THE DIFFERING FACES OF INJURIOUS AFFECTION

1. *Origin*

"Injurious affection" is an expression which is associated with the law of resumption. It is commonly used today in statutes which prescribe the factors to be taken into account in assessing compensation for land which has been compulsorily acquired. More specifically, it generally refers to a claim by an owner, part of whose land is resumed and part of which he retains, in respect of the damage which he suffers to the land retained.

Section 6 of the Railways Clauses Consolidation Act 1845 (U.K.) provided for the assessment and payment of compensation to the owners and occupiers of land "injuriously affected" by the construction of a railway. In interpreting the section Lord Cranworth in *Ricket v. Metropolitan Railway Co.* said that the damage must be *damnum cum injuria.*

> The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration.[1]

As will be seen "injurious affection" has grown beyond this original concept: it is primarily concerned with depreciation to the value of retained land.

Sections 63 and 68 of the Lands Clauses Consolidation Act 1845 (U.K.)[2] used the same expression and in *McCarthy v. Metropolitan Board of Works,* Bramwell B. said—

> . . . the word "injuriously" does not mean "wrongfully" affected. What is done is rightful under the powers of the Act. It means hurtfully or "damnously" affected. As when we say of a man that fell and injured his leg. We do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injured, that is to say, hurtfully affected. At the same time, I am clearly of opinion that to entitle the parties interested to compensation,

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1 (1867) L.R. 2 H.L. 175 at 198.

2 Largely superseded by s. 10 of the Compulsory Purchase Act 1965. At the time of writing new legislation is being considered in England—see paragraph 22 infra.

the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act.[3]

Two points emerged from this interpretation. First, the injury must be an actionable wrong but for the Act authorising it. Secondly, the injury must be done whilst the powers of the Act are being exercised, as distinguished from the authorised user of the thing which the Act authorises. The usual illustration of the second rule is *Brand v. Hammersmith City Railway Co.*[4] where damages were held to be recoverable against a railway company for injury caused by vibration, smoke, and noise, caused by their trains during the construction of their line, because such damage was caused by reason of the exercise of their powers. The company was not, however, liable for such damages occasioned by its trains after the line was completed.

2. *A term of art*

Accepting that the term is generally to be found in land acquisition statutes, in recent years there has been some reaction against its use. Perhaps the problems which have arisen over the years have suggested to the draftsmen that it might be better to avoid its use. Thus s. 33 of the Surface Rights Acquisition and Compensation Act 1968 (Saskatchewan) includes amongst the factors to be considered—(a) payment or allowance for severance, (b) the adverse effect on the remaining land by reason of severance, and (c) payment or allowance for nuisance, inconvenience, disturbance or noise to the owner caused to the adjoining land of an owner due to the acquisition.[5] The expression "adverse effect" has been used instead of "injurious affection" although the latter has been the expression traditionally used since it appeared in the Lands Clauses Act 1845. It falls into the category of a term of art, that is to say it is a phrase which by judicial interpretation has come to have a special meaning at common law where it is not expressly defined by statute.

3. *Where it arises*

Injurious affection arises in two situations:

(i) where land is resumed, and

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3 (1872) 8 L.R.C.P. 191 at 208; affirmed by the House of Lords (1874) 7 H.L. 243.

4 (1869) L.R. 4 H.L. 171. Subsequently applied in Jones v. Stanstead Railway Co. (1872) L.R. 4 P.C. 98 and in numerous other cases.

5 See Sychuk, *Compensation for Oil and Gas Surface Rights in Saskatchewan* (1972) 36 Sask. L. Rev. 387. Section 20 of the Right of Entry Arbitration Act 1955 (Alberta) has a similar provision, but s. 15 of the Expropriation Procedure Act, 1961 (Alberta) refers simply to "injurious affection".

(ii) where land is not resumed.

Historically it is more closely associated with the situation where land is resumed. But in recent years it has become an expression which has been used more frequently in situations where no land has been resumed.

4. *Where land resumed*

Where land has been resumed it is possible to discern six situations in which an owner may wish to establish a claim for injurious affection:

(i) permanent physical damage caused to his retained land by reason of works carried out on the resumed land—e.g. a high wall is constructed on the resumed land which shades certain plants needing a lot of sunshine causing the plants to die;

(ii) temporary physical damage caused to his retained land by reason of the acquisition—e.g. the exhaust fumes from lorries passing by the retained land to the resumed land which damage plants which subsequently recover when the lorries stop passing;

(iii) depreciation in value caused to his retained land by reason of *severance*;

(iv) depreciation in value caused to his retained land by reason of the *proposed or anticipated use* to which the resumed land will be put;

(v) depreciation in value caused to his retained land by reason of the *construction* of the public works on the resumed land;

(vi) depreciation in value caused to his retained land by reason of the *actual use* to which the resumed land is being put.

(i) and (ii) are concerned with physical damage; (iii)-(vi) are concerned with depreciation in value.

A resumes 10 acres of B's 30 acre estate for the purpose of constructing a nuclear power station. By reason of the severance the remaining 20 acres is no longer a viable size for continuing the use to which B put his land. Before the resumption the 30 acres had a market value of $60,000. After the resumption the retained two-thirds has a value of, not $40,000, but say $30,000 by reason of the manner in which part of the original estate has been severed. Its value is depreciated by reason of the severance, and he can claim under (iii). The proposed use to which A intends to put the land causes the market value of B's retained land to fall to, say, $25,000, and he may be able to claim under (iv). During the period of actual construction of the nuclear power station, the process of construction may depreciate

the value of the retained land to, say, $20,000 and B may wish to claim under (v). Then, when the construction of the power station has been completed it may be possible to argue that while the proposed use did not depreciate the value of the land, the actual use has done so to, say, $15,000 and B will wish to claim under (vi). The unexpected ugliness of the completed power station may further depreciate the value. One of the problems in injurious affection is to define its limits.

5. *Seldom defined*

Injurious affection is an expression used in many statutes. The statutes seldom define the expression which is therefore dependent upon the interpretation which the common law cares to give it. The problem is whether the common law gives it a consistent interpretation applicable to all statutes which use the expression or whether it is capable of a different interpretation in each statute in which it appears. And obviously any particular definition in a statute may give a different meaning from that which may be associated with the common law.

