

**PRIVATE RIGHTS, PUBLIC GOOD: BALANCING COMPETING INTERESTS
UNDER EXPROPRIATION LAW**

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I. Introduction

“There is general agreement that the existence and the exercise of this power [to expropriate] in actual cases constitutes an invasion of civil rights in our current legal system. Notwithstanding this, the power conferred and exercised in proper cases and according to proper principles is necessary in the public interest.”

-Royal Commission Inquiry into Civil Rights, 1968

The balancing of the public interest with the individual’s civil rights, as articulated above by the Royal Commission Inquiry into Civil Rights in Ontario, 1968,² naturally creates competing interests in expropriation legislation. By definition, expropriation violates a landowner’s property rights. It is a forced taking wherein the landowner generally has no choice in the matter and is required to surrender his or her property rights for the sake of the public good. However, the individual is, ostensibly, not to be forsaken for the public good. The provincial and federal expropriations Acts have the ethereal aim of compensating, as fully as possible, a landowner whose land has been forcibly taken by an expropriating authority.

The articulated purpose behind expropriation law in Ontario, and ostensibly other provinces, is “the fulfillment by the state of its obligations to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience, and disturbance to the life of its citizens to as great an extent as possible.”³ The Supreme Court of Canada has said 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 landowner whose property has been taken.”⁴ Thus, compensation is the touch-stone of expropriation law, and the principal avenue available to landowners to address the disturbance and loss caused by expropriation.

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² Ontario, *Report of the Royal Commission Inquiry into Civil Rights*, vol. 3 (Toronto, Queen’s Printer: 1968) [Ontario Royal Commission Report].

³ *Ibid* at 11.

⁴ *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 at 43 [Dell].

The legislation provides not only for compensation for the market value of the land taken, but also compensates a landowner for disturbance damages caused by the expropriation, including business loss, moving costs, legal expenses and inconvenience. Generally, the scheme of the expropriating authority, that is the use it intends to make of the expropriated land, does not factor into the valuation of the expropriated land for the purposes of compensating the landowner. A landowner is entitled to compensation for the market value of the land,⁵ based on its highest and best use,⁶ whether or not the landowner or the expropriating authority actually put the land to that use. Where a landowner claims injurious affection, however, the scheme becomes very important to the analysis.⁷ The construction of the public works and the use of the public works directly affect the landowner's remaining land and therefore must be considered.

Injurious affection is defined at subsection 1(1) of the Ontario *Expropriations Act*:

- 1(1) "injurious affection" means,
- (a) where a statutory authority acquires part of the land of the owner,
 - (i) 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
 - (ii) 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 the statute.
 - (b) where the statutory authority does not acquire the land of an owner,
 - (i) such reduction in market value of the land of the owner, and
 - (ii) such personal and business damages

⁵ *Expropriations Act*, R.S.O. 1990, c. E.26 at subsection 14(4)(b) [*Expropriations Act*].

⁶ *Ibid* at subsection 14(1).

⁷ *Salvation Army, Canada East v. Ministry of Government Services* (1984), 31 L.C.R. 193 (Ont. Div. Ct.), *aff'd* (1986), 34 L.C.R. 193 (Ont. C.A.).

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.

This definition is substantially similar to the legislation in other provinces, including Manitoba, Nova Scotia and New Brunswick. British Columbia and Alberta's legislation, as we shall see, contains a certain distinctions. Injurious affection therefore applies to owners where either a portion of their land has been expropriated or where none of their land has been expropriated. It aims to compensate them for damages suffered to their remaining lands. However, certain decisions have sought to impose a number of arbitrary limitations on the compensation recoverable under subsections 1(1)(a) and (b) of the Ontario *Expropriations Act*. These limitations, if applied, would tip the balance in favour of the public good at the expense of the individual and appear contrary to the underlying intentions of expropriation statutes. This discussion will explore the historical origins of these limitations and consider whether they remain relevant, fair or necessary. This analysis will be aided by comparing the application of injurious affection in Ontario to approaches to injurious affection in other jurisdictions.

II. Arbitrary Limits to Injurious Affection: The *Edwards* Rule

The English Court of Appeal's decision in *Edwards v. Minister of Transport*⁸ imposed limitations on an owner's ability to be made whole in instances where an owner's claim was founded in injurious affection. In *Edwards*, the Minister of Transport challenged a decision of the Lands Tribunal to award the claimant, Mr. Edwards, compensation for the total diminution in value of his land as a result of a highway that was partially built on land expropriated from him.

Mr. Edwards lived on a parcel of land in rural Shropshire. The Minister of Transport put in a highway of sorts to the east of Mr. Edwards' property and for that purpose expropriated from Mr. Edwards two small triangles of land. Mr. Edwards' remaining property was affected by the noise, lights and other disturbance from the highway. Harman L.J. for the Court of Appeal stated: "One can sympathize with [Mr. Edwards] in the disturbance of his quasi-rural peace, but it is none the less clear that, for the greater good of the greater number, householders nowadays must put up with these things [...]"⁹

In putting up with these things, however, Mr. Edwards claimed compensation for the damage to the value of his property related to the highway. The Lands Tribunal found that the total market value lost by Mr. Edwards as a result of the construction and use of the highway was £4000. The Minister of Transport appealed on the grounds that Mr. Edwards was only entitled to damages resulting from the highway attributable to the construction and use of the highway on the lands expropriated for that purpose from Mr.

⁸ [1964] 1 All E.R. 483 (C.A.) [*Edwards*].

⁹ *Ibid* at 485.

Edwards. The Minister of Transport therefore submitted that Mr. Edwards was only entitled to compensation in the amount of £1600.

