Interplay Between Oil and Gas, and Potash

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The legal nature and effect of Potash Restricted Drilling Areas

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I. INTRODUCTION

Anyone who has followed Saskatchewan news in the past several years has likely encountered the following headlines:

"Farmers near potash mine fighting for mineral rights"¹

"Oil-potash clash sparks major Sask. lawsuit"²

"Restrictions on drilling violates property rights, lawsuit claims"³

However, the readers of these news articles may be less familiar with the government regulation that is at the root of the "clash". This paper highlights legislation of significance that restricts concurrent development of potash, and oil and gas resources in the province. This paper also examines relevant case law and provides insight into certain legal remedies that may be available to compensate mineral owners who cannot exploit their resources because of government regulation.

Much of the tension that exists stems from regulations passed in 1995, when the Government of Saskatchewan passed a regulation allowing for the creation of "Potash Restricted Drilling Areas" (or "PRDAs"). A PRDA is an area in which drilling is restricted by anyone other than the party who has rights to mine Crown potash in the applicable mineral area of Saskatchewan.⁴ The purpose of PRDAs is to guard against the risk that potash mines will flood as a result of other mineral-related activities. Since the regulation was passed in 1995, nine PRDAs have been created, each of which benefits an operating potash mine in Saskatchewan. Appendix "A" to this paper contains a list of the current PRDAs in Saskatchewan and Appendix "B" contains a map showing the location of the current PRDAs in Saskatchewan.

While PRDAs benefit the potash industry, another effect is that, since PRDAs restrict any other type of drilling, they limit the development of other mineral activity, including oil and gas activity. Practically speaking, this prevents the owners of oil and gas rights contained within a PRDA from obtaining any benefit from their oil and gas rights. To date, it has been holders of oil and gas lands that have been most vocal about the development restrictions imposed by the PRDAs.

⁴ PRDAs are not to be confused with the rights that the Crown has under The Crown Minerals Act (Saskatchewan) to withdraw any Crown minerals or Crown mineral lands available for disposition, so that such withdrawn minerals or mineral lands become unavailable for private parties to explore or develop.
The complaint of the oil and gas owners, as reflected in the above-noted headlines, is that the PRDAs are depriving them of the value of their mineral rights by preventing the extraction of their minerals. Some of these mineral-owners have launched a class-action lawsuit against the Saskatchewan Crown asserting that they ought not be deprived of their property rights without compensation from the Crown.5

From a legal perspective, an examination of PRDAs leads to questions regarding the extent to which a provincial government may interfere with private property rights and when such interference entitles the property owner to compensation. In examining whether or not Saskatchewan mineral holders (other than holders of potash lands) in PRDAs ought to be compensated for the restrictions on the development of their minerals, this paper considers whether PRDAS may be best classified as land use regulation, expropriation or de facto expropriation. Given the unique nature and effect of PRDAs, any such a categorisation would likely need to be determined by a Court on a fact-specific basis.

II. POTASH RESTRICTED DRILLING AREAS

A. Potash Mining in Saskatchewan

Potash is of significant importance to Saskatchewan's economy; potash annually accounts for approximately eleven per cent of Saskatchewan's total exports and, in 2014, potash is forecasted to provide approximately four and a half per cent of the Province's total revenue.6

As of 2012, Saskatchewan was the world's leading potash-producing jurisdiction. Saskatchewan produces around 95 per cent of Canada's potash and accounts for nearly one-third of global potash production.7 The cumulative sale value of all the potash companies in Saskatchewan totaled $6 billion in 2012.8

Currently, three companies operate ten potash mines in Saskatchewan – eight conventional mines and two solution mines.9 In addition to the existing infrastructure, investment of nearly $14 billion in upgrades and expansions is expected among the existing producers by 2023. These upgrades and expansions are anticipated to increase Saskatchewan's total potash production capacity by over 90 per cent.10 At least eleven other companies are also currently involved in potash exploration in Saskatchewan, some with plans to develop potash mines.11

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5 Q.B. No. 1373 of 2010. However, according to comments made in the Legislative Assembly, the lawsuit, filed in 2010, may have lost momentum or been abandoned (see Saskatchewan, Legislative Assembly, Standing Committee on the Economy, 27th Leg, 2nd Sess, No 15 (7 May 2013) at E320-21 (Hon. Dan D’Autremont).
7 Saskatchewan Ministry of the Economy, Saskatchewan Exploration and Development Highlights 2013, at 4 [Highlights].
8 SEC, supra note 6 at 7.
9 The companies are: Agrium Inc. (1 mine); The Mosaic Company (4 mines); and Potash Corporation of Saskatchewan Inc. (5 mines).
10 Highlights, supra note 7 at 2.
11 Most significant among these include K+S Potash Canada's Legacy solution mine project and BHP's Jansen mine project (see generally Highlights, supra note 7 at 11-13).
Saskatchewan's potash is deposited in what is known as the "Middle Devonian Prairie Evaporite Formation" (the 'Prairie Evaporite'). Generally speaking, the Prairie Evaporite is the remains of what was once a landlocked sea which, around 400 million years ago, evaporated, leaving successive layers of sediment leading to the formation of potash and many other types of minerals.\(^\text{12}\)

The Prairie Evaporite lies beneath most of Southern Saskatchewan and its outer boundaries extend into Alberta, Manitoba and the northern American states. A resource map of Saskatchewan showing \textit{inter alia} the location of the potash deposits (i.e., the Prairie Evaporite) in Saskatchewan is attached to this paper as Appendix "C". See also Appendix "D", the Saskatchewan Stratigraphic Correlation Chart, showing correlations for all major formations (including oil, gas and potash formations) across Saskatchewan.

