to pay compensation for lawful injury to land not consequent upon a taking of a portion of that land (henceforth the even shorter, "IAS").

It is not so much that this area of the law is evolving in a manner that seems to create new causes of action against local governments exercising their public law duties or discretions, as it is, rather, the application of old law by imaginative counsel to new intrusions by government in our increasingly complex society.

I will proceed to briefly discuss the legislative basis for the claim, the common law rules prescribing its success, modern applications, and, based on those, a look forward to possible future applications of the jurisprudence.

II. The Legislation

It has been said with substantial authority that compensation in these cases must rest on a clear statutory foundation as "it has never been suggested that there is a common law right to compensation..."[1]

The statutory framework is accordingly critical to our discussion.

For the City of Vancouver, it is found in section 541 of the Vancouver Charter:

> Where real property is injuriously affected by the exercise on the part of the City of any of its powers, the City shall, unless it is otherwise provided in this or some other act, make due compensation to the owner for any damage necessarily resulting therefrom beyond any advantage which the owner may

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

> derive from any work in connection with which the real property is so affected.

For the rest of the province, section 544 of the Municipal Act is pertinent:

> The council shall make to owners, occupiers or other persons interested in real property entered on, taken, expropriated or used by the municipality in the exercise of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages necessarily resulting from the exercise of those powers beyond any advantage which the claimant may derive from the contemplated work.

The final provision is section 40 of the Expropriation Act which represents an interesting example of the legislator knowing well enough to resist codifying the law of IAS (and further muddying an already murky stew) but at the same time, creating a forum, the Expropriation Compensation Board, within which to try these claims in whatever form they might develop at common law. Section 40 of the Expropriation Act provides as follows:

> (1) In this section, "injurious affection" means injurious affection caused by an expropriating authority in respect of a work or project for which the expropriating authority had the power to expropriate land.
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> (2) The repeal of the Expropriation Act, R.S.B.C. 1979, C. 117, and the amendments and repeals in section 56 to 128 shall be deemed not to change the law respecting injurious affection where no land of an owner is expropriated, and an owner whose land is not taken or acquired is, notwithstanding those amendments or repeals, entitled to compensation to the same extent, if any, had those enactments not been amended or repealed.
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> (3) An owner referred to in subsection (2) who wishes to make a claim for compensation for injurious affection shall make his claim by applying to the board, and the board shall hear the claim and determine
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> (a) whether the claimant is entitled to compensation, and
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> (b) if so entitled, the amount of the compensation.

III. The Common Law Rules

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 powers;

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.[2]

One of the most cited examples of a successful IAS claim involves one of the most common by-products of public works - the effect on traffic circulation in the area of commercial premises after completion of a road alignment project.

The case is *Regina* v. *Loiselle* (1962) 35 D.L.R. (2d) 274 (S.C.C.). The facts (as set forth in the headnote) involved a Respondent who owned and operated a service station on a provincial highway. At the request of the St. Lawrence Seaway Authority, and largely at its expense, the Quebec Government closed the highway some eighty feet from the Respondent's property and diverted it a distance of 1500 feet. As a result of the diversion, and the works constructed by the Authority, the Respondent's property was located in a cul-de-sac at the end of the street eighty to ninety feet from a canal and 1500 feet from the intersection of the highway. None of the Respondent's land was taken.

The Court awarded compensation for IAS pursuant to the enabling authority set out in section 18(3) of the St. Lawrence Seaway Authority Act. The Court applied the four conditions noted above and in particular said this of the third condition:

> "As to the third condition it seems clear to me that there was a "physical interference with a right which the owner was entitled to use in connection with the property" ... and that on the evidence, such interference substantially diminished its value as a commercial property. The Respondent carried on

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[2] *Autographic Register Systems Ltd.* v. *C.N.R.* [1933] Ex. C.R. 152

> a general garage and service station selling oil, gasoline and the like, and prior to the construction of the canal, the property was well located for that purpose. The learned trial Judge found that the construction of the canal and the diversion of the highway has adversely affected the Respondent's land as a commercial property and there is ample evidence to support that finding"

Loiselle is an interference with access case and it has always been the common stuff of IAS claims. Some of the modern applications will be discussed below.

More dramatic, in the scope it suggests for the remedy, is the interesting judgment of the Supreme Court of Canada in *Toronto* v. *The J.F.Brown Company* (1917) 55 SCR 153.

For counsel advancing IAS claims of a less traditional bent than the access cases, *J.F. Brown* is a treat.