In considering how much compensation *Edwards* was entitled to, the English Court of Appeal found that most of the disturbance suffered by Mr. Edwards as a result of the highway was not from that portion of the highway on Mr. Edwards' expropriated land. Rather, it was due to that part of the road constructed on a hill, where the noise of the cars changing their gears and the lights from the cars' headlights shining into the house caused disturbance to Mr. Edwards' property. By the time the cars got to the stretch of highway constructed on Mr. Edwards' land, the worst was over.¹⁰ The Court of Appeal held that Mr. Edwards was entitled only to compensation for the injurious affection suffered by him as a result of the construction and use of the highway on the property expropriated from him and agreed with the Minister of Transport that the proper award of damages was therefore £1600.

In coming to this conclusion, the Court of Appeal relied in part on the decision of Crompton J. in *Stockport, Timberley and Altringham Ry. Co.*,¹¹ referred to by the Court of Appeal as the first case on the matter of injurious affection. In that decision, Crompton J. articulated the basic analysis for compensation where damages are suffered by a landowner subject to partial expropriation:

“But the question here is, whether such a rule [for compensation] is at all applicable to cases where part of the land is taken and compensation given, not only for the value of the part taken, but for the rest of the land being injuriously affected, either by severance or otherwise [...]”¹²

In apparent contradiction with our Supreme Court's subsequent view in *Dell*,¹³ Crompton J. held that injurious affection was not fully compensable:

“Where damage is occasioned by what is done upon other land which the company have purchased, and such damage would not be actionable against the original proprietor, as in the case of a sinking of a well and causing the abstraction of water by percolation, the company have a right to say, we had done what we had a right to do as proprietors, and do not require the protection of any Act of Parliament; we, therefore, have not injured you by virtue of the provisions of the Act; no cause of action has been taken away from you by the Act. Where, however, the mischief is caused by what is done on the land taken, the party seeking

¹⁰ *Ibid* at 486.

¹¹ (1864), 33 L.J.Q.B. 251 (C.A.) [*Stockport*].

¹² *Ibid* at 253.

¹³ *Supra* note 4.

compensation has a right to say, it is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage: without the Act of Parliament everything you have done, and are about to do, in the making and use of the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question.”¹⁴

Therefore, based on the analysis in *Stockport*, the Court of Appeal held in *Edwards* that a landowner whose property has been partially expropriated may only recover for the damages suffered as a result of the part of the public works constructed on his or her expropriated property.¹⁵

An egregious example of this reasoning is to be found in the matter of *City of Glasgow Union Ry. Co. v. Hunter*,¹⁶ where the House of Lords found that the complaining landowner was not entitled to be compensated for the disturbing use of a neighbouring pumping station and reservoir because the land expropriated from the claimant had been used to lay pipes for the pumping station and reservoir only and no part of the pumping station or reservoir was located on the landowner’s expropriated land. The use of the pipes caused very little disturbance in and of themselves and therefore the landowner was entitled to little compensation.

(A) The *Edwards* Rule in England: Reversed by Legislation

The *Edwards* Rule was, justifiably, the subject of much criticism in England. In 1969, the Justice Society released a report entitled “Compensation for Compulsory Acquisition and Remedies for Planning Restrictions”¹⁷ wherein they recommended that the *Edwards* Rule be disavowed:

“We believe that this decision should be reversed so that an owner who has had part of his land taken from him will receive full compensation for the injurious affection to the land he retains, regardless of whether or not the damage is caused by the use of the lands taken from him.”¹⁸

This change was also recommended in a White Paper published in 1972:¹⁹

¹⁴ *Supra* note 11 at 253.

¹⁵ *Ibid* at 486.

¹⁶ (1870), L.R. 2 Sc. & Div. 78 (H.L.).

¹⁷ U.K., Justice Society (Administrative Law Committee), *Compensation for Compulsory Acquisition and Remedies* (London, Her Majesty’s Stationary Office: 1969) [Justice Society Report].

¹⁸ *Ibid* at 22.

¹⁹ U.K., H.C., “Development and Compensation – Putting People First”, Cmnd. 5124 in *Sessional Papers*, 1972 [White Paper].

“Hitherto a claimant has generally been entitled to compensation only for such of the effects of the construction and use of the works as take place on the land taken from him. In future there will be compensation to be based on the depreciating effect upon the land left to him of the works and their use as a whole.”²⁰

The English *Land Compensation Act* adopted this change in 1973²¹ at subsection 44(1):

“Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole works and not only the part situated on the land acquired or taken from him.”

(B) The *Edwards* Rule in Australia: Judicially Abandoned

The *Edwards* Rule was recently considered by the High Court of Australia in *Marshall v. Director General, Department of Transport*.²² On appeal from the Supreme Court of Queensland (Court of Appeal), the High Court was asked to review subsection 20(1) of the *Acquisition of Land Act 1967* (Qld) to determine whether a landowner could be compensated for diminution in value due to increased risk of flood damage to his remaining property. The Department of Transport had expropriated a portion of Mr. Marshall’s land for purposes ancillary to the widening of the Bruce Highway and a table drain was constructed on the land expropriated from him. Mr. Marshall sought compensation for the decreased value to his remaining lands, not due to the table drain, but due to the increased susceptibility of the remaining lands to flooding as a result of the widening of the highway.

Subsection 20(1) of the *Acquisition of Land Act 1967* (Qld) reads:

“(1) In assessing the compensation to be paid, regard shall in every case be had not only to the value of land taken, but also to the damage, if any, caused by either or both of the following, namely

- (a) the severing of the land taken from the claimant;
- (b) the exercise of statutory powers by the constructing authority otherwise injuriously affecting such other land.”

²⁰ *Ibid* at para. 29.

²¹ *Land Compensation Act 1973* (U.K.), 1973, c. 26.

