Expropriation's
Evolution to Ambiguity:
A Case Study of
535534 British Columbia Ltd v. White Rock (City)

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I. Introduction:

Cases of expropriation are decided using well-established legal tests. However, as case law has developed and as those legal tests have been refined, the deciding factor has paradoxically become a flexible assessment of whether complete private use has been eliminated. The case of *535534 British Columbia Ltd v. White Rock (City)* exemplifies this trend.

I. Facts:

Although there is considerable historical background to this case, for our purposes the facts can be stated simply. On September 17, 1997, the Burlington Northern and Sante Fe Railway Company granted the appellant developer, 535534 British Columbia Ltd., an option interest in nine parcels of property. These parcels include waterfront property adjacent to a railway line in the City of White Rock. On September 29, 1999, the City of White Rock adopted *Zoning Bylaw 1591* (hereafter referred to as the Downzoning) which zoned the parcels to civic, public utility and railway use. The developer commenced action declaring that this Downzoning constituted an expropriation of its interest in the parcels, as the zoning now bars sub-division and development.

The British Columbia Supreme Court held that the Downzoning is not an expropriation. In 2003, both an appeal and leave application by the developer were dismissed.

II. Issues:

The central issue in the case is that of expropriation. Specifically, did Zoning Bylaw 1591 amount to an expropriation for which the appellant is entitled to compensation? Was the Downzoning of the property a legitimate employment of the government regulatory power, or alternatively, did it place an unduly severe restriction on the use of the property, necessitating compensation to the owner?

In order to find an expropriation the following needs to be considered:

Was there a "taking"?

Was there a corresponding benefit or acquisition?

Was the private interest completely removed?

If not, what is the nature and proportion of the interest that remains?

III. Background:

The issues at stake are influenced by and representative of the Anglo-Canadian belief in the underlying dual functions of property. Property governs both the use of things and the allocation of social wealth, sometimes in opposition of each other. For the individual, property is a bundle of legal entitlements. The entitlements include among the incidents of ownership, the right to use and improve on one's land. For the state, property serves the public interest and it uses its statutory authority to restrict the private use and enjoyment of owners in the interest of the public. The power of the state to take land in this context corresponds to a deprivation of individual owner rights in a private property system. Eric C.E. Todd's *The Law of Expropriation and Compensation in Canada*, 2nd Ed. 1992 p1 remarks: "Power of expropriation is generally recognized as a necessary adjunct of the modern government, but its exercise nearly always results in a traumatic experience for the

affected property owner." Without this power, individuals would have a veto power over public interest as dictated by the state. However, if that state power is absolute, private property lacks what our common law recognizes as a fundamental incident of ownership: enjoyment and use through development and profit.

This tension emerges out of the Anglo-Canadian historical and constitutional context that grounds much of Canadian jurisprudence. It can also be contrasted with a contemporary international perspective that offers alternative approaches and rationales, but which has emerged from similar traditions of property values.

Historically, the codes of *Justinian* and *Theodosius* demonstrate that the Roman Empire had a system of forcible taking for the building of public works including fortifications, lecture halls, aqueducts and public baths. The property "taking" power of King John and subsequent English rulers was restrained with the entrenched property rights of the *Magna Carta* in 1215. Hugo Grotius, in *De Jure Belli Et Pacis* (1625) Bk.II, ch. XIV §§ VII, writes, "A king may two ways deprive his subjects of their right, either by way of punishment or by virtue of the eminent power. But if he does it the last way, it must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss he suffers, out of the common stock." In the *Law of Nations* (1758) Bk. I, ch.XX, § 244, Emmerich de Vattel expanded on the idea of eminent *domain* and the duty of government to justly compensate for private property taken for the public good.

Canadian jurists of the nineteenth century were also involved in the debate of property rights and social legislation. As the Treasurer of the Law Society of Upper Canada and leader of the Liberal party, Edward Blake said in 1882:

> I am a friend to the preservation of the rights of property... but I believe in the subordination of those rights to the public good.... I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are

> thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province. (Canada, *House of Commons Debates*, April 14, 1882, at 915).

While judicial conflicts dominated the property debate of this era in the United States, Canadian lawyers with no private property protections in the *British North America Act* of 1867 debated individual autonomy and state power outside judicial review.

a. Constitutionality:

As Blackstone affirmed in Vol. I, p.139 of his 1765 *Commentaries on the Laws of England*, although there is no English constitutional principle of compensation for private property "takings", the supremacy of Parliament under the Common Law is tempered by the presumption against the taking of property without compensation. The *English Bill of Rights* of 1689 also shows that the interests of property owners are represented in non-constitutional ways, with a statutory limit on the king's power to seize property.

