This paper deals with the valuation of rights of way or “strip takings” for highways, utility transmission lines, pipelines, surface rights of entry and well sites. It considers the valuation of residual and reversionary rights; temporary rights of way; looping, twinning and substitute pipelines; strips and small parcels; severance and injurious affection damages; fixed farming costs and the set-off of benefits. The paper concludes with a brief examination of the impact of politics on the valuation of surface rights.

I. RIGHTS OF WAY — RESIDUAL VALUE — REVERSIONARY VALUE

In strictly legal terms a right of way is a type of easement. It enables a person, corporate entity or government authority, to use part of the land of another person in a particular way and for a limited purpose or purposes. At common law, the acquisition of a right of way does not give the holder a fee simple interest. Moreover, it does not confer the right to exclusive possession such as arises under a lease.

Clearly, the term “right of way” in modern usage does not always correspond to the common law concept. Consider the following examples:

(1) The acquisition of a strip of land by a municipality or highway authority for the establishment of a highway or the widening of an existing highway. Such a “right of way” usually involves the whole fee simple interest.
The acquisition of a strip of land by a public utility in order to locate towers and electric transmission lines. The owner of the land may retain limited rights over the strip and perhaps no rights in the areas occupied by the towers.

The acquisition of rights of entry and/or strips or small portions of land for a gas or oil pipeline together with well sites and pumping stations. The pipe is usually buried and the landowner retains the right to cultivate on top of it. After a period of years the pipeline will cease to be functional at which time the surface rights will expire and the fee simple interest will no longer be encumbered.

The common law has been concerned mainly with the first two examples, i.e., fee simple highway strips and the more limited rights over strips for utility easements. Rights of entry, well sites and pipeline strip takings have, almost from the outset, been governed by legislation which was, and is, founded more upon political considerations than upon strict legal or valuation principles.¹

Some of the difficulties which are experienced by courts, compensation tribunals, lawyers and appraisers with respect to rights of way valuations would disappear if the above distinctions between different types of rights of way were kept firmly in mind. The first task in approaching any right of way valuation is to ascertain the nature of the right of way, and in particular the residual and reversionary rights, if any, left to the landowner. In other words what can the owner still do with the right of way land during the continued existence of the right of way? Will the right of way ever come to an end? Upon expiration of the right of way, will the landowner have an unencumbered fee simple?²

A. Highway Rights of Way

Usually the strip taken for a highway or irrigation canal involves the taking of the full fee simple interest.² In such cases there are two

¹ The principal Canadian statutes dealing with compensation for surface rights are: Petroleum and Natural Gas Act, R.S.B.C. 1979, c. 323, s. 21; Pipeline Act, R.S.B.C. 1979, c. 328; Railway Act, R.S.B.C. 1979, c. 354; Surface Rights Act, S.A. 1983, c. S-27, s. 25; The Surface Rights Act, S.M. 1983, c. 4, C.C.S.M. S235, s. 26; The Surface Rights Acquisition and Compensation Act, R.S.S. 1978, c. S-65, s. 29; National Energy Board Act, R.S.C. 1970, c. N-6, s. 75.19.

² For example in Sharma v. Minister of Transportation (1985) 33 L.C.R. 52 (Alta. L.C.B.), 5.86 acres were taken; in Peterson v. The Queen (1986) 35 L.C.R. 135 (Alta. L.C.B.), 3.04 acres were taken; and in Postman v. The Queen (1985) 32 L.C.R. 369 (Alta. L.C.B.), 18.02 acres were taken for an irrigation canal.
issues to be resolved: the negative impact (injurious affection) of the highway on the remaining land; and the value of the portion of land taken for the highway.

B. Power Transmission Lines and Towers

In these cases there are three issues to be resolved. The first is to determine the residual and reversionary rights which remain in the owner. Secondly, there is the negative impact (injurious affection) of the towers and lines on the remaining land. Finally, the value of the portion of land impressed by the right of way needs to be considered.

Usually residual and reversionary rights are valued as a percentage of the market value of the portion impressed by the right of way. The percentage may vary all the way from zero to fifty percent. In other words, sometimes the cost to the acquiring authority of obtaining the right of way is the same as if it had taken the fee simple interest.

For example, in B.C. Hydro & Power Authority v. Bossio Motors Ltd., 20.56 acres of the power line right of way traversed a 350-acre parcel which, though undeveloped, had a highest and best use for a residential subdivision. The court held that the expropriation of the right of way:

for all practical purposes is equivalent to the expropriation of the fee in the land. While [the owner] or his successors in title may have limited use of that land, they cannot have exclusive possession nor build upon it. It is therefore proper . . . to value the interest taken as if the whole land had been taken.

Similarly, in Gujda v. Ontario Hydro, the transmission line right of way affected 7.6 acres out of 9.3 acres of unimproved landlocked bushland. The former Ontario Land Compensation Board found that the easement sterilized the entire 9.3 acres and awarded compensation based on 100 percent of the market value.

With respect to effect of the easement on the subject lands, the board is of the opinion that the rights remaining to the owners have been almost completely obliterated. Residual benefits to the owner after an easement is taken are usually expressed in terms of a percentage of market value. It is established law that such percentage is determined by the facts of each individual case. In these particular circumstances, looking at all the evidence, the board finds that the taking of the easement has effectively sterilized the entire 9.34 acres as to any de-

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4. Ibid. at 134.
development potential, or as to any use to which the owners might reasonably put the whole of the lands, not only the easement lands. In other words, it is as though the fee in the entire parcel had been expropriated.6

As pointed out in Gujda, the percentage of market value attributed to residual value must be determined on the facts of the particular case. However, in Homeniuk v. City of Edmonton,7 the Alberta Land Compensation Board usefully summarized some possible components of residual value as follows:

(a) The value or economic benefit, if any, in use which remains to the owner with regard to the easement land. This may be based on existing use or future use and of course must be assessed having regard to the constraints imposed by the easement and the operations carried out thereon.

(b) The reversion of the full interest to the owner at some future indefinite date.

(c) The owner's continued right to sell the land subject to the easement.8

Homeniuk involved the expropriation of a transmission power line easement affecting 3.45 acres of a ninety-one-acre parcel of unimproved land used for agricultural purposes. Two large steel towers each occupied thirty square feet. The City said the residual value was fifty percent. The owner said that it was virtually nothing and the Board agreed with the owner. As to the first component, remaining use, the highest and best use of the land was for future industrial development and, on the evidence, any use which might be made of the easement area (e.g., temporary parking) was very limited. As to the second, the right of reversion, the easement was in perpetuity and there was no evidence of the present worth, if any, of any future reversionary right and so no basis for finding any residual value. As to the last, the right to sell the land subject to the easement, the Board dismissed this for lack of evidence that it had any value in the marketplace.

The former Ontario Land Compensation Board held that the residual value of rights of way for power transmission lines was twenty-five percent of market value.9

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6 Ibid. at 111.
8 Ibid. at 348-49.
C. Pipelines

Again, the three issues are residual and reversionary rights, injurious affection to the remaining land and the value of the portion of land impressed with the easement.

Once pipelines are buried under agricultural lands, farming may generally continue with little, if any, disruption. Accordingly, in Re Interprovincial Pipe Line Co., the Ontario Court of Appeal held that the residual value to the farmer of the right of way had to be taken into account. However, on the facts, the residual value was held to be negligible and no deduction was in fact made. In Union Gas Co. of Canada Ltd. v. O'Neill, the same court reduced an award of the Ontario Land Compensation Board from 100 percent to fifty percent of the fee value for an easement over agricultural lands which had industrial development potential.

In Alberta the leading case is Re Cochin Pipe Lines Ltd. and Rattray, which involved a pipeline governed by the federal National Energy Board Act. The Alberta Court of Appeal renounced the practice which had developed in Alberta of ignoring residual value and also denied that it was proper to value residual rights by arbitrarily discounting the market value by some percentage (usually fifty). It expressly followed the Interprovincial Pipe Line and Union Gas Co. decisions. However, no set-off for residual value was made here because the operator had not raised the issue at trial and therefore the appellate Court had no evidence from which to value the residuary interest.

Wonsch Construction Co. Ltd. v. Union Gas of Canada involved a permanent gas transmission pipeline through agricultural land. The former Ontario Land Compensation Board held that there was no hard and fast rule for determining residual value. In the instant case the residual value was thirty-five percent of the value of the land impressed with the pipeline right of way.

In Re Interprovincial Pipe Line Co., the Ontario Court of Appeal suggested consideration of the following factors in determining residual value: future maintenance of the pipeline; pipeline inspections;
possible construction of additional lines; restrictions against building roadways and other improvements such as fencing on the right of way without consent of the company even though such consent may normally be granted; liability of the owner to pay property taxes with respect to the land included in the right of way; and the effect upon servicing the remaining land.  

