

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.,
1999 NSCA 98
Glube, C.J.N.S.; Hallett and Cromwell, JJ.A.

BETWEEN:

ATTORNEY GENERAL OF NOVA	)	Alexander M. Cameron
SCOTIA, representing Her Majesty the	)	for the appellant
Queen in Right of the Province of Nova)	
Scotia)	
Appellant)	
- and -)	
MARINER REAL ESTATE LIMITED,	)	Rubin Dexter
2102660 NOVA SCOTIA LIMITED, and	)	for the respondent Mariner
LAMONT MOSHER and CAROLE ANNE	)	Real Estate Limited
MOSHER)	
Respondents	)	Martin Dumke
	)	for the respondents 2102660
	)	Nova Scotia Ltd & the Moshers
)	
	)	Appeal heard:
	)	May 13, 1999
)	
	)	Judgment delivered:
	)	August 18, 1999
)	
)	

THE COURT: Appeal allowed per reasons for judgment of Cromwell and Hallett,
JJ.A.; Glube, C.J.N.S. concurring.

CROMWELL, J.A.:

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. 56.

[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.

II. Facts and Relevant Legislation:

(a) The Respondents' Claim:

[6] Kingsburg Beach is a place of great natural beauty. It is also ecologically significant because it contains diverse habitats and a complete range of beach, dune and beach ridge resources. From the highwater mark seaward, it is Crown land and a beach regulated by the regime established by the provincial **Beaches Act** and Regulations. From the high watermark landward, it is privately owned by persons including the respondents.

[7] The **Beaches Act** permits the Governor in Council to designate land from the high watermark landward as a beach and thereby impose on that land the stringent regulatory regime established by the **Act and Regulations**. As noted, the respondents lands have been so designated; the Crown land from the high watermark seaward is covered by the **Act** without the need to make a designation.

[8] It will be necessary to review some of the facts in detail later in these reasons; a brief overview will be helpful here. The respondents own land at Kingsburg Beach. Their lands were designated as a beach under the **Beaches Act** in March, 1993. In November of 1994, Jacques Whitford Environment Limited was commissioned to conduct an environmental study of Kingsburg Beach. The study was completed in late 1994. In the meantime, the respondents had commenced litigation against the Province asserting that they should have been given an opportunity to be heard prior to the Governor in Council, on March 9th, 1993, designating the dune area behind the

Kingsburg beach as a beach within the meaning of the **Beaches Act**. On May 5th, 1995, Justice MacAdam ruled that the Province ought to have given the respondents an opportunity to be heard prior to passing the March 9th, 1993, Order-in-Council. As a result, on July 25th, 1995, after giving the respondents an opportunity to be heard on the matter, the Governor in Council confirmed the Order-in-Council of March 9th, 1993, designating the area a beach. The July 25th, 1995, Order-in-Council permitted construction of other dwellings in the designated area if, as of March 9th, 1993, the owners had the necessary health and building permits to proceed. None of the respondents had the necessary permits as of March 9th, 1993.

[9] The respondents applied for permission to build single family residences on their lands as required under the **Beaches Act**. Permission was not granted. Actions were commenced by the respondents seeking a declaration that their lands had been expropriated and that they are, therefore, entitled to compensation under the provisions of the **Expropriation Act**.

[10] The right to compensation asserted by the respondents is set out in s. 24 of the **Expropriation Act**:

24. Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act.

Section 3(1) of the **Expropriation Act** defines expropriate as “... the taking of land without consent of the owner by an expropriating authority in the exercise of its statutory powers...”. There is no issue here that the owners did not consent or that the

designation was lawful. The question is whether “land” was “taken” “by” an expropriating authority.

[11] The respondents’ claim is that there has been a *de facto* expropriation, so called because it is claimed that there has been an expropriation, in fact, even though the formal procedures of expropriation were not followed and no legal title has been lost or acquired. The claim is that the restrictions on the use of the land arising from the application of the **Beaches Act** and Regulations have taken away virtually all the economic value and benefits of ownership of the land and that there has been a resulting enhancement of the value of publicly owned land. It is common ground on this appeal that for there to be an expropriation, land must be taken from the respondents and acquired by the Province.