6. *Ontario definition*

Ontario is an exception to the general rule. The Expropriation Procedures Act 1962-63 of that Province did not define injurious affection but s. 1(e), Expropriations Act 1968-69 (Ontario) states—

> "injurious affection" means,
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> (i) where a statutory authority acquires part of the land of an owner,
>
> a. the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
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> b. such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
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> (ii) where the statutory authority does not acquire part of the land of an owner,
>
> a. such reduction in the market value of the land of the owner, and,
>
> b. such personal and business damages,
>
> resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

> and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom the lands are acquired retains land contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired;

Section 13(2)(c) of the Act states that the compensation payable to the owner shall be based, inter alia, upon damages for injurious affection.

The Expropriation Act 1968-69 (Canada) uses the expression injurious affection but does not define it.

7. *No definition in Australian land acquisition Acts*

None of the land acquisition Acts in Australia defines "injurious affection". Section 63(b) of the Public Works Act 1902 (W.A.) provides that in assessing compensation regard shall be had to

> The damage, if any, sustained by the claimant by reason of the severance of such land from the other adjoining land of such claimant or by reason of such other lands being injuriously affected by the taking.[6]

Section 26, Valuation of Land Act 1960 (Vic.) follows the language of the Lands Clauses Act 1845 (U.K.) and states—

> In determining whether any and what sum is to be paid by way of compensation in respect of any land required as aforesaid or in respect of any other land of the same owner injuriously affected by such taking or acquiring the Court shall in each case have regard to . . .

the principles of compensation including, inter alia, enhancement. The reference to "severing of land" in section 35, Lands Compensation Act 1958 was omitted when the Valuation of Land Act 1960 was amended by the Valuation of Land (Appeals) Act 1965. Section 124 of the Public Works Act 1912 (N.S.W.), which was drafted in similar terms to section 35 of the Lands Compensation Act 1958 (Vic.), states that in assessing compensation regard shall be had not only to the value of the land purchased or taken,—

> but also to the damage (if any) caused by the severing of the lands taken from other lands of the owner, or by the exercise of any statutory powers by the Constructing Authority otherwise injuriously affecting such other lands . . .

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6 The meaning of the provision was discussed in Konowalow v. Minister of Works [1961] W.A.R. 40.

Section 20, Acquisition of Land Act 1967 (Qld.) adopts similar language but section 25(ii)(b) Land Acquisition Act 1969 (S.A.) provides that consideration may be given to—

> the loss occasioned by reason of severance, disturbance or injurious affection . . .

The expression is not used at all in the Lands Acquisition Act 1955 (Commonwealth). Nor is it used in the Lands Resumption Act 1957 (Tasmania).

The problem is whether "injurious affection" is capable of a consistent meaning in each of the five Australian States which use it. A further problem arises as to whether it may be implied as a factor to be taken into account in assessing compensation for land compulsorily acquired under the Lands Acquisition Act 1955 (Cth.) and the Lands Resumption Act 1957 (Tas.).

8. *Use in other statutes*

Since it was introduced into the Railways Clauses and Lands Clauses Acts of 1845 the expression "injurious affection" has been used in other statutes. The question has then arisen whether it means the same thing in other statutes as in the Railway and Lands Clauses Acts. Section 332 of the Public Health Act 1875 (U.K.) provided:

> Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir canal river or stream . . . in cases where any . . . person would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting of such reservoir canal river stream unless the local authority first obtained the consent in writing of the . . . person so entitled . . .

In *Roberts v. Gwyrfai District Council*[7] the use of the words "injuriously affect" in this context was held to be quite different from their use in s. 68 of the Lands Clauses Act.

Where the expression "injurious affection" is used in land acquisition statutes and is not defined, the courts try to give it a consistent interpretation. For example, in *Re Pulsifer*,[8] Patterson J. in the Nova Scotia Supreme Court said that the words in the Canadian Expropriation Act had the same meaning as the same words in s. 11 of the Expropriation Act 1954 of Nova Scotia and applied the principle associated with *Sisters of Charity*.[10] In *Norway Pines Cabins Ltd. v.*

7 [1899] 1 Ch. 582, affirmed [1899] 2 Ch. 608.
8 (1962) 35 D.L.R. (2d) 647.
9 See paragraph 8.
10 See note 14.

Minister of Highways for Ontario[11] Laskin J.A. spoke of "injurious affection" as having a well-understood meaning developed by case law which may appropriately be given to the Expropriation Procedures Act 1962-63.[12]

9. *The leading English authorities*

Harman L.J. described injurious affection in *Edwards v. Minister of Transport* as—

> a piece of jargon having a respectable pedigree and prolific of litigation in our courts for a century or more . . .[13]

This case is the leading modern authority on the subject in the English courts, although it is possible to argue that the better authority is the Privy Council's decision in *Sisters of Charity of Rockingham v. The King*,[14] which was based on nineteenth century cases and applied in *Edwards*.

Sisters of Charity was concerned with the meaning of "injurious affection" in a former Canadian Expropriation Act of 1906 which in common with its successors did not contain its own definition of the expression. The facts were that the Sisters owned land in Nova Scotia (on which they had a school) immediately on the west side of a public road and a railway. On the east side they owned two small promontories of land on the margin of a public harbour. They had made a bathing house and wharf on the promontories, both of which they used in connection with the school, but no legal right of way across the railway was proved. The Crown expropriated the two promontories for a public purpose, and upon an area wholly to the east of the railway, and including the two small promontories, made a large railway shunting yard. The Sisters sought compensation for the "injurious affection" to their property on the west of the railway by reason of the construction of the shunting yard. Section 20 of the Expropriation Act permitted compensation to be awarded for land

> injuriously affected by the construction of any public work.

Lord Parmoor, a former editor of Cripps on Compulsory Acquisition of Land[15] and subsequently referred to as a "great authority on this

11 (1967) 59 D.L.R. (2d) 234.

12 Since repealed—see paragraph 7 supra.

13 [1964] 2 Q.B. 134 at 146.

14 [1922] 2 A.C. 315.