D. RIGHTS OF ENTRY AND WELL SITES

Again the three issues are residual and reversionary rights, injurious affection to the remaining land and the value of the portion of land impressed with the surface rights.

Usually rights of entry and land for access roads and well sites under surface rights legislation are not granted in perpetuity, but only for the lifetime of the oil or gas production. The courts have affirmed that residual value should be taken into account and where, for example, the life of an oil well is, say, eighteen to twenty years, the value of the rights acquired by the operator "must be worth substantially less than the same interest on a permanent fee simple basis."  

In *Krupa v. Camel Resources Ltd.*, Mr. Justice Wachowich contrasted expropriation, which "might be termed a ‘forced sale’" with a right of entry which "can be thought of as a temporary ‘forced rent’."  

In both situations it is understood that there shall be fair compensation. However, in the instant case, under the right of entry order the owner was not losing his land but only rights to the surface for fifteen years after which time all of the freehold rights would revert to him. Consequently, "it appears somewhat unreasonable for a landowner demanding full market value for his land to be paid for it now (plus allowances for inconvenience, nuisance, damage, etc.), never sell it and reacquire it in 15 years."

In *Dome Petroleum Ltd. v. Lūvam Farms Ltd.*, the right of entry order specifically reserved to the owner the right to use the land for agricultural purposes. Mr. Justice Egbert held that the interest retained by the owner in the easement area was "of substantial value"

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17 *Supra*, note 10, *per* Pickup C.J.O.

18 *Cabrè Exploration Ltd. v. Arndt* (1986) 35 L.C.R. 193 at 204, [1986] 4 W.W.R. 529, 45 Alta. L.R. (2d) 137 (Q.B.) *per* Dea J. In *Cabrè* the parallel was drawn with the distinction between a grant for a term of years and a fee simple.


which he fixed at seventy-five percent of the market value. Accordingly, the Surface Rights Board's award of 4.59 acres × $450 = $2,065.50 was cut down by seventy-five percent to $516.375 rounded to $520.24.

In *Dome Petroleum Ltd. v. Grekul*, by the time the compensation claim for a right of entry had been determined by the Surface Rights Board the surface rights had reverted to the owner because the well drilled had proved to be a dry hole and was abandoned.

Mr. Justice Miller observed that the Alberta Court of Queen's Bench had had some difficulty in deciding upon the rationale to be used for determining the value of residual or reversionary interests in right of entry situations. He also noted that qualified appraisers were having similar difficulties. He attempted to lay down some general guidelines. Where, as in the instance case, it is known that the interest under a right of entry for drilling purposes or for a pipeline would soon be terminated, the value of the reversionary interest should be taken at seventy-five percent of the market value of the land. Where the date of termination of a right of entry was in the distant future, the value of the reversionary interest should be taken at fifty percent of the market value of the land and with a pipeline easement the reversionary and residual value would be seventy-five percent of the land value.

In *TransAlta Utilities Corp. v. Kehlert*, Mr. Justice MacCallum noted that s. 25(2) of the Alberta *Surface Rights Act* allows the Board to ignore residual and reversionary value. However, he held that the provision did not justify a refusal to consider residual value where evidence of such value was brought before the Board. In the instant case, notwithstanding the right of entry order, the owner retained the right to farm the right of way. On the evidence this benefit was held to be 23.7 percent or $711 per acre. Accordingly, the compensation award of $3,600 for the value of the land affected by the order was reduced by 23.7 percent or $853.20, leaving a net award of $2,746.

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26 See *Dome Petroleum*, *supra*, note 25 at 122-23.
27 *Ibid.* at 123.
31 *Supra*, note 29 at 175.
Courts and tribunals “cannot make bricks without straw” as Mr. Justice Spencer said in *Scurry Rainbow Oil Ltd. v. Lamoureux*.

In that case, he held it was correct for the B.C. Mediation and Arbitration Board to make a deduction for reversionary value and that it had not erred in law in making a mathematical deduction when no evidence had been specifically directed to the value of the reversion. The Board had reached the best decision it could on the evidence put before it.

*Helenslea Farming Ltd. v. County of Parkland No. 31*

involved the expropriation of a sewer line easement comprising 1.53 acres from a 36.5-acre parcel with an immediate highest and best use as a single unit country residential property. The Alberta Land Compensation Board exercised its statutory power to ignore residual value, saying that:

No doubt this decision must be made judicially. Upon consideration of all the evidence the board is satisfied that for all practical purposes the Owner has lost the use of the land within the right of way and therefore finds that it is appropriate to ignore the residual value to the Owner.

II. TEMPORARY RIGHTS OF WAY AND WORKING EASEMENTS

From time to time temporary easements may be required, for example to provide working access during the construction of a pipeline in a permanent right of way. In such cases the temporary easement may be valued on the same basis as a lease of the same land for the period in question.

In *Badach v. Town of Spruce Grove*, the municipality expropriated 2.59 acres as a temporary working space for use during construction of a sewage pipeline system on another 1.95 acres. The Board accepted the evidence of an appraiser who multiplied the market value of the acreage ($6,000 per acre based on the unit acre-

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33 (1985) 33 L.C.R. 133. Remitted by the Alberta Court of Appeal for rehearing on another point, (1987) 37 L.C.R. 191. See also *City of Weyburn v. Barry* (1987) 37 L.C.R. 97 (Sask. C.A.). Residual interest in land subject to permanent sewer pipeline easement was valued at fifty percent. Reversionary interest in land subject to temporary (four months) construction easement was valued at 100 percent, i.e., no compensation was awarded for the temporary easement.
35 *Supra*, note 33 at 139.
age value of the sixty developable acre parcel used for agricultural purposes) by the current rate of return (11.5 percent) by the length of time used and period required for reclamation (one year). Accordingly, the mathematics were as follows: $2.59 \times \$6,000 \times 11.5 \times 1 = \$1,788$ — rounded to $\$2,000$.

In Helenslea Farming Ltd. v. County of Parkland No. 31, the temporary working area expropriated in conjunction with the construction of a sewer line was never actually used but was stripped of all vegetation. One appraiser said the temporary easement should be valued as if it had been taken as part of the permanent easement. Another appraiser based his opinion on awards made by the Surface Rights Board in the Edmonton area during the relevant period. The Alberta Land Compensation Board had arrived at a value of $\$5,000 per acre for land taken for the permanent easement. It awarded $\$2,500 per acre for the land taken for the temporary easement because of the loss of vegetation and land disturbance which represented a long-term disfigurement.

III. LOOPING, TWINNING AND SUBSTITUTE PIPELINES

_Dome Petroleum Ltd. v. Hampson_ involved the placing of a third pipeline in a right of way already containing two pipelines. When the first pipeline right of way was established in 1969 the owner had been awarded compensation on the basis of the fee simple value, i.e., without any set-off for residual or reversionary value. In 1971 when the second pipeline was laid, the Surface Rights Board awarded only nominal damages of $\$25 a quarter section. When the third pipeline was laid, District Court Judge Dea also fixed compensation at a nominal $\$100 a quarter section. The reversionary interest would not be affected at all if the third pipeline ceased to be required before or at the same time as the first and second pipelines. Even if the third pipeline lasted longer, and therefore prevented the reversionary interest from vesting, the owners had in any event already received the fee simple value on the first taking.

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38 _Supra_, note 33.

39 Ibid. at 139.

40 Ibid. at 140.


42 Ibid. at 142.

43 Ibid. at 144-45.
Likewise, in *Nova v. Will Farms Ltd.*, the owner had been compensated on the basis of the fee simple value with no set-off at the time of the first pipeline installation in 1965.\(^4\) "The first taking did not take the fee simple. It left to the respondent residual rights including substantial occupational rights and the reversion."\(^5\) In 1977 the company was authorized to place a second pipeline alongside the first and in the same right of way. It was agreed that the new line was a looping or twinning of the old. Both lines carried the same stream of gas and were subject to the same mechanical control. Accordingly, it was a reasonable inference that the second line would remain in operation no longer than the first.\(^6\) Therefore, the vesting of the reversionary interest would not be postponed. Consequently there was no reduction in the value of the reversionary interest as a result of the second taking, and a token award of $100 per parcel, the same amount as awarded by the Surface Rights Board, was appropriate.\(^7\)

*Arychuk v. Calgary Power Ltd.* did not involve a pipeline, but a transmission power line.\(^8\) In 1975 the authority expropriated a new right of way to upgrade a power line located on an old right of way obtained by agreements in 1929. The new line carried more power and used steel towers instead of wooden poles. It was held that the expropriation of the new right of way, which gave the company much wider powers than those already held, constituted an abandonment of the old right of way. Any remaining value of the old right of way to the company was held to be negligible and was to be ignored in determining compensation payable for the new right of way.