[12] As noted, there is no challenge in these proceedings to the legality of the designation. For the purposes of this appeal, therefore, we must assume that the **Beaches Act** provides lawful authority for the designation in the circumstances present in this case. Similarly, there is no challenge on this appeal to either the conferral or the exercise of the discretion to refuse the respondents’ applications to build residences. It may be arguable that the **Beaches Act** was not intended to confer discretion to designate lands where its exercise has the effect of imposing the sweeping and stringent limitations on the enjoyment of virtually the whole of a private owner’s lands which have resulted from the designation in this case. It may also be arguable that the

apparent absence of guidelines or process protections normally attached to the land use planning process might put in question the legality of the broad discretion under the **Beaches Act** and Regulations to grant or refuse permits in relation to private land. No such arguments were made in this case and nothing in these reasons should be taken as addressing these sorts of issues in any way.

(b) The Beaches Act and Regulations:

[13] Central to the respondents' claim is the effect of the designation and related actions taken by the Province with respect to their lands. It is necessary, therefore, to examine the regulatory scheme established by the **Beaches Act** and Regulations.

[14] The stated purpose of the **Beaches Act** is to provide protection for beaches and associated dune systems as environmental and recreational resources, to regulate and enforce land-use activities on beaches and to control recreational and other uses of beaches that may cause harm to them : see s. 2(2). Beach is defined as "that area of land on the seaward of the mean high watermark" and " to landward immediately adjacent thereto to the distance determined by the Governor in Council." The land in issue in these proceedings falls within the second branch of this definition because the respondents' title proceeds landward from the mean high watermark.

[15] There is a determination process set out in s. 5 of the **Act**. An immediate effect of a determination that land is a beach is that, pursuant to s. 6, no person is to

remove any sand, gravel, stone or other material from the beach without the Minister's permission. There is also a list of prohibited activities on a beach including being impaired, acting in a noisy or disorderly manner, creating a disturbance, engaging in conduct detrimental to the safety of other beach users, wilfully destroying natural resources found on the beach, and engaging in any other activity prohibited by regulation: see s. 8(1). Contravention of these prohibitions is punishable on summary conviction: see ss. 9 and 10. The Minister also acquires the following extraordinary power over a beach:

8 (2) Where there is reasonable and probable grounds to believe that a person has violated or is about to violate any provision of this Act or the regulations, or that the entry upon or remaining within a beach by any person may be detrimental to the safety of the other beach users or their enjoyment of the beach, the Minister or a person authorized to act on the Minister's behalf may, without notice or hearing, issue a verbal or written order prohibiting that person from entering upon or being within a beach specified in the order for a period specified therein.

[16] There is also a broad grant of regulation-making power set out in s. 13 pursuant to which Regulation 70/89 was made. Under s. 3 of the Regulation, the Minister may appoint a person, including a casual employee of the Department, as a beach attendant, to perform on a beach such duties as may be assigned by the Department of Natural Resources. Under s. 4, the Minister is authorized to enter into a management agreement with the owner or occupier of land adjacent to a beach and, under section 5, issue a permit to a person for the removal of sand, stone or other material from the beach. Various activities are restricted including the following:

7. Except as provided in the Act or with a permit from the Minister, no person shall, while on a beach,

(a) wilfully remove, deface or injure any natural object, tree, shrub, plant or

- (b) grass;
wilfully remove, deface, damage or destroy a signboard, sign or notice placed on a beach or adjacent to a beach;
- (c) wilfully remove or displace any rock, mineral, fossil, sand, gravel or other aggregate or object of natural curiosity or interest;
- (d) display a sign or advertisement;
- (e) sell or offer for sale an article or service or thing or carry on a business;
- (f) alter, damage or destroy any watercourse; or
- (g) leave a fire unattended until it is completely extinguished;

8(1) No person who owns or is in control of a domestic animal shall permit it to be at large on a beach where a sign or notice is posted by the Department that domestic animals are to be kept on a leash. ...