15 This Victorian classic first appeared in 1881 and reached its 11th edition in 1962. A reviewer at [1964] Cambridge L.J. 132 remarked that a substantial part of the text was virtually unreadable and that it was easier to understand the antiquated English statutes than to grapple with the much

subject",[16] gave the judgment of the Privy Council. He traced the reported English decisions on "injurious affection" and held that the possession and control of the two promontories gave an enhanced value to the Sisters' land on the west side of the railway, and that in respect of depreciation in value of those lands due to the *anticipated use* of works which might be constructed upon the two promontories, the Sisters were owners whose land had been injuriously affected. In assessing compensation regard should be paid to the anticipated use of the promontories as part of a shunting yard, not to the actual use at the time of the assessment. He said:

> It appears that before the hearing of the case the railway shunting yard had been laid out, and that the actual use of the land comprised in the two promontories was inconsiderable. In the opinion of their Lordships, however, actual user at the time when the compensation case is heard is not the basis on which the amount of compensation should be assessed. It may be that at the time when the compensation case is heard no works have been constructed, and in any case the [owners] are entitled to claim compensation which must be claimed once for all, for depreciation in the value of their lands on the west side of the railway, in so far as such depreciation is due to the anticipated legal use of authorized works which may be constructed upon the two promontories.[17]

Lord Parmoor accepted that there was a problem in assessing the compensation for "injurious affection" where the mischief complained of arises partly on lands taken from an owner and partly on other lands outside the owner's property. Nevertheless this was where the line was drawn between compensable damage and non-compensable damage. And logically it was sound. After all an owner of land adjacent to the shunting yard, none of whose land was expropriated, but whose land suffered depreciation in consequence, would not be entitled to any compensation in the absence of special statutory provision.

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greater difficulties of the 11th edition. Despite the appearance of two short works—Lawrance, Compulsory Purchase and Compensation (5th edition, 1972) and Davies, Law of Compulsory Purchase and Compensation (1972) it is curious that no comprehensive and authoritative work has yet appeared on the English market to replace Cripps. It continues to be referred to by the courts in England, Australia and Canada, e.g. by McDermid J.A. in Re Murphy Oil Co. Ltd. and Dau (1959) 7 D.L.R. (3d) 512 at p. 526.

16 Per Harman L.J. in Edwards, note 3, at 152.

17 [1922] 2 A.C. 315 at 328.

Sisters of Charity was fully examined by the English Court of Appeal in *Edwards v. Minister of Transport.*[18] The claimant in this case was the owner of a dwelling-house with about two acres of ground. He also owned an adjacent grazing field of some 2½ acres in extent. In order to construct a large modern trunk road, two small triangular pieces of land, containing 302 and 38 square yards respectively, were compulsorily acquired. A sum of £4,000 for injurious affection was assessed if the compensation was to be assessed on the basis of reduction in value of the owner's entire property by the road as a whole; £1,600 if the compensation was limited to the acts caused done upon the two small pieces of land actually acquired. Giving the principal judgment of the Court, Harman L.J. said that he could see no reason why they should not follow *Sisters of Charity.* Where damage arises partly on a claimant's land and partly off it, he cannot claim the whole damage which has arisen but only that part of it which he can attribute to activities on what formerly was his own land. Donovan L.J. summarised the position as follows:

> If a public authority acting under statutory powers constructs a highway opposite my house but takes none of my land for the purpose, I cannot claim compensation for any diminution of value of my house caused by the noise and other inconveniences inflicted by the traffic. If, on the other hand, part of my frontage is compulsorily acquired and made part of the new highway, the position is different. Then I may claim not only the value of the land taken but also something in respect of any consequential diminution of value of my house . . . In assessing this latter claim, however, regard must be had only to two things done on the land taken from me. Where a highway is concerned, this restriction is of course artificial. The noise of traffic will begin well before it reaches the plot of land which was formerly part of my frontage and it may continue long after traffic has passed it. All the noise will contribute to any diminution of the value of my house; and it will be very difficult at times to say how much of that diminution of value is due to what the traffic does simply on the land taken from me.[19]

The decision was reached in respect of s. 63 of the Lands Clauses Act 1845 which speaks of damage

> . . . injuriously affecting such other lands by the exercise of the powers of this or the special Act . . .

and this was taken to mean damage due to things happening on the land compulsorily acquired.

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18 See note 13.

19 [1964] 2 Q.B. 134 at 157.

Leave to appeal to the House of Lords was refused. A century has lapsed since the House of Lords considered injurious affection in *Duke of Buccleuch v. Metropolitan Board of Works*[20] and none of the present judges were alive when it considered the subject in *Cowper Essex v. Acton Local Board.*[21] There is perhaps an element of doubt as to whether the House of Lords would endorse this decision. It has shown elements of a revolutionary spirit in *Birmingham City Corporation v. West Midland Baptist Trust Association*[22] (the date of acquisition) and in *Rugby Joint Water Board v. Foottit*[23] (enhancement and depreciation) and in consequence it is difficult to be certain whether it would be prepared to retain the present line of demarcation determining the limits of injurious affection.

10. *The leading Canadian authorities*

Injurious affection has arisen in a substantial number of reported cases in Canada and it is perhaps unwise to regard *Sisters of Charity*[24] as the sole authority on the subject. Certainly it is regarded as a leading authority and was expressly followed by the Supreme Court in *Shawinigan Water & Power Co. v. Gagnon.*[25] In this case the expropriating authority intended to use the land for an aviation field at the date of expropriation, but subsequently used the expropriated land for an electric transmission line. In assessing compensation for "injurious affection" it was held to be irrelevant that it had become impossible to use the land for the original purpose. Injurious affection concerned proposed, not actual, use of the expropriated land.

It remains now to examine some of the other leading Canadian cases which are not as well known on the western side of the Pacific Ocean.

11. *Severance*

Ranking perhaps as a case of equal importance with *Sisters of Charity* is the Privy Council decision in *Holditch v. Canadian Northern Ontario Railway Co.* where Lord Sumner said:

> The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with

20 (1872) L.R. 5 H.L. 418.
21 (1889) 14 App. Cas. 153.
22 [1970] A.C. 874.
23 [1972] 1 All E.R. 1057.
24 See note 14; some of the earlier Canadian cases are discussed by Todd, *The Mystique of Injurious Affection* [1967] U.B.C. L. Rev. 127.
25 [1931] 3 D.L.R. 665.

> or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.[26]

In Canada it is usually customary to treat severance damage as part of injurious affection. It refers either (i) to damage caused to the retained land by the loss of the part which is taken, or (ii) to damage caused where the land is bisected by the expropriating authority. In *Re McCain and City of Saint John,* Ritchie J.A. said:

> Severance, in my opinion, is a form of injurious affection.[27]

It is more convenient to treat them as separate factors because they are distinct. Kane J.A. in *Village of Cremona v. Spence* took this view:

> Severance and inconvenience constitute a portion of injurious affection. However, for the purpose of this judgment, when I refer to injurious affection, I mean injurious affection other than severance and inconvenience.[28]

The distinction is not always clearly made by the courts. Inconvenience, or disturbance as it is frequently termed, is another distinct and separate factor which is not generally included in the term "injurious affection".[29] In this case the Alberta Supreme Court, Appellate Division was concerned with the "injurious affection" caused by the purpose of the expropriation, namely a municipal sewage lagoon.