IV. VALUATION OF STRIPS AND SMALL PARCELS

A. THE "BLACKSTOCK" FORMULA

The determination of the market value of a strip or small parcel affected by a right of way or well site and taken from a larger parcel usually cannot be determined by the conventional direct sales comparison, income or cost approaches. Faced with this difficulty, in the 1940s, Mr. R. G. M. Blackstock, Q.C., then Chairman of the Alberta Public Utilities Board, which had jurisdiction to determine compensation for provincial pipeline easements, devised a formula which,

\(^{5}\) Ibid. at 117 per Kerans J.A.
\(^{6}\) Ibid. at 119.
\(^{7}\) Ibid. at 121.
appropriately, became known as the "Blackstock" formula. According to this formula the unit market price of the whole parcel is ascertained and to this is added fifty percent, to fix the unit value of the portion of the whole parcel taken for the right of way or easement. So, for example, if a 100,000-acre farm has an *en bloc* market value of $100,000,000 (i.e., $1,000 per acre on average) and the strip taking in total comprises six acres, then the compensation payable for that strip is $6 \times 1,000 plus 50\% = 9,000.

In the original cases using the formula, namely *In re Valley Pipe Line Co. Ltd.* and *In re Imperial Pipe Line Co. Ltd. and Pahal*, the fifty percent was added as compensation for the land and for some, not all, aspects of disturbance damages and injurious affection caused through loss of fertility, inconvenience in working the land and weeds on the right of way. This is usually overlooked or left unstated in comments and purported applications of the formula.

In the first case, *In re Valley Pipe Line Co. Ltd.*, the company expropriated an easement over a 16½-foot strip (one acre in total) along the boundary of the owner's quarter section for an oil pipeline to transport crude from the Turner Valley oil field to Calgary. The Board found on the evidence that the unit acreage value of the whole quarter section was $45. Mr. Blackstock awarded $75 for the one acre included in the right of way. He noted that $45 per acre:

would be the basis for the measure of compensation... had the whole quarter section been the subject of expropriation proceedings, but this could hardly be the basis of compensation for the acquisition of an isolated area or two.\textsuperscript{51}

The compensation of $75 was:

inclusive of damage caused through loss of fertility, damage caused through inconvenience in working the land and through weeds on the right-of-way, but will not include actual damage to crops on the right-of-way caused by the company's user of it.\textsuperscript{52}

Similarly in the second case, *In re Imperial Pipe Line Co. Ltd. and Pahal*, the company expropriated an easement over a 33½-foot strip (two acres in total) for an oil pipeline to transport crude from the Leduc oil field south of Edmonton.\textsuperscript{53} After making the same examina-
tion of pipeline construction and maintenance as in the first case, Chairman Blackstock concluded:

It can be asserted, without evidence to support it, that no farmer would sell two acres from his farm at the same price (per acre) at which he would sell the whole farm. That consideration plus inconvenience and loss of fertility must be assessed and allowed for. There is no evidence to guide the board on this phase and it proposes to follow the principles laid down in the Valley Pipe Line case, supra, by increasing the market value of the land by 50 percent and by adding the usual 10 percent to the aggregate for compulsory taking, or in round figures a total of $125 per acre.54 [emphasis added]

In Calgary Power Ltd. v. Hutterian Brethren of Pincher Creek,55 the Public Utilities Board applied the “Blackstock” formula in determining compensation for a power transmission line right of way. In later cases, courts and tribunals sometimes applied the Blackstock formula with reference to the value of the land affected by the easement, and awarded additional compensation for injurious affection or other damages. Such was the case in Lamb v. Canadian Reserve Oil and Gas Ltd.,56 which involved the taking of a surface lease of over 1.21 acres of a 320-acre parcel for a roadway and well site. The Supreme Court of Canada, Mr. Justice Martland speaking for the majority, agreed with the District Court Judge who had applied the “Blackstock” formula because there was no comparable sales data of small parcels taken from larger parcels.57 The Saskatchewan Court of Appeal58 had rejected the “Blackstock” formula and would have compensated for the 1.21 acres on the basis of the unit acreage value of the 320-acre parcel.59 In addition to the award based on the “Blackstock” formula, all the specific headings of compensation for annual payments of severance, nuisance and loss of use were also awarded as provided for in the relevant surface rights legislation.60

The current status of the “Blackstock” formula remains in doubt. In Re Cochin Pipe Lines Ltd. and Rattray, the Alberta Court of Appeal held that the formula ought not to be used because there was evidence of the market value of the entire parcel from which the

54 Supra, note 50 at 33.
57 Ibid. at 532 (S.C.R.), at 10 (L.C.R.).
60 Ibid. at 767 (D.L.R.), at 212-13 (L.C.R.).
sixty-foot-wide pipeline strip was taken. The whole parcel comprised two quarter sections of which the pipeline right of way affected 5.07 acres. The Court of Appeal held that compensation for those 5.07 acres should be awarded on the basis of established prices for large parcel sales in the range of $300 to $350 per acre.

In the circumstances of this case, where a per acre value could be established for the parcel out of which the right of way was taken, I am of the opinion that it would be proper, in principle, to accept the figure of $350 per acre as being the top of the range value, at the date of expropriation, for the quarter-sections affected and compensate the land-owner for the land taken on that basis subject to any set-off equal to the value of any residual interest remaining with the respondent, if indeed, such a set-off is justified in the circumstances of this case.2 [emphasis added]

Cochin has been followed in British Columbia in Dome Petroleum Ltd. v. Juell which involved a right of entry and use of 7.22 acres for an access road and well site. The B.C. Mediation and Arbitration Board had held:

In determining the value of the land, the Board recognized the fundamental principle that a small parcel normally carries a higher unit value than that of the larger parcel from which it was taken.64

Mr. Justice Berger held that the Board was wrong on this point. He expressly followed Cochin in rejecting an arbitrary additional allowance where a small parcel is taken.65

If Cochin is correct and because the Supreme Court of Canada refused leave to appeal, it would appear that the "Blackstock" formula has gone. It would be a rare case indeed when it is not possible to evaluate the en bloc aggregate value of "the parcel out of which the right of way [is] taken".

In a number of cases the Alberta Land Compensation Board has expressly refused to apply the formula because, among other reasons, it considers itself bound by those sections of the Expropriation Act which require the determination of market value.66 It has concluded that this mandate precludes the application of the formula. In any event, the Board appears to follow the guidelines laid down by the Alberta Court of Appeal in The Queen v. Bonaventure Sales Ltd.67 which is considered below.68

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61 Supra, note 12.
62 Supra, note 12 at 449 (D.L.R.), at 204 (L.C.R.) per Haddad J.A.
64 Ibid. at 86.
65 Ibid.
66 R.S.A. 1980, c. E-16, ss. 41, 42(2)(a) and 53.
68 See infra, note 69 and following.
B. THE "BEFORE AND AFTER" METHOD

This method is almost self-explanatory. First, it requires the determination of the market value of the parcel before the imposition of the right of way. Secondly, it requires the determination of the market value of the remaining parcel after the imposition of the right of way. The difference between these two figures represents the loss in value to the owner and the amount of compensation payable.

The method has obvious limitations. In particular, it favours the expropriating authority which gets full credit (a set-off) for any general or special benefit to the remaining land. In some cases this could wipe out not only a claim for injurious affection to the remaining land, but also any claim for the land taken for or impressed by a right of way. Secondly, even where there is no general or special benefit and no injurious affection to the remaining parcel, there may be little, if any, difference between the before and after values. In both situations the landowner could end up with no compensation, which politically and psychologically would be an unacceptable result.

Modern statutes usually preclude the use of the "before and after" method because in partial takings they require the use of the summation method. This involves a determination of the market value of the portion taken or affected, plus a determination of injurious affection damage, if any, to the remainder. The Expropriation Acts of Manitoba, Ontario, Nova Scotia and New Brunswick, but not Alberta, provide for the discretionary use of the before and after method where the part expropriated "is of a size for which there is no general demand or market". The same Acts, including Alberta, require the use of the summation method.

