Compensation For The Taking Of Partial Interests In Canada

by Dr. Eric C. E. Todd

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. Shopsky [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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affected by the temporary easement and thereby determine an annual "rent". For example, *Canadian Building Materials Ltd. v. Metro Toronto ([1972] 3 L.C.R. 28)*, involved a one year easement comprising 37,127 square feet of land which had a market value of $1.25 per square foot. A capitalization rate of 6% was applied to arrive at an award of $2,785.50. Similarly, in *Union Gas Co. of Canada v. O'Neill*, referred to above, easements for two years comprised 2.051 acres with a market value of $550 per acre or $1,130 which was capitalized at 7% to give an annual payment of $79.00 or a total of $158.

The question as to the value of any residual rights to the fee simple owner during the currency of the temporary easement does not appear to have been considered in the reported cases.

2. *Valuation of Fee-simple Strips and Small Parcels Taken From Larger Parcels*

A partial taking may comprise a fee simple strip, for example for the establishment or widening of a highway, or a small parcel from a large parcel, for example for a pipeline pumping station or a sewage lagoon. In such cases it may be impossible to establish the market value of the strip or small parcel by the usual appraisal techniques because necessary data, such as comparable sales information, is not available.

A number of years ago, faced with this problem with reference to strip takings, the Alberta Board of Public Utility Commissioners, which at that time had jurisdiction to determine compensation in such cases, applied a formula which, appropriately, became known as the "Blackstock formula", the late Mr. G. M. Blackstock Q.C. being the chairman of the Board. In retrospect it can be seen that the formula was based on two reasonable generalizations. 1. A prudent owner would not likely be willing to sell a strip or small portion of a larger holding for the same unit price as he would sell the total holding, and 2. In general, small parcels of land sell for more per unit than larger parcels.

In *Lamb v. Canadian Reserve Oil and Gas Ltd. ([1976] 10 L.C.R. 1; [1977] 1 S.C.R. 517)*, Canadian Supreme Court Justice Martland described the Blackstock formula as follows:

> "Recognizing that it was unfair to the owner, on the expropriation of a small tract of land from a larger area, to pay him only the average value per acre of the whole area, Blackstock adopted the practice of increasing the average value per acre of the small tract by 50%".

For example, if a 500 acre farm had a total land value of $500,000 or an average of $1,000 per acre and the taking involved a strip comprising six acres, then the compensation payable for that strip would be 6 x $1,000 plus 50% - i.e. $9,000. Depending on the circumstances of the particular case, there might also be additional compensation payable for severance damage and, or, injurious affection to the remaining acreage. The Blackstock formula was only concerned with the compensation for the land taken.

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The *Lamb* case involved the taking of 1.21 acres of a 320 parcel for a roadway and well site. The Saskatchewan Court of Appeal had rejected the application of the Blackstock formula. However, Justice Martland, speaking for the majority, agreed with the trial judge who had stated that where, as in the instant case, there were no comparable sales "and where a small area is taken out of a larger unit an appraiser should apply the Blackstock formula in order to arrive at a fair value of the land". Justice Blackstock added, "In these circumstances, which involved (the trial judge's) appraisal of the evidence before him, in my opinion his conclusion should not have been disturbed".

The decision allows the Blackstock formula to be applied where (1) a fee simple strip or small parcel is taken from a larger parcel and (2) there is no available evidence of comparable sales of strips or small parcels taken from larger parcels. However, the Alberta Court of Appeal in *Cochin Pipe Lines Ltd. v. Rattray*, referred to above, seems to have added a much wider restriction, in cases governed by the Canadian National Energy Board Act, namely that the formula is not to be used where there is evidence of the market value of the full parcel from which the strip or small parcel was taken. In such cases, the Court held, the per acre value of the whole parcel should be applied to the acreage taken with a set-off equal to the value of any residual interest if such a set-off is justified in the circumstances of the case. It is respectfully submitted that in this aspect the *Cochin* decision may be unsound unless, on the eivdence, it was in fact the case that the 5.07 acres of the two quarter sections of farm land would have sold for no more than the $300-$350 per acre which was established as the price range for sales of entire quarter sections.

