

## *Mariner Real Estate Ltd v Nova Scotia,*

### 1999 NSCA 98

**Cromwell JA** (Glube CJNS concurring):

#### **I. Introduction:**

[1] This case involves a collision of important interests. On one side, there are the interests of the respondents in the enjoyment of their privately owned land at Kingsburg Beach. On the other is the public interest in the protection and preservation of environmentally fragile and ecologically significant beach, dune and beach ridge resources. In the background of this case is the policy issue of how minutely government may control land without buying it. But in the foreground is the narrower issue of whether the stringent land use regulations applied by the Province to the respondents' lands is an expropriation of them within the meaning of the *Expropriation Act*, R.S.N.S. 1989, c. 156.

[2] The respondents' lands were designated as a beach under the *Beaches Act*, R.S.N.S. 1989, c. 32. This designation brings with it a host of restrictions on the uses of and activities on the land. Pursuant to power conferred by the *Act* and Regulations made under it, the Minister refused to grant the respondents permission to build single family dwellings on their land. The respondents sued, claiming their lands had, in effect, been expropriated and that they were entitled to compensation. Tidman, J., at trial, found that there had been an expropriation.

[3] In reaching this conclusion, the trial judge made two key findings. First, he decided that the respondents had been deprived of land within the meaning of the *Expropriation Act*. There were alternative bases for this finding. One basis was that the designation, on its own, was, in law, a taking of land. The alternative basis was that the taking resulted from the designation coupled with the application to the respondents' lands of the regulatory regime flowing from the designation. These, in combination, in the judge's view, took away virtually all of the land's economic value and virtually extinguished all rights of ownership.

[4] The second key holding by the trial judge was that the province acquired land within the meaning of the *Expropriation Act* because the regulation of the respondents' lands enhanced the value of the provincially owned property from the high watermark seaward.

[5] In my respectful view, the learned trial judge erred in each of these conclusions. For reasons which I will develop, my view is that the loss of economic value resulting from land use regulation is not a taking of land within the meaning of the *Expropriation Act*. Further, in my opinion, the respondents did not establish either the loss of virtually all rights of ownership, or that the Province had acquired any land as a result of the designation. I would, therefore, allow the appeal, set aside the order of the trial judge and in its place make an order

dismissing the respondents' action.

### III. Analysis:

#### (a) De facto Expropriation:

[6] The respondents' claim that what was, in form, a designation of their land under the *Beaches Act* is, in fact, a taking of their land by a statutory authority within the meaning of the *Expropriation Act*. This claim of *de facto* expropriation, or as it is known in United States constitutional law, regulatory taking, does not have a long history or clearly articulated basis in Canadian law. We were referred to only three Canadian cases in which such a claim was made successfully, only two of which dealt with the expropriation of land.

[7] The scope of claims of *de facto* expropriation is very limited in Canadian law. They are constrained by two governing principles. The first is that valid legislation (primary or subordinate) or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land. The second is that the Courts may order compensation for such restriction only where authorized to do so by legislation. In other words, the only questions the Court is entitled to consider are whether the regulatory action was lawful and whether the *Expropriation Act* entitles the owner to compensation for the resulting restrictions.

[8] *De facto* expropriation is conceptually difficult given the narrow parameters of the Court's authority which I have just outlined. While *de facto* expropriation is concerned with whether the "rights" of ownership have been taken away, those rights are defined only by reference to lawful uses of land which may, by law, be severely restricted. In short, the bundle of rights associated with ownership carries with it the possibility of stringent land use regulation.

[9] I dwell on this point because there is a rich line of constitutional jurisprudence on regulatory takings in both the United States and Australia which is sometimes referred to in the English and Canadian cases dealing with *de facto* expropriation: see for example *Belfast (City) v. O.D. Cars Ltd.*, [1960] A.C. 490 (U.K. H.L.). The Fifth Amendment to the United States Constitution (which also applies to the States through the Fourteenth Amendment) provides that private property shall not be taken for public use without just compensation. In the Australian Constitution, section 51(xxxi) prohibits the acquisition of property except upon just terms. While these abundant sources of case law may be of assistance in developing the Canadian law of *de facto* expropriation, it is vital to recognize that the question posed in the constitutional cases is fundamentally different.

[10] These U.S. and Australian constitutional cases concern constitutional limits on legislative power in relation to private property. As O'Connor, J. said in the United States Supreme Court case of *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (U.S. Mass. 1998), the purpose of the U.S. constitutional provision (referred to as the "takings clause") is to prevent the government from "... forcing some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole.” Canadian courts have no similar broad mandate to review and vary legislative judgments about the appropriate distribution of burdens and benefits flowing from environmental or other land use controls. In Canada, the courts’ task is to determine whether the regulation in question entitles the respondents to compensation under the *Expropriation Act*, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation.

[11] In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation. As expressed in Ian MacF Rogers, *Canadian Law of Planning and Zoning* (looseleaf, updated to 1999) at s.5.14, “The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing in return.” Numerous cases support this proposition including *Belfast (City) v. O.D. Cars Ltd.* (supra) and *Calgary (City) v. Hartel Holdings Co.*, [1984] 1 S.C.R. 337 (S.C.C.). Many others are reviewed by Marceau, J. in *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* (1999), 67 L.C.R. 1 (Alta. Q.B.) at para 35 ff. I would refer, as well, to the following from E.C.E. Todd, *The Law of Expropriation in Canada*, (2nd, 1992) at pp. 22-23:

Traditionally the property concept is thought of as a bundle of rights of which one of the most important is that of user. At common law this right was virtually unlimited and subject only to the restraints imposed by the law of public and private nuisance. At a later stage in the evolution of property law the use of land might be limited by the terms of restrictive covenants.