In British Columbia the Expropriation Act provides that in partial takings the market value of the land expropriated:

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70 See, for example, the federal Expropriation Act, R.S.G. 1970, c. 16 (1st Supp.), ss. 23, 24 and 25.
71 The Expropriation Act, S.M. 1970, c. 78, s. 27(3), C.G.S.M. E190; Expropriations Act, R.S.O. 1980, c. 143, s. 14(3); Expropriation Act, 1973 S.N.S. 1973, c. 7, s. 27(4); Expropriation Act, R.S.N.B. 1973, c. E-14, s. 39(3).
72 See supra, note 71, s. 26(1) (Man.), s. 13(2) (Ont.), s. 26 (N.S.), s. 38(1) (N.B.) and also supra, note 34, s. 42(2) (Alta.). Note in Helenslea Farming Ltd. v. County of Parkland No. 37 (1987) 37 L.G.R. 191 at 192 (Alta. C.A.) per Stevenson J.A., when dealing with a partial taking for a sewer line right of way, the Court stated: We do note that tests for compensation in unusual fact situations and appraisal evidence would be well served by application of the "before and after" test: the comparison of the market value of the entire parcel before the taking and the market value of the parcel after the taking in arriving at the market value of what was taken.
may be established by determining the market value of the area of all of the land before the date of expropriation and subtracting from it the market value of the land remaining after the expropriation occurs, but in no case, subject to section 43,\textsuperscript{73} shall compensation be less than the amount determined by multiplying the ratio of the area of the land taken to the area of all of the land before it was taken, times the value of the land before it was taken.\textsuperscript{74}

C. THE "BONAVENTURE" PRINCIPLE: EN BLOC UNIT PRICE

In effect this method simply returns to the "Blackstock" formula \textit{without the fifty percent bonus}. The unit price of the whole acreage before the imposition of the right of way is determined using whatever conventional methods of valuation are appropriate. The unit price is then applied to the acreage affected by the right of way. Additional compensation for any injurious affection to the remaining acreage by the imposition of the right of way is calculated separately. This method has been consistently used by the Alberta Land Compensation Board since the 1980 decision of the Alberta Court of Appeal in \textit{The Queen v. Bonaventure Sales Ltd.}\textsuperscript{75}

Bonaventure owned two parcels of land comprising 127.93 acres and 1.51 acres from which two strips, comprising 3.43 acres and 0.30 acres respectively along the boundary, were taken for road widening purposes. The Alberta Land Compensation Board valued the two strips totalling 3.73 acres as if they were a small holding being sold on the open market,\textsuperscript{76} and used comparable sales data of similar sized parcels which were selling at $75,000 per acre. This gave a compensation amount of $280,000. The Court of Appeal rejected this approach saying that what had been expropriated was not a small parcel of 3.73 acres, but rather two strips of 3.43 and 0.30 acres for which there would not have been willing buyers or sellers. Therefore, it was not reasonable to notionally convert the two unsellable strips into one saleable small acreage parcel in order to value the strips. In the circumstances, the correct approach was to determine the market values of the original two parcels in order to arrive at a per acre value of each, which could then be applied to the respective acreages taken. The matter was referred back to the Board.\textsuperscript{77} This time, on the evidence, the Board found that the market value of the 127.93-acre

\textsuperscript{73} Section 43 provides for a set-off of any special benefit to the remaining land from the construction or use of works by the authority.
\textsuperscript{74} S.B.C. 1987, c. 23, s. 39(3).
\textsuperscript{75} \textit{Supra}, note 67.
\textsuperscript{76} \textit{Bonaventure Sales Ltd. v. The Queen} (1979) 17 L.C.R. 161 at 169 (Alta. L.C.B.).
parcel was $60,000 per acre and the market value of the 1.51-acre parcel was $90,000 per acre. Applying these figures to the two strips yielded $205,800 (or rounded to $206,000) for the 3.43 acres and $27,000 for the 0.30 acres or a total of $233,000.

A later case, also a strip taking for highway widening, was Kerr v. Minister of Transportation (No. 1). The strip was approximately 200 feet at its widest, narrowing to a point at each end and was somewhat less than a half mile long. The strip was taken from a parcel of 147 acres and comprised some 5.72 acres. The Alberta Land Compensation Board found that the 147 acres was made up of some thirty-seven acres of “highway commercial” land valued at $4,000 per acre and 110 acres of recreational land valued at $1,000 per acre. Because the 5.72-acre strip had been taken off the highway commercial frontage, the Board awarded $4,000 per acre and did not take the overall average unit price of the 147 acres into account.

Where, as is the case here, it is found that the front portion of the Owner’s land (which includes the subject land) has a separate, distinct and different use from the remainder of that land it is not appropriate or correct to use the value of such remaining land as part of the determinant for the value of the subject land. While it is possible that the Owner’s land may be sold as an entire parcel, it is equally possible that, under the circumstances here present, it may be sold in more than one separate parcel. In the Board’s opinion the proper approach is to establish the unit value of the 37 acres of land found to have commercial potential and the unit value so found is the value to be attributed to the . . . subject land. Thus, the value of the remaining land, found to be of use for recreational purposes, is extraneous to determination of the market value of the subject land . . . .

This approach was affirmed by the Alberta Court of Appeal. It noted that in Bonaventure the parcels were composed of homogeneous acreage. In contrast, in Kerr the whole parcel comprised highway commercial (at $4,000 per acre) and recreational (at $1,000 per acre) acreage. If the pro rata value of the whole parcel had been used, it would have resulted in the expropriating authority:

obtaining all highway commercial land, which was worth $4,000 per acre, at a value which had been diluted by arriving at an acreage valuation by using the value of the recreational land. I think the statute does not so provide and The Queen v. Bonaventure Sales has no application except where the acreage is homogeneous.

78 Ibid. at 339.
80 Ibid. at 74-75.
82 Ibid. at 184.
The Court did not overlook the fact that the practical effect of the approach it approved in Kerr is that the owner may be overcompensated. In Kerr the calculation of compensation did not take into account the severance betterment accruing to a portion of the remaining former recreational land. As a result of the taking, some of that former recreational land now had a higher and better use as highway commercial land. As the Court put it:

the strip of land expropriated for the highway is taken from the front of the block and added to the block at the back thus converting the land at the back which was formerly recreational property into highway commercial property.

However, the Court noted that this situation was expressly dealt with by the Alberta Expropriation Act which provides that in a partial taking the owner is entitled to the market value of the expropriated land even when, as the result of the expropriation, the value of the remaining land is increased.

Helenslea Farming Ltd. v. County of Parkland No. 31 involved the taking of a sewer line right of way comprising 1.53 acres from a 36.5-acre parcel having an immediate highest and best use as a single unit country residential property. The parcel comprised valuable high land and less valuable low land. The easement went through the high land. In this case, as in Lorenz v. City of Lloydminster, the total acreage of the subject property had one highest and best use, but within that total acreage some acres had different productivities or utilities, and therefore different unit values. In Helenslea both appraisers purported to apply the Bonaventure principle as modified by Kerr, but the Alberta Land Compensation Board accepted the opinion of the authority's appraiser who only valued the high land. The Court of Appeal remitted the matter to the board for rehearing on the ground that the appraiser should have made separate valuations of the high and low land.

The Kerr approach was expressly followed by Mr. Justice Strayer in the Federal Court in Canadian National Railway Co. v. Industrial

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83 See Todd, supra, note 69 at 288-90 (example six).
84 Supra, note 81 at 184.
85 Ibid.
86 S.A. 1974, c. 27, s. 53, as am. R.S.A. 1980, c. E-16, s. 55.
87 For further extensive consideration and application of the Bonaventure principle by the Alberta Board, see United Management Ltd. v. City of Calgary (1986) 36 L.C.R. 162.
88 Supra, note 33.
Estates Ltd., involving a strip taking from the more valuable portion of an acreage parcel. It was held that the less valuable portion of the acreage should be ignored in determining the unit value of the more valuable portion which was to be applied to the acreage taken.

D. SETTLEMENTS, PATTERNS AND AREA AGREEMENTS

As already noted, it may be impossible to establish the value of rights of way or surface rights by the conventional direct sales comparison, income or cost approaches. There will not often be willing buyers and sellers of such rights in the conventional sense. Moreover, surface rights legislation may require the payment of compensation for factors in addition to market value. For example, in Scurry Rainbow Oil Ltd. v. Lamoureux, Mr. Justice Spencer held that the B.C. Mediation and Arbitration Board had erred in relying solely on “the evidence of the company’s appraiser who testified to the price per acre of land gleaned from other sales.” The B.C. Petroleum and Natural Gas Act refers to the “value of the land” which the Court held includes any “special factors in the case...which give a greater value to this owner for this particular piece of land than is shown by the average value of land per acre in sales made by other owners.” Thus, the “value of the land” for compensation purposes in surface rights cases may be more than market value. Of course it may be less, as pointed out by Madam Justice Trussler of the Alberta Court of Queen’s Bench who said in Jones v. Bankeno Resources Ltd.: “There are many instances where market value is not an appropriate measure given the residual value of the land....”

In addition to the “value of the land”, surface rights legislation provides for the payment of compensation for some or all of the following factors: severance, “adverse effect”, nuisance, inconvenience, disturbance or noise, cumulative effect of rights previously acquired, and “other factors that the board considers proper”.