There is also no constitutional principle in Canada guaranteeing legal due process in response to the deprivation of property rights. As Peter Hogg, *Constitutional Law of Canada* 2003, 28.5(d), puts it, "Neither the federal government nor a provincial government is under any constitutional (as opposed to statutory obligation) to pay fair compensation, or any compensation, for property expropriated." This passage does allude to the statutory obligation present in the *Canadian Bill of Rights*.

Section 19(a) of the 1960 *Canadian Bill of Rights*, a statute only applicable to federal laws, does create due process protection for the removal of property. Like much of the bill, however, this has had limited influence on the courts. For example, in *Authorson v. Canada (Attorney General)* (2003) SCC 39, the court dismissed an attempt to use the *Bill of Rights* to

deny effect to a federal provision that limited compensation arrangements to some disabled veterans.

A similar provision was omitted from the *Canadian Charter of Rights and Freedoms*. Although originally tabled to include such a provision, a majority of the provinces feared a limitation on the scope of possible economic legislation. There was also a concern that a *Charter* right to property would allow unqualified constitutional protection of ownership over tangible and intangible things. In *"The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights"* (1988) *Alberta Law Review* vol.26 No.3 p.548, Jean McBean articulates the grandiose fears of a *Charter* property clause that would "take away the hard won rights of Canadian workers to occupational health and safety laws, of Canadian wives to the benefit of matrimonial property laws, and of Canadian citizens in general to the benefits of environmental laws, rent control legislation and numerous other acts of government which benefit Canadians while encroaching on the property rights of those affected by the law…." While not including a strict procedural right to property holders (that critics said could turn into a broad substantive right), the exclusion can not be construed as an attempt to deny or take away the possibility of compensation for expropriation. The resulting omission indicates that the court can focus on common law precedent to balance the rights of private property owners with the rights of the state in competing property claims.

b. International Relevance:

Part of the concern over inclusion of a property clause in the *Charter* was based on the constitutional interpretations of the courts in the United States. The Fifth and Fourteenth Amendments to the U.S. Constitution include private property due process clauses. While some legal theorists believe this constitutional backdrop reinforces views of the state as

inherently coercive, the U.S. Supreme Court continues to favour a flexible judicial attitude of case-by-case balancing.

Similarly, the *Australian Constitution, section 51(xxxi)* limits government acquisition of property to "taking" on "just terms." International treaties which Canada has signed also include property guarantees. The freedom from arbitrary deprivation of property is in the *Universal Declaration of Human Rights, Article 17* (1948), and Article 1 of the *European Convention for the Protection of Human and Fundamental Freedom* (1950) includes property rights.

An international trade treaty provides procedural due process rights for foreign investors subject to government "takings" in Canada. Article 1110 under chapter 11 of the *North American Free Trade Agreement* (NAFTA) limits expropriation of investments to public purpose "takings" or on payment of compensation. In *Metalclad v. United States* (ICSID Case No. ARB (AF)/97/1 2000), an arbitration panel found the Mexican government violated this Chapter 11 provisions of NAFTA in using land regulation to refuse the opening of a hazardous waste facility. This tribunal interpretation leaves open the possibility that American views of the primacy of private property can be grafted onto Canadian jurisdiction with respect to American investors. It seems misplaced that foreign property owners would have greater property rights in Canada than Canadians, but I am reassured that claims for compensation and cases of expropriation will continue to be governed by the courts balancing state interest and private rights, as exemplified by some of the American jurisprudence.

The American case most frequently quoted with approval dealing with the nature of expropriation rights is *Pennsylvania Coal Company v. Mahon et al,* (1922) 260 U.S. 393. It is the *locus classicus* of the principles governing expropriation. Justice Holmes, writing for the majority, summarizes "the general rule at least is, while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a "taking"" (p.325). Although balanced by *Euclid v. Ambler Realty Co.,* (1926) 47 St.C.114, the majority (including Holmes) defended land-use zoning as constitutional and acknowledged that considerations depend on individual case locality and circumstances. This was further nuanced by *Keystone Bituminous Coal Assn. v. DeBenedictis*, (1987) 107 S.Ct. 1232, where the substance of the *Pennsylvania Coal Company* was distinguished in a case of similar facts, but the rationale of the Holmes balancing test remains. Thus, Holmes test of "too far" remains an informing principle.