²² [2001] H.C.A. 37 [*Marshall*].

In reviewing subsection 20(1)(b), the High Court looked at the plain language of the section and noted that there was no limiting language which could be construed as restricting a claimant's damages for injurious affection to those attributable to the land expropriated from him or her.²³ The High Court then considered the 1972 High Court decision in *The Commonwealth v. Morison*,²⁴ which the respondent Department of Transport contended endorsed the *Edwards* Rule by not specifically overturning it. In *Morison*, the High Court considered whether the landowner could be compensated for injurious affection related to the expansion of an aerodrome when the land expropriated from him by the Commonwealth was used only for purposes ancillary to the aerodrome and not for the expansion itself. The High Court distinguished *Edwards* on various grounds, including the difference in language between the then extant U.K. Act and the Australian *Lands Acquisition Act* (Cth.). However, Barwick C.J. also identified a real issue with the *Edwards* Rule:

“[T]hat 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.”²⁵

[...]

“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 the use of that part of the facility when constructed which is constructed on acquired land.”²⁶

Unlike the Court in *Morison*, the High Court in *Marshall* found that section 63 of the English *Land Clauses Consolidation Act 1845*, considered in *Stockport*, was relatively indistinguishable from the language in subsection 20(1)(b) of the *Acquisition of Land Act 1967* (Qld).²⁷ However, Gaudron J., in a concurring opinion, questioned the reasoning in *Stockport* and *Edwards*:

“Why the claimant should be in a preferred position in respect of work done on the acquired land and have no rights in respect of work done off the acquired land that affected the retained land is not readily apparent. Upon acquisition of the land, the claimant

²³ *Ibid* at para. 20.

²⁴ [1972] H.C.A. 39 [*Morison*].

²⁵ *Ibid* at 40.

²⁶ *Ibid* at 36.

²⁷ *Supra* note 22 at para. 62.

stood in the same relationship to the acquirer as neighbouring occupiers. [...] It is not easy to see anything in s. 63 which supports the view that, the special right having been given, a claim for injurious affection should be limited to consequences arising from the use of or works done on the resumed land.”²⁸

The majority of the High Court simply rejected *Edwards*:

“The reasoning in *Edwards* is in our respectful opinion, in any event unconvincing. Harman L.J. described “injurious affection” as a piece of jargon. It is more than that. It is a neat, expressive way of describing the adverse effect of the activities of a resuming authority upon a dispossessed owner’s land. Reference to it in disparaging language does nothing in our view to assist in the elucidation of what it involves. The use of this common expression serves well to distinguish the statutory right from the common law claim in nuisance. It is unnecessary, and it would be unprofitable in these reasons, to examine his Lordship’s reasons and his analysis of the earlier cases to ascertain why the apparently unambiguous language of s. 63 of the 1945 Act was given the meaning his Lordship and others have attributed to it. Like the Court in *Beaver Dredging*, we do not read the decision in *Morison* as embracing the reasoning in *Edwards*.”²⁹

Therefore, on the highest Court authority in Australia, the *Edwards* Rule is not applicable for the reason that it simply does not make sense.

(C) The *Edwards* Rule in Canada: Remaining Uncertainty

Unlike the U.K. and Australia, the application of the *Edwards* Rule in Canada remains uncertain, as it is inconsistent with current Canadian principles of full compensation, but has not been directly rejected by the courts or legislatures.

Interestingly, the principle enunciated in *Edwards* is traceable back to a Canadian decision of the Privy Council, *Sisters of Charity of Rockingham v. R.*³⁰ In *Sisters of Charity*, the claimant school owned two adjacent parcels of land separated by a highway and a railway line. The school buildings were located on the west side of the railway and the land on the east side of the railway fronted onto the water and was used for recreational and landing purposes. The Crown expropriated two small peninsulas on the eastern portion of the lands belonging to the school in order to accommodate a shunting yard for the railway. The school sought compensation not only for the taking but also for

²⁸ *Ibid* at para. 61.

²⁹ *Ibid* at para. 32.

³⁰ (1922), 67 D.L.R. 209 (J.C.P.C.) [*Sisters of Charity*].

injurious affection in relation to the western property. Referring to Crompton J.'s decision in *Stockport*, Lord Parmoor for the Privy Council accepted that the statutory provision in question bore the interpretation that a landowner subject to a partial taking may be compensated for both the construction and use of the public works on the expropriated land affecting the remaining land. However, Lord Parmoor limited recovery to that portion of the public works on the taken land:

“If this decision is applied to the circumstances of the present appeal, it would, in the opinion of their Lordships, sanction a claim to compensation for the probable or apprehended use of the two promontories as part of a railway shunting yard. No doubt a difficulty arises in the assessment of amount where the mischief complained of arises, not only on the land which has been taken from the appellants, but also on land over which they had no ownership claim; but this is no reason for refusing to entertain a claim; but this is no reason for refusing to entertain a claim, so far as the damage claimed can be shown to arise from the apprehended legal use of the lands taken from them.”³¹

On this basis, the Privy Council held that the promontories were of value when held together with the western property and the school was therefore able to recover damages for injurious affection to their remaining property. In determining what compensation was payable to the school, Lord Parmoor stated that the current and anticipated future use of the expropriated land was relevant and therefore although currently the expropriated land was not being used for the shunting yard, that potential future anticipated use was relevant to the determination of compensation.³² However, the school could only be compensated for the “mischief complained of” arising from the use of the expropriated land, not from the public works as a whole.³³

The *Sisters of Charity* decision was adopted in *Edwards*. Arguments have also been advanced that the *Edwards* Rule was also incorporated into the definition of injurious affection in the Ontario, Manitoba, Nova Scotia and New Brunswick expropriation Acts through the use of the word “thereon” in sub-clause 1(1)(a)(i) of the *Expropriations Act*.³⁴ The use of the word “thereon” may also have been placed in sub-clause (1)(1)(a)(i) to distinguish injurious affection caused by the actual taking (on the property) from injurious affection from a source other than that which is part of the taking of the property.

