THE TAKING ISSUE, COMPENSATION AND ENVIRONMENTAL CONTROL

by

George Herman Eustace Manning

B.A., University of Manitoba, 1973

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

in the Department

of

Economics

SIMON FRASER UNIVERSITY

May 1976

APPROVAL

Name: George Herman Eustace Manning

Degree: Master of Arts

Title of Thesis: The Taking Issue, Compensation and Environmental Control

Examining Committee:

Chairman: Dennis R. Maki

Jack L. Knetsch
Senior Supervisor

Thomas E. Borcherding

William E. Rees
Assistant Professor
The University of British Columbia

Date Approved: May 26, 1976

PARTIAL COPYRIGHT LICENSE

I hereby grant to Simon Fraser University the right to lend my thesis or dissertation (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this thesis for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Title of Thesis/Dissertation:

The Taking Issue, Compensation, and Environmental Control

Author:

(signature)

GEORGE MANNING

(name)

26 May 1976

(date)

ABSTRACT

Planning for environmental quality control in the interest of public health and amenity has the effect of imposing obligations and restrictions upon owners of land. They prohibit or restrict the rights of users and in some cases impose monetary costs or compel land owners to expend money on altering their property. It is usually the case that constitutional or statutory provisions require that if the desired ends are achieved by means of a 'taking' compensation is due. If they are achieved through regulation compensation is not due. The question then becomes one of deciding where to draw the line between constitutional regulation and the invasion of the rights of private property.

In attempting to answer this question the problem was first examined from the standpoint of externalities and a general discussion of property rights with the view of ascertaining what rules seem to favour one right over another. But since the problem is usually expressed in legal terms the next step involved a review of judicial decisions in Canada, the United States and the United Kingdom in order to gain some insight into how the taking issue has been handled under different jurisdictions. Also it was thought that a summary of major views of academic scholars in this area would pave the way for developing a more acceptable theoretical rationale.

The results have indicated that no consistent rules have been devised to indicate when regulation ends and a taking begins. They have been characterized as being liberally salted with paradox. In many court decisions judges have accepted the so-called general rule that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking without specifying how far is too far. Another approach has been to rely on the notion that prohibition of nuisance-like activities do not qualify as restrictions on property, and therefore are not subject to compensation.

ACKNOWLEDGEMENTS

I would like to thank the members of my supervisory committee, Professors Jack L. Knetsch and Thomas Borcherding. Thanks are also due to the B.C. Institute of Economic Policy Analysis for providing the funds necessary to undertake this research through a grant to Simon Fraser University.

I would also like to thank Mary Roberts for invaluable Library assistance and Donna Popovic for expert typing and editorial assistance.

G.H.E. Manning

THE TAKING ISSUE, COMPENSATION AND ENVIRONMENTAL CONTROL

Table of Contents

CHAPTER I

Introduction

Many environmental problems, particularly those referred to as spill-over effects or externalities occur because a large number of people are placing conflicting demands on non-exclusive resources such as air, water, scenic beauty, peace and quiet. Improvement in the quality of the environment, therefore, requires a change in the behaviour of the agents producing the externalities. Though exploitation of natural resources and degradation of the environment are by no means the only instances of externalities, they are common ones of growing environmental concern which continue to pose new and difficult legal questions requiring the resolution of conflicting economic and human values. As a result increasing efforts are being made to control problems of environmental abuse originating from undesirable uses of land and other resources.

The past decade has witnessed the emergence of many environmental groups who are putting increased pressure on governments to institute measures to halt pollution in all its forms. Experience has shown that the problem is difficult to say the least, for though pollution is often viewed as a distinction between destructive and constructive uses of a resource, between guilty and innocent parties, the legal and ethical characteristics of the distinction are controversial. For example, is a pulp processor destructive because of what he puts into a river, or because of what other upstream users are putting in at the same time; or because of what a downstream user is taking out? The conflict rests in no small part on the problem of deciding upon who has the legal right to the use

of the resource in question. Coase[1] has argued in favour of accepting any status quo pollution and suggests that it is ethically and allocatively equivalent whether victims offer payments to polluters to stop or the state forces polluters to compensate the victims for the right to continue. The composition of output is unaffected (except for income effects) by the manner in which the law assigns liability for damages.

Increasing efforts are being directed at preserving and improving environmental quality and to prevent pollution problems connected to the use of land. It is the aim of this thesis to examine the extent to which regulatory controls by government conflicts with statutory requirements for compensation to losses in property values. Property values will move up or down in response to changes in the economic and social environment of the area in which the property is situated. The question at issue then becomes one of deciding to what extent individuals owning property should be protected from losses in value resulting from projects undertaken for the benefit of the public. If part of an individuals property is taken the question of compensation is easily settled but in cases where no land is taken the problem is much more complex. Some commentators have said that an owner's claim to compensation for "injurious affection" is said to be "...really a question of tort law and the interaction of the nuisance concept with the defences of statutory authority and the immunity of the crown."[2]

---

1. Ronald Coase, "The Problem of Social Cost," 3 Journal of Law and Economics (1960), 1-44.

2. Report of the Ontario Law Reform Commission on the basis for Compensation on Expropriation, 1964, p. 46.

Government may require individuals to surrender their land to the state or limit the uses to which private property may be put without surrender of ownership or possession. Owners of property are being forced increasingly to comply with several different requirements regarding their property without compensation. The underlying reason seems to be that compliance is essential to the interests of the community and accordingly private owners should be required to comply even at a cost to themselves. Since the restrictions on the use of property, whether or not they carry a right to compensation are usually in the public interest the essence of the compensation problem thus centers around the question: at which point does the public interest become such that a private individual ought to comply at his own expense with a restriction or requirement designed to support the public interest. This question is becoming one of growing concern since noncompensatory obligations are being added to the list of requirements which are considered to be essential to the well-being of the community.

The protection of property rights through the common law in British Columbia and other common law jurisdictions will be reviewed. An examination of court decisions as well as administrative decisions that have emerged to establish better current legal positions on the taking issue will also be undertaken. In addition, policy options related to environmental control and their implications for the explicit and implicit assignment of property rights and resultant responsibilities will also be examined.

Chapter II will present a general discussion of property rights and review the legal structure which exists for the protection of these rights

through the common law. The types of criteria used by the courts in making their decisions in connection with tort law and pollution will be thoroughly discussed.

Chapter III will present an overview of the constitutional issues regarding the rights and responsibilities of the Federal and Provincial governments in Canada for protecting the environment. In particular, the taking issue as it relates to British Columbia will be discussed and reference will also be made to how the issue is being handled in the United States and the United Kingdom.

In Chapter IV an attempt will be made to examine some of the court decisions in British Columbia and how they fit in with statutory requirements for compensation.

Chapter V presents a summary of the views of some leading economics and legal scholars on the question of compensation and how one decides where to draw the line between actions by government which require compensation and those that do not.

Finally, Chapter VI presents a summary of how the taking issue has been handled by various jurisdictions and highlights some of the judicial reasoning which seemed to be implicit in many crucial court decisions.

CHAPTER II

Property Rights, Pollution and The Common Law

Property rights may be defined as the behavioural relations among individuals that arise from the existence of things and pertain to their use; and the system of property rights assignments is that set of economic and social relations defining the position of interacting individuals with respect to the utilization of scarce resources.[1] From this definition it should be clear that such rights do not refer solely to real property. According to Demsetz[2] property rights convey the right to harm oneself or others; they specify how persons may be benefited or harmed and, therefore, who must compensate whom to modify the actions taken by others. The recognition of this, as he notes, leads easily to the close distinction between property rights and externalities.

Whenever externalities exist there is an indication that some costs and benefits are not being taken into account by users of resources. If the exchange of property rights is allowed this increases the degree to which internalization takes place; and as was pointed out in Chapter I, with zero transactions costs, the output that results is efficient and independent of how ownership is initially assigned. At times, however, the exchange of property rights may be prohibitive because of high transactions costs.

---

1. Svetozar Pejovich, "Towards an Economic Theory of the Creation and Specification of Property Rights," in The Economics of Legal Relationships, ed. by Henry Mann, (West, St. Paul), pp. 37-52.

2. Harold Demsetz, "Toward a Theory of Property Rights," American Economic Review, Papers and Proceedings, vol. 57 (May 1967), 347.

It follows, therefore, that the creation of property rights assignments is a powerful and perhaps a necessary condition for more efficient allocation and use of resources.[3]

The right of ownership in an asset consists of a bundle of rights which include the right to use it, to change its form and substance, and to transfer all rights in the asset.[4] However, even though this definition suggests that the right of ownership is exclusive, ownership is not, and can hardly be expected to be an unrestricted right. The right of ownership is exclusive only in the sense that it is limited by the use restrictions explicitly stated by the legal system and does not exist independently of the protections and responsibilities linked with such a right by law. Those persons to whom rights are assigned must respect the rights of others. If some of the uses to which property is being put conflict with the use others are making of their private property, it follows that the private property system is being violated. To say that an individual possesses private property rights means that no one else has the right to make the choice of uses of that resource, and any selection of use must not affect the physical attributes of another person's property.

In a similar manner, the right to exclude others from the free access to a resource is, in effect, to specify property rights in that good. This is the basic distinction between private and public (or common) property

---

3. Supra note 1.

4. E. Furubotn and Svetozar Pejovich, "Property Rights and Economic Theory: A Survey of Recent Literature," in The Economics of Legal Relationships, ed., by Henry Manne, (West, St. Paul, 1975), pp. 53-65.

ownership. Public property ownership must be borne "in common" by all members of the community and the nominal owner (in Canada - the Crown), has the right to establish rules pertaining to the use of that resource. Where common property is available for use on a no-rule basis the result tends to be that it is over-used and abused relative to private property. To put the matter differently, when property rights are undefined those who wish to use the resources in ways that deteriorate them invariably triumph over those who wish to use them in ways that do not deteriorate them.

Common Law Rights and The Environment

Within the area of pollution control the individual, to some extent, has been able to protect his own interests by legal action in the ordinary courts. The common law (that body of legal principles which evolved from decisions made by judges of civil courts over hundreds of years) has recognized certain rights which are not to be harmed through the polluting activities of others. The means by which the courts protected these rights are damages (where the defendant is required to pay the plaintiff monetary compensation for the harm inflicted), and injunctions (whereby the "wrong-doer" is ordered to refrain from his polluting activity). The courts must be satisfied that the person seeking the remedy does in fact possess some legally recognized right. Historically, common law remedies were developed to protect individuals against damages to their persons or property and persons with interests in land - whether as landowners or tenants - may use the common law to prevent others from harming or interfering with his ordinary and peaceful enjoyment of that land.

Riparian Rights and Remedies

The owner of land adjoining a river, stream or lake has certain rights respecting the water therein whether or not he owns the bed.[5] These rights arise from his ownership of the bank and from the Latin word for bank, ripa, they derive their name of riparian rights.[6]

Since water has been classified as something owned by the whole community as opposed to something owned by one which could be appropriated by one person to the exclusion of others, the theory is illustrated in water law by the principle that no one owns the water, but only a usufructuary right exists.[7] The rights to use water in a stream, river or lake stem from a person's property interests in, or possession of the land bordering on the water. According to traditional English doctrine, an interest gives the individual a right to water which has undergone no sensible diminution in quality or quantity of its "natural flow"[8] - that is, unpolluted. As a result, riparian owners have maintained actions for pollution against various causes including mines,[9] Sawdust slabs and mill refuse,[10] dumped clay,[11]

---

5. Byron v. Stimpson (1878), N.B.R. 697; Attril v. Platt (1883); 10 S.C.R. 425; Municipality of Queens County v. Cooper (1946), S.C.R. 584.

6. Byron v. Stimpson (1878), N.B.R. 697.

7. P.S. Elder, "Environmental Protection Through the Common Law," 12 Western Ontario Law Review (1973), 107-171.

8. John Young & Co., v. Bankier Distillery Co. (1893), A.C. 691.

9. Nepisiquit Real Estate and Fishing Co. v. Canadian Iron Corporation, (1913) 42 N.B.R. 387; Salvas v. Bell (1927) 4 D.L.R. 1099.

10. McKie v. K.V.P. Co. Ltd. (1948) O.R. 398, affirmed (1948) O.W.N. 812, affirmed (1949) 4 D.L.R. 497.

11. Fisher & Son v. Doolittle & Wilcox Ltd. (1912) 22 O.W.R. 445.

sewage systems,[12] sewage plants[13] and tanneries.[14] Damages have been awarded or injunctions granted for interference with the plaintiff's source of drinking water or to his water stock,[15] or with his ability to run a paper mill because the water was blocked by slabs,[16] and for detrimentally affecting fishing[17] or affecting the quality of a lower riparian's agricultural land.[18]

While the alteration in the character of the water must be appreciable or sensible to result in a cause of action to a riparian owner, it need not amount to pollution in the ordinary sense of the word. Thus if the operations of an upper riparian make soft water hard, for example, by adding hard water from a mine, even if it is pure, this would be actionable at the suit of a lower riparian owner.[19] A claim that the comparative importance of an industry can confer a right to pollute[20] has also been rejected and again illustrated

---

12. Clare v. City of Edmonton (1914) 26 W.L.R. 678, Batt v. City of Oshawa (1926) 59 O.L.R. 520; Groat v. City of Edmonton (1928) S.C.R. 522.

13. Burgess v. City of Woodstock (1955) O.R. 814; Stephens v. Richmond Hill (1956), O.R. 88; Howrich v. Holden Village (1960) 32 N.W.R. 491.

14. Weber v. Township of Berlin (1904) 8 O.L.R. 302.

15. City of St. John v. Barker (1906) 3 N.B. Eq. 358; Clare v. City of Edmonton (1914) 26 W.L.R. 678; Burgess v. City of Woodstock (1955) O.R. 814.

16. Austin v. Snyder (1861), 21 U.C.Q.B. 299; Mitchell v. Barry (1867) 26 U.C.Q.B. 416.

17. Nepisiquit Real Estate and Fishing Co. v. Canadian Iron Corporation (1913) 42 N.B.R. 387; McKie v. K.V.P. Co. Ltd. (1948) O.R. 398; affirmed (1948) O.W.N. 812; affirmed (1949) 4 D.L.R. 497 (S.C.C.)