Today the principal restrictions on land use arise from the planning and zoning provisions of public authorities. *By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers* in order, for example, to facilitate the future acquisition of the land for public purposes. “Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down ... (but) a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose.: ..... (emphasis added)

[12] The point is illustrated by *Salvation Army, Canada East v. Ontario (Minister of Government Services)* (1986), 53 O.R. (2d) 704 (Ont. C.A.). The appellant owned roughly 98 acres of land. A permanent limited interest was expropriated

for running high voltage electric transmission lines and the effect of this taking was to divide the property in two. The property (except 18 acres) was also included in the Parkway Belt West Plan, with the result that part of the northern 50 acres was designated for highway and public utility purposes and the rest for uses “complimentary” to the plan. Complimentary uses did not include residential or any other substantial development. The purposes of the Parkway Belt West planning process was based on four principles:

1. To define and separate communities and thus provide people with a sense of community identity.
2. To link communities with service corridors which can facilitate the movement of peoples, goods, energy and information without disrupting community integrity, shape or function.
3. To provide a land reserve for the future anticipating land uses which cannot be foreseen today.
4. To offer open space and recreational facilities where they are most needed; right at the back doors of our urban complexes.

[13] The issue in the case was whether compensation was owed for the Parkway designation in addition to that payable for the taking for the transmission lines. The Parkway designation resulted in the decline in market value of \$62,000 per acre to \$10,000 per acre.

[14] The Court unanimously held that no compensation relating to the designation was payable. Grange, J.A. said at pp. 708-709:

In law, there can be no compensation for “down-zoning” such as resulted from the Parkway Plan. As Estey, J. put it in *The Queen in right of British Columbia v. Tener et al.*, [1985] 1 S.C.R. 533 at p. 557, 32 L.C.R. 540 at p. 345, 17 D.L.R. (4th) 1: “Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down.”

*Although there may be (indeed there is) a presumption in favour of compensation where a statute authorizes expropriation, the compensation itself must be found in a statute . . . The claim must be based on expropriation of the land or upon injury to land by the expropriation of other land . . . Injurious affection cannot be taken to include any diminution in value totally unrelated to the expropriation and caused by down-zoning.* (emphasis added)

[15] To substantially similar effect, Finlayson, J.A., (Zuber, J.A., concurring) said at pp. 717-718:

The real complaint of the Salvation Army relates to the Parkway Belt West Plan and its effect on land values, but *it is well accepted that such a plan does not give rise to compensation provided the planning authority acts in good faith.* I rely for this statement, as did my

brother Grange, upon the statement of Estey J. in *The Queen in Right of British Columbia v. Tener et al.*, [1985] 1 S.C.R. 533 at p. 557, 32 L.C.R. 340 at p. 345, 17 D.L.R. (4th) 1 at p. 7: “Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down.”

That this has been the law for some time is clear from an examination of decisions of the Supreme Court of Canada starting with *Soo Mill & Lumber Co. Ltd. v. City of Sault Ste. Marie*, [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429, where Chief Justice Laskin in dealing with the *Planning Act of Ontario*, rejected the appellant’s assertion of invalidity on the grounds that the by-law of the municipality was prohibitory of the use of the land. He stated that a freeze on development following the precepts of an official plan and an implementing zoning by-law are permitted where no bad faith is shown . . .

In *Sunbay Developments Ltd. v. City of London*, [1975] 1 S.C.R. 485, 45 D.L.R. (3d) 403, 2 N.R. 422, Chief Justice Laskin stated that it was open to the respondent city to freeze development. As the policy pursued by it was clear and within its powers, the mere addition in a holding regulation of superfluous words dealing with the future amendment of the by-law should not be taken to invalidate the effective words in the holding regulation.

In *Hartel Holdings Co. Ltd. v. Council of City of Calgary*, [1984] 1 S.C.R. 337, 8 D.L.R. (4th) 321, [1984] 4 W.W.R. 193, Madam Justice Wilson, speaking for the Supreme Court of Canada, dealt with an appellant in Calgary who complained that its lands had been effectively sterilized by being designated as a proposed park. It offered to sell its lands to the municipality, but the price offered by the municipality was not acceptable. The appellant then brought an application for an order directing the municipality to expropriate it; it failed.

[16] In light of this long tradition of vigorous land use regulation, the test that has developed for applying the *Expropriation Act* to land use restrictions is exacting and, of course, the respondents on appeal as the plaintiffs at trial, had the burden of proving that they met it. In each of the three Canadian cases which have found compensation payable for *de facto* expropriations, the result of the governmental action went beyond drastically limiting use or reducing the value of the owner’s property. In *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.), 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)* (1991), 80 D.L.R. (4th) 1 (B.C. C.A.), which closely parallels *Tener*, the private rights had become “meaningless”. (1978), [1979] 1 S.C.R. 101 (S.C.C.) In *Manitoba Fisheries Ltd. v. R.* (1978), [1979] 1 S.C.R. 101 (S.C.C.),

the legislation absolutely prohibited the claimant from carrying on its business.

[17] In reviewing the *de facto* expropriation cases, R.J. Bauman concluded, and I agree, that to constitute a *de facto* expropriation, there must be a confiscation of "... all *reasonable* private uses of the lands in question.": R.J. Bauman, "Exotic Expropriations: Government Action and Compensation" (1994), 54 *The Advocate* 561 at 574. While there is no magic formula for determining (or describing) the point at which regulation ends and taking begins, I think that Marceau, J.'s formulation in *Nilsson* is helpful. The question is whether the regulation is of "sufficient severity to remove virtually all of the rights associated with the property holder's interest." (at para 48).