(3) Except with a permit from the Minister, which will prescribe appropriate restrictions relative to time, area and conditions, no person shall ride or walk a horse on a beach.

(4) No person who owns or is in control of a domestic animal shall fail to clean up any animal excrement or mess left on a beach by that animal.

[17] Development of a beach is prohibited without the prior written authorization of the Minister: s. 6. The term “develop” is defined (in s. 2(c)) to mean the “...construction of a path, trail or road on a beach or the erection or placement on a beach of a building, structure or other manmade feature not indigenous to the site.”

[18] The Regulations do not differentiate between the two types of beaches defined in the **Act** - i.e., the area seaward from the high watermark on one hand and designated areas to landward on the other. It is difficult to see how some of the Regulations could be applied to the latter sort of beach, the type in issue in this case. For example, s. 5 of the Regulations authorizes the Minister to issue a permit to a person to remove sand (or other material) from a beach. Presumably it is not the

intention to give the Minister the power to do so with respect to a designated beach without the consent of the owner, but the section imposes no such limitation. It is also hard to imagine that it was intended to authorize the Minister to appoint a casual employee to be a beach attendant on a designated beach that is private property. While there may be arguments that aspects of these Regulations are *ultra vires* to the extent they purport to apply to privately owned land, no such argument has been advanced or considered in this case. I, therefore, will not consider this aspect further.

[19] In summary, it is important to note that this scheme imposes two types of regulation. First, it prohibits some activities absolutely. For example, pursuant to s. 8 no person shall, while on a beach, be impaired by alcohol or drugs, act in a noisy or disorderly manner or create a disturbance. The second type of regulation prohibits activities unless a permit has been obtained from the Minister. Activities allowed with a permit include development (broadly defined) of a beach (s. 6 of the Regulations), removal of sand and gravel (s. 6 of the **Act**), and interference with the natural amenities such as trees, plants, rocks and minerals: (s. 7 of the Regulations).

(c) The respondents' lands and their uses of them:

[20] I will now review the evidence with respect to the use of each of the respondents' lands:

(i) Mariner Real Estate

[21] The property was acquired in 1988 for \$5,500.00 as a possible retirement base for the company's principal, Mr. Rose, or as an investment for the future. The taxes before and after designation were \$100.00 or less. Mr. Rose apparently had no intention to build on the property before 1993 and, although he applied to build after the designation in 1993, he applied not for the purposes of building at that time, but to preserve his rights.

[22] When Mr. Rose applied to build a single family home on his lot in November, 1993, he was advised there was a moratorium on construction. After the Jacques Whitford ecological study report on Kingsburg beach was received a year later, Mr. Dexter's clients, including Mr. Rose, were invited to make representations or comments on their applications in light of the study. Mr. Rose did not do so. The application to build was rejected in April of 1995. Later that year, he applied again to build a house, essentially repeating his first application. He provided no comfort to the Department that what he was proposing would not damage the beach. These proceedings were commenced before a response was received to this application.

[23] Aside from the denial of permission to build a house, there was no evidence that the regulatory scheme inhibited other uses to which Mr. Rose wished to put the land. The only use Mr. Rose made of the property was to walk around it, sometimes with friends, and take pictures. He applied for a permit to build a fence in 1995 which was granted with conditions that Mr. Rose conceded were not particularly onerous.

(ii) 2102660 Nova Scotia Limited

[24] This respondent, through its principal, Mr. Hamilton, acquired its property in March 1993, knowing that there was a move to designate the property. Mr. Hamilton is an American real estate broker specializing in shore properties. The purchase price was not in evidence. No cash was paid, but there was apparently a mortgage on the property in favour of a company owned by Edmund Saunders.

[25] Mr. Hamilton had the property surveyed and the title quieted. He testified that he thought residential construction would be permitted provided the local building regulations were complied with. He had a septic permit which was renewed annually until he was advised it could no longer be renewed because of the designation. He obtained a building permit but was also advised that he needed a ministerial permit under the **Beaches Act** before building. Permission to build was refused. Mr. Hamilton was aware of the Jacques Whitford Study but did not modify his application in light of its recommendations because, as he put it, the study “didn’t say what one should do to make the modification at all, they were so vague. And there was nothing in there telling me what I should do to make a modification”.