18. Weber v. Township of Berlin (1904) 8 O.L.R. 302; Salvas v. Bell (1927) 4 D.L.R. 1099.

19. John Young & Co. v. Bankier Distillery Co. (1893) A.C. 691; cited in Crowther v. Town of Cobourg (1912) 1 D.L.R. 40.

20. Ibid., p. 698.

more than fifty years later in McKie v. K.V.P. Co. Ltd.[21] where the judge stated:

> If I were to consider and give effect to an argument based on the defendant's economic position in the community, or its financial interests, I would in effect be giving to it a veritable power of expropriation of the common law rights without compensation.[22]

Riparian owners on a natural stream have one of a "bundle of rights" attached to the ownership of the land. Anyone who pollutes the water infringes upon the right of a lower riparian owner and becomes liable for all damages to the riparian's land.[23] However, it should be pointed out that since the right is only usufructuary, a riparian is precluded from claiming damages for interference with any property right in the water.[24] Nevertheless, a riparian owner need not suffer actual damage to entitle him to an action for pollution of the water for his right to receive the water in its natural state is a property right appurtenant to his land.[25] If there is no proof of damage, then an injunction is usually issued as long as the riparian owner establishes that the water has been polluted.[26] Otherwise the offending party, by continuously discharging a substantial amount of effluent into a

---

21. McKie v. K.V.P. Co. (1948) O.R. 398 (H.C.), (1948), 3 D.L.R. 201, affirmed (1949) 1 D.L.R. 39 (C.A.), affirmed (1949) S.C.R. 698.

22. [1948] 3 D.L.R. 214.

23. Supra note 19.

24. John P.S. McLaren, "The Law of Torts and Pollution" in The Law Society of Upper Canada: Recent Developments in the Law of Torts, Special Lectures (1973) 309-329.

25. Mitchell v. Barry (1867) 26 U.C.Q.B. 416.

26. City of St. John v. Barker (1906) 3 N.B. Eq. 358; Crowther v. Town of Cobourg (1912) 1 D.L.R. 40; Supra note 10.

stream for twenty years may acquire a prescriptive right[27] to do so.

Perhaps the two most important decisions relating to riparians' cause of action regarding the quality of water are McKie v. K.V.P. Co. Ltd.[28] and Stephens v. Richmond Hill.[29] In the former case the court granted an injunction against the continuing emission of pollutants by the defendant's paper mill into the Spanish River and the lack of necessity for proving damage to the plaintiff's use and enjoyment of the water in its natural state was stressed. In addition, it was held that it was unnecessary and irrelevant to show the importance of the defendant's business or its economic necessity to the community. The latter case involving a municipality resulted in an injunction being granted against the operation of a sewage plant which was contaminating water running through the plaintiff's lands.

Nuisance Actions and The Environmental Problem

1. Private Nuisance

Non-riparian owners are also protected from the use of water that may damage their lives or property by flooding or otherwise but they have no claim at common law against another for polluting a stream unless the pollution creates a nuisance. The objective of private nuisance is the protection of the individual in the use and enjoyment of his land from damage, injury or inconvenience caused by operations carried out upon the

---

27. Ibid., see also Hunter v. Richards (1912) 26 O.L.R. 458; affirmed (1913) 28 O.L.R. 267.

28. Supra note 10.

29. Stephens v. Richmond Hill (1956) O.R. 88.

lands of others or in public places. Its primary attraction is that since it is designed to protect individual property rights, it is no defence that others are suffering the same consequences.

In the case of McKie v. K.V.P. it was illustrated that if the Plaintiff has a property right, then regardless of the effect of the pollution upon others, once interference with his right is established, he is entitled to a remedy. Proof of special damage is not necessary.[30] In the event that the nuisance is of a continuing nature, the crucial issue is whether the conditions under which the plaintiff is forced to live as a result of the defendant's pollutants are beyond the bound of reasonable tolerance. Similarly, in deciding whether there is an unreasonable interference with the plaintiff's interest in the use and enjoyment of his land, the court is required to determine whether the defendant has been engaging in a "reasonable user" of land. This enables the court to "strike a tolerable balance between competing claims of landowners, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the others."[31] In theory, at least, this involves consideration of both the seriousness of the alleged harm by the plaintiff and the utility of the defendant's conduct. The court may weigh a variety of factual elements such as the sensitivity of the plaintiff or his operation, the character of the locality, and the duration of the interference.

---

30. John P.S. McLaren, "The Common Law Nuisance Actions and The Environmental Battle-Well-Tempered Swords or Broken Reeds?", in 10 Osgood Hall Law Journal (1972), p. 537.

31. John Fleming, The Law of Torts (3d., 1965), p. 373, quoted in Elder, p. 117.

The importance of these considerations should not be understated for if property damage is the issue, the court will refuse to consider the nature of the locality. However, if material injury has occurred, the defendant's use of his property is, by definition, unreasonable, even though the neighbourhood is predominantly a manufacturing district,[32] and even though the defendant has used all possible care to avoid the damage.[33] The defendant does not have a right to carry on an activity which results in damage to another. Only when a plaintiff complains of substantial interference with emjoyment or personal discomfort is the type of district relevant. The court must be satisfied, in these circumstances that the inconvenience is more than "fanciful" or "fastidiousness."[34] It must be an inconvenience that materially interferes with the ordinary comfort physically of human existence, not according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English [and Canadian] people.[35] In deciding this issue the courts consider the type of neighbourhood because what would be a nuisance in a quiet residential neighbourhood is not necessarily so in a factory or commercial district.[36]

2. Public Nuisance

Where the nuisance interferes with a public right, the plaintiff is not entitled to launch his claim in the public interest, for example, to protect

---

32. St. Helen's Smelting Co. v. Tipping (1865) 11 H.L.C. 642; 11 E.R. 1483.

33. Imperial Gas Co. v. Broadbent (1859), 7 H.L.C. 600; 11 E.R. 239.

34. Walter v. Selfe (1851), 4 De E & Sm 315; 64 E.R. 849, pp. 322 and 85; cited by P.S. Eder supra note 7.

35. Supra note 7.

36. Supra note 32.

his community from pollution. If the vindication of the public interest is at issue the only representative of that interest whom the law will recognize is the Provincial or Federal Attorney-General, as the case may be. Only he has the power to launch a criminal prosecution or bring a civil action for an injunction.[37]

In addition to its limitation as an action for the citizen to protect the public interest, public nuisance has two distinct shortcomings as a vehicle for protecting individual rights. Firstly the plaintiff is required to show that he has suffered "special damage" - damage which is different from that suffered or anticipated by other members of the public. In practice it would seem that the plaintiff has to be careful not to supply any evidence which would indicate that others are suffering similar harm, neither can he convert his specific problem into a community problem. In a recent decision involving Hickey v. Electric Reduction Co. of Canada[38] the court dismissed the action of a group of commercial fishermen who claimed that they had suffered loss in revenue resulting from the pollution of Placentia Bay by the defendant's plant. Since the right to fish is a public right, it was left to the plaintiff to show that the harm suffered was different in kind, rather than degree from that suffered by the public at large. But since the plaintiff was only exercising a common public right to fish, it could have no greater rights than any other member of the public.

---

37. Oak Bay v. Gardner (1914) 19 B.C.R. 391 (C.A.; 6 W.W.R., 1023, 17 D.L.R. 805; Turtle v. Toronto (1924), 56 O.L.R. 252 (C.A.).

38. (1972) 21 D.L.R. (3d) 368.

The second limitation is that if a plaintiff is a member of a special group which suffers peculiar loss, he may lose his case because that group comprises a large part of the community, and for practical purposes the public equals the special class. The decision in the above case also took into account that the plaintiff, like most other fishermen in the area was engaged in commercial fishing and therefore the loss was not unique.

Remedies

The same two remedies available to riparian owners - injunctions and damages - are also available to a plaintiff in nuisance actions. If the suit relates to past, non-recurring interference, damages are available exclusively while in the case of a continuing nuisance both are usually sought. In either case, however, damages will cover the harm suffered until the time of trial. Only if some permanent damage has been done to land will the damages contain a prospective element to cover the future impact of the depreciated value of the land.

Where the suit is launched for an environmental purpose, the granting of an injunction is usually the main objective. If a perpetual prohibitory injunction is granted this means that direct pressure is brought upon the offender to seek ways of stopping the pollution, less his enterprise be curtailed. Damages are not as compelling unless complementary to injunctive relief because they may not be sizeable enough to cause the polluter to change his ways, and if that is the case, it may be considered by him as a form of judicial licence.[39]

---

39. Rombough v. Crestbrook Timber Ltd. (1966), 55 W.W.R. 577 (B.C.C.A.); 57 D.L.R. (2d.) 49.

Criteria Used by The Courts

The tradition of granting injunctive relief follows the English heritage of the nineteenth century which stressed the primacy of individual rights. Injunctive relief is, however, discretionary and it is left to the courts to substitute damages as a form of prospective compensation. The main question which arises in the environmental context is how broad and flexible is this distinction. In Canada, two strains of authority exist, one following the English heritage and the other following the dominant doctrine in the United States of "comparative injury" or "balancing the equities".

The individualistic approach of the English judges has gained considerable support from Canadian judges. In Canada Paper Co. v. Brown,[40] Idington, J., in deciding whether to grant an injunction, appeared to have no doubts regarding the primacy of the individual's rights to enjoy his land free from unwarranted interference. This was made clear in the following passage:

> ...As long as we keep in view the essential merits of the remedy in the way of protecting the right of property and preventing them from being invaded by mere autocratic assertions of what will be more conducive to the prosperity of the local community by disregarding such rights, we will not go far astray in taking as our guide the reasoning of any jurisprudence which recognizes the identical aim of protecting people in their rights of property when employing the remedy of perpetual injunction.[41]

In a more recent decision by Stewart J. of the Ontario High Court in Stephens v. Richmond Hill[42] it was observed that:

---

40. (1922), 63 S.C.R. 243; 66 D.L.R. 287.

41. Ibid., 291.

42. (1955) O.R. 806 (H.C.)

> It is the duty of the state (and of statesmen) to seek the greatest happiness of the greatest number. To this end, all civilized nations have entrusted much individual independence to their Governments. But be it ever remembered that no one is above the law. Neither those who govern our affairs, their appointed advisors, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual, save within the law. It is for the Government to protect the general welfare by wise and benevolent enactment. It is for me, or so I think, to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement.[43]

The above decisions rely on the authority of Shelfer v. London Electric Lighting Co.[44] where the following general principles seem to have been laid down to decide on what grounds injunctive relief ought to be refused:

(1) If the injury to the plaintiff's legal right is small,

(2) And is one which is capable of being estimated in money,

(3) And is one which can be adequately compensated by small money payment,

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction.

If these conditions are satisfied, then damages may be substituted for an injunction with the onus of establishing the case for damages resting on the defendant.[45] Though the Shelfer case has been accepted as law in Canada, it is still not clear whether the principles outlined above are to be applied conjunctively or disjunctively. Duff, J. in a statement denying that economic considerations were irrelevant, applied the conjunctive test but

---

43. Ibid., p. 813.

44. (1895) 1 Ch. 287 cited in McLaren, supra note 30.

45. McKinnon Industries Ltd. v. Walker (1951) 3 D.L.R., 577.

in a later decision which relied on the same authority, Macdonnell, J.A., in Bottom v. Ontario Leaf Tobacco Co.,[46] claimed that the Shelfer rules were being applied more liberally in Canada than in England. Thus although the plaintiff sought an injunction to restrain the operations of the defendant's tobacco factory the fumes from which were causing inconvenience to him and his wife, damages were substituted. The rationale used by Macdonnell, J.A., is clearly stated below:

> ...The defendant's factory, employing it is said some two hundred men, has been equipped with every known device for preventing the escape of fumes and smells; it is impossible to avoid the discomfort caused to the plaintiff without stopping the operation of the factory altogether; to grant an injunction prohibiting the present nuisance would mean the closing of the plant, resulting not merely in loss to the defendant but in unemployment disastrous to a small community.[47]

Another strain of Canadian cases indicate the use of a benefit-cost comparison in deciding whether or not to grant an injunction. The most famous of these cases were decided by Middleton, J., while at the Ontario High Court and is the authority followed in the Bottom decision. In Chadwick v. City of Toronto,[48] he awarded damages rather than an injunction against the city on the rather peculiar ground that although its noisy electric pumps were not covered by statutory authority, and although the earlier pumps had not been a nuisance, the pumping was necessary and the nuisance could not be avoided if the use of electric pumps were to continue. Also in Black v.

---

46. (1935) O.R. 205 (C.A.); (1935) 2 D.L.R. 699.

47. Ibid., p. 211, p. 704.

48. (1914), 32 O.L.R. 111 (H.C.), affirmed by Court of Appeal 115.

Canadian Copper Co.[49] where the defendant's mine was undoubtedly a nuisance, he argued as follows:

> Mines cannot be operated without the production of smoke from the roast yards and smelters,which smoke contains very large quantities of sulphur dioxide. There are circumstances in which it is impossible for the individual to assert his rights as to inflict a substantial injury upon the whole community....If the mines should be prevented from operating, the community could not exist at all. Once closed the mines and the mining community would be at an end, and farming would not long continue....The consideration of this situation induced plaintiff's counsel to abandon the claims for injunctions. The Court ought not to destroy the mining industry - nickel is of great value to the world - even if a few farms are damaged or destroyed.[50]

Since the Bottom decision the refusal to grant an injunction on such grounds has apparently lost much of its appeal. That decision, however, by observing the conjunctive test in the Shelfer rules illustrates the confusion that arise from those rules; but it seems to provide a useful qualification to the strict refusal of the courts to consider the economic hardship when deciding whether or not to grant an injunction. Based on the existing circumstances, one may argue that the decision is not as extreme as it appears on the surface since the case occurred at the height of the depression.

Though the "English approach" has received overwhelming support in Canada, McLaren[51] points out that if the courts respond to a "balancing of the equities" they must also include consideration of the adverse environmental effects of the defendant's operation if the pollution is left unabated.

---

49. (1917) O.W.N. 243 (H.C.)

50. Ibid., 244.

51. Supra note 30, p. 556.

This means that two apparently conflicting community interests must be balanced against each other rather than matching the economic livelihood of the community against the purely individual concern of the plaintiff for a more acceptable life style. McLaren argues further that in the days of Middleton, J., it might have been difficult to look beyond the economic equation because of a lack of widespread knowledge concerning environmental degradation and its solution. He refers to the decisions which followed the "Middleton thesis" as "judicial mercantilism" that cannot be justified today because the technology is now available and social values are increasingly reflecting the desire to compensate for excessive and unchecked industrialization by restoring the quality of the environment.

Defences to Nuisance

(1) Legislative Authority

The argument that nuisance has been created while exercising statutory authority is one with which the environmental litigant may be confronted where the anti-pollution suit is brought against a municipality or public utility. The essence of this defence is that where a statute authorizes a particular operation which cannot be carried out without resulting in damage or interference to others, liability cannot be placed on the defendant as long as he has taken all reasonable care to avoid the injurious effects.

This defence originates from a nineteenth century English decision but today it has lost much of its popularity to such an extent that it is unlikely to pose any significant obstacle in an environmental suit. This was evident

in Groat v. Edmonton[52] where Rinfret, J., refused to accept the defence on the grounds that there was no express intent in the legislation to abridge private rights. Similar reasoning was employed in Stephens v. Richmond Hill[53] where a municipality sought to resist an injunction by reasoning that it had statutory permission to construct a sewage-disposal plant which overflowed and caused a nuisance. The courts are moving in the direction of shifting the burden of proof to the defendant who has to demonstrate that his conduct is authorized by the legislation in question and that the damage or inconvenience which results is inevitable. In the latter case it was held that even if there was lawful authority for the project as constructed the legislation with respect to sewage projects was permissive and could not be construed to license the committing of a nuisance.