The Prairie Evaporite is over 200 metres thick at points and is generally located at depths between 400 metres and 2750 metres.\(^\text{13}\) Given the depth of the Prairie Evaporite, there is a significant risk of flooding associated with mining potash. Potash deposits in the Prairie Evaporite are often located below aquifers, which are layers of water-bearing permeable rock capable of holding substantial amounts of water. The Dawson Bay Formation overlays much of the Prairie Evaporite and contains such water-bearing rocks.

If an aquifer is penetrated or fractured there is a significant risk that a potash mine below the aquifer will be flooded. As a salt, potash is water soluble and, therefore, a flood of a potash mine can be catastrophic to operations. For example, in October 2006, Russian potash producer Uralkali's Berezni Mine 1 flooded, which led to depletion of over 90 per cent of the potash reserves associated with the mine.\(^\text{15}\) Further, flooding is not uncommon; over the past 150 years, over 80 potash mines have flooded around the world.\(^\text{16}\)

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{idealised_cross_section.png}
\caption{Idealised cross-section of the Prairie Evaporite.}\(^\text{14}\)
\end{figure}

\begin{thebibliography}{16}
\bibitem{Fuzesy2} Fuzesy, supra note 12 at 7.
\bibitem{Berezniki} Loss of potash reserves is not the only damage caused by the flooding of Berezni Mine 1. Since the flood, multiple sinkholes have formed including one that may be the world's largest manmade sinkhole. Unsurprisingly, the sinkholes have wreaked havoc on the city of Berezni, which was built directly on top of the mine (see Andrew E. Kramer, "A Russian City Always on the Watch Against Being Sucked Into the Earth", \textit{The New York Times} (10 April 2012) online: The New York Times <http://www.nytimes.com/2012/04/11/world/europe/russian-city-on-watch-against-being-sucked-into-the-earth.html?pagewanted=all&_r=0>.
\end{thebibliography}
Flooding can be caused by any number of activities that disrupt the aquifers lying above potash reserves. Drilling is one such activity as drilling through or near aquifers may cause the water-bearing rocks to fracture, leading to the release of water.

Given the significant consequences that may flow from flooding, it is understandable why mining companies and parties entitled to potash royalties, including the Crown, want to avoid any potential disruption of aquifers.

B. Potash Restricted Drilling Areas

In 1995 the Saskatchewan government passed a regulation allowing for the restriction of the drilling of wells in areas surrounding active potash mines in Saskatchewan. While no record can be located relating to the discussions that took place prior to the enactment of this regulation, it appears from subsequent debates in the Legislative Assembly that the purpose of the regulation is to help prevent flooding of potash mines and deposits.17

When the regulation first came into force on May 18, 1995 it was contained in section 20 of The Oil and Gas Conservation Regulations, 1985 (Saskatchewan), regulations enacted pursuant to The Oil and Gas Conservation Act (Saskatchewan) (the "OGCA"). In 2012, The Oil and Gas Conservation Regulations, 1985 were replaced by The Oil and Gas Conservation Regulations, 2012 (Saskatchewan) (the "OGCA Regulations"). Section 20 under the previous regulations is now section 26 under the OGCA Regulations, but otherwise remains unchanged. Section 26 provides as follows:

26(1) In this section:

(a) "potash disposition holder" means:

(i) a person, other than the Crown, that operates a mine to extract, recover or produce potash and that:

(A) owns a fee simple interest in potash; or

(B) pursuant to a lease or other instrument granted by a person other than the Crown, has the right to extract, recover or produce potash; or

(ii) the holder of a Crown disposition respecting potash pursuant to The Crown Minerals Act;

(b) "potash restricted drilling area" means a potash restricted drilling area established pursuant to subsection (2).

(2) The minister may make orders establishing any area of land as a potash restricted drilling area for the purpose of restricting the drilling of wells near potash mines.

(3) No person shall drill a well within a potash restricted drilling area without first:

However, flooding does not always result in the complete loss of production. For example, when Potash Corporation of Saskatchewan Inc.’s Patience Lake Mine was subject to flooding in the late 1990s, it was able to successfully convert the conventional mine into a solution mine which is still in operation today.16

17 Saskatchewan, Legislative Assembly, Standing Committee on the Economy, Standing Committee on the Economy, 27th Leg, 2nd Sess, No 15 (7 May 2013) at E320-21 (Hon. Dan D’Autremont).
(a) obtaining the written approval of the minister; and

(b) obtaining the written consent of every potash disposition holder whose potash is located within the potash restricted drilling area and submitting a copy of the consent to the minister.

(4) The consent mentioned in subsection (3) is not to be unreasonably withheld by a potash disposition holder.