The distinction between severance and injurious affection was taken a stage further in *Re McCain and City of Saint John*[30] by the New Brunswick Supreme Court, Appeal Division. It was held that in claiming for injurious affection by reason of severance, it is unnecessary that there should have been unity of occupation and a use of the expropriated land with that in respect of which the claim for severance compensation is made. It is only necessary to show unity of ownership and of possession and control and, indeed, the lands need not even be physically contiguous.

Injurious affection and severance damage are of course closely related to each other. They both concern the depreciation or injury caused by the expropriation to land retained. Where a claim is made under either head the same question concerning unity of possession and control which was held to exist in *Cowper Essex*[31] and to be

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26 [1916] 1 A.C. 536 at 542.
27 (1965) 47 D.L.R. (2d) 164 at 181.
28 (1965) 50 D.L.R. (2d) 131 at 132.
29 See paragraph 16 infra.
30 See note 27.
31 See note 21.

absent in *Holditch*[32] will arise. In *The King v. Halin,*[33] where the owner had subdivided his land into separate building lots and claimed compensation for injurious affection to his remaining land resulting from the expropriation of part of his holding for use as a flying field, the Supreme Court rejected his claim on two grounds: (i) the zoning regulations in force at the time of the expropriation permitted flying in the area; and (ii) the single unity of ownership of separate lots not otherwise having any relation to one another did not support a claim for depreciation of the lots remaining after the expropriation of some of them.

The interaction between injurious affection and severance damage may be illustrated by *The King v. MacCullock*[34] where land was expropriated for a naval magazine. The owner was held entitled to some allowance both for severance and for possible loss in sale value of some of the property retained due to the use to which the expropriated parts might be put as a magazine. The loss due to severance was occasioned by the fact that a road which the owner had planned to construct on the southern end of land could not be constructed as it was to have been built on the lands taken and due to an escarpment could not be constructed at all. Applying the rule in *Sisters of Charity,* Cameron J. held that apart from the loss sustained by severance, the compensation for injurious affection must be limited to the mischief which may arise from the anticipated use of the properties taken from the owner; the danger to be anticipated from an explosion from the magazine existed at the time the owner purchased the properties and for such hazard then existed he was not entitled to compensation. In this case Cameron J. treated severance under the general heading of injurious affection, and in *The Queen v. Potvin*[35] Thorson P., in determining a claim for damages because of severance where some of the remaining lands were not contiguous to the expropriated land, classified it as injurious affection by reason of severance.

12. *Implied into Canadian expropriation statutes*

The current trend is for the Canadian expropriation statutes generally to state the factors which are to be taken into account when assessing compensation for land expropriated. Section 13 of the Ex-

32 See note 26.
33 [1944] 1 D.L.R. 625.
34 [1951] Ex. C. R. 59.
35 [1952] Ex. C. R. 436.

propriations Act 1968-69 of Ontario does so and includes injurious affection as one of those factors. But if the expropriation statute does not include any reference to injurious affection will the courts be prepared to imply that it is to be taken into account as one of the factors? The answer given by the Supreme Court of British Columbia in *Minister of Highways for British Columbia v. British Pacific Properties Ltd.*[36] was in the affirmative. The Highways Act 1960 required compensation to be paid for land compulsorily taken, but made no reference to injurious affection. Reviewing a number of authorities,[37] Martland J. concluded:

> . . . in computing the compensation to be paid for lands taken by the appellant pursuant to the provision of the Highways Act, damage sustained by the land owner by reason of the severance of lands taken from other lands owned by him is a part of the compensation to be given for such lands.[38]

The interaction between two statutes may also be illustrated by *Norway Pines Cabins Ltd. v. Minister of Highways.*[39] Traffic control islands were constructed on the highway abutting the claimant's land under the Highway Improvement Act. He sought compensation for reduction in value of his land by reason of the construction under s. 6(1) of the Expropriation Procedures Act (Ontario) which provided that

> Where land is expropriated or is injuriously affected by an expropriating authority . . .

compensation is payable. The Highway Improvement Act 1960 also permitted a claim for compensation for injurious affection. The Ontario Court of Appeal held that the claimant could claim for injurious affection under the Expropriation Procedures Act even though there was no expropriation.

13. *Where no land is resumed*

The question then arises as to how, where there is no resumption of land, injurious affection differs from injurious affection where there is resumption. In *Edwards,* Harman L.J. disapproved of the idea of terming the latter (when there is resumption) "pure injurious affec-

36 (1960) 23 D.L.R. (2d) 305.

37 In particular Blundell v. King [1905] 1 K.B. 5516; University College, Oxford v. Secretary of State for Air [1938] 1 K.B. 648 and Cedars Rapids Manufacturing & Power Co. v. Lacoste [1914] A.C. 569.

38 (1960) 23 D.L.R. (2d) 305 at 312.

39 See note 11.

tion",[40] although there was in fact no discussion on whether an alternative expression, such as "statutory injurious affection" was apt in situations where there was no compulsory purchase. The same expression is used in both situations. Where there is no resumption a claim for injurious affection depends upon a statutory right being given to a land owner to make a claim because some activity on nearby land by the Crown or some other public authority gives him a right to make such claim.

14. *Where work completed*

One of the earlier Canadian cases in which a claim for injurious affection outside the law of expropriation became possible is *McCarthy v. City of Regina.*[41] The owner of property sought compensation by reason of the injurious affection suffered by the construction of a subway. None of the owner's land was expropriated but the city's charter provided—

> In case any land not taken for any work or undertaking constructed, made or done by the council or commissioners under the authority of this Act is injuriously affected by such work or undertaking the owner or occupier or other persons interested therein shall file . . . his claim for damages.

The Supreme Court held by 4-1 (Davies C.J. dissenting) that the owner was entitled to the depreciation in the value of his property as of the date of publication of the notice of completion of the work. The claim could only be made after the completion of the work. Idington J. remarked that the

> statutory provision seems novel and may be unique . . . ,[42]

and Anglin J. said that the

> compensation of the claimant should be the amount of the depreciation in the value of his property, as it stood at the date set, due to the work in question, i.e., he should be awarded the difference between its value as it then stood with the work constructed and what would have been its value as it then stood had the work not been constructed.[43]

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40 [1964] 2 Q.B. 134 at 144; in Canadian Pacific Railway v. Albin (1919) 49 D.L.R. 618 at 624 Anglin J. spoke of "mere injurious affection" where land was not taken. Section 92, Town and Country Planning Act 1968 (U.K.) refers to "consequential injurious affection" where an owner's access is restricted to the highway.