Since inevitable has been interpreted to mean that which is unavoidable given the state of current scientific knowledge, taking into account practical feasibility, it is possible for the plaintiff to counteract the above argument by producing evidence to show that the defendant's process is not the most efficient in terms of pollution control technology.

(2) Prescription

If a defendant's plant has been operating in the same location for a period of twenty years or more during which there was an uninterrupted discharge of pollutants over or onto the plaintiff's property, he may claim that he has acquired a prescriptive right to pollute that property. A number of Canadian nuisance decisions imply that it is possible for the

---

52. (1928) S.C.R. 533.

53. Supra note 42.

emission of smoke, fumes or water pollution to be legalized by prescription.[54] As the prescriptive right runs with the survient land it is no objection that the particular plaintiff has been occupying the land for less than twenty years. However, as McRuer, C.J. noted in Russell Transportation v. Ontario Malleable Iron[55] it is an objection that the adverse effects of the user have not been apparent. Thus the defence failed where although the defendant's use had been pursued for a period of twenty years, deleterious substances resulting from the use became apparent only at a later date. The courts have also established that a prescriptive right cannot be acquired where the nuisance cannot be attacked or prevented.

Two other factors may also influence the court's decision not to accept the defence of prescription. Certain forms of pollution such as air pollution vary in intensity from day to day depending upon weather conditions and interaction with other pollutants. Furthermore, the level of pollution may be incremental, and while the level of emission may be constant, the adverse effects may get progressively worse during the twenty-year period.

---

54. Danforth Glebe Estates Ltd. v. W. Harris & Co. (1919), 16 O.W.N. 41 (Ont. C.A.); Duchman v. Oakland Dairy Co. (1929), 1 D.L.R. 9 (Ont. C.A.); B. C. Forest Products v. Nordal (1954), 11 W.W.R. 403 (B.C.S.C.)

55. (1952) O.R. 621 (H.C.); (1951) 4 D.L.R. 719.

CHAPTER III

Constitutional Authority and The Taking Issue

1. The Constitutional Setting

The distribution of rights and responsibilities for environmental protection under the Canadian Constitution is very complex. Managing the environment does not comprise a homogeneous constitutional unit, but instead it cuts across the different areas of both federal and provincial responsibility. Consequently, it is impossible to list each government's function relating to the environment under a "federal" or "provincial" heading. However the legislative authority of the federal government is considered dominant in areas of international, boundary, and coastal waters. Exclusive jurisdiction over fisheries, navigation and shipping, as well as every body of water that is navigable, (even in such rudimentary ways as floating logs), fall within the powers of the federal government.[1] According to Gibson, some authorities hold the view that the federal government also has a major jurisdiction over inter-provincial waters, but no description of such rights in this area can be made with confidence.[2]

Several complicating factors cause a function to be considered as federal in some circumstances and provincial in others, or vice versa. The problem seems to arise because the language used to describe federal and provincial powers under the British North America Act is very general.[3]

---

1. Dale Gibson, The Constitutional Context of Canadian Water Planning, Government Document (1968), p. 9.

2. Ibid., p. 5.

3. Op. cit.

However, in the event that there is an over-lapping of jurisdiction, both levels of government are free to deal with the matter, but if federal and provincial legislation on a particular subject are inconsistent, the former takes priority and the latter is regarded as invalid to that extent.[4]

Inter-jurisdictional immunity is also a complicating factor because in some circumstances laws made by one government on a particular subject are not applicable to activities carried on by or under the legislative control of another government. In this respect, Gibson notes that provincial laws relating to garbage disposal, for example, would probably be enforceable against airport authorities, even though aviation and airports are matters under federal jurisdiction, but a provincial noise abatement law could not be applied to aircraft.[5]

Because of these complications, it is not surprising to find that both levels of government have difficulty in determining their respective fields of responsibility in the area of environmental management. There is considerable disagreement about where the boundaries lie between the jurisdictional spheres of each government. An indication of the confusion is given by a recent prosecution by the Attorney-General of Ontario v. Lake Ontario Cement and Truckways[6] whose vehicles were said to have created a noise impairing the quality of the natural environment, contrary to section 14.1(a) of the Ontario Evnironmental Protection Act. The judge of the

---

4. Ibid., p. 9.

5. Dale Gibson, Constitutional Jurisdiction over Environmental Management in Canada, Government Document #247 (1970), 41.

6. (1973), 2 O.R. 247.

provincial court ruled that the protection and conservation of the environment was a matter of national concern and therefore within the legislative domain of the federal government to make laws for the "Peace, Order, and Good Government" of Canada. He proceeded to rule section 14 of the Act ultra vires. But the Supreme Court of Ontario held that the provincial legislature can pass laws in relation to property and civil rights and matters of a merely local or private nature in the province.

Ownership of Natural Resources

In order to gain a greater understanding of the constitutional situation it is necessary to go beyond a description of property rights and examine the respective rights of the two levels of government to make laws concerning natural resources. Gibson states that both the federal and provincial governments have some power to legislate in respect of property owned by the other, and in some cases, this law-making power is much more significant than ownership rights. If constitutional jurisdiction over environmental management were based exclusively on property rights, the provinces would be in a predominant position, but when legislative powers are also taken into account, the importance of the federal government's role is increased considerably.

This point is illustrated by considering the fact that the provincial legislatures have been empowered to make laws relating to the "management and sale of the public lands belonging to the province"[7] the federal

---

7. Gerard v. La Forest, Natural Resources and Public Property Under the Canadian Constitution, (Toronto: University of Toronto Press, 1969), p. 164.

government has the authority to legislate in respect of the "public debt and property".[8] Both of these provisions have enabled the legislatures in question to make laws pertaining to its property which it would not be able to enact with respect to the other's property. The provinces, however, do enjoy proprietary rights over land and other natural resources within their boundaries by virtue of section 109 of the British North America Act. They also have primary jurisdiction over the distribution of land from the Crown to private owners, control over its use and matters relating to land-law in general. This authority stems from provincial responsibility for "property and civil rights in the province."[9]

Pollution

Pollution was not an issue at the time of writing the British North America Act, and as Gibson points out though little has been written on the constitutional jurisdiction to control pollution in Canada, those who have written on the subject are far from unanimous in their conclusions.[10] It is agreed that both levels of government have significant powers to deal with the problem but opinions differ considerably regarding the relative importance of federal and provincial roles.

The ownership of natural resources gives the provinces power to enact a wide variety of legal techniques to control pollution, including penal sanctions[11] to protect the quality of those resources. In addition, their

---

8. Ibid, p. 134.

9. Dale Gibson, Constitutional Jurisdiction over Environmental Management in Canada, Government Document #247 (1970), p. 12.

10. Ibid., p. 43.

11. Ibid., p. 44.

jurisdiction over "civil rights in the province" enables them to regulate those areas of the common law, such as the law of nuisance, that apply to polluting activities.

Expropriation

According to La Forest, one of the most serious conflicts between federal and provincial power arises in relation to compulsory taking. He states that a province, in the exercise of its legislative power over "property and civil rights", may expropriate or authorize the expropriation of property, even without compensation. But a province could not expropriate federal property that is within the exclusive competence of Parliament.[12] On the other hand, it does not matter how the federal government acquires property, whether under a constitutional provision, purchase, confiscation or expropriation.[13] La Forest also adds that the word property in section 91 (1A) of the British North America Act is used in its broadest sense to include every kind of asset and partial interest. However, on a complete transfer of property to anyone else, it ceases to be public property and is no longer subject to the jurisdiction of Parliament as such.[14]

2. The Taking Issue

One of the by-products of land-use planning in a system characterized by a combination of public and private ownership of land is the taking of

---

12. Supra note 7, p. 173.

13. Ibid., p. 134.

14. Ibid., p. 135.

private property for public uses. This form of interference with the use of private property may conflict with an individual's use and enjoyment of the same. Though in Canada or in England no constitutional restriction is placed on the taking of private property for public uses without due compensation as is the case in the United States under the fifth and fourteenth amendments, the problem is very relevent nonetheless. Despite the lack of a constitutional provision the courts of Canada and England have achieved similar results by interpreting the statutes relating to expropriation on the assumption that the legislature does not intend to authorize the taking of an individual's property without compensation unless this is explicitly stated in the Act.

Many situations arise in which the value of land will change as a result of government regulation. Property values will respond to changes in the economic and social environment of the area and may suffer severe depreciation as a result. Little or no problem exists if a physical taking of property is brought about by government action but, as has been mentioned above, in cases where no land is taken , an owner's claim to compensation for "injurious affection" is not, strictly speaking, a claim of compensation for expropriated property. The remedy is said to be "...really a question of tort law and the interaction of the nuisance concept with the defences of statutory authority and immunity of the Crown."[15]

The question of liability in this area raises the greater problem of the responsibility of the State to the citizen for harm it causes him because of

---

15. Ontario Law Reform Commission: The Basis for Compensation on Expropriation 1964, 46.

its activities. Nevertheless, the law on compensation for injurious affection where no land is taken has been treated as a part of expropriation law because it owes its existence to the expropriating statutes; its origin being the English Lands Clauses Consolidation Act 1845.[16]

The Case of British Columbia

Since the law in Canada follows from that of England, only a brief discussion of the problem of "taking and compensation" will be undertaken at this point. The reason is that the problem has been given much more attention there and as it becomes more acute in Canada legal scholars will be citing the law of England as the authority.

Refering again to the place in the law of injurious affection, The Law Reform Commission has stated that the law in this respect is both "stunted and confused."[17] As a result it is not surprising to find that in British Columbia the law on compensation for injurious affection is part of expropriation law under the Lands Clauses Act. But other jurisdictions, such as the federal statute, make no such provision. In developing the law where there is no taking, the English courts have feared that they might be opening the door to wide and infinite claims beyond the contemplation of Parliament. The result is that a number of restrictive rules have been created by the English courts and have been subsequently adopted in Canada.[18] Though this does not

---

16. Law Reform Commission of British Columbia: Report on Expropriation, (1971), p. 160.

17. Ibid., p. 160.

18. These are the "McCarthy" rules to be discussed below.

solve the problem, the courts of British Columbia have declared that section 69 of the Lands Clauses Act will support a claim for injurious affection where no land has been taken.[19] Some expropriating statutes exempt the application of the Lands Clauses Act, notably section 16 (2a) of the Highway Act[20] enacted in 1964 provides:

> The Lands Clauses Act does not apply to any proceedings under or pursuant to this Act.

The Law of Taking and Compensation - The British Experience

One writer has stated that any coherent study of the law of compulsory purchase of land in England ought to begin with the writing of Blackstone.[21] The following passage illustrates that point:

> 'So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Beside the public good is nothing more essentially interested than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature above can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by stripping the subject of his property in any arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that

---

19. Supra note 16.

20. Revised Statues of British Columbia, 1960, c. 172.

21. Sir William Blackstone, Commentaries on the Laws of England, Volume 1, 15th ed. (London; King's Printer, 1809).

> the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.'[22]

The first code relating to compulsory acquisition is the Lands Clauses Consolidation Act, 1845. Landowners were being compelled under this Act to submit to being parties to a contract and though it did not follow that they should bear the burden of being victims of a tort, this seems to have been the impression of much of the judicial thinking of the nineteenth century. As a result, many problems relating to "injurious affection" confronted those who were faced with the task of having to interpret the compulsory Purchase Statutes.

The term "injurious affection" is not defined in any enactment. Its legal origin, according to Davies,[23] seems to be section 63 of the 1845 Act which uses the words '...severing...or otherwise injuriously affecting....' Davies points out that injurious affection is regarded as a wider concept than severence, and that in its modern sense it is virtually private nuisance which is not actionable by virtue of the reasoning in Hammersmith and City Rail Co. v. Brand,[24] but which may be compensatable, and in some circumstances is, in fact, compensatable beyond the scope of nuisance. The term is said to mean depreciation to land caused by what happens to other land, and when used in its older sense, embracing severence, it is equivalent to the victorian term - 'depreciation.'[25]

---

22. Ibid., pp. 138-139, quoted in Davies, Law of Compulsory Purchase and Compensation, London, (Butterworths, 1975).

23. Keith Davies, Law of Compulsory Purchase and Compensation, London, (Butterworths, 1975) p. 168.

24. (1869), L.R. 4 H.L., 171.

25. Davies, p. 166.

The issue of compensation has been more controversial in cases where no land has been taken from the claimant or the depreciation of which he complains is caused by what is done on land not taken from him. Over the years the facts of many of the leading cases before the courts were considered as belonging to the first category. Consequently the test of compensation for injurious affection was said to be defined by the 'four rules' in the McCarthy case to be discussed below. This was the judgement of the House of Lords in Metropolitan Board of Works v. McCarthy.[26] The case arose over the construction of the Victorian Embankment but the compulsory purchase took no land from the claimant. The construction of the embankment resulted in the blocking and destruction of Whitefriars dock - a public dock very close to the claimant's business premises where he traded and sold building materials. As a result of the dock being destroyed the plaintiff's premises became permanently damaged and diminished in value. He argued that, not only was he affected as an ordinary member of the public using the highway, but that the value of his business premises had depreciated because other modes of access were less convenient. His right to compensation for depreciation to his premises was upheld.

It was pointed out that this case was equivalent to an earlier decision in Chamberlain v. West End of London and Crystal Palace Rail Co.,[27] in which the railway company blocked an existing public road and diverted it to a new bridge which they built within their statutory powers. The plaintiff's

---

26. (1874), L.R. 7 H.L. 243.

27. (1863), 2 B. &. S., 617.

land was situated on a portion of the old road which was converted into a cul-de-sac. As a result he succeeded in claiming for the depreciation to his land.

In comparing the two cases Davies,[28] indicates that the anology is with tort, not strictly private nuisance as such but with public nuisance privately actionable. This is made possible because the obstruction of the highway resulted in loss and damage peculiar to the plaintiff, over and above that suffered by other members of the general public. It should be recognized, however, that the plaintiff can only claim compensation for injurious affection in such a case if the particular loss is to land value, not a trade loss or any other kind of damage which in principle could justify an action in tort.[29]

The Four Rules of The McCarty Case

If a claim for injurious affection passes each of the four rules listed below, then the right to compensation is established. If it fails to pass any one of them, there can be no title to compensation even though in some cases a right of action may exist at common law. The 'four rules' are as follows:

(1) The injury complained of must result from some act made lawful by the acquiring body's statutory powers.

(2) The injury must be such as would have been actionable but for statutory powers.

---

28. Supra note 23.

29. This difference arises from the "McCarthy" rules.

(3) The injury complained of must be an injury to land not merely a personal injury or an injury to trade.