[18] Considerations of a claim of *de facto* expropriation must recognize that the effect of the particular regulation must be compared with reasonable use of the lands in modern Canada, not with their use as if they were in some imaginary state of nature unconstrained by regulation. In modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation. As stated in *Belfast (City)*, there is a distinction between the numerous "rights" (or the "bundle of rights") associated with ownership and ownership itself. The "rights" of ownership and the concept of reasonable use of the land include regulation in the public interest falling short of what the Australian cases have called deprivation of the reality of proprietorship: see e.g. *Newcrest Mining (W.A.) Ltd. v. Australia (Commonwealth)* (1996), 190 C.L.R. 513 (Australia H.C.) at p. 633. In other words, what is, in form, regulation will be held to be expropriation only when virtually all of the aggregated incidents of ownership have been taken away. The extent of this bundle of rights of ownership must be assessed, not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put. It seems to me there is a significant difference in this regard between, for example, environmentally fragile dune land which, by its nature, is not particularly well-suited for residential development and which has long been used for primarily recreational purposes and a lot in a residential subdivision for which the most reasonable use is for residential construction.

[19] Claims of *de facto* expropriation may be contrasted with administrative law challenges to the legality or appropriateness of planning decisions. For example, zoning by-laws may be attacked as *ultra vires* if they are enacted for a confiscatory or other improper purpose if such purpose is not one authorized by the relevant grant of zoning power: see e.g. *Columbia Estate Co. v. Burnaby (District)* (1974), 49 D.L.R. (3d) 123 (B.C. S.C.). The issue in such cases is not whether the by-law effects an expropriation within the meaning of expropriation legislation but whether its true purpose is a lawful purpose. Similarly, where an administrative tribunal is empowered to approve or disapprove municipal planning decisions, drastic impact on land use or value may be used as a relevant consideration: see e.g. *Nepean Restricted Area By-law 73-76, Re* (1978), 9 O.M.B.R. 36 (O.M.B.) at 55. In neither sort of case is the land owner claiming compensation under

expropriation legislation, but rather, is attacking the legality or soundness of a land use regulation decision with respect to which the severity of the restriction falling short of extinguishment of virtually all rights of ownership may be relevant. Where, as in this case, however, such a claim for compensation is made, the claimants must bring themselves within the definition of expropriation under the statute conferring compensation. As noted, the test is exacting. Both the extinguishment of virtually all incidents of ownership and an acquisition of land by the expropriating authority must be proved.

**(b) The Effects of Regulation:**

[20] In my opinion, where a regulatory regime is imposed on land, its *actual application* in the specific case must be examined, not the potential, but as yet unexploited, range of possible regulation which is authorized. This point is demonstrated by the *Tener* case. The Court was clear in that case that the taking occurred as a result of the denial of the permit, not by the designation under the *Park Act* which required the permit to be obtained.

[21] The American constitutional cases have recognized the importance of looking at the actual application of the regulatory scheme as opposed simply to its potential for interference with the owner's activities. The U.S. Supreme Court requires in regulatory takings cases that there be a final decision regarding the application of the challenged regulations to the property: see *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (U.S. Nev. 1997), at 1664-5. This rule is based on the common sense proposition that a "... Court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes": see *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (U.S. Cal. 1986). In my view, the same principle applies to claims of *de facto* expropriation in Canada.

[22] The declaration sought and granted by the trial judge in this case was that the designation of the lands pursuant to the *Beaches Act* constituted an expropriation within the meaning of the *Expropriation Act*. In my opinion, this was an error. While the act of designation imposes on the respondents' lands a regulatory regime, that does not, of itself, constitute an expropriation. One of the respondents' main complaints is that they were refused permission to build dwellings on the lands. That refusal was not an inevitable consequence of the designation of the lands as a beach, but flowed from the refusal by the Minister of permission required to develop the lands pursuant to s. 6 of the Regulations. If permission to build had been granted, would the designation have effected a *de facto* expropriation? The answer, I think, is self-evidently no. It was not, therefore, the designation alone that was crucial, but the designation in combination with the refusal of permission to develop the lands by building dwellings.

[23] My determination that the trial judge erred in this way does not resolve the appeal. The broader question of whether the designation, *together with* the decisions made under the regulatory regime it imposed, constitute an expropria-

tion was argued at trial and in this Court. That broader question is, therefore, properly before us.

**(c) Is loss of economic value loss of land under the *Expropriation Act*?**

[24] The trial judge found that the respondents had been deprived of land. His main conclusion appears to have been that the loss of “virtually all economic value” constituted the loss of an interest in land. He also found, however, that the “... fee simple in the [respondents’] lands has been stripped of its whole bundle of rights.” Both aspects of his holding are before us in this appeal and, in my respectful view, both are in error.

[25] The judge found as a fact that the plaintiffs had lost virtually all economic value of their lands. That is a question of fact. The trial judge decided to accept the evidence of the respondents’ expert, Mr. Hardy, on this point. While there was some attempt to attack it in this Court, I conclude that the finding is reasonable and supported by the evidence at trial and should not, therefore, be disturbed on appeal.

[26] The judge further found that the loss of virtually all economic value was the loss of land within the meaning of the *Expropriation Act*. This holding contains two key elements: that the loss of all economic value is the loss of land within the meaning of the *Act*, and further, that the loss of virtually all economic value is a taking of land as those phrases appear in the *Expropriation Act*.

[27] I will address in this part of my reasons the first of these holdings. Does the loss of economic value of land constitute the loss of land within the meaning of the *Expropriation Act*?

[28] The *Expropriation Act* does not define land exhaustively, but states that land includes “...any estate, term, easement, right or interest in, to, over or affecting land”: section 3(1)(i). This provision, especially the emphasized text, suggests that a broad, non-technical approach to the definition of land was intended. This is consistent with the compensatory objectives of the *Expropriation Act* and with the long-established interpretative approach to such legislation. As Cory, J. said in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32 (S.C.C.):

... since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor ... In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, at p. 748, it was observed that “[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute”.

It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken.