In recent years, parties in surface rights cases faced with these difficulties have often turned to other types of “comparables” as measuring tools for determining compensation. These “comparables” are used either under the specific heads of compensation set out in the

91 Supra, note 1.
92 Supra, note 32.
93 Ibid. at 69.
94 R.S.B.C. 1979, c. 323, s. 21 (1) (b).
95 Supra, note 32 at 69.
RIGHTS OF WAY

Statutes or as a compensation package usually referred to as a “global amount”.

These other “comparables” take the form of: individual settlements or deals between other landowners and the same or different operating companies; or a pattern of individual settlements or deals; or an area agreement reached on behalf of a number of landowners with one or more operating companies.

1. INDIVIDUAL SETTLEMENTS OR DEALS

While the matter is not entirely free from doubt, as a matter of general principle, given sufficient evidence of the details and surrounding circumstances, individual settlements or deals are admissible, provided “the parties were concerned only to reach agreement on a figure deemed to be the fair [compensation].”\(^9\) However, if the individual deals comprise “global amounts” it may be difficult, if not impossible, to make the requisite nexus of comparability between such deals and the subject property.

In *Siebens Oil & Gas Ltd. v. Livingston*,\(^{98}\) the Alberta Court of Appeal expressly agreed with a statement of the Surface Rights Board to the effect that:

> individual, isolated deals negotiated should not be accorded much weight unless the circumstances relative thereto are fully known, since extenuating circumstances could result in such payments having been unreasonably high or unreasonably low.\(^9\) [emphasis added]

2. PATTERNS OF SETTLEMENTS OR DEALS

In some instances there may be evidence of a number of comparable agreements, settlements or deals which, in the words of Mr. Justice Bracco in *Petryshen v. Nova, An Alberta Corp.*,\(^{100}\) were “reached for identical benefits between willing sellers and willing buyers where the parties, the land, the subject-matter of the agreement and the timing are all comparable and applicable”.\(^{101}\) To be relevant to the valuation process, “the agreements that form the pattern of agreements must be truly comparable with the situation before the board.”\(^{102}\)

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\(^{98}\) *Siebens Oil & Gas Ltd. v. Livingston* (1987) 37 L.C.R. 76 at 218 (Alta. Q.B.) *per* Trussler J.


\(^{101}\) *Ibid.* at 278.

\(^{102}\) *Mobil-GC Canada Ltd. v. Mackey* (1987) 37 L.C.R. 216 at 218 (Alta. Q.B.) *per* Trussler J.
In Siebens Oil & Gas Ltd. v. Livingston, the Alberta Court of Appeal stated:

However, where there are such a number of deals established so that it may be said that a pattern has been established by negotiations between the landowners and oil companies in a district, then the Board should only depart from such compensation with the most cogent reasons. I think it should be accepted that no matter how expert outsiders are that the oil companies and landowners have the better judgment as to what compensation should be paid in their own interests. [emphasis added]

The Court held that the Surface Rights Board should have taken into account, as very cogent evidence, the rates established by the board of directors of an irrigation district for an unspecified number of surface leases for well sites. It also concluded that although the Board should not consider individual settlements where a company may have, for a variety of reasons, paid more than it thought was fair:

in an area where there is a course of dealing between oil companies and surface owners whereby a standard rate of compensation has been paid and accepted, this evidence should at the very least be given great weight by the Board. [emphasis added]

In Petryshen v. Nova, an Alberta Corp., the Alberta Court of Appeal agreed with Mr. Justice Bracco who had held that the Surface Rights Board erred in rejecting, without reasons, evidence of valuation agreements concerning pipeline easements made in the same area between farmers, including Petryshen, and another company, namely Canadian Hunter.

The position taken in Siebens Oil and Petryshen was reaffirmed by the Alberta Court of Appeal in Nova, an Alberta Corp. v. Bain. In this case the company sought to undermine patterns of dealings which the Surface Rights Board had found to exist and to be of weight. One pattern had been established by a Canadian Hunter agreement covering 100 miles of pipeline running parallel to the pipeline being put in by Nova. Another pattern comprised Peace Pipe Lines agreements with twenty-eight owners of land fairly close to the lands involved in Nova. Nova called evidence, including representatives of Canadian Hunter and Peace Pipe, to try to explain why

103 Supra, note 98.
104 Ibid. at 37 per McDermid J.A.
105 Ibid. at 36.
106 Supra, note 100.
particular prices were paid. They alleged undue pressure to settle at inflated figures and claimed that the agreements included facts extraneous to the value of what was being taken by Nova. The Board was unimpressed. The trial judge agreed with the Board. The Court of Appeal said that the credibility and weight which were to be given to the patterns were properly matters for the Board to decide.

In *Markovich Bros. Farming Co. Ltd. v. PanCanadian Petroleum Ltd.*, Mr. Justice Decore held that the Surface Rights Board should have looked at the most cogent evidence available. He was specifically referring to eight agreements as to global amounts of compensation for rights of entry entered into by another company and other owners of comparable land in the area, although some of that land was as much as twenty or thirty miles distant as the crow flies.

In *TransAlta Utilities Corp. v. Kube*, Mr. Justice Stratton held that fourteen negotiated agreements established a "pattern of dealings" for similar power line easements in an area one and a half miles east and three miles south of the subject property. There was no cogent evidence adduced to make him depart from that method of valuation. Accordingly, he upheld an award of the Surface Rights Board which followed the pattern.

The decision of the Alberta Land Compensation Board in *Merkel v. Municipal District of Taber No. 14*, illustrates the necessity for some caution in using patterns of agreements or settlements in non-surface rights cases. *Merkel* involved the expropriation, for road widening purposes, of the fee simple in a strip 16.5 feet wide comprising one acre in total and running along the boundary of an eighty-acre parcel. The Municipality offered $600 per acre which was based on what had been accepted by eleven of the twelve owners whose land was also required for the same project, Mr. Merkl being the "hold out".

The Board refused to regard the $600 per acre figure as determinative of market value. It agreed that the figure might provide a floor or lower limit in the determination of market value. The figure was not determinative because it did not take into account any differences in the quality and use of the various parcels, i.e., the same rate was

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109 Supra, note 107 at 93.
paid for pasture land as was paid for crop land. The Municipality had taken into account the fact that the owners had requested the road upgrading and would receive a benefit. However, the *Expropriation Act* precluded consideration of any increase in value resulting from the project. Further, global amounts and patterns of agreements may be appropriate in determining compensation for surface rights. However, the *Expropriation Act* requires distinct and separate findings as to market value and compensation for any injurious affection, disturbance or incidental damages. And finally, in *Markovich* the agreements forming a pattern were entered into by a number of landowners with more than one authority. In the instant case, all the settlements were with a single authority. The Board accepted the evidence of the owner’s appraiser based on comparable sales data and awarded $700 per acre.

3. AREA AGREEMENTS

As Associate Chief Justice Miller noted in his encyclopedic reasons for judgment in *Dome Petroleum Ltd. v. Richards*, the development of compensation for surface rights in Alberta has proceeded in stages. Initially companies dealt with each surface owner on an individual basis and the Surface Rights Board did the same. Then, after *Siebens*, the “pattern” approach was recognized. Difficulties with this approach arose in practice. For example, how many negotiated settlements or deals established a pattern? Court decisions accepting or rejecting patterns had not been of much assistance in laying down broad general guiding principles. Then the “global approach” to compensation for surface rights developed, and finally organized surface rights groups emerged to bargain collectively with operators using the “global” approach and arriving at what are called “area agreements.”

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113 R.S.A. 1980, c. E-16, s. 45(c).
114 *Ibid.* s. 42(2).
115 In *Scurry Rainbow Oil Ltd. v. Lamoureux*, *supra*, note 32, no evidence was tendered to enable the Board to decide whether a pattern was established by six surface leases entered into by the operator with other landowners. In *TransAlta Utilities Corp. v. Malmberg* (1985) 34 L.C.R. 97 at 102 (Alta. Q.B.) per MacDonald J., the pattern comprised settlements made “with a considerable number of landowners on the basis of annual compensation of $100 per tower” though such settlements were not determinative. In *Mobil-GC Canada v. Mackey*, *supra*, note 102, it was held that there was an absence of truly comparable agreements forming a pattern.
117 *Supra*, note 98.
118 The term is used to describe “the assessment of compensation in a lump sum, in an effort to consider many inter-related factors together, rather than esti-
The origin and nature of an area agreement is described by Mr. Justice Cavanagh in Sandboe v. Coseka Resources Ltd. A group of landowners (or sometimes one very major landowner negotiating with one or more operators with respect to a large area) in a particular area form a surface rights group or association and pay a nominal membership fee. The group usually retains legal or other counsel to negotiate on behalf of the group as a unit with any mineral rights developer that proposes to operate in the area. The group demands global compensation figures for well sites or other rights. The negotiated global figures are then applied uniformly to all landowners within the group regardless of differences as to the details of particular sites. The operator does not have to negotiate with individual owners and is assured that members of the group will not take legal steps to have the global amount reviewed.