³¹ *Ibid* at 214.

³² *Ibid* at 216.

³³ *Ibid*.

³⁴ See *Wilson et al v. City of London*, [1997] O.M.B.D. No. 1558, rev'd (1999), 73 L.C.R. 255 (Ont. Div. Ct.) [*Wilson*].

Unlike the Justice Society in England, the Ontario Law Reform Commission did not consider the *Edwards* Rule in its 1969 Report.³⁵ Thus, the considerations for the scope of injurious affection in the *Expropriations Act* do not appear to include the *Edwards* Rule. In the years following the 1969 Ontario Law Reform Commission Report, Courts and Boards have in certain instances relied upon the *Edwards* Rule to support an apparent desire to limit the scope of injurious affection. This application requires further attention as part of a fresh consideration of the balance between public interest and the invasion of landowners' rights.

The issue identified by Barwick C.J. for the High Court of Australia highlights the weakness in the application of the *Edwards* Rule in Ontario and elsewhere: the difficulty in dissecting which portion of the damages caused to the remaining lands is attributable to that portion of the public works located on the expropriated land. This analysis contained too many elements of mystery for Barwick C.J. and yet Canadian Courts and tribunals frequently engage in it. This approach, from the case-law, often appears arbitrary and unscientific. In an Ontario Municipal Board ("OMB") decision, upheld by the Ontario Divisional Court, the Board characterized the analysis as follows: "At this point, the decision becomes, by necessity, somewhat subjective. There is no history or precedent on which to base the measurements to be addressed."³⁶ However, Lord Parmoor's statement that "this is no reason for refusing to entertain the claim" spurs the OMB and the Courts on to enter into this arbitrary analysis.

The Court of Appeal of Alberta in *Landex Ltd. v. Red Deer (City)*,³⁷ overturned a municipal board decision to apply the *Edwards* Rule to the Alberta *Expropriations Act*. The relevant section of the Alberta *Expropriations Act* reads:

56. When part only of an owner's land is taken, compensation shall be give for
- (a) injurious affection, including:
 - (i) severance damage, and
 - (ii) any reduction in market value to the remaining land,
- and
- (b) incidental damages

³⁵ Ontario, *Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation*, (Toronto, Queen's Printer: 1969) [1969 Ontario Law Reform Report].

³⁶ *Airport Corporate Centre Inc. v. Ontario* (1995), 55 L.C.R. 135 (O.M.B.), (1996), 89 O.A.C. 174 (Gen. Div.) [*Airport Corporate Centre*].

³⁷ (1991), 45 L.C.R. 241 (Alta. C.A.).

if the injurious affection and incidental damages result from or are likely to result from the taking or from the construction or use of the works for which the land is acquired.

The municipal board, pursuant to *Sisters of Charity*, limited recovery to that portion of the works constructed on the expropriated land. The Court of Appeal distinguished the Alberta *Expropriations Act* from the Ontario, Nova Scotia and New Brunswick expropriations Acts, which contain the word “thereon”. The Court of Appeal held that, absent express legislative intent, the claimant’s recovery should not be limited.³⁸ The Court went on to say:

“Nor can I see any justice or logic in the old rule that the work must be on the exact land taken. If a public body expropriates several lots or parts of lots for garbage disposal, it is an accident which partial lot the smoke stack is erected on. Using the old rule would make Alberta’s compensation scheme illogical and unfair.”³⁹

It remains unclear whether certain provincial legislatures, by the use of the word “thereon” in the definition of injurious affection, have chosen to favour the public interest in such an “illogical” manner where injurious affection is concerned. This narrow and restrictive interpretation of the word “thereon” appears contrary to the fundamental principles of full compensation and making an expropriated owner whole, as was espoused by the Supreme Court of Canada in *Dell*, where Mr. Justice Cory wrote:

The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person’s property constitutes a severe loss and a very significant interference with a citizen’s private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. ... 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.⁴⁰

In spite of this apparent uncertainty in the meaning of the word “thereon” in sub-clause 1(1)(a)(i), neither the provincial legislatures, the courts or municipal boards have endeavoured to clarify the meaning of the word “thereon” and dismiss the application of the *Edwards* Rule in order to ensure expropriated owners are fully compensated..

³⁸ *Ibid* at 249.

³⁹ *Ibid*.

⁴⁰ *Supra* note 4 at 88 to 89.

(E) The *Wilson* decision

In *Wilson*,⁴¹ the Divisional Court considered an OMB decision applying the *Edwards* Rule to sub-clause 1(1)(a)(ii) of the Ontario *Expropriations Act*. This case arose from the City expropriating land from the frontages of two landowners' properties to facilitate the widening of the City's Fanshawe Park Road. The claimants sought damages for both the construction and use of the road, including physical damage caused to their houses on the property due to the vibrations from the construction. The claimants therefore sought compensation under the *Expropriations Act* pursuant to both sub-clause 1(1)(a)(i) for diminution in property value and sub-clause 1(1)(a)(ii) for personal damages. The City argued that both sections of the *Expropriations Act* were subject to the *Edwards* Rule and therefore the claimants were only entitled to recover for damages suffered as a result of the public works on their expropriated property, not for damages suffered as a result of the public works *in toto*.