[29] The authorities generally take an expansive view of what may constitute land for the purposes of expropriation legislation. In *Tener*, for example, there was no question that the respondents' interest in minerals was an interest in land. Estey, J. held that the respondents' rights included a grant of all minerals in the lands with the right to remove same and that denial of access to the lands so as to preclude access to the minerals was, in effect, a reduction of the property rights which were granted to the respondents. In her concurring judgment, Wilson, J. (Dickson C.J.C. concurring) based her conclusion on a different analysis. She held that "... the absolute denial of the right to go on the land and sever the minerals so as to make them their own deprives the respondents of their *profit à prendre*. Their interest is nothing without the right to exploit it. The minerals *in situ* do not belong to them. Severance and the right of severance is of the essence of their interest."

[30] Similarly, this Court in *Harris v. Nova Scotia (Minister of Lands & Forests)* (1975), 11 N.S.R. (2d) 361 (N.S. C.A.) commented at p. 380:

The *Expropriation Act* [as it then stood] (s. 1) gives "due compensation for any damages necessarily resulting from the exercise" of expropriation powers but gives that compensation only to "the owner of *land* entered upon, taken or used ... or injuriously affected" (*italics added*). The key word "land" is defined by s. 1(c):

> (c) 'land' includes any estate, term, easement, right or interest to, over, or affecting land

This extended definition clearly covers more than traditional estates, such as a fee simple or a life estate, and more than options or other "interest in land" to which the rule against perpetuities may apply. It also includes "any ... right ... affecting land", a phrase broad enough to cover rights such as Kenman's first refusal right. It would be unthinkable that such a valuable right could be wiped out without compensation: the wide definition of "land" prevents that result.

See also *Steer Holdings Ltd. v. Manitoba*, [[1992] 2 W.W.R. 558 (Man. Q.B.)] (*supra*) at para. 34, *aff'd* (1992), [1993] 2 W.W.R. 146 (Man. C.A.).

[31] While the term "land" must be given a broad and liberal interpretation, the interpretation must also respect the legislative context and purpose. As I will develop below, the *Expropriation Act* draws a line, on policy grounds, between the sorts of interference with the ownership of land that are compensable under the *Act* and those which are not. That line, in general, is drawn where land is taken. In interpreting where this line falls, the Court must give the term a meaning which is both consistent with the *Act's* remedial nature but also with appropriate regard to the legal context in which the term was adopted. It is not the Court's function, as it would be if applying a constitutional guarantee of rights of private property, to evaluate the legality or fairness of where the legislature has drawn that line, but to interpret and apply it.

[32] Kroft, J. in *Steer Holdings Ltd.*, supra, at para. 34 sounded a note of caution in this regard in his discussion of *Tener* and *Manitoba Fisheries Ltd.*. He emphasized that while both of those decisions gave a liberal interpretation to the kinds of property rights which may become the object of a claim for compensation, both reinforced the point that prohibition of uses or dissipation in value is not necessarily a taking.

[33] To the same effect, the House of Lords in *Belfast (City) v. O.D. Cars Ltd.*, drew a distinction between the aggregated rights (or “bundle of rights”) which, together, constitute ownership and each particular right taken individually. As Viscount Simonds stated, at p. 517, any one of the rights which, in the aggregate constitute ownership cannot itself and by itself aptly be called property. It follows, as he noted, that the right to use property in a particular way is not, itself, property. In my view, this comment is even more apt where, as here, the issue is whether such a loss constitutes the loss of land.

[34] Reliance was placed on *Tener* for the proposition that loss of economic value of land is loss of land. In my view, however, there is nothing in the judgments of either Estey or Wilson, JJ. in that case supporting this proposition. The case does stand for the proposition that whether an interest in land has been lost is to be judged by the *effect* of the regulation as opposed to its *form*. There was no transfer of ownership of the minerals in *Tener* and it was assumed that the respondents retained legal title to them: per Estey, J. at 564. However, both judges linked their holding to the loss, in effect, of a traditionally recognized interest in land. Estey, J. characterized the lost interest as the loss of access to the mineral rights. He commented at pp. 556 and 564 that the question of the value of the remaining rights, or indeed of the rights taken, was relevant only to computing the compensation payable, *not to whether* there had been a deprivation of an interest in land. Wilson, J. went to great lengths in her judgment to characterize the lost interest as a *profit à prendre*.

[35] In *Manitoba Fisheries Ltd. v. R.*, the appellant asserted a right to compensation based on the principle that absent clear words to the contrary, a statute is not to be construed so as to take away property without compensation. The Court found there had been a taking, that there was no express provision for taking without compensation, and that compensation was, therefore, payable. The point of mentioning this is to note that the claim for compensation in that case, unlike the present one, was not based on any express statutory entitlement to compensation. The decision is some assistance in its holding that the creation by Parliament of a government corporation for the purpose of monopolizing the whole business of the appellant (and others like it) had the effect of depriving the appellant of its goodwill as a going concern and of rendering its physical assets virtually useless, and further, that the goodwill taken away constituted property of the appellant. It is clear that, as in *Tener*, it is the *effect* rather than the form of the governmental action that is considered. However, the *Manitoba Fisheries Ltd.* case was not concerned with whether the loss of economic value constituted the loss of an interest in land, but rather, whether there had been

a loss of property. The goodwill was found to be property, not an interest in land. The case is, therefore, of limited assistance in deciding whether the loss of economic value of land is the taking of an interest in land within the meaning of the *Expropriation Act*.