41 (1919) 46 D.L.R. 74.

42 Idem at 77; cf. Toronto v. J. F. Brown Co. (1917), 37 D.L.R. 532 and Ripstein v. Winnipeg [1919] 3 W.W.R. 130.

43 Idem.

Brodeur J. said:

> By the law of Saskatchewan, the liability of the municipality to pay compensation for land injuriously affected is not limited to the cases where some land has been actually taken by the city but it exists in any case where land is injuriously affected by the exercise of the power conferred by the Act.[44]

Davies C.J. dissented on the ground that improvements had been made to the property during the construction of the subway which were not within the contemplation of the statute. Thus the owner had increased the damages by his own act above that to which he was entitled. But the Court held that the Act provided that the damages for injurious affection should be assessed at the time of the completion of the work regardless of what the owner had done to his property before that date. There was no suggestion of fraud in this instance.

Holland and Couper v. City of Vancouver[45] may also serve to illustrate. In this case the owners of land in Vancouver claimed damage to their property following upon the construction of a ramp leading to a bridge. Shortly before the ramp was built the owners made improvements to their property and at the hearing the city contended that the owners knew the ramp was about to be constructed and that it would involve their property in some way, yet they made no move to obtain relevant information before making the improvements. In the British Columbia Court of Appeal, Sidney Smith J.A. said that if it had been an expropriation case he thought that the submission would be sound, but that it had no application for cases of injurious affection where the city acquires no estate or interest in the lands in question. Knowledge of the city's intention to proceed with the construction of the ramp did not prevent the owners from making such improvements as they saw fit and subsequently making a claim for injurious affection under the relevant statute.

Again in *The Queen v. Loiselle*[46] the St. Lawrence Seaway Authority Act provided that the Authority

> shall pay compensation . . . for damage to lands injuriously affected by the construction of works erected by it.[47]

In this case the injurious affection was caused by the diversion of a highway. The diversion was made at the request of the Authority. It

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44 Idem at 79.
45 (1959) 19 D.L.R. (2d) 404.
46 (1962) 35 D.L.R. (2d) 274.
47 Section 18 (3), St. Lawrence Seaway Authority Act 1952 (Canada).

was clear that the location of the highway would not have been changed had the Seaway not been built. Abbott J. in the Supreme Court said that the conditions required to give rise to a claim for injurious affection to a property, when no land is taken are well established, namely:

> (1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
> (2) the damage must be such as would have been actionable under the common law, but for the statutory powers;
> (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
> (4) the damage must be occasioned by the construction of the public work, not by its user.[48]

15. *Other kinds of damage*

There are of course different kinds of claims which may be available for injury caused by authority under statutory powers. Injurious affection probably does not embrace all such claims.

In *Stevenson v. Canadian Northern Railway Co.*[49] snow fences were erected on the farm land adjoining the railway under the authority of the railway Act. The fences caused the formation of a large snow bank which in turn, on melting, prevented the owner of the land from seeding grain at the proper time thereby reducing the yield. The statute permitted a claim for "land damages". The railway company contended that the damage must be an injury to the land itself, that is, something of a permanent nature, but the Manitoba Court of Appeal held that the only method for ascertaining what the damage for land is under such temporary conditions, can only be arrived at by computing the reduction in productiveness of the land. There was of course no negligence in the erection of the fences and the remedy depended upon that provided by statute. It was not a case of injurious affection although it was a case of assessing damages for the injurious effect of the fences upon the farm, that is, for interference with the usual farming use of the land.

16. *Disturbance and inconvenience*

Where land is expropriated injurious affection is but one of the factors which the court or tribunal assessing compensation may take

48 35 D.L.R. (2d) 274 at p. 276 approving Autographic Register Systems Ltd. v. Canadian Pacific Railway Co., [1933] Ex C.R. 152 and Challies, The Law of Expropriation (1954) p. 136.

49 [1948] 1 D.L.R. 247.

into account. In addition to the market value of the land the dispossessed owner may be entitled to claim in respect of special value, disturbance, expenses, inconvenience, or relocation. The question arises whether injurious affection is of wider import where land is not expropriated than where it is. Can it, for example, include disturbance? The problem was considered in *Canadian Pacific Railway v. Albin* by the Supreme Court where Anglin J. observed—

> While . . . no clear principle can be deduced from the English authorities why the measure of compensation should be more liberal in the case of taking of land than in that of mere injurious affection, the distinction is too well established in England to admit of further discussion there. In the former case loss of goodwill and loss of business in so far as they enhance the value of the land to the owner, including all that forms part of it in the eyes of the law, may be taken into consideration in estimating the compensation. . . . Yet in the latter case to entitle the owner to any compensation the injury must be such as affects the lands —lessens its value—apart from the use to which any particular owner or occupier might put it; and profits of a business carried on on the property can properly be considered only in so far as they indicate not any special or exceptional value to the present proprietor, but the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put . . .[50]

However in *City of Edmonton v. Walter Woods Ltd.*[51] the statute provided for injurious affection compensation where a city in the erection or construction of a work

> causes damage to an owner or other person having an interest in land immediately adjacent to the land upon which the city erects or constructs the work . . .

The city built an overpass on the street in front of the owner's land. The Alberta Supreme Court, Appellate Division considered that the statutory provision was designed to remove the anomaly referred to in *Canadian Pacific Railway v. Albin,* supra, and the compensation could include the declining rental income resulting from the impairment by the city's work. Subsequently the Supreme Court approved this interpretation of the statute.[52] Injurious affection is therefore a different concept in Canada where land is not expropriated from its award where land is expropriated.

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50 (1919) 49 D.L.R. 618 at 624.
51 (1963) 39 D.L.R. (2d) 167.
52 (1964) 42 D.L.R. (2d) 689.

The problem in *New Brunswick Electric Power Commission v. Barberie*[53] was whether salmon fishing operation in waters adjacent to land expropriated could be taken into account. Section 29(1) of the Electric Power Act 1961-62 (New Brunswick) required the Commission to pay compensation to the owner of

> property acquired by it or injuriously affected by the exercise of any of its compulsory powers . . .

Section 29(5) permitted compensation where the undertaking necessitated the discontinuance of a business. The expropriated land consisted of 41 acres and had a frontage of about 400 feet on the shore of a bay. As a result of the expropriation the owner of the land no longer owned any land on the water. The salmon fishing which the owner conducted did not amount to a commercial undertaking and it was held that since the owner could not establish that there had been a discontinuance of a business he could not claim compensation.

