

# Compensation For The Taking Of Partial Interests In Canada

by Dr. Eric C. E. Todd

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The taking of only a part of an owner's interest in land can give rise to particular problems and challenges in determining the compensation payable. In Canada the courts, provincial land compensation boards and the various legislatures have developed or recognized a variety of techniques for valuing easements and rights of way, fee simple strips and small parcels taken from larger parcels, and the determination of compensation for severance and injurious affection damage.

## 1. Valuation of easements and rights of way

Sometimes the wording of the document acquiring or taking a partial interest may not define precisely what interest in the land is acquired or taken from the owner. For example it may not be clear whether the interest taken is a fee simple strip, or an easement or right of way, or some lesser right such as a mere licence. In an early British Columbia case, *Tarry v. West-Kootenay Power and Light Co.* ([1905] 1 W.L.R. 186), the owner, Tarry, had signed a document which stated that he

conferred on the company "the sole and exclusive and absolute possession" of a 300 foot wide strip for a power line across his land. He asked the Court to rectify the document on the ground that its wording appeared to grant the fee simple in the strip to the company whereas it had only been intended to confer "a right or licence to occupy the land for a specific purpose of maintaining a pole line thereon." Notwithstanding the words "the sole and exclusive and absolute possession" the court concluded that the deed granted only a right of way "leaving the (owner) such right of cultivation as may be consistent with the grant and such as will not interfere with (the company's) poles or pole line." In a more recent decision of the Alberta Court of Queen's Bench, *Redwater Water Disposal Co. Ltd. v. Shopsy* [1979] 18.L.C.R. 294, the compensation questions involved the taking of 1.5 acres for use as a salt water disposal well, not in fee simple but "for an indeterminate period of time". In such circumstances what residual rights remained in the owner? Finally, in

*NOVA v. Will Farms Ltd.* ([1981] 5.W.W.R. 617), the Alberta Court of Appeal had to consider the effect, if any, on the owner's residual rights in a pipeline right of way for which compensation had been paid in 1965, by the placing in 1977 of a second looping or twinning pipeline alongside the first. Had the company to pay the owner any compensation with regard to the second looping pipeline?

Having ascertained what residual rights have been left to the owner after the taking the second problem is how to value those rights, or the rights taken, for the purpose of determining the compensation payable. In general

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Canadian courts and land compensation boards have adopted a somewhat pragmatic, and certainly non-technical, approach in the valuation of residual rights. In short, they have either held that any residual value should be ignored and compensation paid on the basis of 100% of the market value as if the owner had given up the entire fee simple or they have, in effect, held that the acquiring authority should pay 50%, or some greater percentage, of the fee value.

In Ontario, in the leading case, *Union Gas Co. of Canada Ltd. v. O'Neill* ([1973] 5 L.C.R. 92), the Ontario Court of Appeal reduced an award of the Ontario Land Compensation Board from 100% to 50% of the fee value for an easement over agricultural lands which had potential for development as industrial property, and 50% now appears to be the general measure of compensation in that Province. One of the strangest cases must surely be *Ruddell v. Union Gas Co. Ltd.* ([1974] 6 L.C.R. 81), in which the Ontario Board awarded two dollars and eighty cents for a permanent easement. The easement was 7 inches in width and 3,340.59 feet in length or a total of .0447 acres. The owner's appraiser had established an estimated land value of \$125 per acre. On that basis the fee value of .0447 acres was five dollars and fifty nine cents and 50% of the fee value amounted to two dollars and eighty cents. The Board also fixed compensation for a temporary three month easement of 50 feet at \$8.38 and observed, "While the foregoing amounts would appear to be grossly inadequate there was no evidence upon which to fix a market value of the easements in any greater amount."

In *Cochin Pipe Lines Ltd. v. Rattray* ([1980] 22 L.C.R. 198; [1981] 1 W.W.R. 732), which was a case governed by the Canadian National Energy Board Act, the Alberta Court of Appeal denied that there was any authority in the case law for an alleged practice in Alberta of ignoring the value of residual rights. The Court asserted that the proper approach to the valuation of an easement was first to determine the market value of the full parcel from which the right of way is carved and then apply the per acre value to the acreage taken. From this amount must

be deducted the proven value of any residual rights remaining with the owners. Moreover, the Court denied that it was proper to value residual rights by arbitrarily discounting the market value by 50%. "The value of the residual interest in each case must be determined from the evidence". However, because the appellant company had failed to adduce evidence before the arbitrator as to the value of the residual interest the Court of Appeal declined to attempt to value it and held that compensation should be awarded on the basis of 100% of market value without any set-off.

In cases governed by the *Alberta Expropriation Act* (S.A. 1974 c. 27), it

should be noted that section 55 of that Act expressly provides.

"On the expropriation of an easement or right of way, the Board, in making its award for the value of the interest taken, may ignore the residual value to the owner."

This appears to be the only Canadian statutory provision concerning the treatment of residual rights for purposes of determining compensation for easements and rights of way.

In the case of temporary easements, for example to provide access in order to install pipe in a permanent right of way, it is usual to apply a capitalization factor to the market value of the acreage

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