[36] Some cases have interpreted *Tener* and/or *Manitoba Fisheries Ltd.* as standing for the proposition that the loss of virtually all economic value of land is the loss of an interest in land within the meaning of expropriation legislation. For example, in *Harvard Investments Ltd. v. Winnipeg (City)* (1995), 56 L.C.R. 241 (Man. C.A.), Twaddle, J.A. (writing only for himself) stated that there are two elements to a taking, the second of which he described as “the complete extinguishment of the asset’s value to the owner.” He found support for this formulation in certain words of Estey, J. in *Tener*, specifically in reference to the value of the loss of access to the minerals. Twaddle, J.A. also referred to *Manitoba Fisheries Ltd.*, specifically to a passage in the judgment of Ritchie, J., that the effect of the legislation was to put the appellant “out of business” and render its retained physical assets “virtually useless”. However, with respect, these passages do not support Twaddle, J.A.’s conclusions. It was clear in *Tener* that it was not the loss of the economic value of the minerals that constituted the interest in land taken, but the complete inability to exercise the right of access to, or withdrawal of, the minerals. Similarly, in *Manitoba Fisheries Ltd.*, it was not the loss of the value of the goodwill or the decline in value of the physical assets, but the loss of the ability to carry on the business at all that was considered by the Court to be the property taken away.

[37] We were referred to *Steer Holdings Ltd. v. Manitoba*, (*supra*), affirmed (1992), [1993] 2 W.W.R. 146 (Man. C.A.) . Kroft, J., at trial, stated, and I agree, that *Tener* and *Manitoba Fisheries Ltd.* made clear that a narrow or restricted definition of property should not be given but the concept should be extended to more intangible kinds of property rights and benefits. He also found, and this is the key point, that the diminished potential for economic gain established in that case did not constitute the taking away of a property right or asset, tangible or intangible. He reviewed in detail several authorities, including the decision of the Supreme Court of Canada in *Calgary (City)*, (*supra*), standing for the proposition that land use regulation frequently requires owners to surrender some value or future value of their land with no compensation.

[38] The Court of Appeal affirmed Kroft, J.’s decision. The focus of Huband, J.A.’s judgment for the Court was on the question of whether prohibiting the construction of a structure spanning a watercourse resulted in the City acquiring a benefit; in other words, on the issue of whether there was an *acquisition* rather than on whether there was a loss. However, Huband J.A. did state that he was “... inclined to agree there was a “taking away” in the sense that the legislation limited the plaintiff in what it could do with the property.” This suggests that it was the interference with incidents of ownership rather than loss of economic value that was relevant. Huband, J.A.’s judgment does not support the proposition that loss of economic value is the loss of an interest in land.

[39] We were referred to *Casamiro Resource Corp.* and, in particular, to the statement of Southin, J.A. for the Court that the effect of the Order in Council being considered in that case reduced the "... Crown grants to meaningless pieces of paper." However, it is clear in the judgment that the rights in issue were the same as in *Tener* and that they were, in effect, completely taken away by the Order in Council. The case, therefore, like *Tener*, does not turn on the loss of economic value.

[40] We have been referred to no Canadian case in which the decline of economic value of land, on its own, has been held to be the loss of an interest in land. Several cases, on the contrary, recognize the distinction between the value of ownership and ownership itself. This suggests that the loss of economic value of land is not the loss of an interest in land within the meaning of the *Expropriation Act*. This conclusion is, in my view, strongly supported by the overall scheme of compensation established by the *Act* and by judicial interpretation of it.

[41] The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the *Expropriation Act*. In my view, this distinct treatment supports the conclusion that decline in value of land, even when drastic, is not the loss of an interest in land. To understand this point, it is necessary to consider briefly compensation for "injurious affection", that is, injury to lands retained by the owner which results from the taking.

[42] Section 26 of the *Expropriation Act* sets out the main heads of compensation payable upon expropriation:

26 The due compensation payable to the owner for lands expropriated shall be the aggregate of

- (a) *the market value of the land* or a family home for a family home determined as hereinafter set forth.
- (b) the reasonable costs, expenses and losses arising out of or incidental to *the owner's disturbance* determined as hereinafter set forth;
- (c) damages for *injurious affection* as hereinafter set forth; and
- (d) *the value to the owner of any special economic advantage* to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation. (emphasis added)

[43] Pursuant to s. 30(1), compensation is payable to the owner of land for loss or damage caused by injurious affection; this is a defined term under the *Act*:

3(1) In this Act, ...

- (h) "injurious affection" means ...
- (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, ...* (emphasis added)

[44] Pursuant to ss. 26(c) and 30(1) and 3(1)(h), the *Act* provides for compensation to the owner of land where there has been no taking of that owner's land. The important points are first, that compensation for injurious affection as defined in the *Act* *is the only instance in which compensation is provided for the loss of value of land absent the taking of an interest in land*. Second, the legislative scheme for compensation draws a sharp dividing line between loss resulting *from a taking of land* and the loss of value of land caused by other governmental activities. In short, a sharp, and in a sense, arbitrary division is made for the purposes of compensation between takings and losses caused in other ways.

[45] This distinction was noted and described by Cory, J., for the majority of the Supreme Court of Canada, in *Dell Holdings Ltd.* at pp. 51-52:

The whole purpose of the *Expropriations Act* is to provide full and fair compensation to the person whose land is expropriated. *It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay.* There is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay when land is expropriated and for losses accruing from delay in the planning approval process when land is not taken. *Both statutory and judicial approaches to compensation are, as might be expected, very different in these two situations.* (emphasis added)

[46] As noted by Cory, J., the common law recognized this distinction. Wilson, J. described it in her concurring reasons in *Tener* at p.547-548:

*Where land has been taken the statute will be construed in light of a presumption in favour of compensation* (see Todd, *The Law of Expropriation and Compensation in Canada*, pp. 32-33) *but no such presumption exists in the case of injurious affection where no land has been taken* (see Todd, *supra*, at pp. 292 *et seq.*; Challies, *The Law of Expropriation* (2nd ed.), pp. 132 *et seq.*). In such a case the right to compensation has been severely circumscribed by the courts (see *The Queen v. Loiselle*, [1962] S.C.R. 624) and, *although the policy considerations reflected in the restrictive approach to recovery for injurious affection simpliciter have been seriously questioned* (see Todd, "The Mystique of Injurious Affection in the Law of Expropriation" (1967), *U.B.C.L. Rev.* - C. de D. 125),