The facts are simple. The *J.F. Brown Company* owned and operated a department store at the southwest corner of Queen and Parliament Streets in Toronto. The report continues:

> "In the year 1912 the Appellant, with a view of providing much need lavatory accommodation for the public, constructed a lavatory for men and women at this corner, it being a street car transfer point and a place of public concourse, and, therefore, a logical situation for such a convenience. The lavatory was constructed underground and about 50 feet apart were stairways leading to the same, with metal hoods over them similar to those under a subway entrance in a large city. These entrances were a distance 8 feet from the building of the Respondent, being midway between the curbing and the street line, which space was completely concreted so as to form an extended sidewalk. Halfway between the entrances was a small structure of inconspicuous appearance used as a breather."

The Company advanced a claim against the City based, in the main, upon the circumstance that the maintenance of a public lavatory near its property caused a diminution in its value.

Present at the Supreme Court of Canada decision were Davies, Idington, Duff, Anglin and Brodeur, JJ. The Court dismissed the appeal from the Court of Appeal, which had, on equal division, upheld the arbitrator's award of $9,000.00 for IAS.

Brodeur, J. simply concurred in dismissing the appeal. Davies, J. dissented and would have allowed the appeal. Iddington, Duff and Anglin, JJ. each wrote in the majority.

Their judgments are important in appreciating the potential scope of compensable IAS.

All three agreed on an important qualification to the rule that compensable IAS speaks to

damage occasioned only by the construction of the public work, not by its user.

Clearly here, if that rule applied, there would be no recovery because it was the use of the work as a public lavatory - not its initial construction - that impacted the Company's property value. The majority in *J.F. Brown* held that the statute at bar did not include the "construction" rule as a qualification on compensation.

Section 325(1) of the Municipal Institutions Act provided:

> Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this act or under the authority of any general or special act, unless it is otherwise expressly provided by such general or special act, the corporation shall make due compensation to the owner for the land expropriated or, where it is injuriously affected by the exercise of such powers, for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

This provision is critical in the B.C. context because the Municipal Act and the Vancouver Charter provisions are very similar in wording.

The second important aspect of *J.F. Brown* is the majority's analysis of the claim in the light of the actionable rule. That is could *J.F. Brown*, but for the statutory authority allowing the City to construct the work, have maintained an action at common law in respect of it?

This is the most critical qualifier on the scope of compensable IAS.

Many public works in the vicinity of private lands adversely affect property values, but can the owner point to some physical interference by government with some legal right or attribute attaching to his lands?

For himself, Iddington, J., on this aspect of the case, boldly departed from the historical requirement of the actionable rule. Again, relying on the plain words of the statute, quoted above, he would allow compensation simply if the owner could show a diminution of property value after the advent of the public work.[3]

Duff and Anglin, JJ. took a more traditional tack but even they liberalized the actionable rule.

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[3] At pages 172 and 173 of the Report

Duff, J. applying the actionable rule, accepted the view that in constructing the opening and railings about the openings, in a public highway, the City, but for the statutory authority, created a public nuisance by unlawfully interfering with the public's right of passage in the highway. Duff, J. held further, without much analysis, that this claimant could sue on the public nuisance because the company, in the diminution in its property value, suffered a particular loss more than that shared by the general public.

Then his Lordship dealt with the real hurdle - this owner could not say that its loss in property value was due to the actionable obstruction of the highway. Duff, J. continued at page 192:

> "Does the circumstance that the loss is not due to the obstructions as such affect the application of the principal? If an illegal act causes damage to an individual, which is particular damage, that is to say, which affects him particularly over and above any harm it may cause the public generally, and that damage is a natural and probable consequence of the act, reparation for such damage is, I think, recoverable, and I do not see why the law breaker should escape this consequence because of the fact that the injurious results (the natural and probable results) of his concrete illegal act are not connected by any causal relation with the particular circumstances giving the act its specific illegal character. The point has been dealt with in *Campbell* v. *Paddington*, in which it was held that an erection in a highway, unlawful as an obstruction to the public right of passage, which also interfered with the view from the Plaintiff's windows and thus deprived her of the opportunity of letting some rooms for the purpose of viewing a procession, was actionable at her suit although she was not specially affected by the obstruction as an obstruction to the right of passage."