(iii) Lamont and Carole Anne Mosher

[26] The Moshers are long time residents of, and owned various pieces of land in the Kingsburg area. The four lots in issue in these proceedings were referred to in evidence as the house lot, the gutter lot, the dry spitz (or garden) lot and the cemetery

lot. The house lot, a part of the gutter lot and the garden lot were acquired from Mr. Mosher's grandmother in 1966. Other portions of the gutter lot were acquired in 1975 from his great uncle and between 1985 and 1988 from Harold Mosher and Grace Creamer.

[27] Mr. Mosher testified as follows concerning the use of the land:

A. So the land was basically used for farming. And all these properties, except the one — and that is known as the house lot — I can't remember of ever using that, ploughing that or anything. But they were all ploughed, there were crops planted in them, they were fenced for pasture. And some of these lots were used in later years for things like recreational camping and things like that.

A. Well, I, myself, kept cattle in the '60s, until my barn burned down in '66, '67, along there. And I was forced out of the — could no longer afford to be a farmer. And farming in the small restricted pieces of land, it was getting pretty hard to make any money at that, at that time. So basically the land was — didn't really have any farming value after, I would say, 1970, except for recreational purposes, like small gardens and things like that for ...

Q. So how far do you remember these activities going on?

A.. Probably up until the mid-70s, maybe even 1980. After 1980 the only use I can think of, of any consequence, was that we camped on some of the shore lots, lots with shore frontages. (emphasis added)

[28] Mrs. Mosher described the use of the land before the designation as follows:

A. ...I had a horse back in the '60s and '70s, and I used to tether that horse out at the point and out at the beach and — for grazing.

Q. Um-hmm.

A. And also, our children, who are now grown up, also had a pony. And I felt very safe that they could ride their pony and horse — actually, when they got older, they had a horse as well, after I had sold mine. And they used it on the beach, below the high water mark. And it was very safe for them if they fell off.

Q. Okay.

A. And also — I'm not sure if he mentioned the manure that he used for gardening and the grain that he used to grow on the field and take to — for processing, to the thrashing floor for processing.

Q. Uh-hmm.

A. Also, we did a lot of tenting in that area and much ...

Q. A lot of?

A. Tenting.

Q. Yes.

A. In addition to the 19 foot Prowler that we had, we — previous to that and after

that we tented on the beach in various locations, some on the undivided lots that we're not naming in the lawsuit

.....
A. The other thing that — there was something else that came to mind. We had a number of occasions to have lots of parties and campfires and sing-songs, a traditional way of life for the people of Kingsburg, which is certainly not happening today, because of the designation. (emphasis added)

[29] Mr. Mosher agreed at trial that the cemetery lot was too small to build on in light of municipal building requirements and that the garden lot would not “perc” meaning that a septic permit could not be obtained for it.

[30] The Moshers obtained septic and building permits for the house lot in February and April of 1993, the building permit being acquired on the latter date, some weeks after the designation. An application for a ministerial permit to develop the house lot was made in May of 1993, by way of a handwritten memo faxed to the Department. A second application was filed in January of 1994 for construction of a single family dwelling. This was refused in April of 1995, although Mrs. Mosher was apparently not provided with the letter which was sent to her then solicitor. A third application, basically the same as her earlier one, followed in September of 1995, which was refused in March of 1996. Mrs. Mosher, also in 1996, asked to build a fence but received no response.

[31] Apart from the application to build a fence and a single family dwelling on the house lot, there were no other applications by the Moshers for ministerial permission for other development or use of the land in issue in this litigation.