In *Wilson*, the OMB considered *Dell* in light of the decisions in *Sisters of Charity* and *Edwards*.⁴² The OMB opined that it was settled law that *Edwards* was incorporated into the *Expropriations Act* by virtue of sub-clause 1(1)(a)(i). The OMB went on to find that *Edwards* was also applicable to sub-clause 1(1)(a)(ii):

“The question then arose as to whether the *Edwards* Rule also applies to subsection 1(1)(a)(ii) of the Act. We are of the opinion that it does. The Board notes that “such personal and business damage” referred to in subsection 1(1)(a)(ii) cannot be isolated from subsection 1(1)(a)(i). These damages, in our view, arise from the “construction of the works thereon or by the use of the works thereon” as stated in subsection 1(1)(a)(i) and 1(1)(a)(ii).”⁴³

In finding that the *Edwards* Rule is settled law, the OMB relied upon the decision of *Ben's Ltd. v. City of Dartmouth*, by the Nova Scotia Expropriations Compensation Board. In this decision the Board found, in interpreting a similar provision, that although the legislature omitted “thereon”, it was open to the Court to find that the subsections should be read together and therefore that the limitation in *Edwards* should apply to both subsections.⁴⁴ However, in *Ben's*, the Nova Scotia Expropriations Compensation Board went on to consider whether an expropriated landowner could recover additional damages under the equivalent of clause 1(1)(b), which provides compensation to a landowner not subject to expropriation. The subsection in the Ontario *Expropriations Act* states:

1(1) “injurious affection” means,

⁴¹ *Supra* note 34.

⁴² *Supra* note 34 at para. 11.

⁴³ *Ibid* at para. 14.

⁴⁴ *Ben's Ltd. v. City of Dartmouth* (1978), 14 L.C.R. 357 at 363 (N.S.E.C.B.) [*Ben's*].

[.....]

- (b) where the statutory authority does not acquire the land of an owner,
 - (i) such reduction in market value of the land of the owner, and
 - (ii) 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.

The tribunal in *Ben's* stated:

“The difficulty of applying the rules in a logical way [arises] where, as in the present case, the execution of the works involve[s] both a partial taking and a separate exercise of statutory powers in connection with the alteration of an existing road. [...] Although in this case there is not [...] a convenient separation of physical effects, the Board is of the opinion that the same logic can be applied in the present case and holds that the claimant is not precluded from claiming on account of the interference with access merely because it has a separate and different claim on account of the partial taking. In the present circumstances, no double recovery is involved and the separate and different losses suffered by the claimant result from the exercise of separate and different statutory powers. Subject to the considerations discussed below, it is the Board’s opinion that each type of detrimental effect would give rise to a cause of action if it occurred without the other, and, in the absence of any duplication or overlap, it offends reason that one right should lapse because the claimant suffered double injury.”⁴⁵

However, the OMB in *Wilson* did not pick up on this aspect of the *Ben's* decision and applied the *Edwards* Rule to sub-clause 1(1)(a)(ii) of the *Expropriations Act*, thereby restricting the damages to which the landowner was entitled without reciprocally opening up clause 1(1)(b) as an additional source of compensation.

The decision of the OMB in *Wilson* was appealed to and overturned by the Divisional Court. The Court found that there was no necessary nexus between sub-clauses 1(1)(a)(i) and (ii) of the Ontario *Expropriations Act* and that in having not included the word

⁴⁵ *Ibid* at 363-64.

“thereon” in sub-clause 1(1)(a)(ii), the legislature chose not to impose the *Edwards* Rule on personal and business damages. The Court went to on say that if this were not so, an absurd consequence would follow:

“Further, if the *Edwards* rule were to apply to s-s. 1(1)(a)(ii), it would follow that an owner claiming under s-s 1(1)(b) could be in a more advantageous position than an owner claiming under s-s 1(1)(a)(ii), and an interpretation of s-s 1(1)(a)(ii) that could lead to such an illogical result should be avoided.”⁴⁶

The logic espoused by the Court in the above passage is also applicable to the incorporation of the *Edwards* Rule into sub-clause 1(1)(a)(i).

The goal of full compensation, as heralded by the Supreme Court in *Dell*, is not addressed in either *Wilson* or *Ben's*. *Wilson* creates an illogical divide in the definition of injurious affection and *Ben's* favours an unnecessarily complicated path to fuller compensation. The arguable policy rationale for applying *Edwards* is the balancing of the cost to the public purse with the rights of private interests. This balance was identified by the 1969 Ontario Law Reform Report. Following the Supreme Court's decision in *Dell* this possible rationale is no longer compelling or applicable to expropriations law in Canada.

Private landowners should not be forced to bear the cost of a public works in the name of the public good. The true cost of the works includes the impact of the works as a whole on neighbouring landowners and should therefore only be undertaken if economically viable when that cost is factored into the analysis. A logical and rational approach requires a clarification of the application of the *Edwards* Rule at the Divisional Court or Court of Appeal level and a policy analysis along the lines of the High Court of Australia's decision in *Marshall*. Absent the opportunity for judicial consideration, a simple amendment to the legislation would move Ontario to the modern views taken in England and Australia. This amendment may be as easy as clarifying the ambiguity in sub-clause 1(1)(a)(i) caused by the word “thereon” by removing it altogether.

III. Injurious Affection Where No Land Taken

An ancillary to the *Edwards* Rule is the rule regarding injurious affection where no land is taken. In fact, this principle is raised in obiter in *Edwards*.⁴⁷ The rule states that a landowner whose land is not taken may be compensated, as he or she would be at common law, for the loss associated with the nuisance created by the public works. This is in contrast with the right of a landowner to compensation where he or she has suffered a partial taking, which compensation must be founded on statutory principles. However,

⁴⁶ *Supra* note 34 at 256.

⁴⁷ *Supra* note 8 at 488, citing Lord Halsbury in *Cowper Essex v. Acton Local Board*, (1889) 14 App. Cas. 153 at 161 (H.L.).

a landowner may only be compensated for damages associated with the “construction” of the public works and not for any damages related to the “use” of the works.