(4) The injury must arise from the execution of the works and not from their subsequent use.

In deciding on these rules the following statement was held by the House of Lords to be a sound definition of the circumstances in which compensation might be payable under section 68 of the 1845 Act.[30]

> Where by the construction of the works there is a physical interference with any right, public or private, which owners or occupiers of property are by law entitled to make use of in connection with such property, and which gives an additional market value to such property, apart from the uses to which any particular occupier or owner might put it, there is a title to compensation if, by reason of such interference, the property, as such, is lessened in value.

Nearly a hundred years later, in a noteworthy case involving Edwards v. Minister of Transport[31] where land was compulsorily acquired for a new trunk road, including a small quantity from the grounds of the plaintiff's house. It was held by the Court of Appeal that the taking of land from the claimant was not relevant to a claim for injurious affection insofar as the latter arose from what was done on land not taken from him. This interpretation of section 68 of the 1845 Act referred to above, was held to be applicable to any injurious affection arising on land not taken from the claimant

---

30. See Sylvain Mayer, The Lands Clauses Consolidation Act, 1845: A Code of the Law of Compensation, (London, Sweet & Maxwell, 1903).

31. (1964), 2 Q.B. 134.

whether or not other land had, in fact, been taken from him for the authorized project, and was not restricted to cases where no land was taken from him for the project. Fortunately the judgement in the Edwards case was disposed of by section 44 of the Land Compensation Act 1973,[32] which provides as follows:

> '(1) Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.'[33]

Applying The McCarthy Rules

In Clowes v. Staffordshire Potteries Waterworks Co.,[34] the water company fouled a stream beside which they had compulsorily acquired land for a waterworks. It was held that their statutory authority did not extend to doing that, and so it must be remedied by an action in tort, not a claim for compensation.[35] An essential element in this case was pointed out by Davies[36] who noted that the water company would have been liable in tort not because they fouled the stream but because the court inferred that the fouling was an avoidable consequence of their exercise of the statutory authority conferred upon them and therefore ultra vires.

---

32. See W.G. Nutley & C.H. Beaumont, Land Compensation Act, 1973. (London, Butterworths, 1974).

33. Ibid. Also cited in Davies, supra note 23.

34. (1872), 8 Ch. App. 125.

35. See also Imperial Gas Light & Coke Co. v. Broadbent (1869), 7 H.L. 600.

36. Supra note 23.

On the other hand if expert evidence had led the court to conclude that the fouling was unavoidable the reasoning of the House of Lords in the Brand case would mean that it was within the statutory authority and consequently free of liability in tort. But if the promoters did not require statutory authority perhaps because they were not a company but a group of individuals serving a wealthy landowner who acquired the land privately and employed them to construct a water works for his use, he and they would have been liable in tort because they fouled the stream, regardless of avoidability.[37]

Another test of the 'rules' occurred in Ricket v. Metropolitan Rail Co.[38] in which the House of Lords refused to allow compensation for loss of trade, even though such loss could be found actionable in tort, as public nuisance privately actionable, based on the authority in Wilkes v. Hegerford Market Co.[39]

Much of the controversy did arise over rule (4) since the loss must be caused by the execution of the works and not by the use of the land after the project is completed. In other words, compensation may be payable if the depreciation is caused by actually building a road or railway but not if it is caused by later use of that road or railway by traffic. This rule was in effect laid down by a majority of the House of Lords in the Brand case as a straight question of interpreting the term injurious affection by the execution of the works in section 68 of the 1845 Act. Lord Cairns urged a liberal interpretation of those words to cover subsequent use as well but others held to a restrictive interpretation.

---

37. This principle was further expressed by Lord Blackburn in Geddis v. Bann Reservoir Properties (1878), 3 App. Cas. 435.

38. (1867), L.R. 2 H.L. 175.

39. (1835), 2 Bing. N.C. 281.

In the Edwards case discussed above, the claimant's loss of amenity resulting from noise, lights and other injurious affection caused by traffic using the new trunk road was held not compensable, in consequence of rule (4) regardless of the depreciation in value to his house insofar as the trouble arose on land not taken from him. As Donovan, L.J. remarked, "regard must be had only to things done on land taken from the (claimant)."[40]

A similar case involved R. v. Mountford ex Parte London United Tramways (1901) Ltd.,[41] where a strip of a dentist's garden was compulsorily acquired to widen a street. The claimant received compensation for injurious affection inasmuch as the land taken from him became a public highway by inclusion in the pavement used by pedestrians. But compensation was refused for the balance of the depreciation of his house because it was attributable to the use by the tramcars of land not taken from him since the strip taken from his garden became merely the new pavement and not the tram lines.

Depreciation by Use of Public Works

During the century following the Brand case it became apparent that claimants whose land was injuriously affected because of what was done by the acquiring authorities on land not taken from them stood very little chance of obtaining compensation unless the injury to their land comprised an interference with some other right existing over the land taken. In many nuisance situations, however, interferences with the plaintiff's land

---

40. Supra note 31.

41. (1906), 2 K.B. 814.

directly is likely to arise from use of the defendant's land rather than the construction of works upon it, as in Halsey v. Esso Ltd.[42] where fumes from the defendant's premises damaged the plaintiff's property.

In order to get around the artificial distinction between "construction" and "use" of works established by the McCarthy rules the Land Compensation Act 1973[43] sought to reform this area of the law. This Act did not displace the doctrine in the Brand case and the four rules in the McCarthy case, but instead recognized a new type of compensation referred to as "Compensation for Depreciation to Public Works". Since the McCarthy rules are still law, there is an overlap with the new Act which provides expressly for compensation in cases of depreciation caused by use of works.

Commenting on the state of affairs, Davies remarks that "this convenient distribution of remedies is rough and ready not carefully devised, and so there will still be many cases of genuine loss inflicted on owners without any right of redress."[44]

The problem seems to have been recognized by the Act since section (1) openly concedes that this kind of loss lies within the same area as the tort of nuisance, because it restricts liability to cases where there is express or implied immunity. In addition, section 17 states that if such immunity is denied so that a claim of compensation fails, that immunity cannot thereafter be asserted so as to defeat a claim in nuisance.[45]

---

42. (1961), 2 All E.R. 145.

43. Supra note 32.

44. Davies, p. 179.

45. Ibid., p. 181.

The Right to Compensation - The U.S. Experience

The choice of legal tools to implement policies and programs aimed at coping with the growing enthusiasm for improving the quality of the environment has become a matter of major concern to lawmakers, administrators and the public in general. The course of action often pursued by governments has been in the form of either regulating the use of the land in question through the police power or acquiring it, or property rights therein through the power of eminent domain. Whereas the police power merely restricts property uses in the exercise of the State's power to protect some acknowledged public interest such as the public health, safety or welfare, eminent domain has been described as the "power of the sovereign to take property for public use without the owner's consent."[46]

Since the choice of eminent domain or the police power determine whether or not compensation ought to be paid, the question at issue is where to draw the line. One writer points out that much of the writings on the police power and eminent domain view them as being malleable, capable of being extended or shaped in response to the pressure of circumstances so that one generation's power to regulate land uses may differ from that of its predecessors as well as its successors.[47] Netherton cautions that while the Anglo-American legal system has a mechanism for evolutionary growth, this mechanism depends on a clear understanding of, and respect for certain broad

---

46. Ross D. Netherton, "Implementation of Land Use Policy: Police Power v. Eminent Domain", Land and Water Law Review, Vol. 3, 1968, p. 38.

47. Ibid., p. 34.

principles which comprise the constitutional framework of police power and eminent domain. Within the scope provided by these broad principles of law specific applications of the power to regulate or acquire land may vary in response to circumstances. Thus what appears at first impression to be an erosion of the basic principles turns out to be logical modifications and adaptation of the doctrine within the range of these principles.

Attempts to separate the police power and eminent domain go back over many years. Another aspect of the police power, wider than that described above has been recognized by Freund more than seventy years ago and it seems to have become part of the now current doctrine. It runs as follows:

> "The state...exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control that constitute the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskilled, careless or unscrupulous."[48]

According to this view, the power to regulate private property extends beyond the point of merely preventing appropriation of or injury to property which belongs to the public, and includes restriction of uses of private property which adversely affect the public interest in any and all its forms. In addition it holds that regulation may be applied in anticipation of danger, and is not confined to correcting existing injury. The inherent capacity of the police power to adapt to new community needs as they emerge was emphasized

---

48. Ernst Freund, The Police Power Public Policy and Constitutional Rights (Chicago, Callaghan & Co., 1904), cited by Netherton. Supra note 46, p. 36.

by Justice Holmes in Noble State Bank v. Haskell[49] where he declared that "the police power extends to all the great public needs....It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare."[50]

Today in both statute and common law several instances can be cited, marking the expansion of what Powell has called "social welfare police power" with respect to land use. His reasoning rests on the notion that assurance to a landowner that other property in his vicinity would not be devoted to the prescribed undesirable uses normally compensated him sufficiently for complying with the restriction of his own freedom to devote his own land to any use he pleased. When compensation seemed inadequate the individual is required to bear his loss as a reasonable contribution to the communal welfare.

It is this area of the police power's positive aspects that the lines of distinction become blurred, and courts have had trouble developing consistent patterns to describe these situations in which non-compensatable regulation of land use will be permitted and those in which acquisition with compensation will be required. Accordingly when regulatory measures have been challenged as unconstitutional, courts have tended to limit the scope of their decisions to the issues and circumstances before them, declaring that it is impossible to draw-up a definitive list of the applications of the police power.

---

49. 219 U.S. 104 (1911).

50. Ibid., p. 104, 111.

As public programs involving regulation and acquisition have expanded the scope of police power and eminent domain seem to become increasingly more indistinguishable. The late nineteenth century writing of Lewis offers the following theory of the police power and eminent domain.

> "Everyone is bound to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighbouring property, he is also bound to use and enjoy his own so as not to interfere with the general welfare of the community in which he lives....Whatever restraints the legislature imposes on the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy....But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, then the act becomes one of eminent domain."[51]

This distinction is easy to state but an examination of some important court decisions over the years has revealed that no ready judicial formula exists for determining where "regulation" - the key element of the police power must be equated with an outright "taking" of property for which compensation is due. Moreover, it has been argued that the judicial theories in this area are not always consistent.[52] This has resulted in four theories being advanced for deciding when, in the opinion of the courts a taking is said to have occured. Each theory is discussed below.

---

51. J. Lewis, Eminent Domain, Vol. 6(2d. ed.), New Yori, 1900, Quoted in Netherton, p. 41.

52. See J.L. Sax, "Takings and the Police Power", 74 Yale L.J. 36 (1964) and F.I. Michelman, "Property Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law," 80 Harv. L. Rev. 1165 (1967).

The Physical Invasion Theory

This theory seems tailored to situations involving outright confiscation of an individual's property by the government or agents acting on its behalf. When owners of private property are compelled to transfer title over to the government it ought to be the case that compensation follow as a matter of right, thus establishing a clear case of eminent domain. But the shortfall of this theory is soon recognized as one attempts to generalize it from a sufficient test of taking into a necessary test because the actual transfer of title is not always necessary in order to appropriate all the use of a person's property.

An example to this effect was provided by an early Supreme Court decision involving Pumpelly v. Green Bay Company[53] where it was agreed that a taking had occurred when the plaintiff's land was flooded in accordance with a state law providing for the construction of dams for the purpose of flood control. The court explained:

> It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for the protection and security to the rights of the individual as against the government, and which has received the condemnation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them it shall be held that if the government refrain from the absolute conversion of real property to the uses of the public it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrow sense of the word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction

---

53. 81 U.S. 166 (1871).

> upon the rights of the citizen as those rights stood at common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good.[54]

Based on the decision in this case it becomes apparent that the central core of this theory lies not in an actual transfer of title, but in the physical appropriation or invasion of rights once held by the owner in the use and enjoyment of his property.

The Nuisance Abatement Theory

This theory attempts to establish if compensation ought to be paid by inquiring whether a particular restriction merely forbids conduct that is harmful to the public or whether it seeks to benefit the public good at the expense of private property owners. An illustration of this type of reasoning is provided in the case of Mugler v. Kansas[55] where the Supreme Court upheld a Kansas ordinance forbidding the manufacture and sale of intoxicating liquors without compensating the existing brewery owners for the resulting ruin to their business. In explaining why compensation was not due in this case as opposed to the decision in the Pumpelly case the court ruled that the principles in the Pumpelly case have no application to the Mugler case. It was held that:

> The question in Pumpelly arose under eminent domain while the question now before us arises under what are strictly the police power of the state, exerted for the protection of the health, morals and safety of the people. That was

---

54. Ibid., p. 177.

55. 123 U.S. 623 (1887).

> a case in which there was a permanent flooding of private property, physical invasion of the real estate of the private owner, and a practical ouster of his possession. His property was in effect required to be devoted to the use of the public and consequently, he was entitled to compensation.[56]

The Mugler case was said to be governed by principles that do not involve the power of eminent domain in the exercise of which private property may not be taken for public use without compensation. But when valid legislation prohibits the use of property in ways that are injurious to the health, morals or safety of the community it cannot be in any just sense be regarded as a taking or appropriation of property for the public benefit. It was argued that such legislation does not deprive the owner of control over the use of his property for lawful purposes, nor restrict his right to dispose of it; it is merely a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest. Justice Harlan remarked:

> The power which the states have of prohibiting such use by individuals of their property...cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they must sustain, by reason of their not being permitted by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, it is very different from taking property for public use....in the one case a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[57]

---

56. Ibid., p. 667.

57. Ibid., pp. 668-669.

Harlan went on to point out that when the defendants purchased or erected their breweries the laws of the state did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance or come under any obligation that its legislation upon that subject would remain unchanged.

The theory seems to suggest that compensation ought not to be paid where property is used in ways harmful to the public who then acts to protect itself. It presupposes that the individual whose property is being regulated is somehow to blame for the harm caused by his activities and therefore is not entitled to compensation for any economic loss. Once we start applying based on this premise it becomes difficult to decide where to stop since the use made of private property may be perfectly legal when it began, only to be declared a nuisance because of changing conditions. This is disturbing because the law of nuisance rejects "coming to the nuisance" as a defence so that property owners may be forced to bear the resulting losses for the public good.

The Balancing Theory

The essence of this test of taking is explained by the decision in Rochester Business Inst., Inc. v. City of Rochester[58] in which the court reasoned that the issue of deciding whether a particular governmental restriction amounts to a constitutional taking is a question relying upon the particular circumstances of each case and requires balancing interests between the general public welfare and the extent of diminution in property value. At

---

58. 267 N.Y.S. (2d)., 274 (1966).

first glance the test seems to have great potential since it can be applied to almost any government activity. But it does not go far enough in specifying how to determine whether or not to provide compensation. As was noted in the judgement in Pennsylvania Coal v. Mahon[59] (discussed below) only a difference in degree exists between non-compensatable damage to a property owner under the police power and a deprivation of property rights under the power of eminent domain.