The reasons of Anglin, J. are to the same effect:

> "The construction of the words "injuriously affected" as applied to lands and compensation acts, is too well established to admit of controversy. It imports an affection of the lands themselves, apart from any particular use to which they may be put or any personal inconvenience suffered by the owner (entailing appreciable damage). It also implies an *injuria* known to the law, ie, the doing of an action which is not authorized by the statute, would be actionable - that the loss sustained must not be *damnum absque injuria*. Once an actionable injury is established, however, all the damage sustained in the consequence of the exercise of the statutory power is to be compensated for. Thus, if the *injuria* consists in the blocking of lights to the enjoyment of which the land owner has a legal right, prescriptive or contractual, he is entitled to compensation for interference with other existing lights to the enjoyment of which he has not a legal title... moreover, if the act done is illegal (as Mr.

> Justice Masten has, to me at least, satisfactorily demonstrated the erection of the lavatory in question, but for the statutory authorization, would have been, because of the partial obstruction of the highway involved) damages which are its natural and probable consequences, may be recovered, although no actual damage can be shown attributable to the feature of the act which renders it illegal, or, but for the statutory authorization would have made it so."

J.F. Brown offers much to support the imaginative claimant: conjure an actionable public nuisance for your client and seek compensation under the statute for diminution to property value which is the natural and probable consequence of the public work, although not necessarily damage attributable to the feature of the government conduct which renders it illegal at common law but for the statutory authority.

Given the expansive view of public nuisance that *J.F. Brown* adopts in finding that the relatively innocuous obstruction of the lavatory railings and stairs was actionable at common law, there is real scope for a Claimant coat-tailing a substantial IAS claim to a mildly intrusive public nuisance obstructing a public highway. In the Court of Appeal in *J.F. Brown* it was made clear at common law the public enjoys a paramount right to uninterrupted and unimpeded passage over highways. This being so, IAS ought to be a concern where any government project affects the freedom of passage along a highway: eg. street diversions, one way street systems, the installation of concrete medians, the prohibition or removal of curb drops, and various types of grade separation. There are numerous cases in the reports considering these types of works in the context of our discussion here and I will not try to cite them here. Reference to the index of the Land Compensation Reports will offer a rich source of precedent. The interesting possibility here, based on *J.F. Brown* is the combining of the innocuous street obstruction precipitated as part of the construction of the truly damaging (to property values) public work - eg. a public institution on lands adjoining a residential neighbourhood.

As *J.F. Brown* is of some antiquity, it is salutary to dampen the optimism of claimants' counsel by recalling more modern discussions of IAS in the context of necessary public works.

Here the Supreme Court of Canada decision in *St. Pierre* v. *Ontario (Minister of Transportation and Communications)*[4] is apposite.

In *St. Pierre* the issue before the court centered on whether a land owner may advance a claim for compensation when a public highway project in the immediate vicinity of the

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[4] [1987] 1 S.C.R. 906. The discussion of St. Pierre found in this papter is taken from *Exotic Expropriations: Government Action and Compensation* (1994) 52 The Advocate 561

owners' 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.

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.

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

Whether a compensable claim arose centered 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 validity 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 detract 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 a city causing the accumulation of snow on adjoining building is a nuisance;

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

- *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 use being made of the property, with a resultant loss of value to the property. 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."

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 land. The Minister is authorized - indeed he is charged with the duty - to construct highways. All highway construction will cause disruption. 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."

It should be stressed that this was said in the face of the admission that the highway works caused a $35,000.00 reduction in the value of the St. Pierres' home.

Clearly the actionable rule is still an important qualification on compensable IAS.

Successful claims will most often involve a diminution of property value by an interference with the claimant's highway access. *Jesperson's Brake and Muffler Ltd.* v. *Chilliwack (District)* (1992) 47 L.C.R. 172, (1994) 52 L.C.R. 95 (B.C.C.A.) (leave to appeal to the S.C.C. refused) is a recent example.

There the British Columbia Expropriation Compensation Board awarded the claimant $31,500.00 where construction of a railway overpass in front of the claimant's commercial premises made access there more circuitous.

In the British Columbia Court of Appeal, it was argued that *St. Pierre*, as indeed does the common law of nuisance, calls for a balancing of the private harm with the public good created by the project before one can conclude that the actionable rule has been satisfied.

It was argued, again on the basis of *St. Pierre*, that this balancing process was critical in limiting the otherwise broad class of IAS claims that could seriously impact the economic construction of needed public works.

Finch, JA. for the court said this of that submission:

> "I see nothing in either of those two judgments (*Loiselle* and *Larson*), nor do I see anything in the comments made by Mr. Justice McIntyre (in *St. Pierre*) about those two judgments, to suggest that in determining whether there has been a nuisance created, a balancing process must be gone through to determine whether the Minister's conduct or use of land has been "unreasonable". In both *Loiselle* and *Larson* there has been substantial or significant interference with access to the claimants land. That was held sufficient to constitute a nuisance. Mr. Justice McIntrye distinguished those cases for him where there had been no interference with access, but rather, simply interference with view, privacy, prospect, or other loss of amenity."