(d) The Whitford Report and Minister's Refusal of Permission to Build

[32] A Report by Jacques Whitford Environment Limited was commissioned by the Department of Natural Resources. The firm was asked to provide "...a detailed ecological study of Kingsburg Beach to assist in evaluating the potential effects of existing use and proposed development". The terms of reference included the following:

Assess the existing and potential future impacts of human use and/or development on the ecological integrity of Kingsburg Beach. Ecological integrity in this case will be defined as the overall structure and processes of the beach as a natural system. The study must address the issues of what, if any, development is acceptable within the study area, what type of development and where any development could occur given the environmental, and ecological concerns determined by the study. (emphasis added)

[33] The study contains an extensive discussion of the effects of future development on the area studied. The Report was not adduced as evidence of the truth of its contents at the trial, but only to show the basis upon which regulatory action was taken. I will quote some of the most relevant passages:

3.3 Effects of Future Development on Terrestrial Habitats

The various habitat types found within the Kingsburg study area vary markedly in their sensitivity to anthropogenic activity. In the following text the sensitivity of each of the habitat types described in Section 3.2 are documented in relation to development which might be expected within the study area.

Dunes

Dunes are fragile landforms which can be easily destroyed by human activities and displaced by natural processes (Nordstrom and McCluskey 1984). Within the Kingsburg study area the dunes are a focal point for development and recreational activities. The effect that housing development would have on the Kingsburg Beach dune system is dependent on a number of factors which include:

- the number of houses built
- the design of the houses
- the locations where they are sited
- activities of the occupants.

.....

The presence of houses on the dunes can affect the dunes in several ways. Houses built on standard foundations act as a barrier to the wind and to the movement of sand from all directions. If these structures are located behind the dune crest at lower elevations, they will eventually be buried and become a weak point in the dune (Nordstrom and McCluskey 1984).

Houses built close together may cause wind funnelling between the structures which can cause the formation of blowouts. This tendency can be exacerbated by shade cast by the houses which reduces the vigour of stabilizing vegetation. Nordstrom and MacCluskey (1984) state that interference with natural aeolian transport of sand can be significantly reduced by ensuring that no more than 25% of a building lot is occupied by structures.

The location where a house is sited affects both the dune and the house. Houses located close to the dune crest will have the greatest potential impact on the dune system since the dune crest is the least stable portion of the dune system.

.....

The activities conducted by dune homeowners are very important in determining the potential impacts of housing development on the dune system. Dune systems are highly dynamic and fragile systems which can be damaged by a wide range of human activities. The presence of homes or cottages on the dunes will tend to serve as the focus of human activity resulting in intense trampling damage around dwellings leading to destabilization of the dune. Homeowners will gain access to the beach by crossing the dune crest. This is the most sensitive portion of the dune system The use of vehicles around dwellings can also be very damaging. (emphasis added)

Dogs and cats associated with residences could have a significant effect on bird and small mammal populations in the dune system.

Several studies have reported on the effects of residential development on dune

systems (Michigan Department of Natural Resources 1975, Nordstrom and Psuty 1980, Nordstrom and MacCluskey 1984). In each of these reports the authors state that it is in the best interest of both the public and the property owner not to build in the dunes due to the sensitive nature of this landform and the consequences that the breakdown of dune systems may have on structures built on them. It is possible to mitigate many of the impacts associated with residential development in dune system; however, in order for mitigation to be successful residents must be willing to live under strictly enforced covenants regarding the types of structures permitted, the density of development and the types of activities permitted in the dune systems. Without such restrictions, the ecological integrity of the dune system will be compromised. The existing Municipal Planning Strategy and Secondary Planning Strategy governing the Kingsburg study area and associated provincial regulations do not provide the specific directions which permit the necessary restrictions to be implemented and enforced. As such it is not possible to ensure that the dune habitat is protected in the event of development. Dune residents must also realize that they are building in a high erosion and flooding hazard area in which their investments may be placed at risk. The cost of remediation to save structures which may be threatened or damaged by natural processes may be very expensive placing an added burden on local government and tax payers.

The beach is relatively insensitive to the effects of development since its form and function are governed by large scale abiotic processes.

.....