In Dome Petroleum Ltd. v. Richards Associate Chief Justice Miller enthusiastically embraced the area agreement concept. He said:

The beauty of the area agreements, to my mind, is that all landowners are treated equally when it comes to compensation (with a few logically acceptable variations) and seem more content to share their land surface rights with the operators involved. If we are charged, under the Act, to look for a true willing buyer-willing seller yardstick of measurement for the "taking", it seems to me that these area agreements come closest to fulfilling this criterion. . . .

He concluded that great weight should be given to area agreements:

... where it can be shown that they represent a true arm's length negotiation between owners and operators bargaining on an equal footing. I do not believe that any tribunal should, under the Act, be permitted to exclude such evidence. What may always be at issue is the amount of weight to be attached to the same. To my mind I would hold that even one example of an "area agreement" freely negotiated should be regarded as highly relevant and cogent evidence for the reasons already advanced. It should certainly be accorded mating figures for different types of loss separately" (B. Barton, "Controversy In Surface Rights Compensation: Pattern of Dealings, Evidence And Global Awards" (1986) 24 Alta. L. Rev. 34 at 36). The author concludes that "both general principle and legal authority disfavour the global award. The evidence in a particular case may be in such a form that a global award is dictated, as in cases relying on compensation fixed in a pattern of voluntary dealings. In any other case, a global award appears to be unjustified" (at 57). For a contrary view that "the global approach is the most appropriate way to assess compensation under The Surface Rights Act", see J. D. Carter, C. Carter and R. Carter, "Compensation For Surface Rights In Alberta" (1985) 23 Alta. L. Rev. 435 at 452.

120 Supra, note 116.
121 Ibid. at 62.
more weight than several negotiated leases between individual landowners and an operator or operators, especially if these were signed early in the oil development of a particular area. In addition, I would hold that a compensation tribunal should not be too restrictive in its interpretation of the geographical length and breadth of the area to be affected by an “area agreement”. Once one or more area agreements have been negotiated it seems to me that it would be in the interests of both sides, both from a cost approach and, from the point of view of happy relationships between landowners and operators, that some uniformity emerge so that operators may know in advance what their costs will be to obtain surface entry rights and landowners will know that they are being treated the same as others in like circumstances. There will, of course, always be unusual situations which depart markedly from the norm and these will be dealt with by the Board or the court as they arise.

What then is the situation where no “area agreements” have yet been negotiated nor has any clear “pattern” emerged in an area? It seems to me that in that kind of a situation the only guidelines we have to fall back upon, until a pattern or area agreement emerges, are those broad ones set out in s. 25 of the Act and, here, I do not restrict them to be only the so-called “four heads” approach.122

In the result, the Court accepted area agreements negotiated by several surface rights groups in the Grande Prairie and Peace River districts as representing the best evidence available to determine the compensation payable for all factors set out in s. 25 of the Alberta Surface Rights Act.

A very different approach was taken by Mr. Justice Cavanagh in Sandboe, in considering the relevance of an area agreement, also in the Grande Prairie area.123 The lawyer who negotiated this area agreement gave evidence that such agreements “were comparable to collective agreements in the labour field”.124 Mr. Justice Cavanagh concluded:

When an operator enters into one of these agreements, he is purchasing peace, expeditious leasing, protection from litigation and... elimination of the necessity of hiring appraisers with attendant tedious negotiations and hearings. With respect, it appears that the operator, when he enters into such an agreement, is paying for much more than compensation. There is an element of protectionism and coercion in such agreements. For these reasons, I think the Board was right in holding that global awards under area agreements were not truly comparable and ought not to be the measure of compensation.125

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122 Ibid. at 67-68.
123 Supra, note 119.
124 Ibid. at 293.
125 Ibid.
In Jones v. Bankeno Resources Ltd., Madam Justice Trussler had to decide whether compensation should be based on area agreements or, as the Surface Rights Board had decided, on a pattern of agreements reached with reference to the particular pipeline. She upheld the Board's award of $607 per acre based on the pattern of agreements even though the Board, on an earlier occasion, had awarded a higher amount based on area agreements for another pipeline located on the same subject property.

Perhaps future judicial pronouncements on the subject of area agreements may throw more light on their relevance and usefulness in surface rights compensation cases. In the meantime, the approach of Mr. Justice Cavanagh in Sandboe would seem to be fundamentally sound.

V. COMPENSATION FOR SEVERANCE AND/OR INJURIOUS AFFECTION DAMAGES

As Mr. Justice Matheson said in Witherow v. Rural Municipality of Moose Range No. 486: "The assessment of damages for injurious affection must always be largely a matter of conjecture because future anticipated losses are speculative." In many cases, compensation for injurious affection is measured in terms of a percentage of the market value of the remaining land before the taking. For example, in Clarke v. Township of Nepean, 3.4 acres were taken from a parcel of sixty-four acres for the construction of a large open drain for storm water. On the evidence the facility detracted from the aesthetic appeal of the remaining 60.6 acres for future residential use. The former Ontario Land Compensation Board awarded ten percent of the market value of the remaining 60.6 acres. The Board complained that:

None of the appraisers were of any assistance to the Board in establishing the quantum of compensation to be awarded in this regard. It should be recognized though that such a task would have been based on conjecture... Nevertheless... if such a claim is pleaded and acceded to by an appraiser, that person should exhaust every effort in making relevant information on that point available to the Board.

In Tremolada v. City of Kamloops, a 7.5-foot strip was taken from the frontage of six residential lots for street widening. The arbi-

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126 Supra, note 96.
129 Ibid. at 278.
trator made an allowance of ten percent of the value of the remaining land for injurious affection caused by the elimination of on-street parking and an altered traffic pattern which inhibited access.

*Wilson v. Ontario Hydro* involved the expropriation of a hydro-electric transmission line easement on which was placed five towers covering a seventy-acre strip, on average 190 feet wide, through the middle of a 300-acre residential country estate.\(^{131}\) The towers were 2,000 feet from the residence but visible from it and other parts of the property. The owner’s appraiser reported on a series of eight purchases and resales of properties over which Ontario Hydro had expropriated an easement for earlier sections of the same transmission line. In each case Hydro first expropriated the easement. It then purchased the entire property following registration of the easement. Finally it resold the entire property subject to the easement to another party. Hydro objected to the admission of this evidence by the former Ontario Land Compensation Board. The Ontario Divisional Court upheld the admission. The deeds representing the transactions were in evidence before the Board and included statements in the affidavits of value as to the opinion of Hydro itself as to market value. These represented some evidence, which the Board was entitled to receive, that the expropriation affected the value of the remaining land.\(^{132}\) The Board used this evidence not to establish the market value of the subject property but to ascertain whether or not there had been:

a pattern of market value reduction due to the impact of high voltage transmission lines. If this “pattern” were applied to the claimant’s property it would constitute a measure of injurious affection.\(^{133}\)

The appraiser claimed that the pattern showed a fifteen percent drop in market value. However, the Board had regard to the possibility of “extraneous elements” in the acquisitions and sales and therefore held that compensation for injurious affection based on only a five percent reduction should be awarded in the instant case. The mathematics of *Wilson* were as follows:\(^{134}\)

\[
\begin{align*}
\text{Market value of subject property:} & \quad \$1,250 \text{ per acre} \\
\text{Residual value of easement:} & \quad 25\% \\
\text{Total acreage:} & \quad 301.8 \text{ acres} \\
\text{Less easement acreage:} & \quad 17.173 \text{ acres} \\
\end{align*}
\]

\[
284.627 \text{ acres} = \text{remainder}
\]

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\(^{131}\) *Supra*, note 9.

\(^{132}\) *Wilson v. Ontario Hydro*, *supra*, note 9 at 294 (Ont. Div. Ct.).

\(^{133}\) *Wilson v. Ontario Hydro*, *supra*, note 9 at 174 (Ont. L.C.B.).