In *Gross v. Saskatoon*[54] the claimants operated a business in the city where extensive public works had been carried out. None of the claimant's land was expropriated but they asserted that the works had injuriously affected their business. Dismissing the claim it was held that the works fell short of being a nuisance and the loss of trade was not compensable. The damage was not an injury to the land itself but an injury to the business or trade which was carried on on that land. The case is an illustration of the obvious truism that a claim for injurious affection depends upon the precise context in which it appears within the statute. But traditionally injurious affection damage must be occasioned by the proposed construction of public works, not by their user.

17. *Interference with easement*

A less usual application of injurious affection occurred in *Re Progressive Services Ltd. and District of Burnaby.*[55] Land encumbered by an easement for a right of way was expropriated. Section 478(1) of the Municipal Act (British Columbia) required compensation to be paid to

> Owners, occupiers, or other persons interested in real property . . . expropriated . . . by the municipality.

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53 (1968) 70 D.L.R. (2d) 492.
54 (1970) 73 W.W.R. 272.
55 (1971) 14 D.L.R. (3d) 552.

It held by the British Columbia Court of Appeal that the occupier (in this instance the lessee) of the dominant tenement must base his claim for compensation on injurious affection of the dominant tenement and not on the taking of land. While an easement is an interest in land, the municipality did not expropriate it but only by the subsequent development of the public highway interfered with that easement to the extent that access to the leased premises was severely curtailed. After reviewing a number of cases the Court applied Anglin J.'s dictum in *Canadian Pacific Railway Co. v. Albin*:

> . . . where no part of the owner's land is taken, but access to it merely is interfered with, however close the interference and however complete the destruction of the access, the case is one not of the taking of land but of injurious affection.[56]

18. *Injurious affection caused by operation of laws*

Injurious affection is not caused solely by the proposed or actual construction of public works. It may be caused by operation of law. A case which illustrates the operation of this kind of injurious affection is *Roberts and Bagwell v. The Queen*.[57] Section 4(8) of the Aeronautics Act 1927 (Canada) provided for compensation to every person whose property is injuriously affected

by the operation of a zoning regulation.

The zoning regulation became a burden on the land of the owner which was situated at the end of a runway and it was held that the resulting diminution in value was a proper subject for compensation. Nolan J., giving the judgment of the Supreme Court, distinguished between this kind of injurious affection and that under s. 23 of the Expropriation Act which can only result from some positive act by the Crown and which must be caused by the construction of a public work. In this instance there was no work involved—it was the effect of a zoning regulation. In *Holland and Couper*[58] the claim for injurious affection was in respect of the completed construction of a public work. In cases of expropriation claims are made for injurious affection in respect of the proposed work before it has been commenced or completed.

In Western Australia *Folkestone v. Metropolitan Region Planning Authority*[59] must rank as a leading authority under this head. The

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56 See note 45; 49 D.L.R. 618 at 624.

57 (1957) 6 D.L.R. (2d) 305.

58 See note 45.

59 [1968] W.A.R. 164; discussed by Fogg in *Land Use Planning Law* at p. 309 of this Review.

plaintiffs were the owners of land contiguous to land which had been reserved and zoned for the construction of roads by the promulgation in 1963 of the Metropolitan Region Town Planning Scheme. No part of the plaintiff's land was resumed nor were any restrictions placed upon the user or development of the land by the Scheme. The plaintiffs contended that their land had been injuriously affected within the meaning of s. 11(1), Town Planning and Development Act 1928 by the promulgation of the Scheme in that the construction of the proposed roadways upon the contiguous land would diminish the attractiveness and value of the plaintiffs' land.[60] It would seem from the judgment of Virtue J. that he accepted that the expression "injurious affection" in this context was different from the situation where no land is resumed. He held that a claim under s. 11 only lay where the user and enjoyment of land has been interfered with. He said—

> . . . compensation recoverable for injurious affection should be limited to injury resulting from restriction in enjoyment, use and benefit expressly contemplated by the Scheme and should not extend to damage resulting from activities or the prospect of activities towards implementing the Scheme on other lands not owned by the claimant.[61]

One senses from the judgment the influence of *Edwards*. Whether s. 11 should be given such a restricted meaning is arguable. If it had fallen to the Supreme Court to determine the meaning of the expression without the benefit of precedent, it is speculative whether it would have been construed in this way. Some doubt must be cast on its authority in the light of *Morison* infra.

19. *Damage done to retained land by purpose of acquisition*

Both *Sisters of Charity*[62] and *Edwards*[63] have been regarded in Australia as being authoritative decisions. But a significant contribution to the subject has now been made by the High Court of Australia in *Commonwealth v. Morison*.[64]

The facts of this case were that part of a grazing property of about 900 acres was compulsorily acquired for the purpose of extending an

60 See Morling, *Conflict of Planning Legislation with Private Interests* (1970) 9 West. Aust. L. Rev. 303 at 311. Section 45, Housing, Town Planning, etc. Act 1919 (U.K.) introduced the principle of obtaining compensation for land injuriously affected by the making of a planning scheme. See also the cases discussed by Fogg in this Review.

61 [1968] W.A.R. 164, 168.

62 See note 14.

63 See note 13.

64 (1972) 46 A.L.J.R. 453.

existing airport so as to fit it for use for the operation of jet aircraft and the training of pilots. The acquired land, amounting to 65½ acres, was used to extend an existing runway with a further extension as a premature touch down area, the placement on the land of navigational aids and the construction of a new main taxiway. The works had no utility if not used in conjunction with the existing aerodrome and its facilities. So used, a considerable increase in the depreciatory effect of the existing aerodrome and its use was expected and had a depreciatory effect on the retained land. The question at issue was whether the owner was entitled to compensation for injurious affection in respect only of the effect on the value of the retained land of the work actually done in the acquired land or whether the owner could claim in respect of the depreciation caused to the retained land by the proposal to carry out the public purpose. At the hearing in the Victorian Supreme Court Stephen J. said

> I am not concerned to dissect the total effect and seek to attribute a part of it either to construction work alone on the acquired land or to the effect of use of that part of the facility when constructed which is constructed on the acquired land.[65]

The acquisition was effected under the Lands Acquisition Act 1955 (Cth.), s. 23(1)(c) of which permits the factors governing compensation to include

> the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the carrying out of or the proposal to carry out the public purpose for which the land was acquired.