This principle finds early articulation in *Sisters of Charity*:

“If the railway shunting yard, of which complaint has been made, had been constructed on land, no part of which had been expropriated from the appellants, the appellants would not have been entitled to claim compensation, although, in fact, such construction had seriously depreciated the value of their property on the west side of the railway. Where no land of the same owner is taken, the words “injuriously affected” only include damage or loss, which would have been actionable but for statutory powers, and such damage or loss must be occasioned by the construction of the authorised works, as distinct from their user [sic].”⁴⁸

If the use of public works causes a nuisance, but for statutory authority, neighbouring landowners would have an actionable complaint. The limitation that a non-expropriated landowner may only be compensated for damages caused by the “construction” of a public works is statutorily imposed. The 1969 Ontario Law Reform Report framed the issue as follows:

“If the owner suffers a loss because of the use of the works, why should he not be indemnified? In cases of partial taking, he will be indemnified. Where there is no taking and damage is caused by the construction of the works, he will be indemnified. Why stop there? In principle, it may well be that he would be entitled to recover his loss.”⁴⁹

The Clyne Report in British Columbia⁵⁰ recommended that the legislation be amended to compensate a landowner for injurious affection caused by both the construction and the use of the public works. In reaching this conclusion, the Clyne Report examined the rules for compensation for injurious affection where no land has been taken as developed in the English jurisprudence:

- (1) Injurious affection must be the consequence of the lawful exercise of statutory power, otherwise the remedy is action in the civil courts;

⁴⁸ *Supra* note 30 at 211.

⁴⁹ *Supra* note 35 at 49.

⁵⁰ British Columbia, *Royal Commission on Expropriation* (Vancouver, Queen’s Printer: 1963), The Honourable J.V. Clyne [Clyne Report].

- (2) The injurious affection must arise from that which will give rise to a cause of action if done without the statutory authority for the relevant scheme of works;
- (3) The damage or injury for which compensation is claimed must be in respect of some loss of value of the land of the claimant; and
- (4) The loss or damage to the claimant's land must arise from the execution of the works and not from the authorised use of the lands compulsorily acquired following completion of the works.⁵¹

The Clyne Report recommended that the first and second principles remain in effect in British Columbia, but that the third principle be changed and the fourth principle abandoned:

“The first two conditions flow logically from the view that Section 69 simply provides a substitute for a right of action which has been taken away. The third and fourth conditions, on the other hand, arise solely as a result of the words chosen by the draftsman of the 1845 statute and their effect is often to deprive an owner who has suffered substantial injury of any right of compensation. [...] It will therefore be my recommendation that the third condition be modified and the fourth condition abolished.”⁵²

The Clyne Report recommended that the fourth principle should not find articulation in British Columbia legislation because “there is no rational basis for limiting compensation resulting from the construction of works and not from their maintenance and continued operation.”⁵³ The 1969 Ontario Law Reform Report recommended against this change on the basis that the cost of imposing this liability on the expropriating authority was of an unknown and possibly unwieldy amount; such compensation could not, therefore, be justified for public policy reasons.⁵⁴

When one compares this reasoning with the Supreme Court of Canada's enunciation in *Dell* of the aim of the *Expropriations Act*, as a remedial statute, to fully compensate a landowner, this justification seems lacking. However, the Supreme Court's stated aim of the *Expropriations Act* relates only to a landowner whose land has been taken or partially taken, not to a landowner who suffers interference with the peaceful enjoyment of his or her land where land is not , the former being a more egregious interference with property

⁵¹ *Metropolitan Board of Works v. McCarthy* (1874), 7 L.R. 243 (H.L.) [*McCarthy*].

⁵² *Supra* note 50 at 71.

⁵³ *Ibid* at 118.

⁵⁴ *Supra* note 35 at 49.

rights. The *Edwards* Rule, however, limits compensation for a landowner whether or not the owner is subject to expropriation.

Limiting fair and full compensation seems to contradict *Dell*. If a public undertaking is truly in the public interest, it would only be appropriate for the public to bear its true costs. Downloading part of these costs onto private landowners appears contradictory to the balancing of individual interests and public good, which the *Expropriations Act* seeks to achieve.

The Justice Society Report, like the Clyne Report, also recommended a variation to the limitation on compensation where no land is taken to damages for construction rather than use of the public works: “We believe it to be a sad commentary on the present law that an owner of land in an area through which a motorway is to be constructed should prefer that the motorway takes the whole of his property rather than go near it.”⁵⁵ Until that time in the U.K., *McCarthy* was the seminal case on injurious affection where no land is taken. From that case, the four *McCarthy* Rules reproduced above were extrapolated and were affirmed by the House of Lords in 2001.⁵⁶ The Justice Society Report recommended that a landowner whose land is not taken be able to claim for any damage that would be actionable at common law but for statutory authority.⁵⁷ The White Paper found the common law analogy unworkable, although the goals laudable:

“[T]he time has come when all concerned with development must aim to achieve a better balance between provision to the community as a whole and the mitigation of harmful effects on the individual citizen. In recent years this balance in too many cases has been tipped against the interests of the individual. A better deal is now required for those who suffer from desirable community developments.”⁵⁸

To that end, the White Paper recommended that individual landowners not subject to a partial taking should be compensated for physical damages suffered as a result of public works, both the construction and use thereof.⁵⁹ This change was adopted in the *Land Compensation Act 1973*. Compensation pursuant to that Act arises where: (1) the value of the claimant’s interest in land has been depreciated; (2) the depreciation is caused by “physical factors”; (3) the physical factors are caused directly by the use of the “public works”; and (4) the use of the public works is immune from an action in nuisance.⁶⁰

⁵⁵ *Supra* note 17 at 22-23.