Given the sensitive nature of the dune system and the value of Kingsburg Beach relative to other beach/dune systems in Nova Scotia it is recommended that additional development not take place on the dunes. If development does proceed, it must be subject to strictly enforced covenants controlling factors such as the type and number of structures permitted, minimum set backs from the dune crest, design criteria for dune crossing structures, for roads and paths, maximum dimensions for lawns and parking areas, restrictions on the use of ATVs and the keeping of livestock, as well as restrictions on yard maintenance activities such as the burning of grass, use of pesticides and the introduction of exotic species. (emphasis added)

[34] I think it is clear that protection of the dune areas was the primary motivation of the regulatory scheme imposed on the respondents' lands. According to the Study, the beach, from the high watermark seaward, was not particularly susceptible to being damaged by the effects of development.

[35] The Minister's letter of April 19, 1995, refusing the respondents' requests to build single family dwellings provides, in part, as follows:

These applications have been reviewed in light of the study commissioned by my Department on Kingsburg Beach, carried out by Jacques Whitford Environment Limited.

The study determined that maintaining the integrity of the present sand dunes is critical to reducing or preventing widespread flooding of the backshore lowland by the sea and to preventing erosion and narrowing of the beach face. Given the sensitive nature of the dune system, no additional development was recommended.

Based on the requirements and obligations imposed on me as Minister of Natural Resources under the Beaches Act, and based on the information acquired through the study referred to, it is my decision that further development on Kingsburg Beach would significantly and permanently cause undesirable impacts on the beach and dune systems. For these reasons, I have decided not to approve the development applications referred to in this letter. (emphasis added)

[36] Finally, the Minister's response to the Moshers' third application was as follows:

Staff have reviewed your application to construct a single family home on lands within the designated area at Lower Kingsburg Beach dated September 14, 1995. The lands upon which you propose to build this home and its associated services are situated in the dunes of Kingsburg Beach which are considered critical for preservation. Given the sensitive nature of this dune system and the ecological value of Kingsburg Beach relative to other beach systems in both Lunenburg County and Nova Scotia, the proposed development would cause significant and permanent changes to the beach. For these reasons, I have decided not to approve your proposed application.

III. Analysis:

(a) *De facto* Expropriation:

[37] 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.

[38] 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.

[39] *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.

[40] 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 Corp. v O.D. Cars Ltd**, [1960] A.C. 490 (H.L. (N.I.)). 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.

[41] 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** (1998), 118 S.Ct. 2131, 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.

[42] 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 Corporation v. O.D. Cars** (supra) and **Hartel Holdings Co. Ltd. v. Calgary**, [1984] 1 S.C.R. 337. Many others are reviewed by Marceau, J. in **Alberta v. Nilsson**, [1999] A.J. No 645 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)

[43] The point is illustrated by **Re Salvation Army, Canada East and Minister of Government Services** (1986), 53 O.R. (2d) 704 (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.

[44] 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.

[45] 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)

[46] 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. (emphasis added)

[47] 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 **The Queen in Right of British Columbia v. Tener et al.**, [1985] 1 S.C.R. 533, 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** (1991), 80 D.L.R. (4th) 1 (B.C.C.A.), which closely parallels **Tener**, the private rights had become "meaningless". In **Manitoba Fisheries v. The Queen**, [1979] 1 S.C.R. 101, the legislation absolutely prohibited the claimant from carrying on its business.

[48] 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).

[49] 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**, 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. The Commonwealth of Australia**, [1996-1997] 190 C.L.R. 513 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.

[50] 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. **Re Columbia Estates and District of Burnaby** (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. **Re Township of Nepean Restricted Area By-law 73 -76** (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:

[51] 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.

[52] 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** (1997), 117 S. Ct. 1659 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** (1986), 106 S. Ct. 2561. In my view, the same principle applies to claims of *de facto* expropriation in Canada.

[53] 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.

[54] 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 expropriation 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?

[55] 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.

[56] 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.

[57] 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**.

[58] 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**?

[59] 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 **Toronto Area Transit Operating Authority v. Dell Holdings**, [1992] 1 S.C.R. 32:

...., 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. (emphasis added)

[60] 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.”