The term injurious affection is not used in the Act.

The High Court reviewed the leading English and Australian authorities on the subject.[66] Barwick C.J. noted that the formula of

65 Idem 454.

66 Specific reference was made to In re Stockport, Timperley and Altringham Railway Co. (1864) 33 L.J.Q.B. 351; Cowper Essex, see note 12; Horton v. Colwyn Bay and Colwyn Urban Council [1908] 1 K.B. 327; Sisters of Charity, see note 4; Edwards, see note 3; Cohen v. Commissioner for Main Roads (1968) 15 L.G.R.A. 423; Laycock v. Victorian Railway Commissioner [1917] V.L.R. 556; Brell v. Penrith City Council (1965) 11 L.G.R.A. 156; In re Smith and Minister for Home and Territories (1919), 28 C.L.R. 513; Adelaide Fruit and Produce Exchange Co. Ltd. v. Adelaide Corporation (1960) 106 C.L.R. 85; City of Glasgow Union Railway Co. v. Hunter (1870) L.R. 2 Sc. & Div. 78; Duke of Buccleuch, see note 11; Rainey v. North Down Rural District Council [1959] N.I. 161; Seller v. Minister of Public Works [1934] N.Z.L.R. 988; and Konowalow v. Minister for Works [1961] W.A.R. 40.

s. 23(1)(c) of the Lands Acquisition Act is not in identical terms with that of s. 63 of the Lands Clauses Consolidation Act 1845 which provides that in awarding compensation for land acquired regard should be had

> to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

He did not regard s. 23(1)(c) as a mere attempt to reproduce s. 63 and he thought that there was a sufficient difference to conclude that the whole depreciation in value due to the use of the extended aerodrome as a jet airport was referrable in the circumstances to the works constructed on the acquired land and their use. Referring to *Edwards* he thought that that case

> was presented to the court on the footing that a separate and identifiable depreciatory effect could be attributed exclusively to the work done and the use made of the work done on the acquired land. How this was perceived and quantified in the circumstances has for me elements of mystery with which I need have no present concern.[67]

The difficulty of separating the depreciatory effect played some part in the decision. In *Edwards* a separation was made by agreement between the parties. *Morison* suggests that if this had been impossible, the court has to accept the depreciating effect of the acquisition both on and off the acquired land. Menzies J. thought that if s. 23(1)(c) was *in pari materia* with s. 63 then *Edwards* and the other cases cited might have been of overwhelming weight but he thought the language was quite different.

> Regard is to be had to the depreciation in value of retained land by reason of the proposal to carry out the public purpose for which land taken was acquired and the natural sense of this provision requires that regard should be had to the whole purpose for which the land was acquired and not merely to so much of the purpose as is to be fulfilled upon the land taken from a single land owner.[68]

Walsh J. thought that neither *Sisters of Charity* nor *Edwards* threw much light on the problem and noted that the Canadian provisions considered in *Sisters of Charity* had been considered as not being

67 46 A.L.J.R. 453, 455.
68 Idem 457.

materially different from those in the English legislation. He pointed out that in both cases the relevant work was the establishment of a new undertaking: in *Sisters of Charity* it was for a new shunting yard and in *Edwards* it was for a new road. In *Morison* the land was acquired not for the establishment of a new airport but for an extension of an existing airport. He did not see the decision of the High Court as being incompatible with the English decisions which he did not regard as laying down an inflexible rule that the tribunal assessing the compensation in such cases must always fix separately the amount of depreciation caused by activities taking place on the land taken from the owner. He thought the tribunal should make an appropriate dissection of the total amount of damage where this can be done, but could go no further. Gibbs J., however, thought that

> s. 23(1)(c) should be construed according to its own terms and not upon the assumption that the Parliament intended to give its words the same effect as that which the authorities had held should be given to the different words of the English and the Canadian statutes.[69]

In his view s. 23 should not be given a restricted meaning. Apart from Menzies J., supra, none of the other three judges went as far as this.

The only Canadian case to which the High Court referred was *Sisters of Charity* and that of course was a Privy Council decision decided half a century ago. There seems to have been a tacit assumption that Canadian expropriation law would not have changed in the intervening years. As it happens no new radical principal modifying, elaborating or expounding *Sisters of Charity* seems to have emerged in the Canadian courts where land has been expropriated. In England its authority has been consolidated by *Edwards*. But in Australia its authority is undoubtedly weakened even if the High Court did not go so far as to reject it. Brief reference was made to the position in the United States[70] but injurious affection is a subject which has its origins in the nineteenth century and was not part of English law as received in the United States in the eighteenth century.

Morison leaves open the question whether given say a different factual situation, injurious affection could be implied as a factor to be considered in assessing compensation under the Lands Acquisition Act 1955 (Cth.). The case was primarily concerned with depreciation

69 Idem 464.

70 Corpus Juris Secundum, vol. 29A, Eminent Domain, par. 139, pp. 588-589; City of Crookston v. Erickson, 69 N.W. (2d) 909; and Campbell v. United States 266 U.S. 368 (1924).

caused by the scheme but if one does classify it as a case of injurious affection then it would seem that the High Court has redrawn the boundaries which were set in *Edwards.*

20. *Possible implications of Ontario definition*

A further question remains. In paragraph 6 of this article it was noted that s. 1(e) of the Expropriations Act (Ontario) defined injurious affection. This is, as already stated, unusual, and it remains to be seen whether it alters the common law interpretation which is associated with the term. If one takes the words as a whole s. 1(e)(i)(a) seems to contemplate four possible depreciatory factors—

(i) the acquisition itself;
(ii) the construction of the works;
(iii) the use of the works; and
(iv) any combination of these three.

Two problems arise from the use of the word 'construction' in (ii) above. Does it mean either (a) proposed construction, (b) actual construction, or (c) completed construction? Again, does it refer either (a) to the physical works which are in fact carried out, or proposed to be carried out, by the expropriating authority, or (b) to the general purpose for which the expropriation was effected? If the land is expropriated for sewage disposal the purpose of the expropriation is more likely to cause depreciation than the construction. Since compensation falls by s. 10 to be determined at the date of expropriation (or earlier) one assumes that s. 1(e) refers to proposed construction and proposed use of the works. The section does not make a clear distinction between *proposed* construction and use and *completed* construction and use. Again the temporary process of building the works on the land may depreciate the value of the land temporarily. The permanent use to which the land is put by reason of the completed works may also depreciate the value, either permanently or temporarily. Injurious affection is today more often associated with permanent and lasting depreciation of the market value of the land.