IV. Analysis:

In determining whether a statute results in an expropriation, *Attorney General v. De Keyser's Royal Hotel Ltd*., [1920] A.C. 508 U.K. H.L., sets out the statutory presumption of compensation for expropriation. As Lord Atkinson wrote, "the recognized rule for construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" (*supra* at 542). In construing statutes and following the analysis of the leading Canadian authority, *Manitoba Fisheries Ltd. v. The Queen*, (1978) 88 D.L.R. 3rd 462 S.C.C., an expansive view of property, "taking" and of a corresponding acquisition is taken.

a. "Takings"

In *Manitoba Fisheries Ltd.* (*supra*), the *Fresh Water Fish Marketing Act* created a statutory monopoly which had the effect of putting the plaintiff out of business. Although not an interest in land, the court recognized the intangible goodwill of the business as property that had been taken away. The Supreme Court resisted a strict characterization of "taking" as

a real transfer of possession from the citizen to the state, and incorporated the effect of the legislation in supporting a finding of a "taking."

Tener v. The Queen, [1985] 1 S.C.R. 533 (S.C.C.) expanded on this fluid concept of construing statutory "takings". It was held that denial of access to Crown-granted mineral rights amounted to a recovery of those rights by the Crown. In words applicable to this case as well, Mr. Justice Estey wrote: "Here, the action taken by the government was to enhance the value of the public park…. The notice of 1978 took value from the respondent and added value to the park. The taker… clearly did so in the exercise of its valid authority to govern…. The notice of 1978 was an expropriation and, in my view, the rest is part of the compensation assessment process" (*supra* at 12). Madame Justice Wilson added, "It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense" (supra at 13). In a case with factually similar, *Casamiro Resource Corp. v. British Columbia (Attorney General)*, (1991) 55 B.C.L.R. (2d) 346 (C.A.), Madam Justice Southin found the degree of restricting regulation was beyond an appropriate degree of confiscation without compensation, "the diminution of rights does not always amount to a taking which as a matter of law is equivalent to expropriation. Whether in any given case the acts done by government are so equivalent is a question of mixed fact and law. Here… the grants have been turned into meaningless pieces of paper" (p. 356). A more recent mining resource case *Cream Silver Mines Ltd v. British Columbia,* (1993), 75 B.C.L.R. 2d 324 C.A., cautions that this is not a positive rule of law, but a rule of statutory interpretation.

b. Acquisition

The balancing of fact and law sometimes focuses on a strict correspondence between "taking" and acquisition. In *Steer Holding Ltd v. Manitoba,* (1992) 48 L.C.R. 241, the

plaintiff's development plans spanned a waterway. The provincial legislature amended the *City of Winnipeg Act* to prohibit such developments. In dismissing the action, the court found no "taking" occurred as there was no resulting enhancement or improvement conferred on the government.

The trial judge also cites *A & L Investment Ltd. v. Ontario (Minister of Housing),* (1997), 62 L.C.R. 241 Ont C.A., as a case where expropriation fails because of a lack of acquisition. A & L Investment Ltd. tried to void a 1991 act that limited rent controls. It was further claimed that property rights were included under s.7 of the Charter. The case would have applied expropriation far beyond its established application, both constitutionally with its *Charter* claims and practically with the allegedly expropriated thing being neither tangible nor a recognized intangible like goodwill. Not surprisingly, the claim failed.

In a case with facts closer to *535534 British Columbia Ltd v. White Rock (City, Mariner Real Estate Ltd. v. Nova Scotia (Attorney General),* (1999) 68 L.C.R. 1 N.S. C.A., waterfront property owners were denied permits to build single dwelling units on their plots. It was held that since the owner could still use and enjoy the land in the manner of which they had being doing for previous years and because they have not attempted to develop their land in manner consistent with the statute in question, no expropriation claim was grounded. The claim fails not merely because of no corresponding acquisition, the principle for which it is cited by the court below here, but on the more general lacking of a "taking." Although technically it is true that without a "taking," there can be no acquisition, acquisition is not the lone variable that negates the claim. As Cromwell J.A. wrote:

> The respondents had the burden of proving that virtually all incidents of ownership (having regard to reasonable uses of the land in question) have, in effect, been taken away…. The respondents… have not shown that they would be denied the required permits with respect to such other reasonable or traditional uses of the lands. In short, there is an absence of evidence relating to environmentally appropriate development plans

> on the land in question, and an absence of evidence of refusal of permission for the respondents to engage in other reasonable or traditional uses. These, in combination, result, in my opinion, in the respondents having failed to establish that virtually all incidents of ownership have, by the effect of the *Act* and Regulations, been taken away (*supra* at 89).