*the concern over the indeterminate scope of the liability remains if recovery is permitted for any injury to private land resulting from the non-negligent, authorized acts of public authorities.* (emphasis added)

[47] The important point is this. While the distinction between the value of land and interests in land is, in one sense highly technical, it is, nonetheless, deeply imbedded in the scheme of compensation provided for under the *Expropriation Act*. It is fundamental to the entitlement to compensation under the *Act* claimed by the respondents. This is so because the distinction defines the line between cases in which governmental interference with the enjoyment of land is compensable under the *Act* and cases in which it is not. An impressive argument may be made supporting a broader approach to compensation for governmental interference with the enjoyment of land. The logic of drawing the line based on whether an interest in land has been lost may, as noted by Wilson, J. above, be seriously questioned. Nonetheless, the *Expropriation Act* draws the line in this way. It is, therefore, necessary to give the legislation an interpretation consistent with the words employed and the underlying policy decision which they reflect.

[48] I conclude, therefore, that the learned trial judge erred in holding that the loss of virtually all economic value of the respondents' land, was the loss of an interest in land within the meaning of the *Expropriation Act*.

**(d) Loss of the “bundle of rights”**

[49] That brings me to the trial judge's holding that the effect of the designation and the way it was applied here was to strip the fee simple of its whole bundle of rights. The cases have long recognized that at a certain point, regulation is, in effect, confiscation. The law insists that the substance of the situation, not simply its form, be examined. As noted in *Nilsson*, restrictions on the use of land may be so stringent and all-encompassing that they have the effect of depriving the owner of his or her interest in the land, although leaving paper title undisturbed.

[50] While the decline in economic value of land is not the loss of an interest in land, it may be *evidence* of the loss of an interest in land. As the respondents' appraiser, Mr. Hardy, stated in his report, the value of land is a reflection of several factors, including the scope of the incidents of ownership attached to the lands in question:

Our consideration of the legal basis and economic factors of value in land valuation concluded that it is the rights of ownership that give land value and it is these rights that are the subject of valuation. When the rights of ownership are excessively restricted or removed, it is logical that the value of the land is diminished, destroyed or made idle.

[51] It follows that, where the effect of land use regulation is to eliminate virtually all the normal incidents of ownership, this will be reflected in the market value

of the land. It is not, however, the decline in market value that constitutes the loss of an interest in land, but the taking away of the incidents of ownership reflected in that decline.

[52] We have been referred to only three Canadian cases in which compensation has been ordered where governmental regulatory action has been held to be a *de facto* expropriation: *Tener*, *Casamiro Resource Corp.* and *Manitoba Fisheries Ltd.* I have already reviewed these cases earlier in my reasons. Judging by these cases, *de facto* expropriations are very rare in Canada and they require proof of virtual extinction of an identifiable interest in land (or, in *Manitoba Fisheries Ltd.*, of an interest in property).

[53] The respondents submit that the *Beaches Act* and the Regulations, coupled with the refusal of Ministerial permission for development, prohibit virtually all activities normally associated with the ownership of land. The trial judge accepted this submission.

[54] Preclusion of residential development, as proposed by the respondents, particularly on lands of this environmental sensitivity, is not, of itself, the extinguishment of virtually all rights associated with ownership. For example, *Mariner* and *20102660 N.S. Limited* proposed to build using standard concrete basements. In considering these applications, the Minister had before him the Jacques Whitford report which opined that standard concrete foundations would cause serious damage to the dune systems. Furthermore, it was clear on the evidence that the building of residences on two of the Moshers' lots (i.e., the cemetery and garden lots) would not be permitted, quite apart from the *Beaches Act*. Yet it is not submitted that the requirements dealing with lot size and septic requirements constitute expropriation because they, in effect, prevent building residences on these lots.

[55] With respect, the trial judge erred in finding that the *Beaches Act* designation and ensuing regulation resulted in the expropriation of these two of the Moshers' properties. Residences could not be built on them prior to the designation, and there is no evidence that permission for other uses has been refused.

[56] What of the properties for which permission to build single family dwellings was refused? The trial judge found that virtually all incidents of ownership had been removed through that refusal and the other restrictions applied to the land. With great respect to the trial judge, I disagree.

[57] Many of the restricted activities may be authorized by permit. These include most of the traditional recreational uses described by Mrs. Mosher in her evidence. However, there is no evidence that a permit has been sought for any of these kinds of activities, much less refused. That being so, it is hard to follow the respondents' argument that all of these things are prohibited. As noted earlier, it is not the requirement to obtain a permit that constrains the enjoyment of the land, but its refusal. When, as here, the claim is that the impact of a regulatory scheme has, in effect, taken away *all* rights of ownership, it is not the existence of the regulatory authority that is significant, but its

*actual application* to the lands. As stated in *MacDonald, Sommer & Frates*, supra, the Court cannot determine whether regulation has gone too far unless it knows how far the regulation goes.

[58] The respondents in this case proved at trial that they would not be allowed to build the proposed single family residences. With respect to three of the Mosher's lots, there was not even an application to build; as mentioned, residential development on two of those lots was probably impossible quite apart from the designation. Some reasonable or traditional uses of this dune property may be allowed by permit. Aside from the applications to build fences, no applications for permits relating to these other uses have been made, let alone refused. 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. Neither the respondents nor the Province appear to have explored the possibility that development specifically designed in a way consistent with protection of the dunes might occur. The respondents, while asserting that all reasonable uses of the land are precluded by the operation of the *Act* and Regulations, 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.

