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Alexander J. Black

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Co-location and Convergence of Public Utility Easements

*by Alexander J. Black**

- I. Introduction.
- II. Canada's "Convergence Report."
 - A. RE-REGULATION AND COMMODITIZATION.
 - B. CO-LOCATION: COMPELLING ACCESS TO SUPPORT STRUCTURES.
- III. Eminent Domain and Stewardship of Utility Easements.
 - A. LEGISLATION & EASEMENT DEED BOILERPLATE.
 - B. MULTIPLE-PIPELINES AND "CROSSING REGULATIONS."
- IV. Administrators of the Incorporeal Right of Way.
- V. Co-location and Burdens on Servient Land.
 - A. INTERFERENCE WITH "ACQUIRED RIGHTS."
 - B. VALUING THE EASEMENT UPON A SECOND TAKING.
 - C. ZONING, ECONOMICS AND PUBLIC UTILITY LAW.
- VI. Evolution Versus Revolutionary Use of Easements in the United States.
- VII. Sharing the Hegemony: NAFTA & Telecom Competition.
- VII. Conclusion.

I. Introduction.

In Greek mythology, Stentor was the herald in the Trojan War with the voice of ten men. In Canada, a stentorian call is being made for the efficient use of public utility easements. This article describes the economically efficient and legally permitted uses of easements for natural gas pipelines and other types of utilities. It discusses the inclusion of fiber-optic cable on a pipeline right-of-way and the multiple use or access to the support

* Executive Director; Centre for Regulatory Affairs; The Van Horne Institute for International Transportation and Regulatory Affairs; University of Calgary; Alberta. BA (Hons) Lakehead University (1982), LL.B, Dip. Petrol. Law, University of Dundee, Scotland (1984-85), LL.M, University of British Columbia (1988), Lecturer-in-Commercial Law, University of Glasgow, Scotland (1988-1996), Visiting Professor, Cornell Law School (1993); member of the Alberta and Ontario bars.

structures of other utility easements. Indeed, the process of co-location of essential utility services is being driven by the convergence of market forces and technological advancement in North America.

Accordingly, a developing legal doctrine is challenging the conventional common law conceptions of private property use and public law stewardship of utilities. For instance, federally regulated pipelines in Canada have the legislative power to operate telecommunications systems, such as fiber optics, on their rights-of-way for their own use. The economic efficiency thesis of this new legal doctrine means that they may operate telecommunications for commercial use. Under this nascent doctrine, public utilities are administrators of their easements, having a wider range of public utility land use rights than was previously thought possible.

Increasingly, the issue in Canada is less what right a utility has over its easements; rather, the issue is the extent that third parties have a right to compel a utility to grant them access to the utility's easement support-structures. Co-location of fiber optics on a pipeline is an economic and allocative efficient use of property. As the Canadian utility sector deregulates and re-regulates, the compelling issue therefore concerns the rights of third-party users of the utility easements. And as administrators of their easements, utilities allocate access to essential services. This allocation process involves a question of construction of the enabling legislation. It also concerns construction of tortuous easement deeds, whether they contemplate use that was or was not necessarily contemplated at the time of grant.

The extent of these correlative rights has only been alluded to by the National Energy Board of Canada (NEB), the tribunal charged with stewardship over inter-provincial and international pipelines and electricity transmission systems. While the NEB has considered the issue of multiple use of rights-of-way in relation to the routing of new pipeline facilities, it has not yet properly addressed the issues of co-location and convergence. Therefore, some analogy may be made to the Canadian Radio-television and Telecommunication Commission (CRTC) and its policy of access to utility support structures. In the energy industry, modern telecommunications technology could be used to move forward to real-time¹ pricing and make valve control responses more efficient in the face of potential incidents. Since the cost of installing a single strand of fiber sufficient for a pipeline's needs is not marginally different than installing multiple strands, the unused ("dark fiber") capacity has valuable potential. For instance, in 1985, the Williams Pipeline Co. installed 11,000 miles of fiber-optic cable inside its unused pipelines, aided by a small plastic device invented to pull fiber through pipelines without excavations. Nine years later, Williams sold its network service operations for \$2.5 billion.²