Thus, *Mariner* aptly summarizes the general requirements of a "taking," which include the requirement of a corresponding acquisition by the "taking" body.

On the issue of acquisition by the Downzoning, the parcels operate as a buffer greenway and view corridor for the waterfront of White Rock and continue to act as an unofficial public park. By eliminating the potential for development, the value of the public park was enhanced. The current use was secured and potential for change was limited to another public use. The real consequence of the regulation appeared to be a prohibition of any development on the land and the continuation of the public use of the land, as well as the future potential of leasing and public acquisition.

c. Remaining Interest

As illustrated by *Mariner Real Estate Ltd v. Nova Scotia (supra)*, a key distinction between cases where the court will find expropriation and where it will not centers not on the correspondence of an acquisition to the "taking," but on the relationship of the "taking" to the remaining interest. "Too far" in the Canadian courts thus appears to be virtually extinguishing interests. As Cromwell J.A. sums up successful expropriation cases:

> In *British Columbia v. Tener*, the denial of the permit meant that access to the respondents' mineral rights was completely negated, or as Wilson, J. put it at p. 552, amounted to total denial of that interest. In *Casamiro Resource Corp. v. British Columbia (Attorney General)* which closely parallels *Tener*, the private rights had become "meaningless". In *Manitoba Fisheries Ltd. v. R.* the legislation absolutely prohibited the claimant from carrying on its business (*supra* at 47).

Aubry v. Trois-Rivieres Ouest (Ville), (1978) 4 M.P.L.R. 62 Que. C.A. also provides an early example of this principle. Park and public institution restrictions were put on the appellant's property through a zoning bylaw. The court found that the appellant's interest had been completely eliminated and ordered the removal of the restrictions.

In *Harvard Investment Ltd. v. Winnipeg (City),* (1995) 129 D.L.R. 4th 557, a hotel building received heritage designation thus preventing redevelopment. The judge, Twaddle J.A. found that business ineptitude caused the losses and that value remained independent of the designation. He also succinctly listed a "taking" test requiring " two elements to a taking: (i) the acquisition of an asset by the authority involved or its designate, and (ii) the complete extinguishment of the asset's value to the owner" (*supra* at 277). Inversely, remaining private interest will signify no "taking."

The decision in *Steer* (*supra*) fails this test as the company could still develop its land in any number of ways, with the only exclusion being development that spans the protected waterway. The court found that the statutory amendment had not resulted in the complete stripping of potential from the land. Thus, a downzoning that results in a mere diminution of interest is less likely to receive compensation than a complete removal of interest.

The Frobeens were found to continue to be able to use their property as a private lot, in *Frobeen v. Central Saanich (District),* (1996) 58 L.C.R. 267, after a bylaw restricted land within a setback area "to public use." Since they still had remaining private interests, their claim failed.

A four acre setback on a forty acre parcel of land was not viewed as an expropriation given the large remaining interest in *Hampton Investments Ltd. v. British Columbia (Ministry of Transportation & Highways)* (1997) 61 L.C.R. 224.

Finally, in the case of *64933 Manitoba Ltd. v. Manitoba*, (2002), 71 L.C.R. 171, 193 D.L.R.4th 561, the plaintiff purchased lands in a park subject to significant statutory and regulatory restrictions. Notwithstanding the great reduction in value, the land still had private property value and the expropriation claim was dismissed accordingly.

Applying this "taking" test to whether the Downzoning appears to have resulted in the complete removal of interest in the land, the interest of the developer has to be viewed in relation to the remaining railway interest.

d. Railways

Under the various *Railway Acts* (1871, 1906, 1952), any railway subject to *The Railway Act* (R.S.C. 1952 c.234) has had the ability to expropriate lands in the interest of transportation development and with the approval of the Board of Transport Commissioners. To support the development of transportation infrastructure, various levels of government allowed railways to take lands from private citizens. In compensation arbitration, case law developed recognizing compensation interests, both in lands designated for railway use and in adjacent expropriated and sub-adjacent lands, including adjacent mines and minerals interests (see *Berg & Penn Coals Ltd. v. Canadian National Railway*, 40 C.R.C. 361, *Green v. Canadian Northern Railway*, (1915) 9 W.W.R. 907, *Canadian National Railway v. Terwindt*, [1930] 4 D.L.R. 1004, *Canadian Pacific Railway v. Albin*, [1919] 49 D.L.R. 618, *Nash & Williams v. Edmonton, Dunvegan & British Columbia Railway*, [1917] 36 D.L.R. 601). In *Nash & Williams* (*supra),* a claim in respect to coal rights under land expropriated for railway purpose was awarded separate compensation under the Railway Act, (1906) ch. 37 R.S.C..