[59] I would conclude, therefore, that the respondents failed to establish that they had been deprived of land within the meaning of the *Expropriation Act*.

#### **(e) Acquisition of Land**

[60] As noted, there must not only be a taking away of land from the owner but also the acquisition of land by the expropriating authority for there to be an expropriation within the meaning of the *Act*.

[61] There is no suggestion here that the Province acquired legal title or any aspect of it. The land remains private property although subject to the regulatory regime established by the *Beaches Act*. The argument is that the effect of the regulatory scheme is, for practical purposes, the acquisition of an interest in land.

[62] The respondents submit (and the trial judge held) that *Tener* stands for the proposition that where regulation enhances the value of public land, the regulation constitutes the acquisition of an interest in land. I disagree.

[63] In my respectful view, *Tener*, is, at best, equivocal on this point. When the judgments in *Tener* are read in their entirety and in light of the facts of the case, there is no support for the proposition on which the respondents rely. It is clear in the judgments of both Estey, J. and Wilson, J. in *Tener* that what



was, in effect, acquired in that case was the reversion of the mineral interests which had been granted by the Crown. Estey, J. stated that “[e]xpropriation . . . occurs if the Crown . . . acquires from the owner an interest in property.” He added that the acquisition of the “outstanding interest” of the respondents was a step in the establishment of the Park. He concluded that “[t]he denial of access to these lands occurred under the *Park Act* and *amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937*.” In other words, the effect of the regulatory scheme was not only to *extinguish* the mineral rights of the respondents, but to re-vest them in the Crown. Similarly, Wilson, J. held that the effect of the denial of access was to remove an encumbrance from the Crown’s land. She stated that “. . . what in effect has happened here is *the derogation by the Crown from its grant of the mineral claims to the respondents’ predecessors in title* . . . it is nonetheless a derogation of the most radical kind one which . . . amounts to a total denial of that interest”.

[64] The respondents place great weight on comments of Estey, J. In *Tener* to the effect that the action taken by the government was to enhance the value of the park. These comments, while on their face supportive of the respondents’ position, must be read in the context of Estey, J.’s statements in the case that an expropriation necessarily involves the acquisition of land and that the extinguishment of the Teners’ mineral rights constituted, in effect, the re-acquisition of such rights by the Crown. I do not think, with respect, that his statements to the effect that the re-acquisition enhanced the value of the park takes away from his holding that the Crown re-acquired in fact, though not in law, the mineral rights which constituted land under the applicable definition. I am supported in this view by Wilson, J.’s unequivocal statements to similar effect with regard to the respondents’ *profit à prendre*.

[65] The respondents also rely heavily on *Manitoba Fisheries Ltd.*. In my opinion, their reliance on that case is misplaced. The crucial element in that case was that the same legislative scheme that deprived the company of its goodwill also conferred a monopoly to conduct the same business on the new corporation. The Court not only held that there had been a deprivation but also, in effect, a transfer of the goodwill to the new corporation. Ritchie, J., for the Court, noted that it was conceded in that case that the legislation had resulted in depriving the company of its business; the basic contention of the Crown was that the business *was not taken away by the Crown or the new corporation*. This contention was rejected by the Court. At p. 468, Ritchie J stated that:

Once it is accepted that the loss of the goodwill of the appellant’s business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that *the same goodwill was by statutory compulsion acquired by the federal authority*. It seems to me to follow that the appellant was deprived of property which was acquired by the Crown. (emphasis added)

[66] It is true that, as the respondents submit, the goodwill did not flow to the Crown but to the new corporation. However, the new corporation was created

by federal legislation as part of the monopoly scheme and was admitted to be an agent of the federal Crown: see p. 463. The Supreme Court of Canada, not surprisingly, did not draw a distinction between the corporation created by the Crown as its agent and the Crown itself in these circumstances. The crucial point, to my way of thinking, is that the asset which was, in effect, lost by *Manitoba Fisheries Ltd.* was the asset gained, in effect, by the new federal corporation.

[67] The respondents also rely on the decision at trial in *Casamiro Resource Corp. v. British Columbia (Attorney General)* (1990), 43 L.C.R. 246 (B.C. S.C. [In Chambers]), at 248. The learned trial judge in that case stated, relying on *Manitoba Fisheries Ltd.*, *supra*, that whether the Crown acquired the mineral rights or not was irrelevant. There is no discussion of this point in the judgment on the appeal to which I have referred above. While not doubting the result in *Casamiro Resource Corp.*, which was upheld on appeal, this statement of the trial judge in *Casamiro Resource Corp.* is, with respect, clearly wrong. Contrary to what his statement suggests, for there to be an expropriation, there must be an acquisition as well as a *deprivation*. Moreover, the reliance on *Manitoba Fisheries Ltd.* for a contrary position by the trial judge in *Casamiro Resource Corp.* is, with respect, misplaced for the reasons I have already developed. As noted, there was in *Manitoba Fisheries Ltd.* an acquisition, in effect, of the goodwill by the federal authority.

[68] I conclude that for there to be a taking, there must be, in effect, as Estey, J. said in *Tener*, an acquisition of an interest in land and that enhanced value is not such an interest.

[69] The respondents further submit that their lands have been effectively pressed into public service and that this is sufficient to constitute an acquisition of land. The judgment of the United States Supreme Court in *Lucas v. South Carolina*, 112 S. Ct. 2886 (U.S. S.C. 1992) is relied on. I do not think that case assists us here.