[61] Similarly, this Court in **Harris v. Minister of Lands and Forests** (1975), 11 N.S.R. (2d) 361 (S.C.A.D.) 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**, (*supra*) at para. 34, aff’d [1993] 2 W.W.R. 146 (Man. C.A.).

[62] 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.

[63] Kroft, J. in **Steer Holdings, supra**, at para. 34 sounded a note of caution in this regard in his discussion of **Tener** and **Manitoba Fisheries**. 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.

[64] To the same effect, the House of Lords in **Belfast Corp. 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.

[65] 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*.

[66] In **Manitoba Fisheries v. The Queen**, 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** 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**.

[67] Some cases have interpreted **Tener** and/or **Manitoba Fisheries** 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** (1995), 56 L.C.R. 241, 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**, 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**, 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.

[68] We were referred to **Steer Holdings v. Manitoba, (supra)**, affirmed [1993] 2 W.W.R. 146. Kroft, J., at trial, stated, and I agree, that **Tener** and **Manitoba Fisheries** 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 **Hartel Holdings Co., (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.

[69] 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.

[70] We were referred to **Casamiro** 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.

[71] 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.

[72] 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.

[73] 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)

[74] 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)

[75] 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.

[76] This distinction was noted and described by Cory, J., for the majority of the Supreme Court of Canada, in **Dell Holdings** 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)

[77] 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)

[78] 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.

[79] 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”

[80] 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.

[81] 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.

[82] 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.

[83] 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** and **Manitoba Fisheries**. 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**, of an interest in property).

[84] 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.

[85] 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.

[86] 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 Mosher's 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.

[87] 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.

[88] 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, supra**, the Court cannot determine whether regulation has gone too far unless it knows how far the

regulation goes.

[89] 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.

[90] 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

[91] 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**.

[92] 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.

[93] 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.

[94] 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”.

[95] 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*.

[96] The respondents also rely heavily on **Manitoba Fisheries**. 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)

[97] 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** was the asset gained, in effect, by the new federal corporation.

[98] The respondents also rely on the decision at trial in **Casamiro Corp. et al. v. British Columbia (A.G.)** (1990), 43 L.C.R. 246 at 248. The learned trial judge in that case stated, relying on **Manitoba Fisheries, 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**, which was upheld on appeal, this statement of the trial judge in **Casamiro** 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** for a contrary position by the trial judge in **Casamiro** is, with respect, misplaced for the reasons I have already developed. As noted, there was in **Manitoba Fisheries** an acquisition, in effect, of the goodwill by the federal authority.

[99] 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.

[100] 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 Coastal**

Council (1992), 112 S.Ct. 2886 is relied on. I do not think that case assists us here.

[101] 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**.

[102] 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 **Commonwealth of Australia v. Tasmania** (1983), 158 C.L.R. 1 (H. Ct.) 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)

[103] 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)

[104] 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.) Limited v. The Commonwealth of Australia (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**, as in **Tener**, an acquisition, in effect, of some identifiable interest in land.

[105] 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, 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.

[106] 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**.

[107] 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

[108] 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:

[109] 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.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

HALLETT J.A.: (Concurring)

[110] I agree with Justice Cromwell that this appeal should be allowed. I agree that the designation of the lands as a beach under the **Beaches Act**, R.S.N.S. 1989, c. 32, in itself, is not a *de facto* expropriation. Were it not for the fact that the Regulations contain a provision whereby owners of lands designated as a beach can obtain permission from the Minister to develop their lands, the **Act** and the Regulations, in effect, deprive the owners of such lands of virtually all rights of ownership assuming that

the lands qualify for approval from other regulatory authorities. I also agree with Justice Cromwell's conclusion respecting the effect of s. 12 of the **Beaches Act** and his disposition of the cost issues.

[111] The respondents owned beach front lots which were subsequently designated as beaches under the **Beaches Act**. The respondents applied to the Minister for permission to build three dwellings with conventional concrete foundations on their respective lots. The Jacques Whitford Report expressed the opinion that conventional foundations would result in serious damage to the dunes.

[112] The Minister, upon forwarding the Jacques Whitford Report to the respondents' counsel, invited the respondents to modify their applications. They did not do so; nor did the Minister advise the respondents of the type of modifications that might be acceptable.