A further complication in determining compensation for the taking of a fee simple strip or small parcel from a larger parcel arises out of legislative provisions such as section 53 of the Alberta Expropriation Act which provides,

> "Where only part of an owner's land is expropriated and as a result of the expropriation the value of the remaining land is increased, the owner shall nevertheless be entitled to the market value of the land expropriated."

The effect of this section was considered by the Alberta Court of Appeal in *Kerr v. Minister of Transportation ([1981] 22 L.C.R. 179)*, which was an appeal from an award of the Alberta Land Compensation Board, ([1980] 20 L.C.R. 67). A fee simple strip, comprising 7.71 acres was taken for a highway widening project from a parcel of 147 acres. The strip was approximately 200 feet at its widest and narrowed to a point at each end, being somewhat less than a half mile long. It lay along one boundary of the parcel and adjacent to the existing highway. On the evidence the Board held that the highest and best use of the strip would have been for ultimate development for highway commercial purposes and had

a current value of $4,000 per acre whereas the balance of the acreage had a current value of $1,000 per acre. The Board awarded compensation on the basis of $4,000 per acre and this was confirmed by the Court of Appeal which rejected two arguments advanced by the highway authority. The first argument was based on a previous decision of the Court of Appeal in *The Queen v. Bonaventure Sales Ltd. ([1980] 22 L.C.R. 164)*, which held that where a strip of land is taken for a roadway "the only method in arriving at the fair market value (is) to take a fair market value of the whole of each parcel and then attribute the per acre value to the acreage taken." However, in *Kerr* the Court said that that approach was correct only if the whole of the original parcel was composed of homogeneous acres which was not the case in *Kerr*. The Court observed that acceptance of the authority's argument would have led to the result that it would have obtained highway commercial land, worth $4,000 per acre, at a value diluted by arriving at an overall acreage valuation, including the acreage worth only $1,000 per acre. The second argument was that in fact only the less expensive acreage had been taken because, after the taking of the strip, the owner still had the same depth of highway commercial frontage as before the taking because

> "as the highway is widened the (highway commercial) block (of land) simply moves back and occupies (the less valuable) land which before the widening was (further away) from the highway; the acreage of highway commercial property remains constant. Another way to illustrate the concept is that the strip of land expropriated for the highway is taken from the front of the block and added to the block at the back thus converting the land at the back which was formerly recreational property into highway commercial property."

The Court's short answer to this argument was that the situation was expressly covered by section 53 of the Alberta Expropriation Act. Even though as a result of the highway widening some of the remaining land had increased in value, "the section expressly provides that the owner should nevertheless be entitled to the market value of the land expropriated."

3. *Methods of Determining Compensation for Severance and Injurious Affection Damage*

It is a well established principle of the law of compensation that the owner is entitled to compensation not only for the value of the portion of his land which is taken but also for any decrease in the value of the portion remaining which results from the taking itself or from the use of the portion taken. Such decrease in value is what is meant by the expression "injurious affection".

Injurious affection may arise in either or both of two ways. First, it may result from the mere fact of the taking and whether or not the portion taken is put to any particular use. For example, the partial taking may result in loss or diminution of access from the remaining property to an adjacent highway or it may have the effect of making the remaining parcel non-conforming as to municipal minimum building lot size requirements. Another common example arises where there are certain fixed costs of a farming operation comprising a number of acres. If some acreage is taken the fixed costs will have to be carried by the remaining acreage with a resultant decrease in profitability, and therefore in value, of that acreage. Both examples are a type of injurious affection often referred to as "severance damage" because it is damage, or loss of value, arising from the taking and severing of a portion of land from a larger parcel. Secondly, injurious affection may be "pure injurious affection" as distinct from severance damage. Pure injurious affection occurs as a result of the actual or intended use to which the expropriated portion is put. For example, the remaining land will lose at least some of its value as a residential subdivision if the portion of land taken is used for a sewage lagoon or sanitary land fill.

There are two methods of determining compensation for a partial taking and resultant injurious affection. There are (1) the summation method, which involves the addition of two calcula-

tions and (2) the before and after method which involves the subtraction of one calculation from another.