Pursuant to subsection 18(s) of the OGCA, the Lieutenant Governor in Council is permitted to make regulations deemed necessary to carry out the provisions of the Act according to their true intent and in particular, with respect to the following:

prohibiting or restricting drilling, specifying areas within which drilling is prohibited or restricted, specifying circumstances in which drilling is prohibited or restricted and generally governing the prohibition or restriction of drilling;

It should be noted that one of the purposes of the OGCA is "to protect the environment, property and the safety of the public with respect to the operations of the oil and gas industry". ¹⁸

A PRDA, as provided for in section 26 of the OGCA Regulations, restricts the ability of any person to drill wells (including oil and gas wells) in the PRDA without first obtaining the written approval of the minister and the written consent of the holder of the potash dispositions operating a potash mine in the PRDA. The consent of the potash disposition holder is not to be unreasonably withheld. Consent of the potash mine operator could, in practice, be quite difficult to obtain. If there is even a small risk of flooding, the mine operator may assert that it is reasonable to withhold consent. As depicted in Appendix "B" to this paper, PRDAs surround all ten of the active potash mines in Saskatchewan and cover nearly 1900 sections of land.

For the most part, there is no conflict; as illustrated in the resources map in Appendix C, there is very little overlap between potash, and oil and gas resources in Saskatchewan. However, in the southeast corner of Saskatchewan, the Bakken Formation (containing significant oil reserves) and the Prairie Evaporite overlap, creating the potential for conflict between oil and potash producers.

The following section of this paper includes a discussion of the various ways governments may interfere with private property rights and when such interference entitles property owners to compensation. The purpose of the discussion is to determine how PRDAs may be categorised and whether PRDAs constitute the level of regulatory interference that a Court would agree to award compensation for.

¹⁸ The primary cause of action in the class action lawsuit filed in 2010 with respect to this matter against the government of Saskatchewan asserts that the regulation was not validly passed (see: Plaintiffs' statement of claim filed in Q.B. No. 1373 of 2010). Any discussion of the validity of the regulation is beyond the scope of this paper.
III. THE LEGAL ABILITY OF GOVERNMENT TO RESTRICT PROPERTY RIGHTS

A. Protection of Property Rights in Canada

In many countries the right to private property and the right not to be deprived thereof without due compensation is constitutionally guaranteed. For example, the Fifth Amendment to the United States Constitution states the following:

No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[emphasis added]

Similarly, the Australian constitution gives its Parliament the right to take property, but only with just compensation. Section 51(xxxi) provides as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … [the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

[emphasis added]

In Canada, there is no equivalent constitutional protection of property rights and guarantee of compensation upon expropriation.\(^{19}\) As initially drafted, section 7 of the Canadian Charter was intended to include the protection of the right to enjoyment of property. However, this wording was eventually removed because the provinces were concerned it would unduly interfere with their power to enact legislation affecting property.\(^{20}\) Without a constitutional guarantee of compensation for interference with private property rights, there is no duty upon government to provide compensation, and compensation becomes a mere matter of policy.\(^{21}\)

In Canada, governments may limit private property rights through a variety of avenues. These avenues include the enactment of zoning by-laws and expropriation. As will be demonstrated by the following analysis, PRDAs do not fit neatly into either of those categories.

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\(^{19}\) Quasi-constitutional instruments such as the Canadian Bill of Rights, SC 1960, c 44, purport to offer some protection (e.g., section 1(a) protects the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law). However, this protection has been interpreted narrowly. For example, because of the wording "except by due process of law", section 1(a) does not protect against the expropriation of property by the passage of unambiguous legislation (see Authorson v. Canada, [2003] S.C.J. No. 40). In any case, the Canadian Bill of Rights is not constitutionally entrenched and only applies to the actions of Parliament, not to the actions of provincial legislatures.


\(^{21}\) Ibid at 34.
B. Legislated Restrictions on Private Property Rights

1. Regulation of Property

(i) General

Governments have the ability to regulate the use of private property; a common example of such regulation is municipal zoning. Often, the imposition of restrictions on property through regulation reduces the value of that property; however, the general rule is that no compensation is due to the property owner for any devaluation caused by regulation. ②²

A concise summary of the law with respect to the regulation of property is as follows:

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 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. ②³

This summary of the law finds support in many court cases in Canada. In a Nova Scotia case, the Nova Scotia Court of Appeal discussed land use regulation as follows:

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 … "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… ②⁴

It seems clear that the current law allows Canadian governments to zone and/or otherwise regulate land without compensating affected landowners, even where the value of their property has decreased as a result. The following two examples are provided for illustration of this principle.

The first case involves Steer Holdings, the owner of properties on either side of a creek in Winnipeg. In the late 1980s, Steer Holdings began plans for a commercial development project that would span the creek. ②⁵ However, the legislature of Manitoba passed legislation that prevented Steer Holdings from proceeding with the development (as the legislation prevented any commercial developments that would span the creek).

The Court accepted the general principle that municipal authorities and/or governments have the right to enact plans and zoning regulation which may interfere with the use of private land in a

②³ Todd, supra note 20 at 22-23.
way that adversely changes its value without paying compensation to the owner. Concluding that the legislation in issue amounted to simple regulation akin to zoning of Steer Holding's land, the Court rejected its claim for compensation.