A further problem with the theory as it relates to the aspect of diminution of property value was illustrated in the case of U.S. v. Central Eureka Mining Co.[60] where the War Production Board issued an order requiring non-essential gold mines to cease operating. It was recognized that action in the form of regulation can diminish the value of property to such an extent as to constitute a taking.[61] Yet it was decided that the mere fact that regulation deprives the property owner of the most profitable uses of his property is not necessarily enough to establish the owner's right to compensation.

The Diminution in Value Theory

This theory has influenced judicial opinions on the taking issue and land-use regulation more than any of the foregoing theories. In applying this test the major considerations appear to be how much economic loss the claimant suffers and what use remains of his property. The decision in Pennsylvania Coal Co. v. Mahon[62] seems to suggest that a drastic reduction

59. 260 U.S. 393 (1922).

60. 357 U.S. 155 (1958).

61. Ibid., p. 168.

62. 260 U.S. 393 (1922).

in the economic value of property makes compensation mandatory. The case had involved a statute prohibiting the mining of coal in such a way that would weaken the surface structures above on which homes, public buildings and streets had been built. In explaining why the coal companies were entitled to compensation for their loss of mining rights, Justice Holmes held that[63]

> ...the police power should have limits and one fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most, if not all cases, there must be an exercise of eminent domain and compensation to sustain the act....The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Like the other theories discussed above, this theory fails to satisfy the test of necessity as well as sufficiency. In addition, it is not easily reconciled with the nuisance abatement theory because with respect to that theory the courts have always upheld legislation prohibiting a 'nuisance' even though this may result in economic ruin to the defendant's property.

Delivering a dissenting opinion in the above case, Justice Brandeis centred his opinion on the nuisance abatement theory rather than on a diminution in value test. He reasoned thus:

> Every restriction upon the use of property, imposed in the exercise of the police power, deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights and properties without making compensation. But restriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking. The restriction here in question is merely the

---

63. Ibid., pp. 413, 415.

> prohibition of a noxious use....Whenever the use prohibited ceases to be noxious - as it may because of further change in local or social conditions - the restriction will have to be removed, and the owner will again be free to enjoy his property as heretofore. The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public.[64]

Brandeis held further that the restriction destroyed existing rights of property and contracts. He also noted that values are relative and to consider the value of the coal kept in place by the restriction would also require comparing it with the value of all other parts of the land. Thus the result one obtains would depend upon whether one merely calculates the value of the unaccessible coal or goes further and compare that value with the total value of the property owned by the mining company. In the first instance one may conclude that the mining rights were completely destroyed while in the second the economic loss relative to the total value may be so small that it could be argued that it is not signficant enough to warrant compensation.

Applying Holmes' approach it is easy to see that the theory fails to provide a clear guide to how much economic loss is necessary before the theory can be applied. His explanation that a taking occurs when the diminution in value reaches "a certain magnitude" or when regulation goes "too far" leaves unresolved the crucial question of how much is too much.

---

64. Ibid., p. 417.

CHAPTER IV

Private Rights and Compensation in British Columbia

Before discussing the question of compensation where no land has been taken from the claimant, it is perhaps appropriate to discuss two common law rights which are said to have been abrogated by statute in British Columbia. These are riparian rights and prescriptive right. Later in the chapter specific cases will be examined with the hope that the decisions will shed some light on what factors determine whether or not compensation ought to be paid for injuries resulting from government action.

Riparian Rights

The two basic common law rights of a riparian are (1) a right to make use in certain specified ways of the water flowing past his land and (2) a right to the flow undiminished. It has been argued that these rights are held by riparian landowners in British Columbia to the extent that they have not been taken away by legislation. In tracing the relevant legislation from the first Water Act of 1865 and subsequent statutes, W.S. Armstrong contends that the only rights which exist currently are those granted directly by statute or licence.[1]

In 1870 the provision was made that no one could acquire an exclusive right to use water except under a statutory water record, and to this end Armstrong states that the case of Martley v. Carson[2] satisfied the Supreme

---

1 William S. Armstrong, "The British Columbia Water Act: The End of Riparian Rights", U.B.C. Law Review, 1(1962), 583.

2 (1889), 20 S.C.R. 634.

Court of Canada that the existing legislation had qualified the common law right of riparian proprietors by enabling all persons, whether or not riparians, to obtain a statutory right to divert water for agricultural or other purposes. The provisions with respect to previous provincial statutes were combined into one comprehensive enactment under the Water Clauses Consolidation Act 1897[3] which provided that the right to use "unrecorded water"[4] was to be vested in the provincial Crown. It also stated that no person could divert or appropriate water except under and in accordance with the provisions of a provincial Act. Exceptions were made regarding appropriations for domestic use and stock supply to the extent that they could be satisfied from water vested in the Crown to which the public had access.

The effect of this Act on riparian rights was considered in Esquimalt Waterworks Co. v. City of Victoria[5] by Duff, J., who said:

> ...it cannot, I think, be maintained that it does not indirectly interfere in a most substantial way with pre-existing riparian rights; but it is not, I think, necessary to conclude that the Act...abrogates those rights.[6]

---

3 R.S.B.C. 1897, c. 190.

4 R.S.B.C. 1897, c. 190, s. 2. "Unrecorded water" shall mean all water which for the time being is not held under and used in accordance with a record under the Act, or under the Acts repealed hereby, or under special grant by Public or Private Act, and shall include all water for the time being unappropriated or unoccupied, or not used for a beneficial purpose (cited in Armstrong, p. 584).

5 (1906), 12 B.C.R. 302.

6 Ibid., p. 323.

This view was not shared by the Privy Council in Cook v. City of Vancouver[7] as it refused to pronounce an opinion regarding the continued existence of the right of a riparian owner to make use of the water flowing past his land without interfering with statutory water rights of others, but stated that the common law riparian right to the undiminished flow of such water had clearly been taken away by legislation.

A further provision was made in the Act of 1909 which replaced the one of 1897 and a clause was included to save the right of a riparian owner to use water for domestic purposes.[8] This Act remained in force until 1925 when an amendment was inserted, providing that:

> The property in and the right to the use of all the water at any time in any stream in the Province is for all purposes vested in the Crown in the right of the Province, except only in so far as private rights therein have been established under special Acts or under licences issued in pursuance of this or some former Act relating to the use of water. It shall not, however, be an offence for any person to use for domestic purpose any unrecorded water to which there is lawful public or private access.[9]

In like manner, the effect of this amendment was considered in Johnson v. Anderson[10] by Fisher, J., who concluded that in spite of the amendment, a riparian owner still had the right to make use of the water flowing by his land as long as in doing so he did not interfere with recorded water rights of others. The dispute was between a non-license

---

7 (1912) 17 B.C.R. 477.

8 S.B.C. 1909, c. 58.

9 S.B.C. 1925, c. 61, s. 3.

10 (1936), 51 B.C.R. 413.

holding riparian owner and a licenced defendant who was making unauthorized use of the water. The court held that until records or licences have been granted for all water flowing by or through land, a riparian owner still has the right to use water flowing by his land subject to any rights granted by statute. It was further held that the Act in its amended form did not abrogate those rights to such an extent that the riparian owner has no remedy against a wrongful and unauthorized diversion which deprives him of the opportunity he would otherwise have to use water for domestic purposes without committing an offence. The defendants were ordered to demolish the works which interfered with the stream in question and an injunction was granted. The Plaintiff was also ordered to demolish a dam erected by him which had interfered with the defendants' water rights.

The defendants contended that they did not divert the flow but only cleaned out what they called the west branch of the stream so that the water could flow more freely. But Martin, J., held that they had wrongfully and unlawfully diverted the course and flow of the stream, the natural course of which flowed through the farm lands occupied by the plaintiff and owned to the extent that he was using and relying on the water at least for domestic and stock watering purposes.

According to Armstrong since the above case there have been no decisions in British Columbia in which the continued existence of common law riparian rights have been considered. Nevertheless he argues that the decision by Fisher, J., cannot be justified and concludes that the only rights which a riparian owner now has to use the water flowing past his land are those statutory rights available to all persons, whether riparian owners or not, under the provisions of the Water Act.[11]

---

11 Supra note 1, p. 587.

Water Use and Pollution Control Legislation

If Armstrong is correct the question is what effect this would have on persons dumping waste into watercourses. It is not clear whether a permit issued under the Pollution Control Act (to be discussed below) would constitute a defence to a common law action against pollution. Armstrong's argument would seem to suggest that pollution control permits confer statutory authority to their holders to discharge waste in defiance of any rights at common law. But this view is rejected by Lucas who points out that the Water Act makes no mention of the right to receive water undiminished in quality. Moreover he points out that the Pollution Control Act nowhere purports to deprive the riparian of his right to bring a pollution action; although the Act clearly does abrogate the right of an individual to use waters for waste disposal purposes, without a permit.[12] Lucas concludes by saying that riparian rights continue to exist at least to the extent necessary to allow a riparian owner to maintain an action against pollution, and that this common law right still forms the only basis for an action against pollution of waters.

Early pollution control legislation began with the Pollution Control Act of 1956,[13] under which a board was set up with power to set standards for effluent discharged into all surface and ground waters.[14] Pollution is defined as "anything done or any result or condition existing created, or

---

12 Alastair R. Lucas, "Water Pollution Control Law in British Columbia," U.B.C. Law Review, 4(1969), 82.

13 S.B.C. 1956, c. 36.

14 Supra note 12, p. 65.

likely to be created affecting land or water which in the opinion of the Board, is detrimental to health, sanitation or the public interest."[15] It was specified that no person shall discharge waste into waters under the jurisdiction of the Board without a permit and persons whose rights would be affected by the granting of a permit was entitled to file an objection. The Board then decided whether or not to make the objection the subject of a hearing, and notified the objector of its decision. If a permit was granted, the applicant acquired the right to discharge waste of the quality and in the quantity specified therein.

In 1967, the 1956 Act was repealed and replaced by the Pollution Control Act 1967[16] which owes its origin to the dispute between Western Mines Ltd. (N.P.L.) and Greater Campbell River Water District.[17] The dispute arose from the Board's granting permits to Western Mines Ltd. allowing the discharge of a specified quantity of mine and mill waste into Buttle Lake. Upon the application by Western Mines Ltd., the Greater Campbell River Water District filed a notice of objection to the issuing of permits. In addition the Water District requested technical data from Western Mines and time to consult its own experts and the opportunity to submit evidence in a hearing before the Board. This opportunity was denied and the water district sought to have the permits nullified.

The case reached the Supreme Court of B.C. where it was held that the board in exercising its discretion to grant the objector a hearing was acting

---

15 R.S.B.C. 1960, c. 289, s. 2.

16 S.B.C. 1967, c. 34.

17 58 W.W.R. 705(B.C.C.A. 1967).

in a judicial capacity rather than an administrative one. Mr. Justice Davey after carefully considering section 17(2) of the 1956 Act concluded that whereas the Board was empowered to decide in its discretion whether or not to grant a hearing to an objector, all right to substantiate objections by other means was not precluded.

Following this dispute the 1967 Act was amended in 1968 and section 13(1) was changed to limit the class of persons who may file objections to those having an interest in land or an interest under a water licence or pollution control act permit.[18] This seems to suggest that unless the citizen has a property interest which is affected the law does not allow the assertion of the larger right held in common with all citizens.

Prescriptive Right in British Columbia

Under the common law, anyone could acquire a prescriptive right to pollute a stream by continuous discharge of a perceptible amount of effluent for twenty years. However, Lucas states that quite apart from pollution control legislation this right may have been abrogated by section 38(2) of the Land Registry Act[19] which states that:

> Every certificate of indefeasible title issued under this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the land included at the time of the application upon which the certificate was granted under this act and who continues in possession.

---

18 Supra note 16, s. 2.

19 R.S.B.C. 1960, c. 208.

This was established in Morrison v. Weller[20] where the Plaintiff sued for an injunction restraining the defendant from allowing water to escape onto his land from the defendant's. The plaintiff claimed that the water caused damage to his land and some fruit trees were getting too much water. Some of the top soil was washed away and occasionally his land became so water-logged in places that his heavy machinery become bogged down. While denying the damage, the defendant claimed that by long use he had acquired an easement over the plaintiff's land, thus permitting him to discharge the surplus water thereon.

The plaintiff relied on the certificate of indefeasible title to the property issued to and held by him. There was no restrictive endorsement relating to the easement claimed and consequently the defendant's claim to an easement was denied. Evidence indicated that surplus water had been escaping from the defendant's property since 1907 but the exact date was not definitely fixed by the evidence. Consequently the claim of an easement by prescription was lost and an injunction granted.

Despite this decision the issue seems to be unsettled. Lucas points out that there is authority for the proposition that no prescriptive right to pollute a stream can be acquired even at common law.[21] He states further that section 13 of the Pollution Control Act 1956 deemed the Prescriptive Act to be an extension of the Water Act for the public interest and from there one could go to the Water Act with its provision that "no right to

---

20 (1951) 3 D.L.R. 156 (B.C.S.C.).

21 Van Egmond v. Seaforth, 6 O.R. 599 (Ont. C.A. 1884) cited in Lucas, p. 72.

divert or use water may be acquired by prescription."[22] But this argument is now lost since the Pollution Control Act 1967 contains no equivalent of the old Section 13.

The Issue of Compensation

This section is intended to examine some court decisions in British Columbia to ascertain what rules judges employ in determining whether or not a particular government action affecting an individual ought to be compensated. The right to compensation will be looked at from the viewpoint of statutory authority and immunity of the Crown. On this subject, a leading writer has stated that the partial immunity of activities authorized by the legislature has generated a considerable amount of confusion which has not been resolved.[23] Some writers contend that the problem of immunity is one of administrative law while others insist that it is a matter of statutory interpretation.

The basis of immunity is said to rest on the intention of the legislature but the effect of the legislation on tort liability is usually not specified. In Canada, the Courts have followed England and continue to speculate about the legislative intention in their quest for a solution to the problem and the presence or absence of compensation provisions in the statute. Where no provision exists there may be a tendency to conclude that the act should be

---

22 Lucas, p. 72.

23 Allen M. Linden, "Strict Liability, Nuisance and Legislative Authorization," 4 Osgoode Hall Law Journal (1966), 196.

performed only if it can be done without injury but no presumption to this effect is said to exist.[24] Lord Watson in Metropolitan Asylum v. Hill[25] established the proposition that where the terms of the statute are not imperative but permissive...the fair inference is that the legislature intended that the discretion be exercised in strict conformity with private rights. The generally accepted proposition is formulated thus by Salmond:

> Where the authority is imperative, and not merely permissive, it is necessarily absolute - that is to say when the statute not merely authorizes but also directs a thing to be done, then it may be done regardless of any nuisance that follows from it. An authority which is merely permissive, or on the other hand, is prima facie conditional only; for the legislature will not be deemed, in the absence of special reasons for so holding, to have intended to take away the right of private persons without compensation.[26]

Linden points out that an activity authorized by legislation is now seldom held immune from strict liability or liability in nuisance.[27] Statutory authorization of an activity has become only one of the factors which the court must weigh in determining the existence of a nuisance or strict liability situation. Perhaps the most important factor for the court is whether the plaintiff will be left without compensation for damages to one of his legally recognized interests if the court denies recovery. If it appears that no compensation will be obtained for substantial injury the courts, however, do award damages while using one of the available techniques to remove the applicability of immunity. This was demonstrated in an

---

24 Edginton v. Swindon [1939] 1 K.B. 86.

25 (1881), 6 App. Cas. 193.