\(^{134}\) *Ibid.* at 175.
(1) Market value of remainder
284,627 × $1,250 = $355,783.75
Injurious affection damage at 5%
= $17,789
(rounded to $18,000)

(2) Market value of easement acreage
$17,173 × $1,250 × .75 = $16,099.69
(rounded to $16,100)

Total compensation (1) & (2)
Injurious affection to remainder $18,000
75% of market value of easement acreage $16,100

$34,100

Similarly in Toad Hall Farm Inc. v. Ontario Hydro, seven sales and resales by Ontario Hydro were used to establish injurious affection.\textsuperscript{135} Hydro had purchased larger parcels than required for easement purposes. The lands were later resold to the public subject to Hydro's easements involving towers and cables. In Toad the transmission line itself and the towers were not on the easement expropriated from the claimant, except for a short distance. The Board allowed three percent of the market value of the remainder for injurious affection.\textsuperscript{136}

However, percentage figures used to determine severance and injurious affection damages to the remaining land must not be arbitrary ones. This is shown in the cause célèbre of Gardiner Burton Agencies Ltd. v. Nova Scotia Power Corp., which involved the expropriation of a part of a motel property at Aulds Cove, Antigonish County, Nova Scotia.\textsuperscript{137}

The authority expropriated a 16,000-square-foot portion of a sandbar and erected on it the largest transmission tower in Nova Scotia to carry power lines across the Strait of Canso. The tower is equipped with stroboscopic lights which flash continuously and are not shielded from ground level. The tower is 400 feet high and although located 400 feet from the main motel block constitutes "an overwhelming

\textsuperscript{135} Supra, note 9.
\textsuperscript{136} For details see (1982) 25 L.C.R. 373 at 384 (Ont. L.C.B.).
presence". Upon approaching the motel "one has the illusion that it is located directly underneath the tower." Its placement "made a hideous change in what was formerly a uniquely attractive site".

Mr. Justice Burchell rejected the approach of the Nova Scotia Expropriations Compensation Board, which had determined the amount of compensation for injurious affection by taking 12½ percent of the "before" value ($440,000) of the whole property (excluding the lands actually expropriated) or $55,000. The Court held that compensation for injurious affection had to be measured by accepted appraisal techniques and not by the selection of an arbitrary percentage figure such as the one applied by the Board. In the instant case, the "before and after" method, using the income approach, should have been used and on the evidence the owner was entitled to compensation for injurious affection in the sum of $187,000.

Sometimes a statute will set out the way in which compensation for injurious affection must be determined. For example, the Alberta Municipal Government Act provides for compensation where a municipality causes injurious affection to lands immediately adjacent. Section 137(4) limits the amount payable to a sum not exceeding the difference between the appraised value before and after the exercise of the municipality’s powers, plus not more than ten percent of the difference so determined. It has been held that the ten percent allowance is a "discretional surcharge", a consequential award, not a primary one" and that the onus is on the claimant to make a case for the awarding of the ten percent.

VI. COMPENSATION FOR FIXED FARMING COSTS

Compensation for fixed costs is either an aspect of injurious affection or of disturbance damage. In Alberta it is usually considered under the heading of "incidental damages", which is a specific item under s. 56(b) of the Expropriation Act. In Manitoba it is awarded as an item of disturbance damage.

138 Ibid. at 20.
139 Ibid.
140 Ibid. at 21.
141 Ibid. at 27.
142 R.S.A. 1980, c. M-26, s. 137.
144 Beierbach v. City of Medicine Hat (1982) 24 L.C.R. 97 at 104 (Alta. C.A.) per Clement J.A.
The determination of compensation for fixed costs is usually necessary in the case of partial takings from agricultural land where it is not feasible to replace the portion of the land taken. In such cases:

the remaining lands must bear the share of fixed costs of the farming operation which would otherwise be attributable to the lands so taken. The fixed costs relate to the cost of machinery and equipment required to operate the farm and costs of farm building and other similar improvements. 147

The leading case is Berry v. The Queen which involved the taking for highway purposes of eleven acres in fee simple from a mixed farm of 800 acres. 148 The Alberta Land Compensation Board accepted evidence that the fixed costs for machinery, equipment, farm buildings and similar improvements amounted to $20 per acre. It also concluded that a twenty year adjustment period was appropriate. The resultant sum was capitalized at five percent, based on evidence that the market indicated investors expected a rate of three to five percent. Accordingly, compensation for fixed costs amounted to $2,741.68, being the present worth of $220 (namely eleven acres at $20 per acre) capitalized at five percent for twenty years.

In Groten v. The Queen, 149 the Alberta Board set out the factors to be determined in applying the Berry formula. First, one must determine the amount of acreage taken which no longer bears its burden of fixed costs. In Groten 65.05 acres were taken, plus 2.7 acres of additional headland which were no longer usable for a total of 67.75 acres. Secondly, fixed or overhead costs per acre for the subject land need to be considered. On the evidence in Groten, the cost was $70 per acre. Therefore, the annual loss equalled 67.75 acres × $70 per acre for a total of $4,742.50. Further, a determination of the appropriate "capitalization" rate, in order to take the annual amount over a determined number of future years and discount the same to a present worth or value must be recognized. In Groten this was five percent. Finally, the time period during which the annual loss will occur is relevant. This is a matter of fact which depends on the facts of each case. This was twenty-five years in Groten.

In summary, compensation was determined in Groten by multiplying the annual loss of $4,742.50 "by a factor which will generate that sum of money in each year for the period and at the rate which

149 (1985) 33 L.C.R. 211.
has been selected” (twenty-five years and five percent). Thus
$4,742.50 \times 14.0939 = \$66,840.32 \text{ (rounded to } \$66,840).^{161}

In Johnson v. Department of Highways the Manitoba Land Value
Appraisal Commission explained that since 1981 its practice in deter-
mining disturbance compensation for fixed farming costs is to award
twenty percent of the market value of the land taken, notwithstanding
that farming costs are not particularly related to the market value
of the land.\textsuperscript{162} However, the twenty percent policy is not a fixed rule
and it is always open to either party to adduce evidence that more
or less than twenty percent should be awarded. In the instant case,
on the basis of evidence presented by the authority, compensation
was based on the actual per acre machinery costs ($33.30 per acre)
projected for ten years. The strip taken comprised 1.47 acres which
for the next ten years would have contributed $48.95 annually (1.47
\times $33.30). Assuming an interest rate of eight percent, $354.74 in-
vested at eight percent would enable the owner to apply each year,
for the next ten years, $48.95 towards fixed machinery costs. There-
fore the compensation payable for continued fixed farming costs was
$354.74.\textsuperscript{153}

VII. SET-OFF OF VALUE OF GENERAL OR SPECIAL
BENEFITS

As noted above,\textsuperscript{154} if the “before and after” method is used to deter-
mine compensation for a partial taking, the value of any general or
special benefits or advantages accruing to the remaining land as a
result of the works for which the partial taking was required, will be
taken into account automatically. This could result in the owner re-
ceiving compensation neither for the land taken, nor for any injurious
affection to the remaining land.\textsuperscript{155}

\textsuperscript{150} Ibid. at 223.
\textsuperscript{151} For other items of incidental damages and general disturbance see \textit{ibid.} at
231. For another application of the \textit{Berry} formula see \textit{Postman v. The Queen
\textsuperscript{152} \textit{Supra}, note 139.
\textsuperscript{153} \textit{Ibid.} at 191.
\textsuperscript{154} See \textit{supra}, text following note 69.
\textsuperscript{155} In \textit{Quebec Home and Mortgage Corp. Ltd. v. The Queen (1973) 6 L.C.R.
16 at 88 (F.T.O.T.)} vrd (1975) 8 L.C.R. 88 (Fed. C.A.), the value of the
expropriated property ($500,000) was totally offset by benefits received from
the construction of a highway. The case was governed by s. 49 of the former
Exchequer Court Act, R.S.C. 1952, c. 98, which provided for the set-off of
special or general benefits against compensation payable for land taken or
C.R. 19, “injurious affection” damage to the remaining parcels was totally
offset by accrued advantages.
If the summation method is used, then the set-off of general and special benefits can only reduce or eliminate any claim for injurious affection damages. Whether benefits can be set-off and, if so, whether such benefits include general as well as special benefits, are questions which can only be answered by examining any relevant legislation and the case law. The federal, Manitoba, Ontario, Nova Scotia and New Brunswick Expropriation Acts provide that a benefit can only be set-off against a claim for injurious affection to the remaining land. Benefits cannot be set-off against compensation payable for the value of the land itself or some other expropriated interest.

It is not clear whether the words "any advantage" in these sections are confined to special advantages and benefits or whether they include general advantages or benefits enjoyed not only by the remaining land but also by other lands in the neighbourhood from which there have been no partial takings. In *Starr v. Metro Toronto*, an arbitrator held that the Ontario set-off provision only applied to special benefits.

*West Kootenay Enterprises Ltd. v. City of Castlegar* involved the expropriation of a pipeline easement for a water-main. The arbitrator held that any advantage to the remaining land derived from the presence of the water-main (e.g., rendering the remaining land serviceable at an earlier date) and equally benefited other landowners who had not had land expropriated for the water-main. Accordingly, he did not apply the set-off provision in the British Columbia Municipal Act and distinguished an earlier decision of an arbitration board in *District of Delta v. Moss*.

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156 See *supra*, note 63, s. 25(2); *supra*, note 64, s. 32 (Man.), s. 23 (Ont.), s. 32 (N.S.), and s. 48 (N.B.).