The decision in Steer was affirmed on appeal to the Manitoba Court of Appeal. The Court of Appeal began its decision by stating the general principle that where the legislature imposes some limitation on the use of property, but does not provide for compensation to the owner, no compensation is payable. While the common law developed a presumption that compensation is payable where property is actually taken, there is clear distinction between cases where there is a compulsory taking and cases where some right or interest has been merely restricted or affected. In confirming the trial decision, the Court stated the following:

Thus, zoning by-laws passed by municipalities do not give rise to claims for compensation, and this is so even where there is a "down-zoning" by which the owner's use of the property is more restricted.

A second, more recent, case demonstrates the extent to which property may be regulated without resulting in compensation to the property owner. Nilsson owned land that in 1974 was designated as the North Edmonton Restricted Development Area (the "RDA"), and, as such, Nilsson could not develop the land without municipal permission. Nilsson's application to develop was refused.

Nilsson sued for compensation claiming inter alia that the development freeze removed all uses of the property and essentially amounted to expropriation. The Court of Appeal rejected this aspect of Nilsson's claim, stating that valid land use controls are an "unavoidable aspect of modern land ownership" by which the interests of the individual are secondary to the interests of the public. Since the RDA was valid regulation of land use, Nilsson was not entitled to compensation on that ground.

(ii) Application of Principles to PRDAs in Saskatchewan

The PRDAs established by section 26 of the OGCA Regulations certainly appear to be land use regulations. PRDAs explicitly restrict anyone from drilling wells within the designated area. PRDAs can be easily analogised to the legislation that was in issue in Steer, as described above. In both cases, the legislation states that a person may not do "x" (drill wells or build developments spanning the creek) on designated land "y". In this respect, PRDAs appear to be mere land use regulation akin to zoning and, if this is the case, the mineral owners impacted by PRDAs would not be entitled to any compensation as a result of the PRDAs.

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26 Ibid at 45.
28 Ibid at para 10. See also Harvard Investments Ltd. v. Winnipeg (City), [1995] M.J. No. 460, where it was held that designating a hotel as a historic property, thus preventing the owner from demolishing the building and redeveloping the property, was valid regulation and that the owner was not entitled to be compensated for the (significant) devaluation of its property.
29 Alberta (Minister of Infrastructure) v. Nilsson, 2002 ABCA 283 [Nilsson], leave to appeal to SCC refused, 2003 SCCA No. 35.
30 Ibid at 61.
However, there are also differences. In *Steer*, notwithstanding the legislation in question, the landowner was still able to develop and use its land; it was only restricted in one aspect of development. However, the owners of minerals (other than potash) within PRDAs are, practically speaking, not able to obtain any commercial benefit from their minerals. Unless requisite consents are obtained, PRDAs preclude drilling in the designated areas (except any drilling activities that the applicable potash company undertakes) and, therefore, prevent development of the resource while the PRDAs remain effective.

Where the degree of government regulation results in a loss of substantially all reasonable uses of property, such regulation may more closely parallel expropriation (where compensation is awarded) than mere land use regulation (where compensation is not awarded).

2. Expropriation

(i) General

The federal government and each of the provinces and territories in Canada have passed legislation that allows for the expropriation of property. Generally, expropriation of land by the Crown in Saskatchewan is effected pursuant to *The Expropriation Procedure Act* (the "*EPA*").[31]

For the purposes of the *EPA*, "expropriation" is defined as "the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers" [emphasis added]. The Crown must actually "take" land from the owner in order for expropriation to apply.

"Land" in turn is defined broadly to mean "any estate, term, easement, right or interest in, to, over or affecting land". This definition suggests that the legislature intended a "broad, non-technical approach to the definition of land".[32] As stated in *Harris v Minister of Lands and Forests*:

> 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.[33]

Under *The Land Titles Act, 2000* (Saskatchewan), "land" includes *inter alia* "mines and minerals".

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[31] The *Expropriation Procedure Act* is not the only Saskatchewan legislation dealing with expropriation. Expropriation of land arising out of the construction or maintenance of works and undertakings and the construction of such works and undertakings under *The Water Power Act* and *The Conservation and Development Act* are governed by *The Expropriation Act*. In addition, other statutes authorise expropriation for various other bodies within Saskatchewan. For example, *The Municipal Expropriation Act* (Saskatchewan) permits the council of a municipality to pass by-laws for the expropriation of land for any purpose lawfully authorised by the respective municipal act.

[32] *Mariner*, *supra* note 24 at para 59 (discussing the Nova Scotia *Expropriation Act* contains the same definition for "land" as does the *EPA*).

(ii)  Compensation for Expropriation

As stated earlier in this paper, there is no constitutional limit on governmental authority to expropriate private lands. However, it is well recognized that expropriation constitutes a significant interference with a person's private property rights. Therefore, when the courts consider compensation, the powers of expropriating authorities have been strictly construed in favour of those whose rights are being affected.\(^\text{34}\)

In particular, Canadian courts have applied the principle of statutory interpretation that gives rise to the presumption that, unless provided otherwise, whenever land is expropriated, compensation will be paid. This presumption dates back to the 1920 House of Lords decision Attorney-General v. De Keyser's Royal Hotel Ltd. where it was stated: "...unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."\(^\text{35}\)

In Saskatchewan, the expropriating authority must provide compensation to the owner of expropriated land in accordance with section 49 of the EPA:

49(1) An expropriating authority shall make due compensation to the owner of land expropriated by the expropriating authority in the exercise of its statutory powers beyond any special advantage that the owner may derive from any public improvement for which the land was expropriated.