With the allocation of power and government support, the railways embodied the first massive concentration of corporate power in Canada. As the importance of railway transportation diminished over the years the necessity of holding these lands as railways has also decreased. Accordingly, that concentration of land and power has, to a certain extent, filtered back into various private hands. It therefore seems inconsistent to view the complementary private interest of railway lands as separated from the historical railway use for expropriation claims.

For that reason, the result of *Zoning Bylaw 1591*, in my opinion constitutes the complete removal of private development potential and in conjunction with the corresponding acquisition by the state the bylaw constitutes an expropriation.

e. Interpretation

This application of statutory interpretation is consistent with the relationship between municipalities and the courts. Deference and acknowledgement will be shown to municipalities with respect to their ability to govern and shape development (see *Common Exchange, et al. v. City of Langley* (2000), 16 M.P.L.R. (3d) 85 (B.C.S.C.) as an example of the court's respect to a local government's ability to prohibit particular land uses throughout a community). However, the court should ensure that the zoning enactment reasonably accommodates the rights of citizens and is within its authority. In *Congregation des temoins de Jehovah de St-Jerome-Lafontaine, Roberto Biagioni et Denis Leveille c. Municipalite du village de Lafontaine, Harold Larente et Procureur general du Quebec (Que.),* (2003) 530 S.C.C. 29507, zoning was compelled to accommodate the exercise of religious freedoms. Even when not infringing on Charter rights, local governance should not be allowed to surpass the reasonable exercise of its power through disguising the intention of its bylaws.

For example, agriculture can not be regulated through the vehicle of light and heating fuel emission restriction, when it is found to be a "farm" bylaw in pith and substance, *Windset Greenhouses v. Delta (Corp. of),* 2003 BCSC 570.

In the same way, a successful expropriation action can be found when a statute purporting to serve another function is, in fact, expropriating land (see *Rodenbush v. North Cowichan* (*District*), (1977) 76 D.L.R. 3d 73 B.C.S.C.). In that case, leasers planned to develop a log-haul operation and mill. The local council downzoned to prevent the operation but left some private uses to avoid compensation. In finding for the plaintiff, the judge found that the remaining interests, in reality, excluded all economics interest. Similarly, in *MacMillan Bloedel Limited v. The Galiano Island Trust Committee*, (1993) B.C.S.C. Vancouver Registry No. A920930, the Expropriation Compensation Board found a downzoning removal of single family residential requirements and an alteration of lot size requirements were really intended to sterilize land use by the appellant. The Downzoning also sterilizes all economic interest despite remaining civic, public utility and railway usage and thus is a confiscation of all reasonable private interests in the land.

V. Summary

Zoning Bylaw 1591, from my perspective, exceeds the legitimate use of the government confiscatory power and places an unduly severe restriction on the appellant's property option. Following the precedent of *Aubry v. Trois-Rivieres Ouest (Ville), Manitoba Fisheries Ltd. v. The Queen*, *Tener v. The Queen*, and *Casamiro Resource Corp. v. British Columbia (Attorney General) (supra et al),* the diminution in value constitutes an expropriation of property interests. The two-part test for "takings" of an acquisition and a virtual elimination of all interest set out in *Harvard Investment Ltd. v. Winnipeg (City)* and *Mariner Real Estate Ltd v.*

Nova Scotia appears to be met. The city acquired a view corridor, a park, and the future potential of leasing and public acquisition of the parcels. The developer's options became virtually worthless.

Finding expropriation would also have been consistent with the nature of the parcels of land as historical railway plots (*Nash & Williams v. Edmonton, Dunvegan & British Columbia Railway* supra) and addresses the actual purpose and effects of the legislation (*Rodenbush v. North Cowichan* (*District*) and *MacMillan Bloedel Limited v. The Galiano Island Trust Committee supra et al*).

VI. Conclusion

However, the decision of *535534 British Columbia Ltd v. White Rock (City)* appears to follow different reasoning. While short in its explanation, the finding can only be seen as the court's defense of the government's confiscatory power. Representing a flexible and generous assessment of what constitute remaining interests and value, cases of expropriation appear to have reached a new level of ambiguity where expropriation will only be found when the judicial allies of the government see their counterparts as going "too far" and the legal test developed to create objectivity merely create justification.

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