IV. **Innovative Applications**

It is sobering to consider how far one can take the IAS claim. Sobering because it is a simple matter to file a claim under the Expropriation Act and, with payment of the claimant's reasonable legal and appraisal costs at the end of the day by the public authority, it can be relatively painless litigation.

J.F. Brown was applied in the British Columbia case: *Currie* v. *Chase (Village)* (1986) 32 M.P.L.R. 172 (B.C.S.C.).

This case involved a *mandamus* application to require the Village to appoint an arbitrator under section 544 of the Municipal Act to consider the Petitioner's claim for IAS arising out of the Village's construction of a sewage lagoon on neighbouring property.

Spencer, J. granted the *mandamus*. He adopted the reasoning in *J.F. Brown* to the effect that once some harm is caused to the land which would be actionable at common law then the compensation provisions of a statute such as section 544 of the Municipal Act may be extended to include all injurious affection whether or not it was of a type recognized by the common law. The court concluded at page 178 of the report:

> "... if the Petitioner's land has been devalued simply by the mere proximity of the lagoon, that too is a compensable item under section 544 of the Municipal Act provided that the construction or maintenance of the lagoon has also caused some damage which, but for statutory authority, would have given rise to a successful action by the Petitioner at common law."

Edgecumbe v. *Regional Municipality of Hamilton Wentworth* (1984) 31 L.C.R. 60 (Ontario Municipal Board) is a stark example of the IAS claim succeeding in the absence of, apparently, a full understanding of the importance of the actionable rule. The headnote reads:

> "The claimants residence and parcel of land was located one-third to one-quarter of a mile from the location of the authority's landfill site. Prior to the construction, the property was in a secluded area fronting on a dead end gravel road. For the construction of the landfill site, the road was widened and paved, the site was fenced and the service building and internal roads were built. Subsequent to construction the traffic level increased. Held, the evidence indicated a loss in market value not just a loss of enjoyment by the claimants of the property. The action of the authority changed the enjoyment of the property and the market reacted by making the property less saleable and therefore lowering the market value."

While the claimants argued an interference with the enjoyment of their property that might have qualified as actionable nuisance at common law, no conclusion in this regard was reached by the Board in awarding compensation.

Simply looking for diminution in property value without reference to the actionable rule, even as broadened in *J.F. Brown*, will lead to a potentially ruinous run on the public purse when even the most laudable work, eg, a hospital, police station or recreation facility, is constructed in a neighbourhood.

Of considerable interest is the possibility of advancing an IAS claim where land use controls enacted by government diminish property values.

Here, two important statutory provisions protect local government in British Columbia:

Section 972(1) of the Municipal Act:

> "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 under this Division or the issue of a permit under Division (5)."

Section 569(1) of the Vancouver Charter:

> "Where a zoning by-law is or has been passed, amended or repealed under this Part, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this Part, any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of such zoning and no compensation shall be payable by the city or any inspector or official thereof."

There is an important qualification to section 972(1) of the Municipal Act found in subsection 2 of that section:

> "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."

That qualification is not found in the Vancouver Charter.

The presence of protection like section 972(1) is important when we explore the possibilities its absence might promote.

On point is the decision of Bouck, J. in *Gloucester Properties Ltd.* v. *R. In Right of British Columbia* (1981) 2 W.W.R. 411 (reversed on other grounds [1981] 4 W.W.R. 179).

The facts, relevant to our discussion here, involved an order in council promulgated by the lieutenant governor in council under the Environment and Land Use Act restricting the development of the Plaintiff's lands except with the approval of the Minister of Environment. Bouck, J. referred to the House of Lords decision in *Cannon Brewery Co. Ltd* [1919] A.C. 744 and the trial court decision in *Manitoba Fisheries Ltd.* v. *R.* [1976] 58 D.L.R. (3d) 119, and held at page 426 of the report:

> "Applying the law set out in these cases to the facts before me, it is clear the Plaintiffs have a right to recover compensation from the crown for interference with their property by reason of OC 2763. It has restricted the

> normal development of the land which they could otherwise pursue. No other land owner in the Municipality of Langley is subject to the same prohibition. It is aimed solely at the Plaintiffs. Nor is there a system of compensation for the encroachment of the crown set out in the Environment and Land Use Act. In the result, the Plaintiff's lands have been injuriously affected by the order in council. Because of these factors they have a right to an action brought in this court.