(1.1) Subject to subsection (1), in an action for compensation the judge, in determining the value of the land expropriated, shall not take into account:

(a) any anticipated or actual use by the expropriating authority of the land expropriated at any time after expropriation; or

(b) any increase or decrease in the value of the land expropriated resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated.

(2) Compensation for land expropriated shall be ascertained as of the day on which the expropriating authority takes possession of the land or dedicates the land or the day on which the declaration of expropriation respecting the land is submitted to the Land Titles Registry pursuant to section 10 or 12, whichever is the earliest.

...

(4) The expropriating authority may, before the compensation is agreed upon or determined, undertake to make alterations or additions or to construct any additional thing or to abandon part of the land expropriated or to grant other lands or rights or privileges, in which case any such undertaking shall be taken into account in determining the compensation; and where the undertaking has not already been carried out, the judge trying an action for compensation shall order that the owner is entitled to have such alterations or additions made or such additional thing constructed or such part of the land abandoned or such grant made to him in addition to the amount of compensation, if any, payable to him.


Notwithstanding the above, it would be entirely within the Crown's authority to pass legislation authorising the expropriation of property and expressly providing that no compensation is payable with relation to such expropriation.

(iii) **Injurious Affection**

Injurious affection describes damage caused to the land of an owner by expropriation, where that land has not itself been expropriated. This may occur where part of the owner's land has been expropriated or where neighboring land has been expropriated.

Injurious affection has been described as follows:

If only part of the owner's property is expropriated, the partial taking may decrease the value of his remaining land, which is termed severance damage, or the use to which the expropriated portion is put may adversely affect the value of his remaining land, which is termed injurious affection.\(^{36}\)

An owner of land is not entitled to compensation for injurious affection unless a right to compensation is specifically granted by legislation.\(^{37}\) Since injurious affection flows from expropriation, it cannot exist without expropriation.

While several provinces provide a right to compensation for injurious affection in their expropriation legislation, in Saskatchewan, the *EPA* does not provide a right to compensation for injurious affection.\(^{38}\)

(iv) **Application of Principles to PRDAs in Saskatchewan**

The PRDAs authorised by section 26 of the *OGCA Regulations* do not constitute expropriation because they do not authorise or effect the "taking" of any land. Nothing in section 26 states that any land or any interest in land is to be obtained by the Government of Saskatchewan. Rather, section 26 restricts the type of activities that may be carried out on lands contained in a PRDA. Without a "taking", there is technically no expropriation.

However, as noted in *Nilsson*, in some circumstances, less than an absolute taking may amount to *de facto* expropriation. In such cases, while the original owners still holds title to the property, the degree of regulatory interference is so severe that the owner is entitled to compensation.\(^{39}\) In these cases, the courts have attempted to determine the point at which interference with property rights, and the subsequent reduction in the incidents of property ownership, equate to *de facto* expropriation (also referred to as a constructive taking by certain academic authorities\(^{40}\)) warranting compensation.\(^{41}\)

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\(^{36}\) *McIlwaine v. Government of Saskatchewan*, 2000 SKQB 326 at para 122 [*McIlwaine*].

\(^{37}\) *Ibid* at para 123.

\(^{38}\) *Ibid* at para 125.

\(^{39}\) *Nilsson, supra* note 29 at para 48.

\(^{40}\) Hogg, *supra* note 22 at 364.

\(^{41}\) *Nilsson, supra* note 29 at para 49.
The concept of *de facto* expropriation, and whether or not PRDAs amount to *de facto* expropriation, is the focus of the next section of this paper.

3. *De Facto Expropriation*

(i) **General**

In some cases, regulations do not explicitly or technically provide for the taking of private land by government, but practically limit any reasonable use of the land. While the land has not technically been expropriated in a legal sense, the land owner may be no better off than if it had been expropriated. When this occurs, the courts have intervened and ordered compensation payable as if the property had actually been expropriated. Regulation that amounts to this level of interference with property rights is known as *de facto* expropriation.\(^{42}\)

The Supreme Court of Canada recently restated the common law test for *de facto* expropriation in a 2006 decision concerning Canadian Pacific Railway ("CPR") and the City of Vancouver.\(^{43}\) In 1886, CPR had been granted a corridor of land for the construction of a railway in the City of Vancouver. Ultimately, however, the main line was placed elsewhere and, while the corridor was for many years used for railway purposes, it eventually fell into disuse.

In the late 1990s CPR put forward proposals to develop the corridor for residential and/or commercial purposes. However, the City of Vancouver rejected these proposals and further rejected CPR's assertion that the City should purchase the corridor from CPR if it wished to keep it intact. In 2000, the City passed a by-law designating the corridor as a public thoroughfare for transportation and "greenways" (such as nature paths or cyclist paths). This by-law effectively froze any possibility for commercial development of the corridor and confined CPR to non-economic uses of the land.