26 Salmond, Torts (9th ed.) Sec. 11.

27 Linden, op. cit.

Ontario decision involving Guelph Worsted v. Guelph[28] in which Middleton, J. stated:

> ...absence of [compensation] provision [does] not create a right of action; it only suggests the more careful scrutiny of the act to ascertain whether the real intention of the legislature was to permit the interference with private rights without compensation.

Gradually the courts have recognized that it is left to the defendant to show that his otherwise tortious conduct was authorized by the legislation, and that the damage caused was inevitable. The defendant who wishes to rely on legislative authority as a defence has to prove that the activity was carried out in the only way possible. If he fails, he will be held negligent and outside the protection of immunity. This was illustrated in Renahan v. Vancouver City[29] where owing to the bursting of a water pipe which was part of the defendant city's waterworks system, the plaintiff's lands were flooded and damaged. The system was installed by the City under statutory authority and it was found that in doing so no negligence was present nor had the city acted in any unreasonable or oppressive way. The defendant's submission followed the statement of the Law by Lord Macnaghten in East Fremantle Corporation v. Annois[30] that

> The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit do an act which they are authorized by law to do, and do it in a proper manner, though the act so

---

28 (1914), 18 D.L.R. 73 (Ont.).

29 (1930), W.W.R. 166.

30 (1902), A.C. 213.

> done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.[31]

The doctrine of strict liability laid down in Rylands v. Fletcher[32] was held to be inapplicable. It was pointed out that such an argument would have been faulty since Rylands v. Fletcher was not a case of a company authorized to lay down water pipes by Act of Parliament but was a case of a private individual storing water on his own land for his own purposes.

These arguments were used in support of immunity and thus no compensation was allowed. The line of reasoning employed here seems to follow the maxim that the welfare of the people is the supreme law; and as Linden points out the courts have sometimes relied on this policy in denying liability where action in furtherance of the public good causes harm to an individual, since private interests must bend to the public good. In addition, where undertakings are necessary for the benefit of many, individual rights may have to be infringed, but there is no reason why compensation should be refused.[33]

In contrast to the above decision an opposite result was arrived at in the case of McKenzie Barge and Marine Ways Ltd. v. North Vancouver District.[34] The defendant municipality constructed a ditch to drain

---

31 Ibid., p. 217.

32 (1868), L.R. 3 H.L. 330.

33 Linden, p. 200.

34 (1964), 47 W.W.R. 30.

adjacent lands and this resulted in quantities of silt being deposited on the plaintiff's land, interfering with his business of building and repairing barges and scows. The plaintiff claimed damages and an injunction but the action was dismissed and the plaintiff appealed.

Though the ditch was constructed by authority of the Municipal Act the municipality was not relieved from liability for negligence or for the unjustifiable creation of a nuisance. That result could only have been achieved by explicit language, or by necessary implication. The court held that the question at issue was whether or not the ditch was negligently constructed. The municipality was found liable since the nuisance created was not the inevitable result of work authorized by statute. The injunction was refused but damages were awarded.

To the extent that compensation was awarded, a similar decision was handed down in Corporation of North Vancouver v. North Shore Land Ltd. and May Marine Electric Ltd.[35] The defendants had an opportunity of increasing their land holdings by a scheme of filling and reclaiming land usually covered by water. In doing so, this caused a stream to be diverted and its water flowed across a road allowance and into the plaintiff municipality.

The municipal corporation sued for damages and an injunction restraining the continuation of a nuisance caused by the diversion of the stream over its land. The defendants had continually diverted the waters of the stream onto the lands within the plaintiff's boundaries, obstructing and severing its road allowance. They contended that the natural flow of the stream did not include the plaintiff's territory and pleaded the defence of the Statute of

---

35 (1973), 6 W.W.R. 295.

Limitations,[36] relying on Kerr v. Atlantic and Northwest Railway Co.[37] and Chaudiere and Foundry Co. v. Canada Atlantic Railway Co.[38] The Court held that it was well settled that such a diversion causing injury was actionable, citing Broder v. Saillord[39] and Portage La Prairie v. B.C. Pea Growers Ltd.,[40] among others. The defendants' defence was unsuccessful since the damage was continuing and a new cause of action arose daily.

The judge held that it was difficult, if not impossible, to assess damages and, moreover he stated that damages would not have been the appropriate remedy. He granted an injunction even though he admitted that it would cause hardship on the defendants.

Compensation was also awarded in River Park Enterprises Ltd. et al. v. Fort St. John (Town).[41] The municipality had constructed a sewage treatment plant with effluent piped into a gulley. During spring and heavy rainfall the gulley overflowed onto the plaintiff's land. This created unpleasant odours, caused an algae growth on the land and at times, left a deposit of debris and residue on the overflowed lands.

The plaintiff proposed to subdivide the land and claimed considerable loss due to odours and debris from the overflow. However, while the overflow had been going on for some time, the plaintiff only gave notice after

---

36 R.S.B.C. 1960, c. 370.

37 (1895), 25 S.C.R. 197.

38 (1902), 33 S.C.R. 11.

39 (1876), 2 Ch. D. 692.

40 (1965), S.C.R. 150.

41 (1967), 62 D.L.R. (2d) 519.

a delay of two months during which time he believed that little damage would have been done to his land. The defendant admitted that it had no legal right to put effluent on the plaintiff's land but claimed that little damage was done. It also relied unsuccessfully on the limitation of the Municipal Act and an injunction and damages were awarded.

It is interesting to note that in the above cases, the courts were mainly concerned with whether defendants, acting under statutory authority, were negligent. This seems to lend support to immunity as long as negligence is absent. The position of English law with regards to the infringement of individual rights has been well stated in a United States decision involving Sadlier v. New York[42] where it was pointed out that in the United Kingdom Parliament is supreme and may immunize from liability any infringement of private rights. That rule is founded on the unrestricted and unlimited power of Parliament to take or damage property at will without compensation.

Perhaps the cases should be decided in a wider context allowing more recognition for individual rights. Once again the issue seems to be put in a better perspective by another U.S. decision nearly a century ago. In Pennsylvania v. Angel it was held that:

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smell so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is a 'taking' of his property in the constitutional sense. Of course mere statutory authorization will not avail for such an interference with private property.[43]

---

42 (1914), 81 N.Y.S. 310.

43 (1886), 41 N.J.E., 433. Cited in Linden, n. 123.

Chapter V

Property Rights, Externalities and Compensation: A Summary of Major Views

The issue of property rights, externalities has received an added amount of attention during the last fifteen years or so by both economic and legal scholars. Perhaps a convenient starting point for a discussion of the major views is with the famous "Coase theorem".[1] Coase refers to the standard example of a factory the smoke from which produces harmful effects on nearby properties and suggests that economists seem to have been led to the conclusion that the appropriate solution to the problem would be to make the factory owner liable for the damage caused by the smoke, place a tax on him, or exclude him from residential districts. He argues that such courses of action are inappropriate, often leading to solutions that are not necessarily or even usually desirable. He also considers the case from the standpoint of the law of nuisance where it is left to the courts to decide who has the right to harm the other, and points out that it may be possible for the parties involved to modify the initial situation by means of bargains.

Coase cites the case of Sturgess v. Bridgman,[2] an English decision, in which a confectioner who was accustomed to using two mortars and pestles in connection with his business for several years. Later a doctor came to

---

1 Ronald Coase, "The Problem of Social Cost," 3 Journal of Law and Economics, (1960), 1.

2 (1879), 11 Ch. D. 852.

occupy the neighbouring premises and after eight years he built a consulting room at the end of his garden against the confectioner's kitchen. It was found that the noise and vibration made it difficult for the doctor to use his new consulting room. The doctor brought legal action to force the confectioner to stop using his machinery. The court had little difficulty in granting the doctor the injunction he sought (since coming to the nuisance is no defence) and held that:

> Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgement, but the negation of the principle would lead even more to individual hardship and would at the same time produce a prejudicial effect upon the development of land for residential purposes.[3]

The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But Coase believes that it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the two parties. His analysis is as follows.

The circumstances in which it would not pay the confectioner to continue to use the machinery and to compensate the doctor for the losses that this would bring (if the doctor had the right to prevent the confectioner from using his machinery) would be those in which it would be in the interest of the doctor to make a payment to the confectioner which would induce him to discontinue the use of the machinery (if the confectioner had the right). He argues that with costless market transactions, the decisions of the court concerning liability for damage would be without effect on the allocation of resources.

---

3 Ibid, p. 866.

Furthermore, he contends that the judges' view that they were affecting the working of the market system in a desirable direction by settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights.

Coase discusses a few other nuisance cases and is critical of the reasoning employed by the courts in determining legal rights because from the viewpoint of economics, similar situations are treated differently. He is aware that occasionally the courts do take economic implications into account, citing Prosser[4] who stated that the world must have factories, smelters, oil refineries, noisy machinery and blasting, even at the expense of some inconvenience to those in the vicinity and the plaintiff may be required to accept some not unreasonable discomfort for the general good. He also points out that even though British writers on the subject do not state as explicitly that a comparison between the utility and harm produced is an element in deciding whether a harmful effect should be considered a nuisance, similar views, if less strongly expressed are to be found.[5] But whereas the economic problem is one of how to maximize the value of production, the courts are concerned with who has the legal right.

When transactions costs are positive a rearrangement of rights would take place only if the increase in the value of production exceeded the cost of negotiation. When this does not hold, the granting of an injunction by the courts, or placing the liability for damages on the party causing the

---

4 William Prosser, The Law of Torts, (Minnesota, Western Publishing Co., 1955), p. 412.

5 Coase, p. 20.

harm may result in an activity being curtailed which would have been undertaken if transactions were costless. Under these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates since the value of production may be different, depending on the arrangement of rights. But unless this is the arrangement of rights established by the legal system, Coase argues that the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring may never be achieved.[6]

In summary he concludes that the problem we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm. In a world in which the costs of rearranging the rights established by the legal system are positive, the courts in cases relating to nuisance are in effect making a decision on the economic problem and determining how resources are to be employed. It has been argued that the courts are conscious of this and that they often make, although not always explicitly, a comparison between what would be gained and what lost by preventing actions which have harmful effects. But the delimitation of rights is also the result of statutory enactments. This shows an appreciation of the reciprocal nature of the problem. Coase is critical of statutory enactments, pointing out

---

6 Ibid., p. 16.

that while they add to the list of nuisances, action is also taken to legalize what would otherwise be nuisances under the common law.[7] In addition he states that the kind of situation which economists are prone to consider as requiring corrective Government action is, in fact, often the result of Government action which, though not necessarily unwise presents a real danger that extensive Government intervention in the economic system may lead to the protection of those responsible for harmful effects being carried too far.

The core of Coase's argument is that in a competitive market with zero transactions costs, and assuming no income effects, the composition of output would be unaltered by the way in which the law assigns liability for damage. A modification of the initial delimiation of right would take place through the market if it would lead to an increase in the value of production.

Mishan,[8] on the other hand, issues a word of caution against applying the Coase theorem to real world problems in which transactions costs are positive, income effects are significant and markets are imperfect. Instead he argues for a legal framework which would assign the liability for damages on the party producing the externality. He also uses the standard factory smoke example and points out that optimal positions are not possible when transactions costs are positive. Such costs, he argues, depend on the prevailing legal framework and if there is no law to protect the interests of the inhabitants, it is unlikely that voluntary agreement would be reached. The costs of organizing a large dispersed heterogeneous group for the purpose of agreement on the amount of compensation may be too high.

---

7 Ibid., p. 28

8 E.J. Mishan, The Costs of Economic Growth (London: Staples Press, 1964).

If the law is on the side of the victims, Mishan states that the difficulties associated with reaching a voluntary agreement may be much smaller since the factory owner, or the board of directors, would reach a decision rather quickly when their material interests are being threatened. If the law rules against them, they are likely to weigh the cost of installing smokeless chimneys against the cost of compensating victims. He concludes that when voluntary agreement are reached on how to handle externalities are taken into account by the market, a more satisfactory result is achieved within a legal framework that puts the burden of searching for agreement on the party that can reach and implement decisions with the least expense. In the case of industry-generated external diseconomies, that party is the firm or firms comprising the industry.[9]

Mishan argues for a full liability rule on the grounds of equity stating that if polluters are likely to be more prosperous than their victims, a full liability rule would be more equitable than a zero liability rule. Under a full liability rule, the acting party would have an incentive to offer compensation to induce the affected party to accept some amount of externality, while under a zero liability rule the affected party would have an incentive to bribe the acting party to reduce the amount of the externality.

Randall[10] takes the analysis further and assumes that intermediate solutions are possible with transactions taking places until the net gains

---

9 Ibid., p. 64.

10 Allan Randall, "Market Solutions to Externality Problems," 54 American Journal of Agricultural Economics, (1972), 175.

are maximized. He outlines the three major steps to negotiating and enforcing a market solution to the externality problem. The first is a recognition and enforcement of the status quo established by a full liability rule; the second involves a situation in which the acting party has an incentive to initiate negotiations to induce the affected parties to accept a certain amount of emissions in exchange for compensation; and the third step is that of policing and enforcing the agreement once it has been made.

Step one would require that firms polluting without having obtained the necessary permission of the affected parties must be made either to cease polluting or obtain that permission. The second step is concerned with how the affected parties go about conducting their side of the negotiations. This could be done in three ways: a public agency could bargain on behalf of the affected parties; the affected parties could take a unanimous position and appoint a committee to bargain on their behalf; or each individual could negotiate separately with the acting party. The purpose of step three is to ensure that payment of compensation is made as agreed upon and that the agreed emission limit is not being exceeded.

Randall discusses the various possible outcomes in terms of resource allocation and income distribution depending on the decision-making procedure and the resulting transactions costs. He concludes by saying that market solutions seem to have the potential of achieving substantial improvement in environmental quality if the legal structure were changed to a full liability rule or something approaching it and the affected parties were legally required either to set up their own bargaining committee or accept the help of a government agency to negotiate on their behalf.