⁵⁶ *Wildtree Hotels v. Harrow London BC*, [2001] A.C. 1 (H.L.).

⁵⁷ *Supra* note 17 at 23.

⁵⁸ *Supra* note 19 at para. 5.

⁵⁹ *Ibid.*

⁶⁰ U.K., *The Law Reform Commission Report - Towards a Compulsory Purchase Code: (1) Compensation* (London: Her Majesty’s Printer: 2003) at 133 [Law Commission Report].

There are also a number of procedural matters.⁶¹ “Physical factors” are defined in section 1 of the *Land Compensation Act 1973* as “noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance.” These factors closely mirror what might be compensable at common law through a claim of nuisance, but are an enumerated closed list which provides certainty to the public authority. Nonetheless, this still does not provide full compensation to a non-expropriated landowner for all damages suffered as a result of a public works, including intangible or non-physical damages (for instance, damages related to depreciation in value for obstruction of view). The Compulsory Purchase Policy Review Advisory Group, established by the Department of the Environment, Transport and the Regions, published a report in July 2000⁶² recommending that the English legislation be changed to incorporate compensation for non-physical damages.⁶³ The Law Commission Report disagreed and recommended no change to the law on the basis that, although there is a difference in the way that expropriated landowners and non-expropriated landowners are treated with regard to the use of public works, such a difference is justified:

“In the case of the person from whom land is acquired, the issue is the price to be paid for what is taken. The rules are designed to arrive at a fair price, having regard to the value to the owner. In negotiating that price, the owner is entitled to expect the effects on his other land be taken into account. In the case of the adjoining owner, there is no question of negotiating a price for what is taken. The closest analogy is with the common law rights of any landowner in relation to unreasonable use of his neighbour’s land.”⁶⁴

In the provinces where *Edwards* is still sporadically applied, a non-expropriated landowner may still only claim compensation for damages as a result of the construction of the public works, and not for the use thereof. However, in addition to compensation for diminution in market value, the landowner is also entitled to compensation for personal and business damages related to the construction of the public works. This is not available in England and the Law Commission Report recommended no change to the law, although they noted that in practice a more liberal approach could be adopted to reflect the fact that all consequential damages, including personal and business loss, would be compensable under common law.⁶⁵

⁶¹ *Ibid.*

⁶² Compulsory Purchase Policy Review Advisory Group, *Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report* (London: Her Majesty’s Stationary Office: 2000).

⁶³ *Ibid* at para. 197.

⁶⁴ *Supra* note 60 at 173.

⁶⁵ *Ibid* at 175 and 60.

IV. Conclusion

Where both land is taken and where no land is taken, compensation for injurious affection in certain provinces contains arbitrary limitations. In the event that the *Edwards* Rule remains applicable, where land is taken an owner's recovery is limited to the damages suffered as a result of the construction and use of the public works on the land expropriated. Therefore, under the *Edwards* Rule municipal boards or the Courts are asked to enter into an enquiry, based usually upon expert evidence, as to how much of the damage suffered by a partially expropriated owner is attributable to the work as a whole and how much may be attributed to the work only on the land expropriated.

Such an enquiry asks municipal boards and courts to make the arbitrary and at times artificial determination as to what part of the undertaking to consider when only part of the undertaking is physically located on the expropriated lands. In an instance where the western portion of an owner's property is expropriated for the eastern half of a highway, should a municipal board or court go as far as considering the impact the northbound lanes of a highway have on the remaining lands, while screening out the impact of southbound lanes? What if the taking of the property is only for the right most lane of the highway? What if the taking of the property is only for the right shoulder of the highway? There appears to be an absence of logic in applying such distinctions, especially in light of the fact the remaining lands would suffer injurious affection from the entire highway.

This type of enquiry may give rise to substantially unfair results, as it is based less on objective data and more on subjective, and at times arguably partisan, expert opinions. Much like the case in *Hunter*, above, if a landowner is partially expropriated in furtherance of the construction and use of a sewage plant, but the land expropriated from the owner is used only for the construction of an access road, the land owner may only be compensated for the damages to the remaining property as a result of the construction and use of a road, even though the substantial damage suffered by him or her is the proximity of the land to the sewage plant.

A more rationale interpretation of the *Expropriations Act* avoids the application of the *Edwards* Rule to limit the scope of claims for injurious affection. This is achieved by reading the word "thereon" in sub-clause 1(1)(a)(i) as including the whole of the works so long as the expropriated lands form part of the works as a whole and excluding other works or undertakings that are not located on the lands that are expropriated. This interpretation does not entail the arbitrary limitations on compensation imposed by the *Edwards* Rule and is consistent with the principles of full compensation set out by the Supreme Court of Canada in *Dell*.

Another concern with the *Edwards* Rule, as interpreted by the Divisional Court in *Wilson*, is its arbitrary distinction between injurious affection causing personal and business loss and injurious affection causing a loss in value to property. This seems in itself an absurd result, a consequence the Divisional Court was seeking to avoid, as there

is no compelling policy rationale for compensating all personal and business loss but not loss of property value. Based on the holding in *Dell*, the owner should be made whole by receiving full compensation for all losses arising from an expropriation.