Among other grounds, CPR alleged that the City by-law constituted a *de facto* expropriation of its land because it could no longer use the land for any economically viable purpose. The case eventually made its way to the Supreme Court of Canada. McLachlin, for the Court, stated that in order to constitute *de facto* expropriation and to be eligible for compensation at common law there are two requirements that must be met:

1. an acquisition of a beneficial interest in the property or flowing from it (by the expropriating authority); and
2. removal of all reasonable uses of the property.

Applying the test, the Court first found that the City had not acquired any beneficial interest in the corridor through the by-law, since there was only a possibility that it would eventually be

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\(^{42}\) Variously referred to *inter alia* as "*de facto* expropriation", "*de facto* taking", "constructive taking" or "regulatory taking" ("regulatory taking" is the established term in American jurisprudence). In this paper, the term "*de facto* expropriation" is used, as it is commonly used in Canadian jurisprudence and seems to most aptly describe the legal principle.

\(^{43}\) *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 [Canadian Pacific].
developed into a public thoroughfare, and the by-law did not rule out the current or past uses of the corridor (i.e., for use as a railway).

As for the second requirement, the Court held that the by-law did not remove all reasonable uses of the property. The Court stated that this requirement must not be assessed only in relation to the land's "potential highest and best use" (which is typically a relevant consideration when determining the amount of compensation payable after expropriation has taken place), but having regard to the range of reasonable uses to which it has actually been put. The by-law did not prevent CPR from using the corridor to operate a railway, nor did it prevent CPR from leasing the land for the purposes espoused in the by-law. Thus, in the Court's view, there was still reasonable uses for the property.

The ruling in Canadian Pacific followed three previous decisions which, until Canadian Pacific, were the authority on de facto expropriation in Canada. The earliest of these decisions, Manitoba Fisheries Ltd. v. Canada, was a 1979 Supreme Court of Canada decision in which the court awarded compensation to the plaintiff for de facto expropriation.44

In Manitoba Fisheries, the plaintiff corporation was engaged in the business of marketing fresh water fish in Manitoba. The plaintiff had developed a strong clientele in what was a highly competitive business. However, in 1970 the government of Manitoba passed the Freshwater Fish Marketing Act which inter alia created the Freshwater Fish Marketing Corporation and gave it a monopoly on the right to market fish in the province. The Act explicitly prohibited the plaintiff from engaging in the business that it had previously been engaged in.

The effect of the Act was to put the plaintiff out of business, without compensation. One issue on appeal at the Supreme Court of Canada was whether or not the plaintiff was entitled to compensation for the loss of its business (i.e., the goodwill of its business). Ritchie J, for the majority, opined that goodwill is one of the most valuable assets of any business and that the clientele was a valuable asset of the plaintiff. In addition, when the legislation prevented the plaintiff from carrying on business, this clientele had nowhere to go except the Crown corporation. The Court found that the plaintiff had been deprived of property (the property being the goodwill of the business), and that such property was acquired by the Crown. The appellant was awarded judgment in the amount of the fair market value of its business less the residual value of the remaining assets of the business.

A second decision considered by the Supreme Court of Canada when hearing the Canadian Pacific case was a 1985 Supreme Court of Canada decision considering de facto expropriation in the context of mineral rights. In British Columbia v. Tener, the plaintiffs were owners of sixteen mineral claims granted by the Crown in right of British Columbia in 1934.45 The plaintiffs had paid $100,000 to acquire the claims. Five years later, a provincial park was created which encompassed the land subject to the mineral claims. In 1977, the owners applied for park use permits, which were required to conduct exploration work on the mineral lands situated within the provincial park. The park use permits were rejected and the plaintiffs sued for compensation.

44 [1979] 1 S.C.R. 101 [Manitoba Fisheries].
45 [1985] 1 S.C.R. 533 [Tener].
In *Tener*, the Supreme Court of Canada unanimously concluded that the plaintiffs were entitled to compensation for *de facto* expropriation but were divided on the reasons why. Wilson J, for the minority, examined in detail the nature of the plaintiffs' interests and found that, in holding the mineral claims in question, the plaintiffs had a single integral interest in land. Such interest was essentially a *profit à prendre* which was comprised of both the mineral claims and the surface rights necessary for their enjoyment. She explained that a *profit à prendre* is a right to enter onto the land of another person and take some profit (e.g. minerals) from the land. The holder of a *profit à prendre* has no title to the [mineral] until the [mineral] is severed from the land. The holder of the *profit à prendre* does not hold title to the minerals *in situ*, as they form part of the fee; rather, the holder owns mineral claims and the right to exploit them through the process of severance.

Wilson J went on to find that the Crown's refusal to grant the park use permits prevented the plaintiffs from exercising their right to go upon the surface of the land for the purpose of severing the minerals. Since a *profit à prendre* is worthless without this right, Wilson J found that the *profit à prendre* had been *de facto* expropriated. Further, Wilson J found that the Crown had gained a benefit that was akin to the removal of an encumbrance from its land.

In response to the Crown's argument that there was no expropriation and instead simply regulation, Wilson J stated that while in some cases refusal of a licence or permit may constitute mere regulation, it is not mere regulation when it has the effect of defeating a person's entire property interest.