[70] The U.S. constitutional law has, on this issue, taken a fundamentally different path than has Canadian law concerning the interpretation of expropriation legislation. In U.S. constitutional law, regulation which has the effect of denying the owner all economically beneficial or productive use of land constitutes a taking of property for which compensation must be paid. Under Canadian expropriation law, deprivation of economic value is not a taking of land, for the reasons I have set out at length earlier. It follows that U.S. constitutional law cases cannot be relied on as accurately stating Canadian law on this point. Moreover, in U.S. constitutional law, as I understand it, deprivation of property through regulation for public purposes is sufficient to bring a case within the constitutional protection against taking for “public use”, unlike the situation under the *Expropriation Act* which requires the taking of land. It is not, as I understand it, necessary in U.S. constitutional law to show that the state acquires any title or interest in the land regulated. For these reasons, I conclude that the U.S. takings clause cases are not of assistance in determining whether

there has been an acquisition of land within the meaning of the *Nova Scotia Expropriation Act*.

[71] On this aspect of the case, Australian constitutional law is of more assistance. As noted, s. 51 (xxxi) of the Australian Constitution prohibits the acquisition of property on other than just terms. The focus of the prohibition is on *acquisition*, rather than *taking* with the result that the Australian cases, unlike most of the U.S. takings clause cases, have addressed in detail what is required for there to be an acquisition. For example, in *Australia (Commonwealth) v. Tasmania* (1983), 158 C.L.R. 1 (Australia H.C.) three members of the High Court of Australia (Mason, Murphy and Brennan, JJ.) held that a federal statute which had the effect of preventing development on the land in question without the Minister's approval, enacted to protect and conserve the land for cultural and environmental reasons, did not constitute an acquisition of property. Mason, J. at para. 70 of his reasons, put it this way:

The effect of s. 9, and perhaps to a lesser extent, of ss. 10 and 11, is to prevent any development of the property in question, subject to the Minister's consent, so as to preserve its character as a wilderness area. . . . . *In terms of its potential for use, the property is sterilized, in much the same way as a park which is dedicated to public purposes or vested in trustees for public purposes, subject, of course, to such use or development as may attract the consent of the Minister. In this sense, the property is "dedicated" or devoted to uses, that is, protection and conservation which, by virtue of Australia's adoption of the Convention and the legislation, have become purposes of the Commonwealth. However, what is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property.* (emphasis added)

[72] Brennan, J. expressed the same conclusion as follows at para. 94:

In the present case the Wilderness Regulations and ss. 9, 10 and 11 of the Act affect the freedom of the State of and of the HEC to use the Wild Rivers National Park and the HEC land for the construction of the proposed dam. But that is not sufficient to attract the operation of par. (xxxi). *Unless proprietary rights are acquired, par. (xxxi) is immaterial to the validity of the impugned Commonwealth measures. Though the Act conferred a power upon the Minister to consent to the doing of acts which were otherwise prohibited on or in relation to land, that power was not a proprietary right.* In my opinion, the Commonwealth acquired no property from Tasmania. (emphasis added)

[73] These comments are particularly significant for Canadian expropriation law because the Australian High Court has found there to be an acquisition of land in a case roughly parallel to *Tener*. In *Newcrest Mining (W.A.) Ltd. v. Australia*

(*Commonwealth*) (*supra*), at p. 633 the issue was whether the prohibition of mining in a national park constituted an acquisition of the appellant Newcrest's mining leases. Justice Gummow, expressing the majority view on this issue, accepted the submission of the appellants that the state acquired "identifiable and measurable advantages" consisting of acquisition of the land "freed from the rights of Newcrest to occupy and conduct mining operations thereon": at pp. 69-70. Fundamental to this decision, as was the case in *Tener*, is that the sterilization of the mining leases, in effect, removed a limitation on the legal interest in the land which the Commonwealth owned subject to that interest. There was in *Newcrest Mining (W.A.) Ltd.*, as in *Tener*, an acquisition, in effect, of some identifiable interest in land.

[74] Returning to the respondents' submissions in this case, in my opinion, the freezing of development and strict regulation of the designated lands did not, of itself, confer any interest in land on the Province or any other instrumentality of government. I am reinforced in this opinion by many cases dealing with zoning and other forms of land use regulation. Estey, J., in *Tener*, notes that ordinarily compensation does not follow zoning either up or down. The Supreme Court of Canada in *Dell Holdings Ltd.*, *supra*, accepted the general proposition that, under our law, owners caught up in the zoning or planning process, but not expropriated, must simply accept the loss (provided, of course, that the regulatory actions are otherwise lawful). Development freezes have consistently been held not to give rise to rights of compensation: for a review of the authorities, see *Nilsson*, *supra*. One of the bases of these decisions is that the restriction of development generally does not result in the acquisition of an interest in land by the regulating authority.

[75] There was no evidence that the economic value of the Crown's land was enhanced. Even if its value could be considered to be enhanced in some other sense, such enhancement, in my view, is not an acquisition of land for the purposes of the *Expropriation Act*.

[76] I conclude that the trial judge erred on this aspect of the case. In my respectful view, regulation enhancing the value of public property, if established, is not an acquisition of "land" within the meaning of the *Expropriation Act*.

#### **(f) The Section 12 Argument**

[77] The appellant also submits that even if there was an expropriation, compensation is precluded by s. 12 of the *Beaches Act*. In my view, the short answer to that argument is found in ss. 4(1) and (3) of the *Expropriation Act*. Even assuming a direct conflict between s. 12 of the *Beaches Act* and s. 24 of the *Expropriation Act*, ss. 4(1) and (3) of the latter *Act*, in my opinion, make it clear that the provisions of the *Expropriation Act* apply. Had I found there to have been an expropriation, s. 12 of the *Beaches Act*, in my opinion, would not preclude compensation under the *Expropriation Act*.

#### **IV. Disposition:**

[78] I would allow the appeal, set aside the order of the trial judge and in its place make an order dismissing the action. The case raises several important issues which, in my view, it was in the public interest to have resolved. For that reason, I would not disturb the trial judge's order for costs at trial and I would make no order as to costs of the appeal.

*Appeal allowed.*