The other side of the coin is represented by the views of the legal scholars who are concerned largely with the rules governing whether or not compensation ought to be paid. The problem is best put in perspective by considering first the writing of Michelman[11] whose aim is to de-emphasize the reliance on judicial action as a method of dealing with the issue of compensation. He begins by rejecting the assumption that a case-by-case adjudication should or must be the prime method for refining society's compensation practices. Instead he is concerned with finding a compensation principle that is fair or just and argues that attempts by the court in formulating rules of decision in this respect have consistently yielded rules that are ethically unsatisfactory. This observation, he states, seems to justify the hypothesis that decision rules which will yield other than a partial, imperfect, unsatisfactory solution and still be in harmony with judicial action, cannot be simply formulated.

Michelman examines some of the judicial decisions in an attempt to discover whether any of the criteria yield a sound and self-sufficient decision rule and discovers that one of the following four factors has usually been crucial in classifying an occasion as compensable or not.

(1) Whether or not the public or its agents have physically used or occupied something belonging to the claimant,

(2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued,

(3) whether or not the claimant's loss is outweighed by the public's gain,

---

11 Frank I. Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harvard Law Review, (April 1967), 1165.

(4) Whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people. He points out that attempts at applying these criteria as general principles are either seriously misguided, ruinously incomplete or uselessly overbroad.[12]

These four criteria represent the Physical Invasion Theory, the Diminution of Value Theory, the Balancing Theory and the Nuisance Abatement Theory, discussed previously, consequently, only a brief comment need be made regarding each. Of the first theory, Michelman states that "since it is axiomatic that when government formally asserts a transfer of title to itself it must pay just compensation it should follow that where government makes regulatory or permanent use of a thing which would be wrongful unless it had acquired title, it must pay that amount of compensation which acquisition of a title commensurate with its use would have cost it."[13] But all too often government has denied its obligation to pay compensation by declining to acquire title which amounts only to wordplay while failing to justify any sharp line of distinction between encroachment in its different forms of affirmative occupancy and negative restraint.

In applying the second theory the issue of compensation is directed to the object injuriously affected and one has to ascertain what proportion of its value has been destroyed by the measure in question since the destruction must approach totality for compensation to be paid. Michelman contends that it is difficult to see the relevance of this particular inquiry to just

---

12 Ibid., p. 1184.

13 Ibid., p. 1186.

decision, and adds that "the difficulty is aggravated when the question is raised of how to define the 'particular thing' whose value is to form the denominator of the fraction."[14]

According to the balancing theory a police power measure is considered to be legitimate if the need for, or the gain contemplated by society from it outweighs the harm it will cause the individual or class of individual claimants. The use of this test as a means of determining whether or not particular regulations require compensation is rejected on the grounds that it seems to reflect a careless confusion of two quite distinct questions. The first relates to whether a given measure would be appropriate, assuming that it was accompanied by compensation; the second is whether the same measure, assuming that it would be proper under conditions of full compensation, ought to be enforced without payment of compensation. In Michelman's view the first question may be related to the balancing test, but not the second. Moreover, he asserts that this test "leads us momentarily to suppose that society has interests not shared by everyone, and that there are people who have interests which are not relevant to a calculation of...'society's interests'."[15]

Finally the Nuisance Abatement Theory seeks to justify compensable and non-compensable impositions by asking whether the restriction simply restrains conduct which is harmful to others or whether it aims at benefiting the public through the extraction of public good from private property. The idea behind this theory is that if the answer to the first question is in the affirmative

---

14 Ibid., p. 1192.

15 Ibid., p. 1194.

compensation is not due, while a similar answer to the second question would require compensation. Michelman argues that a system of classifying regulations as compensable or non-compensable according to whether they prevent harms or extract benefits will not work unless we establish a benchmark of "neutral" conduct which enables us to say where refusal to confer benefits become a readiness to inflict harms. He uses this theory to demonstrate that there is no basis for a general rule dispensing with compensation in respect of all regulations apparently of the "nuisance-prevention" type, and cites the case of Miller v. Schoene[16] as supporting evidence. In that case the Supreme Court upheld a Virginia statute requiring, without compensation, the destruction of cedar trees infested with a pest fatal to nearby apple orchards but harmless to the host cedar trees. Michelman points out that as long as efficiency is the only justification advanced for a measure, it is impossible to classify that measure as one which prevents harm rather than extracts benefits, or vice versa.

Besides his critical discussion of the four criteria or theories, Michelman considers several theories of justice and fairness, including theories of property, utilitarian theories, compensation and fairness, theories of justice, etc., with the hope of finding a clear and convincing statement of the purpose of compensation practice in a form which would show us how to state the variables which ought to determine compensability. He concludes that "within the confines of a single transaction we may indeed be put to a choice between public good and private security, for the

---

16 276 U.S. 272 (1928).

possibility of adjustment through compensation may then be merely theoretical and not a practical possibility."[17]

A slightly different but equally interesting critique of the judicial reasoning and a spirited attempt at devising a formula to explain when regulation by government in the public interest ends and a "taking" begins is presented by J. L. Sax.[18] He too is critical of the four theories discussed above but devotes more attention to the nuisance abatement and diminution of value theories, particularly the latter.

In relation to the former theory he states that the "creation of harm test" on which it is based relies on the argument that while in general established economic interests cannot be diminished merely because of a resulting public benefit, that rule does not apply where the individual whose interest is to be diminished is responsible for creating the need for public regulation of his conduct. The problem ought to be viewed not as one of "noxiousness" or harm-creating activity but rather, one of inconsistency between perfectly innocent and independently desirable uses.

The latter theory is considered by Sax to be probably the most popular current approach to the taking issue. It seems to express two interrelated ideas: (1) that all legally acquired existing economic values are property and (2) that while such values may be diminished somewhat without compensation, they may not be excessively diminished: the meaning of "excessive" is necessarily imprecise, but it is fairly clear under the theory that it would

---

17 Michelman, p. 1258.

18 Joseph L. Sax, "Takings and the Police Power," 74 Yale Law Journal, (1964), 36.

be unconstitutional to deprive a property of all or a substantial portion of its economic value. Though this approach does have remarkable appeal, the problem is much more complicated than merely identifying existing economic values, denominating them property, and providing a rule that those values may not be wholly or substantially destroyed.[19]

One reason for the failure of this test, according to Sax, is that it presupposes a false definition of property. In some instances established values are destroyed under the pretext that the interest affected was not property and therefore not entitled to constitutional protection. The statement by Justice Jackson in the Willow River Power case that "only those economic advantages are 'rights' which have the law back of them...whether it is a property right is really the question to be answered"[20] is cited as the classic formulation of the "no-compensation because of no-property" approach.

Sax points out that a denial of compensation on the grounds that the interest affected is not a property right is in a sense rejecting the essence of the test - the proposition that established economic values as such are entitled to constitutional protection. Finally he states that the diminution of value test presents a highly unrealistic view of the working of the compensation rule in American law and alleges that the "no-property" approach is so widespread and pervasive that the policy of preventing individual economic loss as such can hardly be said to have received significant

---

19 Ibid., p. 50.

20 United States v. Willow River Power Co., 324 U.S. 499, 502(1945) cited in Sax, p. 51.

recognition by the courts. This leads him into questioning whether or not we have been mislead into thinking that the function of the compensation clause is to protect and maintain established values, since the courts have not treated it as a primary goal.

As a starting point to deciding what protection ought to be given to property, Sax believes that the first task should be to develop a workable definition of property - a substitute for the rigid conception of property as a fixed status definable only in reference to existing economic values. He endeavours to provide a comprehensive definition which will take into account new conflicts arising from changes in the character of a neighbourhood, in technology, or in public values since these changes will continually revise the permissable uses which are called property. Property is thus defined as the result of the process of competition.[21] This definition makes the question of when to compensate a diminution in value of property resulting from government activity much less difficult to formulate. What is at issue then amounts to deciding what kind of competition should existing values be exposed and from which kind ought they be protected.

Before answers can be found, Sax finds it necessary to consider two different roles played by government in the process of competition. He distinguishes between government encroachment in an enterprise and mediating capacity which yields no benefit and proposes a rule that in the first instance compensation is constitutionally required, thus signifying that a taking has occurred. If government is acting in the latter capacity, losses

---

21 Sax, p. 61.

no matter how severe are not entitled to compensation. This is said to be an exercise of the police power. Whether or not compensation is due can therefore be determined by deciding whether the losses incurred resulted from government's operation of its enterprise or from competition among private interests. Sax also holds the view that government need not pay compensation if it benefits as any other member of the community and if this benefit would not require compensation from a private property owner. Furthermore, in the private sector when an economic loss is suffered as a result of one firm moving or going out of business no action for compensation is allowed, and to the extent that government exercises this same privilege it ought not have an obligation to pay compensation.

In a more recent article[22] Sax realized that the problem is much more complex and so he disowned his previous view that compensation is due whenever government acquired resources for its own use. His reason is that nearly every attempt by government to regulate the private use of land, air and water resources may be considered a taking. An attempt to resolve this conflict in the light of the campaign for a cleaner environment implies that the law of takings is in need of reform. He suggests that property rights and the law of takings are open to modification once property is viewed as an interdependent network of competing uses rather than a number of independent and isolated entities.

---

22 Joseph L. Sax, "Takings, Private Property and Public Rights", 81 Yale Law Journal, (1971), 149.

After modification, cases previously viewed as takings are now considered to be an exercise of the police power in maintaining "public rights". Sax points out that the takings doctrine assumes that the right to compensation can be determined by examining the economic effects that occur within the physical boundaries of one's property. But when property is described as being part of a network of relationships not limited by, or accurately defined by physical boundaries, that view of property rights embodied in current takings law becomes inadequate.

In demonstrating the inadequacy, Sax considers a situation in which, in order to prevent erosion, the government prohibited all strip mining on land with a slope greater than twenty degrees. Instead of posing the question in terms of whether the regulation, however justified, so reduced the value of the restricted owner's land as to deprive it of all present economic productivity, he believes that the problem is more accurately identified by considering the demand of both owners. The mineral owner demands that the lower land serve to carry mining waste while the lower owner demands that the upper land be preserved in a way that protects his desired uses. In this situation neither owner is merely using his own property nor is either entitled a priori to have his demand met since neither conflicting use is superior to the other.

It has been customary for legal analysis to focus only on part of the problem by considering the effects of government action on the claimant's land while ignoring the totality of property which the mine owner is using, and this includes the land owned by those lower down. But Sax sees no theoretical reason why the lower owner should not be equally entitled to compensation by the government for failing to protect his property right to use

his land for residential purposes by prohibiting mining above him, since there is no theory of property rights which suggests that property owners should have an advantage in conflict resolution because of physical location. Both the miner and the lower landowner are equally property owners and to prohibit strip mining would be a taking of the miner's property while a failure to prohibit mining would be a taking of the lower owner's land. And if the public is required to pay for the costs generated by every situation of conflicting use between property owners, this would wildly expand the reach of the compensation provision of the Constitution.[23]

Sax recognizes that because of the interconnectedness of property uses, the use of private property generates spill-over effects on other property users and so he seeks to determine the implication for his "new law of takings". When these effects fall on discrete property owners, and to a substantial degree, the law has responded to the conflict by recognizing private rights of action such as nuisance. However, one characteristic of external effects is that they often fall quite broadly, affecting a large number of potential claimants, each in relatively small amounts. If one supposes that these effects are too broad for any particular litigant to launch a suit of action, the question at issue is whether these costs should be allowed to remain where they fall or whether the diffusely held interests ought to be recognized and advanced in the form of public rights.

How such a conflict would be handled by the new law of takings is demonstrated by considering a situation in which a person owns lowlying land

---

23 Ibid., p. 153.

serving as a flood control reservoir. Under conventional property law, the owner would have a property right to drain, fill, and develop his land even if that activity created serious flood control problems for a large number of persons below him. If the public wishes to retain his land as a natural reservoir, that right must be purchased from him. Sax proposes that the lower owners, cumulatively, should be treated no differently from the individual lower owner even though they speak as members of a diffuse public rather than as conventional property owners. His reason is that one should recognize a public interest in flood control inthe same manner as a private property owner's. By doing so the conflict can be resolved so as to maximize net benefits from the resource network in question, and either claimant might be required constitutionally to yield without compensation.

From private property, Sax moves to a discussion of common property resources. He criticizes the legal system for failure to recognize public rights. Ignoring the cumulative right each person has in the use of such resources, each individual is treated not as a legitimate interest-holder, but as an interloper, and is forced to pay for the protection of his interest. He sees no reason why claims to the right to use resources should be discriminated against simply because they are held in one rather than another conventional form of ownership. He stresses the need for symmetry in the treatment of public rights and points out that to require compensation when a conflict among competing users is resolved in favour of diffuse interest-holders and not when it is resolved against them inevitably skews the political resolution of conflicts over resource use and discriminates against public rights.[24]

---

24 Ibid., p. 160.

Sax also believes that competing resource users should be treated equally when each is making a use having spill-over effects on his neighbours and demands are in conflict. Since no user has an a priori right to impose such effects on the other, such uses may be curtailed by the government without triggering the taking clause. The same reasoning is applied to the use of common property resources. One person may use a stream for the dumping of waste while others may depend on it for a source of drinking water. Since the former use has the effect of placing a burden on the common that use cannot be claimed as a property right that should be protected constitutionally. In short, any demand of a right to use property that has any of the above spillover effects may be constitutionally restrained, however severe the economic loss on the property owner, without compensation; for each of the competing interests that would be adversely affected by such uses has, a priori, an equal right to be free of such burdens.

The test Sax proposes for determining compensation is based on whether uses can be made of land that do not physically restrict a neighbour, burden a common, impose a burden on the community that would require public services or adversely affect some interest in health or well-being. If none of these spillovers are present the landowner has a constitutional right to make those uses. If he is restricted from doing so, he is entitled to receive compensation equal to the highest and best use which could be made of the resource without producing spillover effects.

The question which this new law of takings poses is whether the compulsory payment or non-payment of compensation will make the process more rational. Sax states that the current takings scheme is irrational in that

it requires compensation when the conflict resolution system imposes extreme harm on discrete users but not when similar harm is placed on diffuse users. His proposed scheme has the advantage of making competing interests doctrinally equal, leaving their accomodation to be decided as a matter of public policy rather than of inflexible legal rules. He contends that the goal of a system which regulates property rights should be to maximize the output of the entire resource base upon which the competing claims of rights are dependent, rather than maintaining the profitability of individual parcels of property. As a rule of thumb, Sax states that the appropriate decision as to competing property uses which involve spillover effects is that which a rational owner would make if he were responsible for the entire network of resources effected, and if the distribution of gains and losses among the parcels of his total holdings were a matter of indifference to him.[25]

There has been a lack of writings on the issue of compensation in Canada. A notable exception, however, is that of Eric Todd.[26] He has been critical of the application of the restrictive rules adopted by English and subsequently Canadian courts in situations where no land is taken but an individual is injuriously affected. He argues that the rules have been based on narrow interpretation and in a number of instances the courts have been able to avoid their application by distinguishing the particular statutory provision which they were interpreting from those which gave rise to the rules. "The consequence has been a mixture of conflict, confusion, and lack of logic."[27]

---

25 Ibid., p. 172.

26 Eric Todd, "The Mistique of Injurious Affection in the Law of Expropriation," U.B.C. Law Review (Centennial Issue, 1967), 127-169.