The majority of the Court, in a much briefer decision, while agreeing that the appellants were entitled to compensation, approached it in a different manner than the minority. The majority of the Court held that the refusal to issue the park use permits constituted *de facto* expropriation because it took something of value (the right to enter the land and access the minerals) from the appellants and added it to the value of the park. The appellants lost the value of the right to capture the minerals, and the Crown gained the value of a pristine park free from mineral exploration.

In 1991, the BC Court of Appeal considered a case very factually similar to *Tener*. In *Casamiro*, the predecessor in title of the plaintiff had in 1946 and 1947 received Crown grants to mineral interests that were situated within Strathcona Park. In 1988, an order in council prevented the Minister from issuing any resource permits for mineral exploration in relation to Strathcona Park (for environmental protection reasons). The Court held that the order in council had the same effect as the permit refusal in *Tener*. That is, it reduced the Crown grants to "meaningless pieces of paper". Thus there was a *de facto* expropriation. Since there was no explicit legislation stating that compensation should not be awarded in the circumstances, the Court applied the presumption that the legislature does not

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46 The trial judge had distinguished between the rights stating that the plaintiffs had two rights – a right to the minerals and a surface right to go onto the land to recover the minerals.

47 *Tener*, supra note 45 at para 32.

intend expropriation without compensation, and the plaintiff was entitled to compensation determined pursuant to the Expropriation Act (British Columbia).

A more recent case discussing de facto expropriation in the mineral context is Rock Resources Inc. v. British Columbia, a 2003 BC Court of Appeal decision. In 1995, the Province of British Columbia enacted the Park Amendment Act which created 80 new parks. The effect of the legislation was to prevent the plaintiff from exploring for or developing minerals in parts of two mineral claims (acquired by the plaintiff in 1994) located within the boundaries of the new parks.

The court relied upon Tener to find that the Park Amendment Act had effected the taking of a property right or interest held by the plaintiff prior to its enactment. The court rejected the province's argument that a lack of evidence as to minerals actually within the grants prevented a "taking". In the court's view, that went to the issue of quantum, rather than the actual issue of "taking". Further, the court held that the presumption that the Crown will pay compensation was not rebutted by a clear contrary intention in the authorisation (nor did any applicable legislation explicitly deny compensation).

The final noteworthy decision relied upon by the Supreme Court of Canada in Canadian Pacific was Mariner Real Estate Ltd. v. Nova Scotia, a Nova Scotia Court of Appeal decision. In Mariner, the respondents owned private water-front property which was designated as a beach under the Beaches Act (Nova Scotia). Pursuant to that Act, the respondents were refused permission to build single family dwellings on their lands. The respondents sued, claiming that their land had, in effect, been expropriated, although they agreed that their land was not actually taken from them. The respondents argued that there was de facto expropriation because the regulations on the land had taken away virtually all the economic value of the land and that there was a resulting enhancement in the value of publically owned land (i.e., the beach).

The Nova Scotia Court of Appeal offered a brief overview of the law of de facto expropriation in Canada, recognising that it has had only a short history. The court stated that the law of de facto expropriation is limited by two governing principles: (1) valid legislation may very significantly restrict an owner's enjoyment of private land; and (2) courts may order compensation for such restriction only where authorised to do so by legislation.

The Court cited the three cases addressed above (Tener, Casamiro and Manitoba Fisheries) as the only three cases where claims for de facto expropriation had been successful in obtaining compensation. The Court characterised these cases as awarding compensation on findings that the private rights in each case had become essentially "meaningless". After reviewing these cases, the Court concluded that to constitute de facto expropriation, there must be a confiscation of "all reasonable uses of the land". Regulation will only become de facto expropriation when virtually all of the aggregated incidents of ownership have been taken away.

The Court held that the loss of economic value of land is not in and of itself the loss of an interest in land. However, the Court recognised that decline in economic value may evidence a loss of an interest in land. Notwithstanding the significant devaluation of the land, the Court

50 Mariner, supra note 24.
concluded that the prohibition on building single family dwellings did not amount to the removal of virtually all incidents of ownership in the land, as the respondents could still use the land for other purposes.51

Based upon Canadian Pacific, the most recent ruling on the issue, the standard for establishing de facto expropriation is high. To constitute de facto expropriation, the regulation in question must remove all reasonable uses of the property. In addition, the expropriating authority must gain some beneficial interest flowing from the regulation. In both Mariner and Canadian Pacific, the property owners were prevented from using their property in an economically valuable manner, leaving only uneconomic uses, and in each case the applicable court did not find a de facto expropriation.52 In each of Tener, Rock Resources and Casamiro, the applicable court awarded damages in a circumstance where the Crown had itself granted property rights to the plaintiffs (in the nature of mineral claims) and then, through regulation, removed almost all value associated with those rights.

(ii) Application Principles to PRDAs in Saskatchewan

As explained earlier, PRDAs significantly restrict property rights associated with non-potash mineral lands owned by private parties within PRDA boundaries. While oil and gas activity may take place within PRDAs if the requisite consents are obtained from the Crown and the applicable potash-disposition holder, it may not be practically possible to obtain these consents. It should be recognized that in some cases, holders of oil and gas lands located within PRDA boundaries also own potash rights, and may therefore receive some benefit from those potash interests. However, in other cases, a person may hold rights to only oil and gas (and/or coal) and therefore will not stand to receive any benefit from potash mining activities within the boundaries of a PRDA.