157 The Alberta Expropriation Act, R.S.A. 1980, c. E-16 achieves the same result by a positive provision. Section 55 provides that in the case of a partial taking where, "as a result of the expropriation the value of the remaining land is increased, the owner is nevertheless entitled to the market value of the land expropriated".


160 R.S.B.C. 1979, c. 290, s. 544. The section provides:

The council shall make to owners, occupiers or other persons interested in real property entered on, taken, expropriated or used by the municipality in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages... necessarily resulting from the exercise of those powers beyond any advantage which the claimant may derive from the contemplated work.

Other portions of s. 544 were repealed by the *Expropriation Act*, S.B.C. 1987, c. 23, s. 98.

Sections 39 and 43 of the B.C. *Expropriation Act* provide that in the case of a partial taking, the market value of the expropriated land may be established by the "before and after method". However, in that event, the owner is entitled to no less than the market value of the portion taken. A formula in s. 39(3) prevents the absorption of any injurious affection by general or special benefits other than a special benefit arising from the construction or use of works by the expropriating authority.

VIII. THE IMPACT OF POLITICS ON COMPENSATION FOR RIGHTS OF WAY AND SURFACE RIGHTS

In *Siebens Oil & Gas Ltd. v. Livingston*, Mr. Justice McDermid, delivering reasons for judgment of the Alberta Court of Appeal, said:

When the cases and legislation concerning surface rights are considered it is apparent that there have been political overtones as to what an oil company should pay the surface rights owner. [emphasis added]

He noted that even where the owner of the minerals had reserved the right to work them, the legislature intervened and required compensation to be paid to the surface owner.

Originally in Turner Valley when the first oil well was brought into production in the 1930s there was a standard rate for a ten-acre parcel of $500 for the first year and $100 annually after that. As the industry expanded, the figures increased. Surface owners demanded more and more, to the point that it was even argued that the operator should be obliged to pay a gross royalty.

In *Cabre Exploration Ltd. v. Arndt*, Mr. Justice Dea noted that although it was logically inconsistent to require a mineral owner to pay for a right of entry which at common law he already owned, that is what the surface rights legislation requires, and "logic must bow to the direction of the Legislature." Against this political background the Court in *Siebens* concluded that, if a pattern of settlements by negotiations is established in a particular district, it should normally

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162 S.B.C. 1987, c. 23.
163 Supra, note 98.
164 Ibid. at 36.
165 Ibid.
166 Ibid.
167 Supra, note 18 at 199 (L.C.R.).
168 Ibid. at 200.
be determinative in other similar cases because “the oil companies and landowners have the better judgment as to what should be paid in their own interests.”

In 1973 the Alberta Energy Resources Board issued 3,647 licences which resulted in 334 applications to the Surface Rights Board for rights of entry. In 1980 the comparable figures were 7,833 licences and 1,413 applications. This increased work load of the Board was one reason for the establishment of a legislative Select Committee on Surface Rights in May 1980.

The Committee’s terms of reference included a review of the current levels of compensation to landowners and recommendations for means by which the levels could be adjusted. The Committee reported in November 1981. Its recommendations as to compensation for surface rights were partially implemented by the 1983 Surface Rights Act. The Committee recommended that an operator be required to give written notice on every fourth anniversary of the right to re-negotiate the rate of compensation for the subsequent term of a surface rights lease, and to make a once only “upfront payment to the landowner in recognition of the force-take aspect of the operator’s activities”. The Report also recommended that the Surface Rights Board, in determining compensation, be required to consider the market value of the land granted and the per acre value of the titled unit from which the surface lease is taken. Finally there were recommendations as to residual-reversionary value and interest.

In summary, under ss. 19 and 25 of the Alberta Surface Rights Act the surface owner is entitled to a one-time entry fee of $500 per acre for the land granted to the operator for a maximum of $5,000 per titled unit. The owner is also entitled to compensation for various factors. The Act requires that consideration be taken of the market value of the land granted and the per acre value of the titled unit from which the surface lease is taken. Finally there were recommendations as to residual-reversionary value and interest.

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160 Supra, note 98 at 37 (L.C.R.).
172 Supra, note 170 at 15.
173 See 1983 Act, s. 27.
174 The Report recommended a payment of $1,000 per acre with a maximum payment of $5,000 per titled unit (supra, note 170 at 19). Section 19 of the 1983 Act provides for a one-time “entry fee” of $500 per acre with a maximum fee of $5,000 per titled unit in addition to any other compensation payable in respect of the right of entry.
175 Section 25(2) of the 1983 Act provides that these matters “may” be considered by the Board.
176 See s. 25(2) of the 1983 Act.
177 See s. 25(9).
value of the land granted, the per acre value of the titled unit in which the land granted is located and the loss of use of the land granted. Further, the adverse effect of the area granted on the remaining land and the nuisance, inconvenience and noise that might be caused by the operator's operations should be considered. And finally, compensation calculations may require an assessment of damage to the land granted caused by the operator's activities or any other factors considered proper in the circumstances. Additional compensation necessary to relocate a residence may be necessary for the surface owner. Compensation may also be claimed for damages to land other than the area granted or loss or damage to livestock or other personal property both caused by the operator's activities or the time spent or expense incurred in recovering livestock that strayed due to an act or omission of an operator.

The Report of the Commission of Inquiry Into Surface Rights in Manitoba led to the enactment of the Surface Rights Act. In most respects the Report and Act adopted the general provisions of the Alberta and Saskatchewan surface rights legislation. The Act provides for compensation as follows. Section 26 provides:

(1) For the purpose of determining the compensation to be paid for surface rights acquired by an operator, the board shall consider the following matters:

(a) The value of the land having regard to its present use.
(b) Loss of use of the land or of an interest therein.
(c) The area of land that is or may be permanently or temporarily damaged by the operations of the operator.
(d) Increased costs to the owner and occupant, if any, by reason of the works and operations of the operator.
(e) The adverse effect of the right of entry on the remaining land by reason of severance.
(f) Payment or allowance for nuisance, inconvenience, disturbance or noise to the owner and occupant, if any, or to the remaining land, that might be caused by, arise from or is likely to arise from or in connection with the operations of the operator, and damage, if any, to any adjoining land of the owner, and including damage to or loss of crop, pasture, fence or livestock and like or similar matters.
(g) The nature, type and quantity of any machinery equipment and apparatus to be established, installed or operated by the operator.
(h) Where applicable in the opinion of the board, interest at a rate prescribed by the regulations.

178 January 1982. The sole Commissioner was Mr. R. A. L. Nugent, Q.C.
(i) Any other matter peculiar to each case, including the cumulative effect, if any, of the surface rights previously acquired by the operator or by any other operators under a lease, agreement or right of entry existing at the time of acquisition of the surface rights with respect to the lands.

(j) Such other factors as the board deems proper, relevant and applicable.

A very extensive and interesting account of past and current problems concerning compensation for surface rights is found in the reasons for judgment delivered by Associate Chief Justice Miller in *Dome Petroleum Ltd. v. Richards*. This case dealt with eighty appeals from decisions of the Surface Rights Board concerning rights of entry in the Grande Prairie region of Alberta. Twelve of the eighty cases were selected for purposes of argument, as representing various kinds of situations typically facing a landowner and an oil company where rights of entry are involved. One situation, for example, concerned whether the well site was situated on the corner of an acreage or in the middle of it.

Mr. Justice Miller recognized that much of the difficulty in surface rights cases “arises out of the highly political nature of the basic conflict between two of Alberta’s major industries, namely, the energy and agricultural groups”. The difficulty from a legal point of view was that a surface rights case “does not fit neatly within any well-established legal packages”. The transaction is not a fee simple sale or a commercial lease. He concluded that the underlying intention of surface rights legislation is twofold. The first is to get landowners and operators together to resolve their compensation and operational problems between themselves to their mutual satisfaction. The second is to have a Board quickly determine compensation where agreement is not possible and to provide the background atmosphere and conditions which will encourage settlements.

Against this political background, and as part of it, there have been two interrelated developments. The first is the emergence of groups of landowners, organized by lawyers and others, who band together to bargain as to surface rights compensation on a collective basis with representatives of the oil and gas companies. As already noted, the resultant “area agreements” may or may not be regarded as deter-

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180 Supra, note 116.
181 Ibid. at 52.
182 Ibid. at 57.
183 Ibid. at 61.
minative of any disputed cases in the same or comparable districts.\textsuperscript{184}
The second is the emergence of the concept of "global" awards, which is a package of compensation instead of compensation awarded for the specific heads of a claim. Clearly, lawyers and appraisers involved in surface rights cases should be aware of these developments and of their obvious impact on the appraisal function.

\textsuperscript{184} See \textit{supra}, text surrounding note 116 and following.