[113] To prove a *de facto* expropriation, an owner of an interest in land as defined in the **Expropriation Act**, R.S.N.S. 1989, c. 56 must conclusively prove that there has been, in effect, a confiscation of all reasonable private uses of the interest in the land in question and an acquisition of the same by the statutory authority. That is what occurred in **The Queen in Right of British Columbia v. Tener et al.**, [1985] 1 S.C.R. 533

[114] The Jacques Whitford Report recommended that there be no development on the dune system associated with Kingsburg Beach. Yet the authors also stated:

.....It is possible to construct houses on dunes without severely damaging the entire dune system; however, to be successful residents must be willing to live under strictly enforced covenants regarding the types of structures permitted, the density of development and the types of activities permitted in the dune system. Without such restrictions, the ecological integrity of the dune system will be compromised. Unfortunately the Municipal Planning Strategy and Secondary Planning Strategy governing the Kingsburg study area and associated provincial regulations do not provide specific directions which permit such restrictions to be established and enforced.

Given the sensitive nature of the dune system and the value of Kingsburg Beach relative to other beach/dune systems in Nova Scotia it is recommended that an additional development not take place on the dunes. If development does proceed, it must be subject to strictly enforced covenants controlling factors such as the type and number of structures permitted, minimum set backs from the dune crest, design criteria for dune crossing structures, for roads and paths, maximum dimensions for lawns and parking areas, restrictions on the use of ATVs and the keeping of livestock, as well as restrictions on yard maintenance activities such as the burning of grass, use of pesticides and the introduction of exotic species.

[115] The refusal of the Minister to permit the construction of the type of dwellings proposed by the respondents conclusively proves only that these types of dwellings would not be permitted.

[116] The Minister's letter of April 19th, 1995, advising the respondents that there would be no development on the designated land must be read in the context of the circumstances that existed and as subsequently evolved. The letter was in response to their request to build dwellings with conventional concrete foundations. Subsequent to the refusal of the Minister to permit such construction, the Minister granted permission to two of the respondents to build fences. Thus the April 19th, 1995, letter that stated that there would be no development on the designated lands, which would include even the building of fences, ought to be read as being a reference simply to the construction of the type of dwellings as proposed by the respondents.

[117] The evidence at trial does not support a finding that virtually all incidents of ownership of the respondents' lands have, in effect, been taken from the respondents. It is open to the respondents to apply to the Minister for permission to construct a type of dwelling that would be compatible with preservation of the dune and to enter into restrictive usage agreements with the Province as contemplated by s. 4 of the **Act** and in keeping with the opinion which I have quoted from the Jacques Whitford Report. Permission to build may be granted by the Minister.

[118] Rural shore front property is, as a general rule, acquired for seasonal or full time residential uses either immediately or in the future. Without the right to build a residence on such property, the incidents of ownership remaining are insignificant. However, the nature of shore front land varies and, therefore, a residential use is not always reasonable. If an owner of shore front property that is designated as a beach under the **Beaches Act** is refused permission to construct a type of dwelling that would be reasonable considering the nature of the land, then such refusal may well found a claim that the land has, in effect, been expropriated. The outcome of such a claim would turn on the evidence and, in particular, evidence respecting the nature of the land so designated, the reasonableness of the development proposed for the land and the reasonableness of the restrictions on use proposed by the Province to be incorporated into an agreement.

[119] Given the opinion expressed in the Jacques Whitford Report, the types of dwellings proposed by the respondents were not reasonable for the dune area. There was

an absence of evidence that the Province has prevented the respondents from exercising all reasonable private rights of ownership of the lots in question. Therefore, there was not a *de facto* expropriation.

[120] In order for the dune preservation legislation to achieve its objectives the owners of lands designated as a beach under the **Beaches Act** and the Province must recognize the rights of each other and seek a just solution that would be fair and reasonable to both. That does not appear to have yet occurred in this case.

Hallett, J.A.

Concurred in:

Glube, C.J.N.S.