Where no land is taken, the landowner may only be compensated for damages suffered as a result of the construction but not the use of a public works. The 1969 Ontario Law Reform Report recognized that this limitation was arbitrary, but felt that it was necessary lest the public purse be overwhelmed with having to pay compensation to every landowner affected by the use of a public works.⁶⁶

In practice, however, the distinction between the “use” and the “construction” of the public works is tenuous. The limitation on recovery to damages related to “construction” as it is used in clause 1(1)(b) is generally understood to allow compensation to a landowner not only for damages suffered during the construction of the public works, but also from the fact of the construction of the public works, including its location and existence.⁶⁷ Therefore, a landowner may be compensated for the fact that a sewage treatment centre is erected on neighbouring land, but may not be compensated for the use of that sewage treatment centre. In so far as market value of the land is concerned, the diminution in value related to the construction rather than the use of the public works cannot be readily separated. The fact of the construction is meaningless without some view to the use to which the public works is going to be put. A sewage treatment centre has a readily apparent noxious use and the fact of its construction rather than, for instance, the construction of a recreational facility, although they may have the same physical specifications and may require similar disruption during construction, would give rise to higher compensation under clause 1(1)(b). This leaves the adjudicator with latitude to compensate for the use of the public works when considering its construction.

If the limitations to full compensation caused by the *Edwards* Rule are applicable to the Ontario *Expropriations Act*, and the expropriations Acts in some other provinces, how should an individual landowner go about achieving the stated goal of the Act of full compensation? The decision in *Ben's*, although almost thirty years old, is instructive. Therein, the Nova Scotia Expropriations Compensation Board found that a landowner could claim damages under the equivalent of both clauses 1(1)(a) and (b). The landowner, in that case, had suffered three sets of actionable damages: (1) the damages associated with the taking of the land (which compensation flows from clause 1(1)(a)); (2) the damages associated with the construction of the public works as a whole (which compensation flows from clause 1(1)(b)); and (3) the damages to market value associated with the use of the public works (which compensation for only that portion of the works on the expropriated lands flows from clause 1(1)(a)).⁶⁸ The Compensation Board held

⁶⁶ *Supra* note 35 at 49.

⁶⁷ *Re City of Windsor and Larsen et al.* (1980), 29 O.R. (2d) 669 at 675 (Div. Ct.), *R. v. Loiselle*, [1962] S.C.R. 624 at 626; *Mikalda Farms Ltd. v. Ontario (Management Board of Cabinet)* (2001), 75 L.C.R. 274 at 286-87 (O.M.B.); *Base Ninety Developments Ltd. v. Ontario (Chair of the Management Board of Cabinet)*, [2005] O.J. No. 4542 (Div. Ct.).

⁶⁸ *Supra* note 44.

that the damages suffered were separate and, therefore, the landowner was not, as it appears on its face, obtaining double-recovery, but was being compensated separately for the different damages suffered.⁶⁹ To hold otherwise might give rise to a case where a landowner who had no land expropriated would obtain higher compensation by virtue of the damage suffered by the construction of the public works as a whole than an expropriated landowner who is only able to obtain recovery for his or her damages suffered as a result of the construction and use of the public works on the taken land.

Another instructive case is the recent OMB decision, *Canadian Tire Corp. v. Ontario (Management Board of Cabinet)*.⁷⁰ In *Canadian Tire*, the expropriated party, Canadian Tire Corp., argued that it was entitled to damages for injurious affection related to a partial taking for a purpose ancillary to the construction of Highway 407 in Toronto. They argued that a grade separation was responsible for certain of their business losses and that the grade separation, although not constructed on the land expropriated from them, could not have been constructed but for the use of their expropriated property.⁷¹ Canadian Tire Corp. relied on *Airport Corporate Centre*.⁷² The works on the expropriated lands in that case consisted of embankments and bridge structures for transfers and collector lanes of Highway 401 in Toronto. The OMB found that Highway 401 had injuriously affected the remaining property and that “[t]hose works find their foundation upon the lands which were expropriated from the claimant, rendering the balance of the lands as compensable.”⁷³ In *Canadian Tire*, the OMB found that Canadian Tire Corp. had not suffered any business loss as a result of the grade separation and therefore did not proceed with the analysis. However, the case highlights another way in which landowners may be able to circumvent *Edwards*: by claiming that compensation is due to the injurious affection caused by the works as a whole where integral ancillary works are situated on the expropriated property.

In the post-*Dell* era, Courts and municipal boards in Canada have enunciated more progressive compensation standards for expropriation. This is in keeping with *Dell*. If a proposed public works can sufficiently justify the expropriation of private property, we, as members of the public, should be willing to absorb its entire cost. The runaway cost, or domino-effect, suggested to occur upon the removal of the admittedly arbitrary limitations on recovery of damages for injurious affection by both owners whose land is partially taken and owners whose land is not taken, has not been substantiated by the experience of other jurisdictions. Absurd and frivolous claims are routinely dealt with in civil matters. Similar systemic safeguards would protect the public purse in expropriation-related claims. Therefore, the need to defend arbitrary limits may be

⁶⁹ *Ibid* at 364.

⁷⁰ [2005] O.M.B.D. No. 941 [*Canadian Tire*]. In this case, the expropriated party assumed that the *Edwards* Rule applied to subsection 1(1)(a)(ii) of the Ontario *Expropriations Act*, which, as we saw above, the Divisional Court in *Wilson* ruled was not correct. However, this case is still instructive on potential ways to circumvent *Edwards* as it applies to subsection 1(1)(a)(i).

⁷¹ *Ibid* at para. 31.

⁷² *Supra* note 36.

⁷³ *Ibid* at 138.

overstated, outdated and contrary to the stated purpose of the *Expropriations Act*. Although there are creative ways to circumvent the *Edwards* Rule, if it remains applicable, and some indication that the Courts and the OMB may be more willing to entertain these types of arguments, the best way to ensure that individual landowners are compensated fairly for injurious affection is for the Courts to clearly overturn *Edwards* or for the legislature to remove the ambiguity to sub-clause 1(1)(a)(i) of the Ontario *Expropriations Act* caused by the word “thereon” and thereby evidence a legislative intent to fully do away with the *Edwards* Rule.