The only reasonable use of an interest in petroleum and natural gas mineral lands is the extraction of those minerals through drilling. Since oil and gas drilling in PRDAs is prohibited (unless the applicable consents are obtained), it could be concluded that all reasonable uses of the interest in the applicable mineral lands have essentially been removed. This conclusion would be consistent with the above-discussed cases Tener, Rock Resources and Casamiro, all of which suggest that the inability to develop mineral resources rendered the interests worthless and constituted de facto expropriation.

Thus, it would appear that, based on Canadian case law, the first requirement for de facto expropriation is met – at least in cases where persons do not hold potash interests within PRDA boundaries.

51 The court did recognise that shore front property is typically purchased for full time or seasonal residential use and that without the right to build a residence on such property, the incidents of ownership remaining are insignificant. In this instance the Court decided that there were still reasonable uses for the property, but warned that each situation must be determined on its own facts.

52 See also Nilsson, supra note 29, where the plaintiff’s lands in the City of Edmonton became subject to a restricted development area and a permit was required for any development. Despite the fact that the plaintiff was prevented from developing his land, and the land lost most of its value, the court held there was no de facto expropriation and that there was merely valid regulation of land use.
The second requirement is, however, not as clearly met, as it is debatable whether or not a court would find that the Government of Saskatchewan has obtained any beneficial interest as a result of the PRDAs. This is in no small part due to the uncertainty surrounding what constitutes a "beneficial interest" as required by the Canadian Pacific test. One commentator has been particularly critical of this requirement, stating that the way this threshold was considered in Canadian Pacific sets an impossibly high standard and that the result was unfair.\textsuperscript{53} Unfortunately, no case since Canadian Pacific has provided useful guidance on what constitutes a beneficial interest for the purposes of de facto expropriation.

The Crown does receive a benefit, albeit an indirect benefit, from the PRDAs. The benefit flowing from the PRDAs is a reduced risk that Crown potash will become unminable because of flooding. In addition, the PRDAs increase the likelihood that Crown potash lands will be mined in priority to the development of oil and gas lands contained within PRDAs. Thus, while the Crown is not directly benefitting from restricting private parties from exploiting their mineral interests, there is an indirect benefit to the Crown through the preservation of its potash, and the royalties flowing therefrom. However, based on the de facto expropriation test, as restated in Canadian Pacific, it is unclear whether or not these types of benefits are sufficient to constitute a beneficial interest flowing to the Crown.

IV. CONCLUSION

PRDAs regulate the use of land around potash mines in Saskatchewan. In particular, PRDAs restrict the drilling of any wells within a PRDA (except by the applicable potash company) unless consent to do so is obtained from the holders of the potash dispositions and the Crown. One stated purpose of PRDAs is to help prevent flooding of potash mines.

Notwithstanding the benefit to the potash mine operators, PRDAs negatively affect the rights of mineral-owners who have oil and gas rights (and no additional potash rights) within PRDAs. Without the ability to drill for oil and gas, the oil and gas rights are essentially worthless for as long as the PRDAs remain in effect.

As discussed in this paper, the Government of Saskatchewan has broad powers to regulate land use in the province. However, assuming that the regulation allowing for the PRDAs was validly implemented, the more interesting legal question to consider is whether the Crown is obligated to compensate the holders of mineral lands that are negatively impacted by the PRDAs. There is certainly an argument that compensation is appropriate for the holders of oil and gas lands who cannot develop their minerals because of the PRDAs. However, based on recent case law from the Supreme Court of Canada, it is not certain whether or not a court would order compensation in the circumstances.

\textsuperscript{53} Hogg, \textit{supra} note 22 at 367.
APPENDIX A

Current PRDAs in Saskatchewan

<table>
<thead>
<tr>
<th>PRDA</th>
<th>Established</th>
<th>Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belle Plaine Area</td>
<td>MRO 370/95</td>
<td>72 sections</td>
</tr>
<tr>
<td>Patience Lake Area</td>
<td>MRO 374/95</td>
<td>71 sections</td>
</tr>
<tr>
<td>Allan Area</td>
<td>MRO 671/95</td>
<td>291 sections</td>
</tr>
<tr>
<td>Lanigan Area</td>
<td>MRO 672/95</td>
<td>275 sections</td>
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<tr>
<td>Vanscoy Area</td>
<td>MRO 673/95</td>
<td>149 sections</td>
</tr>
<tr>
<td>Cory Area</td>
<td>MRO 674/95</td>
<td>261 sections</td>
</tr>
<tr>
<td>Colonsay Area</td>
<td>MRO 933/95</td>
<td>232 sections</td>
</tr>
<tr>
<td>Esterhazy Area</td>
<td>MRO 171/96</td>
<td>256.25 sections</td>
</tr>
<tr>
<td>Rocanville Area</td>
<td>MRO 1155/96</td>
<td>281.5 sections</td>
</tr>
</tbody>
</table>
APPENDIX B

Potash Dispositions

Legend

- Pending Potash
- Potash Restricted Drilling Areas
- Crown Reserve
- Indian Reserve
- Oil and Gas Disposition
- Park

March 31, 2014