The summation method requires the determination of first the value of the land taken and second the decrease in the value of the remaining land resulting from injurious affection. The product of these two amounts is the compensation payable.

The before and after method requires the determination of first the value of the entire property before the taking and second the value of the remaining land after the taking. Then the deduction of the "after amount" from the "before amount" gives the amount of the compensation payable.

It has been noted elsewhere, (Todd, **The Law of Expropriation and Compensation in Canada** (1976) , that the before and after method is deceptive in its apparent and disarming simplicity. Its use works to the advantage of the expropriating authority in either of two situations. First, in many cases there may be no difference in market value between the before and after conditions. In such an event, if the method is applied, an owner will receive no compensation even though he owns less property after the taking than he did before the taking. Secondly, compensation otherwise payable for the value of land taken and for injurious affection to the remaining land may be reduced, or even eliminated entirely, as a result of any increment in value to the remaining land arising from benefits accruing from public works carried out by the expropriating authority. In both situations the before and after method may produce logical results but results which may not be either psycholoigcally acceptable to the property owner or politically acceptable to elected officials.

Until a few years ago, with the possible exception of Alberta, in most jurisdictions in Canada the before and after method was the one most commonly used in determining compensation in partial taking cases. Today, primarily as a result of statutory provisions, the position is reversed and it is the summation method which is required to be used.

The Federal Expropriation Act and the expropriation statutes of Ontario, New Brunswick, Nova Scotia, Manitoba and Alberta all provide expressly for the use of the summation method and thereby ensure that in every partial taking the owner will always receive compensation in an amount no less than the value of the expropriated portion. Four Provinces, Manitoba, Ontario, Nova Scotia and New Brunswick (but not Alberta) also provide expressly for the discretionary use of the before and after method, but only where the part expropriated is of a size or shape for which there is no general demand or market.

". . . that the before and after method is deceptive in its apparent and disarming simplicity."

For example, Section 14(3) of the Ontario Expropriation Act which is comparable to provisions in the expropriation statutes of Manitoba, Nova Scotia and New Brunswick states

> "Where only a part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking."

If, for whatever reason, the before and after method cannot be used appraisers appear to adopt two other ways of adapting the summation method where either the portion of land taken has no real market value in the conventional sense of the term or injurious affection to the remaining land cannot be practically determined by other means.

Non-marketable partial takings

In cases of small strip-takings, particularly from residential lots and where there is no injurious affection to the remaining land, compensation is frequently based on the square foot value of the lot determined from an analysis of sales of comparable lots. This method is currently used by the City of Vancouver and also by the municipality of Metropolitan Toronto and is illustrated by the decision of the Ontario Land Compensation Board in *Stewart v. Metro. Toronto ([1980] 21 L.C.R. 365).* In this case a strip comprising 257 square feet was taken from the front of a 50 x 120 foot lot improved with a single family bungalow. The lot and house complied with municipal set back and lot size requirements both before and after the taking. After the taking of the 5½ to 7 feet strip the residence was set back from the widened highway some 18 feet. The appraiser who was called by the municipality testified that he had not used the before and after method because, in his experience, the case of single family dwellings there was usually no measurable loss in market value resulting from such a strip taking unless it brought the road into extreme proximity to the house or the lot became non-conforming. (For a case involving a taking which rendered the remaining parcel non-conforming see *McQuarrie v. County of York ([1970] 1 L.C.R. 279).* Accordingly, it was stated that the practice of Metro. is to compensate on the basis of the square foot land value plus the cost of replacing any landscaping or asphalt and, in the case of badly foreshortened front yards, "something extra for proximity damage."

Injurious affection

In an increasing number of cases compensation for injurious affection is measured in terms of a percentage of the market value of the remaining lands before the taking, i.e.: as a constituent part of the original whole parcel or, in some circumstances, as a percentage of the value of the lands taken.