27 Ibid., p. 162.

Commenting on the restrictive rules that have been laid down by the Courts for application to "no taking" situations (The McCarthy Rules) the Royal Commission on Expropriation in British Columbia, states:

> The rationale of the first two conditions is that an owner whose land has been injured by acts, tortious if done without statutory authority, should be given a right to compensation in place of the right of action removed by the statute. The limitation imposed by those two conditions is, in my opinion sound. These two conditions, incidentally, introduce the common law of private nuisance with its requirement that injury done must be peculiar to the claimant's land, over and above any general injury suffered by all land in the area.[28]

In a more recent report, the Law Reform Commission on Expropriation[29] sought to apply this rationale in an attempt to discover whether situations would arise in which a person suffers a loss for which he ought to be compensated although the activities which cause the loss would not have been actionable in the absence of statutory authority. The two examples considered by the Commission are reproduced below.

> 1. X owns a $60,000 home which faces on a pleasant shady avenue. On the other side of the avenue is a row of housing which backs on to a busy two-lane road, Market Street. The municipality in which the home is located decides to turn Market Street into a six-lane expressway. To accomplish this, the municipality acquires the properties on the other side of Market Street and takes down the houses on those properties. X's house now faces a six-lane expressway. The effect is to drive down the value of his house to $50,000, not because of any nuisance or tresspass that his property will become subject to, but because

---

28 Report of the British Columbia Royal Commission on Expropriation (1961-63), Hon. J.V. Clyne (Commissioner), p. 114.

29 British Columbia Law Reform Commission of British Columbia: Report 1971, p. 161.

> the location is not as desirable as it was before. It is accepted that he can prove he has suffered a loss of $10,000.

Is this a loss which X should bear? Or should society, through the municipality recompense him? When a person buys property does he assume a risk that its value may fall because of public (or private) developments in the area?

> 2. In a rural area, Y owns a small general store and service-station, located on an old highway. A new highway is constructed nearby siphoning off much of the traffic. The loss in business is such that he is forced to close down his store.

Was the possibility of such a loss a risk which Y assumed when he went into business? Since there has been no taking the law of injurious affection would not pay compensation, but Todd takes exception to this. He argues that the actionable rule equated the liability of statutory bodies which cause injurious affection to neighbouring land and the liability of private land-owners who cause similar damage without the sanction of statutory powers. Though it appears logical and just he suggests two arguments that can be advanced against it - one historical, the other modern.

The historical argument is traced from the rules which evolved from the English railway boom of the mid-nineteenth century, and Todd argues that the courts, in developing the actionable rule did not carry out the intentions of Parliament, which assumed that the promoters and speculators involved in the development of railways would pay in full measure for any damage to private property caused by their activities. The modern argument is that the equating of liability for damage done under statutory authority for public purposes with liability of private persons for similar damage under the law of nuisance is not sound. Accordingly, he believed that there is an alternative

premise which runs as follows:

> ...as a matter of public policy it may be preferable that the general public, rather than a private landowner, should bear the burden of a loss which occurs without "fault" on the part of neither.[30]

Expropriating authorities held the view that there is no justification for awarding compensation in respect of the two examples set out above. It was stated that a business has "no vested interest in the passing trade and should not be able to claim for loss of business if traffic moves to a new route or fails to patronize the business because of circuitous travel."[31] It was feared that compensation based solely on economic loss could impose severe financial burden on the taxpayer who ultimately pays for the expropriation, with the result that many worthwhile projects might never be undertaken.

Whereas the Law Reform Commission recommended that in circumstances where there is no taking, expropriating authorities should be liable for damages caused by construction and use of the work. It was agreed that damages should be recoverable only where in the absence of statutory authority, the expropriating authority would have been liable at common law. On the contrary, Todd believes that the law in this respect is unsatisfactory and requires legislative reform. He admits that the subject is difficult and presents very practical problems of determining where to draw the line between public interest and private rights. Consequently, legislatures will be tempted either to avoid the subject completely or to pass legislation

---

30 Todd, op. cit.

31 Law Reform Commission of British Columbia: Report on Expropriation, 1971, p. 162.

on an ad hoc basis by covering specific situations of hardship rather than establishing broad general principles.

In conclusion Todd suggests that there should be no distinction between damage to land, personal damages, sentimental damage, and economic loss. Any provable economic loss should be recoverable, excluding speculative, remote, or imagined losses - only actual provable loss. He favours a broad statutory right to full indemnity subject to the following clearly defined limitations.

1. The onus of proof of economic loss should be on the claimant as in an ordinary common law action for damages.

2. The general rules of remoteness of damage should apply.

3. There should be a limited period within which action should be brought after the commencement of the use of the particular public work alleged to have caused the damage, or after any substantial change in the nature or use of the work.

4. The value of any economic benefit accruing to the claimant as a result of the public work should be offset against his economic damage. The onus of proving any such benefit should be on the authority from whom the damages are claimed.

5. The authority from whom damages are claimed should have the option of paying for the damages or buying the property, with the owner having the right to sell if he forgoes his claim for damages.

He concludes that though the adoption of such a liberal indemnity for economic loss caused by public works involves a departure from the underlying philosophy of the current law which requires individual property owners to suffer damage in the general public interest, the continued and increasing interaction of urbanization and public enterprise undoubtedly will multiply the occasions where individuals are, under the present rules, left without redress.

CHAPTER VI

Summary and Conclusions

Less emphasis has been placed on the taking issue as it relates to British Columbia than was originally intended. The major reason is that few cases could be found on which to assess the issue of compensation. Legislation as recent as the Pollution Control Act does not specify the rights conferred under a permit, neither does it provide for compensation to persons affected by the granting of permits. Nevertheless it is generally recognized that the interests of a landowner in his property is limited by certain conditions requiring that land not be used for purposes inconsistent with the public interest. Therefore legislation, whether called an exercise of the police power, a health and welfare measure or an application of the public trust doctrine, may impose standards on landowners restricting the use of their property without providing compensation for the 'taking'. Alternatively the pollution problem has been viewed as an extension of the nuisance doctrine which requires that property be used so as not to injure the rights of others. But since no direct authority exists in British Columbia on the question of whether a permit will provide a defence in an action against pollution, it is difficult to make specific recommendations at this time. Only a summary of, and an interpretation of some of the reasoning employed in a few of the major decisions will be undertaken.

Most of the writings on the compensation question have been done in the United States probably because, unlike the United Kingdom where parliament is supreme, constitutional restraint is imposed upon the legislature. But judicial efforts to devise a workable test for deciding whether police power

measures impose constitutionally compensable losses on property owners have proved to be unsuccessful. This situation reflects the absence of a generally accepted theoretical rationale for defining the boundaries of the police power as well as the absence of statutory guidelines or criteria for resolving the taking issue.

It is doubtful, however, whether statutory guidelines would completely resolve the problem because the British system is so characterized and it is held that private rights of property are deemed not to have been taken away by statute without compensation unless the intention to do so is expressed in clear and unambiguous terms. Yet in the century following Brand's case, claimants whose lands were injuriously affected by reason of what was done by the acquiring authorities on land not taken from them stood little chance of obtaining compensation unless the depreciation caused to their land comprised an interference with some other right existing over the land taken. Rule (IV) of the four rules in the McCarthy case (discussed above) was very effective in defeating claimants in several situations in which property had been depreciated as a result of the use to which land nearby was put after a statutory authority acquired it and developed it for some public purpose.

The distinction which this rule makes is artificial because privately actionable nuisance comprises interference with rights in another's land as well as direct interference with the plaintiff's property. The only essential factor is the damage to the condition or enjoyment of that property and the interference with an easement which benefits it. But this does not alter the fact that differences in detail may well underline the distinction

between the two varieties of privately actionable nuisance. On the one hand, interference that affects the plaintiff's land directly is likely to arise from use of the defendant's land rather than the works constructed upon it. On the other hand, interference that affects the plaintiff's land by damaging an easement which benefits the land is likely to arise from construction of works rather than use. In general, it appears that construction of works tends to disrupt servitudes while mis-use of property causes the more direct types of private nuisance. This carries little weight in tort since the artificial distinction between construction and use of works on offending land is not relevant to privately actionable nuisance. Only because of Brand's case is it relevant to injurious affection.

In addition to the restricted rules imposed by judges in many of the nineteenth century decisions, the 'taking issue' is not viewed as such in the United Kingdom. Even though interference with rights of development or user has come to be a recognized element of regulation and planning the consequent impairment or diminution of these rights are not treated as a taking of property. When compensation is provided the basis for so doing is not that property or property rights have been taken but rather on the basis that the remaining property has been injuriously affected.

In the United States, a considerable amount of ingenuity has been devoted to the problem of distinguishing between compensable takings and noncompensable regulation. It has become increasingly difficult to decide where to draw the line because the technique of regulation and purchase are no longer confined to traditional areas and methods but overlap to a considerable extent. With regard to title, distinctions between the two methods

become less significant as we observe both methods being used to achieve results which may involve, in either case, comprehensive limitation or direction of use. Since title is composed of a bundle of rights which include duties to the community, negative rights or prohibitions, as well as rights in the individual owner. The state may require the complete surrender of land or it may place severe limitation on the rights of a user without requiring a surrender of ownership. This result may be achieved by regulation almost as extensively as by purchase. Consequently, if the purpose of regulation and purchase become more indistinguishable in the field of land-use control, and if their respective effects on title are the same, then guidelines to the necessity of compensation are weakened or difficult to establish.

Since all losses cannot be compensated it is highly probably that legal decisions will continually be made on an ad hoc basis. It may be the case, however, that the problem though often expressed in legal terms is really an ethical one of determining whether the state should pay for the external costs which its decisions impose on others to the same extent that other planning legislation seeks to compel private decision makers to pay for the diseconomies which their decisions impose on others.

In many of the American cases discussed in which no compensation was provided, the courts seemed to regard the institution of private property ownership as being subject to the implied condition that the state through the exercise of its police powers may impose appropriate regulations to ensure that such property should not be used in ways that cause unreasonable harm to others. This view presupposes a system of reciprocal duties and

benefits between individual owners of property and implicitly regards the constitutional requirement of just compensation as being satisfied in non-monetary form. It concedes that even though an owner may have sustained individual loss as a result of regulation he is compensated for it by sharing in the general benefits which are brought about by the regulation.

The Mugler decision, for example, appears to have been based on such considerations. Firstly the court sought to distinguish between regulation and appropriation or occupation of property since only the latter form of governmental action is regarded as a taking of private property. Secondly a prohibition on the manufacture and sale of alcoholic beverages was not regarded as an interference with property within the meaning of the just compensation clause, but amounted only to the abatement of a harmful or noxious use. Justice Harland went as far as to point out that all property is held under the implied obligation that the owner's use shall not be injurious to the community. Therefore compensation need not be paid when such a nuisance is abated although due process of law would require just compensation if unoffending property is taken from an innocent owner.

Modern writers, notably Sax, have recognized that property consists of more than a mere right of physical occupancy and agree that just compensation may be constitutionally required where regulatory measures fall short of appropriation but substantially diminish property values. It is hoped that future court decisions will focus less on precedent and concentrate more on the increasing problem of distinguishing between regulation and purchase. This should make some contribution to disentangling the riddle of just compensation.

BIBLIOGRAPHY

Armstrong, William. "The British Columbia Water Act: The End of Riparian Rights". 1 U.B.C. Law Review (1962), 583-594.

Coase, Ronald. "The Problem of Social Cost". 3 Journal of Law and Economics (1960), 1-44.

Davies, Keith. Law of Compulsory Purchase and Compensation. London: Butterworths, 1975.

Demsetz, Harold. "Toward a Theory of Property Rights". 57 American Economic Review, Papers and Proceedings (May 1967), 347-359.

Elder, P.S. "Environmental Protection Through the Common Law." 12 Western Ontario Law Review (1973), 107-171.

Gibson, Dale. "The Constitutional Context of Canadian Water Planning." (prepared for the Government of Canada, 1968).

Gibson, Dale. "Constitutional Jurisdiction Over Environmental Management in Canada". (prepared for Constitutional Conference of Continuing Committee of Officials, June 1970).

LaForest, Gerard. Natural Resources and Public Property Under the Canadian Constitution. Toronto: University of Toronto Press, 1969.

Law Reform Commission of British Columbia: Report on Expropriation. Government Document, 1971.

Linden, Allen. "Strict Liability, Nuisance and Legislative Authorization". 4 Osgoode Hall Law Journal (1966), 196-221.

Lucas, Alastair. "Water Pollution Control Law in British Columbia". 4 U.B.C. Law Review (1969), 56-86.

Mayer, Sylvain. The Lands Clauses Consolidation Act, 1845: A Code of the Law of Compensation. London: Sweet and Maxwell, 1903.

McLaren, John. "The Law of Torts and Pollution". The Law Society of Upper Canada: Recent Development in the Law of Torts. Special Lectures. Toronto: Richard De Boo Ltd., 1973.

McLaren, John. "The Common Law Nuisance Actions and the Environmental Battle - Well-tempered Swords or Broken Reeds?" 10 Osgoode Hall Law Journal (1972), 505-561.

Michelman, Frank. "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law". 80 Harvard Law Review (1967), 1165-1258.

Mishan, E.J. The Costs of Economic Growth. London: Staples Press, 1967.

Netherton, Ross. "Implementation of Land Use Policy: Police Power v. Eminent Domain". 3 Land and Water Law Review (1968), 33-57.

Nutley, W.G. and Beamont, C.H. Land Compensation Act. London: Butterworths, 1974.

Pejovich, Svetozar. "Property Rights and Economic Theory". The Economics of Legal Relationships. Edited by Henry G. Manne, St. Paul, West Publishing Co., 1975.

Pejovich, Svetozar. "The Creation and Specification of Property Rights". The Economics of Legal Relationships. Edited by Henry G. Manne, St. Paul, West Publishing Co., 1975.

Randall, Alan. "Market Solutions to Externality Problems: Theory and Practice". 54 American Journal of Agricultural Economics (1972), 175-183.

Report of the British Columbia Royal Commission on Expropriation (1961-63), The Hon. J.V. Clyne, Commissioner.

Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation (Department of the Attorney General, 1964).

Sax, Joseph. "Takings and the Police Power". 74 Yale Law Journal (1964), 36-76.

Sax, Joseph. "Takings, Private Property and Public Rights". 71 Yale Law Journal (1971), 149-186.

Todd, Eric. "The Mistique of Injurious Affection in the Law of Expropriation". U.B.C. Law Review (Centennial Review 1967), 127-169.