Mr. Justice Boucks' view in *Gloucester Properties Ltd.* is to be contrasted with the reasons of Robinson, Co.Ct. J, (as he then was) in *Genevieve Holdings Ltd.* v. *Kamloops (City)* (1988) 42 M.P.L.R. 171. There the Court denied a claim for IAS arising out of a council resolution imposing a moratorium on rezoning and subdivision development.

The Court in *Genevieve Holdings Ltd.* was particularly concerned that IAS cases historically contemplate the physical construction of some work. The report does not indicate that *Gloucester Properties Ltd.* was cited. The requirement for physical work to found an IAS claim is definitely arguable in light of the express words of section 544 of the Municipal Act:

> "The council shall make to owners, occupiers or other persons interested in real property entered on, taken, expropriated or used by the municipality in the exercise of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages necessarily resulting from the exercise of those powers beyond any advantage which the claimant may derive from the contemplated work." (Emphasis added)

However, Professor Todd has noted:

> "... probably the Courts will not limit injurious affection claims to situations where the municipality has effected a "work". If works were held to be necessary, the sections conferring immunity with regard to the exercise of the zoning power clearly would be superfluous."[5]

It is submitted further that not only would section 972(1) of the Municipal Act be superfluous if such conduct did not, in any event, found an IAS claim, neither could we give effect to section 972(2) of the Municipal Act which clearly suggests that an IAS claim could be supported where a zoning bylaw restricts the use of private lands to public uses.

This issue has been canvassed by the Ontario Municipal Board in Re: *Doughty Farms Ltd.* and *Township of Smith* (1992) 47 L.C.R. 43 where the Board was firmly of the view that

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[5] Quoted in *Genevieve Holdings Ltd.* v. *Kamloops (City of)* (1988) 42 M.P.L.R. 171 at 179

section 1(1)(e) of the Expropriations Act (Ontario) does not contemplate compensable IAS arising to amendments from municipal planning documents adversely affecting the value of private lands.

That section is clearer than the B.C. Legislation in stating that IAS only arises in the presence of constructed works by the statutory authority. Section 1(e)(ii) of the Ontario Act provides:

> (e) "Injurious Affection" means,
>
> (ii) where the statutory authority does not acquire part of the land of an owner,
>
> (A) such reduction in the market value of the land of the owner and
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> (B) such personal and business damages,
>
> resulting from the construction and not the use of the works by the statutory authority, as a statutory authority would be liable for if the construction were not under the authority of the statute..."[6]

Section 972(2) of the Municipal Act may offer the frustrated land owner in British Columbia (outside Vancouver) a remedy where a downzoning sterilizes land uses for all but public uses. As noted earlier compensation claims are based on statute and the obvious implication of section 972(2) of the Municipal Act is that the exemption from liability for IAS in the zoning context is lost where private lands are zoned for public uses. That remedy is not available in Ontario (see footnote 6 below) nor in other provinces which do not have legislation similar to section 972(2).

If section 972(2) supports a claim for IAS in the downzoning context it is anomalous that the Expropriation Compensation Board would not apparently have jurisdiction to hear it. Section 40 of the Expropriation Act clearly is restricted to "injurious affection" arising from a "work or project" (see section 40(1) of the Expropriation Act). It would appear that the Supreme Court of British Columbia would have jurisdiction in light of *Gloucester Properties Ltd.*

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[6] See *Salvation Army, Canada East* v. *Minister of Government Services* (1986) 34 L.C.R. 193 (Ont. C.A.)

In reviewing section 972(2) it is important to note that the exception to the exemption from IAS liability is restricted to zoning and rural land use bylaws. Section 972(2) will not avail a frustrated owner whose lands are designated for highways or a park, for example, under an official community plan. For a definitive discussion of the interplay between plans and zoning bylaws in the context of our discussion here, see *Hartel Holdings* v. *City of Calgary* (1984) 1 S.C.R. 337.

V. CONCLUSION

The title to this paper asks: Is City Hall getting nothing for something?

It suggests that IAS claims represent a monetary liability to local government without any real consideration (whether it be land or a real legal interest therein) flowing to the municipality.

If one subscribes to the view that citizens individually harmed by government works ought not to bear the price of progress, the developing law of compensable IAS will be welcomed.

For those who must advise government on the cost of public works, the budgeting process must now consider more ethereal claims by land owners of potentially indeterminate extent and quantum.