In *Masnyk v. County of Lethbridge ([1976] 11 L.C.R. 356),* the Alberta Land Compensation Board acknowledged that the construction of a sewage lagoon on the portion taken would create a "stigma (and) . . . . a depressing effect on the market value of the remaining lands". The Board accepted the opinion of an appraisal witness that the depressing effect would amount to five to ten percent and awarded seven

per cent of the market value of the remaining acreage, this percentage being "arbitrarily selected by the best evidence possible under the circumstances". In *Western Estates Ltd. v. City of Calgary ([1978] 15 L.C.R. 329)*, the Alberta Board awarded 17% of the market value of the remaining land for injurious affection because the land no longer had access to the Trans Canada Highway via a service road and its reduced exposure eliminated the possiblity of future commercial development.

One type of injurious affection which is worth special mention concerns fixed costs and usually arises in partial takings of agricultural lands. In Alberta claims with respect to fixed costs are usually dealt with as "incidental damages" which is a specific item in Section 54 of the Alberta Expropriation Act dealing with partial takings. Alternatively, such claims may be regarded as a type of disturbance damage. In any event compensation for fixed costs usually arises,

> "Where the evidence establishes that it is not feasible to replace the portion of land taken (and) the result is that the remaining lands must bear the share of fixed costs of the farming operation which would otherwise be attributable to the lands so taken. The fixed costs relate to the cost of machinery and equipment required to operate the farm and costs of farm buildings and other similar improvements. In each case where a claim of this nature is applicable careful regard must be had to the particular type of farming operation begin carried on and the nature of the capital assets required therefor. (*Falcon Industrial Properties Ltd. v. Village of Crossfield ([1979] 18 L.C.R. 257, 265 [Alta. L.C.B.]).*

In *Falcon* the fixed costs, on land used for raising and breeding thoroughbred horses, were held to be minimal, namely $7.00 per acre. Applied to the partial taking of 31 acres this amounted to a loss of $217.00 per annum. The Alberta Land Compensation Board allowed a 10 year period for restructuring or altering the fixed costs of operation and a capitalization rate of 8% was applied to give a present value for such loss of $1,460.

In *Holt v. Town of Ponoka ([1980] 21 L.C.R. 160, 167)*, the Alberta Board compensated for fixed costs of $30 per acre applied to the cultivated portion of the *remaining* land rather than to the expropriated portion of cultivated land which does not appear to be a rational approach.

4. *Set-off of General and Special Benefits*

If the before and after method is used to determine compensation for a partial taking, any general or special benefits or advantages accruing to the remaining land as a result of the works for which the partial taking was required automatically will be taken into account. As a consequence, this could result in the owner receiving little or no compensation for the land taken. On the other hand, if the summation method is used to determine compensation then the set-off of benefits or advantages, whether general or special, can only reduce or eliminate any claim for injurious affection damages.

Whether benefits can be set-off against compensation otherwise payable and, if so, whether such benefits include general, as well as special, benefits are questions which can only be determined by an examination and legal interpretation of any relevant legislation. In the absence of legislation it may be argued that no benefits can be set off or, at the very most, only special benefits.

Section 23 of the Ontario Expropriations Act provides that,

> "The value of any advantage to the land or remaining land of an owner derived from any work for which land was expropriated or by which land was injuriously affected shall be set off only against the amount of the damages for injurious affection to the owner's land or remaining lands."

This section makes it clear that a benefit to the remaining land can only be set off against a claim for injurious affection to that remaining land and cannot be set off against the claim for compensation for the value of the expropriated land itself. However, the section does not state whether the phrase "any advantage" includes a general advantage or benefit, i.e.: one which is enjoyed not only by the remaining land but also by other lands in the neighbourhood from which there have not been partial takings.

In *Starr v. Metro Toronto ([1969] 1 L.C.R. 40)*, an Ontario County Court Judge, sitting as an arbitrator, held that only special advantages or benefits to the remaining land could be set off and not benefits shared or enjoyed by other properties in the neighbourhood. Accordingly, although the public works constructed on the portion taken involved measures to avoid future flooding and also the installation of a sanitary sewer, all of which undoubtedly benefited the owner's remaining land, it was held that these were benefits which accrued to all parcels adjoining the river and such general benefits should not be set off against the claim for injurious affection by an owner from whom a portion of land had been taken.