Suppose that remaining land which is not expropriated is injuriously affected by the construction of a road on the taken land. At the time the claim is made the market value of the land is depreciated by $1,000 but six months later when the compensation case is being determined the works are completed and the value of the land has say depreciated by a further $2,000 by actual user. During the six month period there was a time when the process of construction depreciated the remaining land by $4,000, but when this stage was complete the

remaining land recovered its value to some extent. The actual figures may be irrelevant because the value falls to be assessed at the date of the expropriation and the court will be concerned with hypothetical estimates of value made at the time of the expropriation. If a valuer does not value the land at the date of the expropriation he may find this thought-process difficult.

On the face of it the definition in s. 1(e) seems to give injurious affection a wide meaning by including depreciation caused by user of the works. If this includes depreciation by user of the completed works to be assessed at the time of completion of the works, then it would widen the definition. But it would seem that in fact the draftsmen intended no more than a statutory codification of the common law interpretation. One reaches this tentative conclusion with some diffidence. If the section were to be interpreted free of all precedent, the courts may give it a different meaning.

Section 1(e)(ii) provides for a claim for injurious affection where land is not taken, but restricts it to damage resulting from the construction and not the use of such works. Presumably in this instance a claim is permissible in respect of temporary inconvenience.

At any rate one is not wholly convinced that a statutory definition is an improvement. It may lead to further complications in an already complex area.

21. *Conclusion*

Generalisations on the subject of injurious affection must clearly be tempered with caution. It is an area of law which contains a substantial measure of uncertainty. Nevertheless some attempt needs to be devoted to analysing its exact meaning in the law and it is suggested that the following propositions are justified.

(1) A claim for damages for injurious affection is dependent upon there being express statutory provision for such a claim. A claim for injurious affection does not exist at common law. It is a statutory expression to which the common law has given some clarification and refinement. It is possible for it to be implied.

(2) A claim for injurious affection may arise in two situations: (i) where no land is resumed, and (ii) where land is resumed. It has its origin where land has been resumed but is now also to be found in statutes where no land is resumed.

(3) The expression injurious affection must be construed according to its own terms in the context in which it appears. It is not always possible to give it a uniform meaning applicable to all situations in

which it appears, but so far it would seem that all Australian jurisdictions will give it a consistent interpretation where land has been resumed.

(4) Where land is not resumed a claim for injurious affection may arise in four possible situations—

(i) where depreciation is caused to the value of land by the introduction or implementation of a law, rule or regulation, e.g. re-zoning in town planning; or

(ii) where depreciation is caused to the value of land by reason of the actual construction of public works; or

(iii) where depreciation is caused to the value of the land by reason of the proposal to construct public works; or

(iv) where depreciation is caused to the value of the land by reason of the use to which a public authority puts neighbouring land.

(5) Injurious affection generally, but not invariably, refers to depreciation in the value of land. The expression may however also be used to include other damage, resulting from an act rendered lawful by the statutory power of the public authority, which but for the statutory power would be actionable at common law. But it generally refers to injury to land itself and not to personal injury to the owner or occupier or to any injury to business or trade which is not an integral part of the land.

(6) The injury complained of must be an actionable wrong but for the Act authorising it.

(7) Where land is not resumed a claim for injurious affection generally arises in one of the situations listed in (4) above. It is unlikely to cover all four possibilities.

(8) Where land is resumed a claim for injurious affection is only sustainable where part of an owner's land is taken and part is retained. The claim may only be made in respect of the injurious affection to retained land.

(9) Injurious affection in respect of retained land may include

(i) severance damage, if no separate and distinct provision is made in the statute;

(ii) the depreciation caused by the proposed use to which the acquiring authority intends at the time of the acquisition to put that part of the land taken;

(iii) the depreciation caused by the actual use to which the acquiring authority actually puts that part of the land taken; and

(iv) the depreciation caused by the construction of works on the taken part.

Injurious affection is normally associated with (i) and (ii) at common law, but there is no logical reason why it should not include (iii) and (iv) if the statute makes provision accordingly.

(10) Injurious affection is closely linked with the concept of enhancement and depreciation. Enhancement is associated with the Privy Council's judgment in *Pointe Gourde Quarrying & Transport Co. Ltd. v. Sub-Intendant of Crown Lands.*[71] Where the acquisition statute makes provision for both (i) enhancement and depreciation, and (ii) injurious affection, then injurious affection will have a more limited significance than when the statute makes no separate reference to depreciation. In *Morison,* it could well be argued that the High Court was not concerned with injurious affection as described in *Ricket*[72] and that the expression should not have been used at all as the case was concerned with depreciation alone.

(11) Where injurious affection is claimed in respect of the depreciation in value by reason of the proposed use to which the acquiring authority intends to put the part of the land taken, it may not be possible to isolate the depreciatory effect proposed on the part taken from the work as a whole. Where it is possible to isolate the depreciatory factors to the work done on the part taken it is proper to confine the depreciation to the retained land to the effect of those factors. But where such isolation is not possible the compensable depreciation includes the effect of the works on the land taken in combination with other land and the works thereon.

22. *The Land Compensation Bill 1972 (U.K.)*

At the end of 1972 the Land Compensation Bill made its appearance in the House of Commons. The Bill purports to give effect to the proposals in a White Paper.[73] As the law stands in England there is an absence of statutory right of compensation where land or property is affected by a scheme, although none of it was taken for the scheme. The Bill provides that compensation should be paid where the value of an interest in land is depreciated by physical factors such as noise, vibration, smell, fumes, smoke and artificial lighting, and the discharge of any solid or liquid. The Bill recognizes that many people

71 [1947] A.C. 565. This case seems to have received closer attention in England than in Canada—see, for example, Rugby Joint Water Board, v. Foottit, see note 23. It is not reported in the Dominion Law Reports and is not included in Volume 6 of The Canadian Abridgement (2nd edition 1967) or in Volume 5 of the Ontario Digest (1972).

72 See note 1.

73 Development and Compensation—Putting People First (Cmnd. 5124, 1972).

have suffered from the effects of public works in the recent past and claims may be submitted in connexion with works begun three years before the publication of the White Paper—back to October, 1969. Compensation is to be assessed according to prices a year after the start of the works. The Bill is long and complex and it is clear that the cost of building major roads will be sharply increased in consequence of the Bill. At this stage it appears to be an admirable attempt to draw a proper balance between the rights and benefits of the community against inconvenience, nuisance and loss to individuals.

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