This article concerns the efficient use of pipeline easements and identifies the new legal doctrine of co-location. It explains the present *lacunae* in the law due to an unreconciled tension between public law regulation of utilities and the private nature of easements. It also attempts to reconcile this tension, suggesting that pre-existing utility has a right and obliga-

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1. Real-time databases are, by definition, updated continuously. Real-time processing involves instantaneous implementation of the desired changes in the database. Examples of real-time databases familiar to the legal community are Quicklaw, Westlaw and LEXIS-NEXIS.
 2. Andrew C. Barrette, *Tilting Toward Telephony: How Electric and Gas Companies Can Leverage Their Systems for a Changing Market*, 33 NO. 11 PUB. UTIL. FORT. 26 (1995).
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tion of stewardship over its easement. For example, when railways came into existence, a general legal rule developed, called the "Junior-Senior Rule"³ where the newcomer had to compensate the existing utility for the costs of crossing. The old Board of Railway Commissioners accordingly based their decision in ordering a crossing agreement since this was less intrusive or offensive to the proprietary interest of the senior utility.

As public (or administrative) law developed in Great Britain and Canada from the 1920s, statutory tribunals like the NEB developed their own peculiar policies in order to meet the needs of the industry served. These statutory tribunals have implemented legislative regulations to govern the manner and form of utility crossings. These tribunals have also made decisions themselves or interpreted court decisions concerning the use of utility easements. However, these disparate decisions have never been reconciled with the common law property rights of easement. Instead of the present pernicious practice of compartmentalization, regulators and courts ought to harmonize the rules concerning public utility stewardship of easements.

II. Canada's "Convergence Report."

In the United States, electric utilities are increasingly diversifying into the local and long distance communication market. In Canada, action has been less pronounced due in part to a slower pace of industrial change and a relative lack of competition in the communications market. This is changing as local utilities must go this route in order to survive. New developments are occurring in automatic meter reading, wireless phone systems, remote terminal units, and supervisory control and data acquisition (SCADA) systems. For example, UTILiNK is a business that installs dark (or unused fiber-optic cable⁴) throughout the electric utilities jurisdiction and a one-time connection from the providers "point-of-presence" (POP), which is otherwise usually found at the outskirts of a city where the municipality connects with long distance phone companies like AT&T and Sprint. The utility can then access a middleman helping the telecommunications provider reach businesses and households via the utilities-owned fiber system. In an era of increased competition, customers are more likely to stay loyal to their utility provider if it can provide them with a wider range of services, including local phone and Internet service. At the same time, these utility providers could use these revenues to lower the cost of their principal services and enhance competitiveness in the North American marketplace.⁵

3. See, e.g., *St. Eugene de Guigues v. C.P.R.* [1937] S.C.R. 451.

4. M. Moss, *New Fibers of Urban Economic Development*, 4 PORTFOLIO: A Q. REV. TRADE & TRANSP. 11-18 (1991). Long distance communications systems increasingly use fiber-optic wires. These have several advantages over traditional copper wire: large carrying capacity, high speed, more security, and higher signal strength. Fiber systems tend to connect major communications hubs because they are not easily spliced and hence not desirable for connecting multiple lateral sites. Fiber systems tend to be installed along existing rights-of-way, whether rail, water or highways. *Id.* The growing use of fiber-optic systems thus tends to strengthen the major existing telecommunication concentrations and therefore the existing hierarchies.

5. Michael McMillan, *Toronto Company Bridges the Gap Between Utilities and Fibre Optic Technology*, *ELECTRICITY TODAY*, Oct. 1997.

Part of the public utility policy justification for co-location is from the CRTC's Convergence Report.⁶ The CRTC proposed that "measures be developed to ensure that all telephone and cable subscribers have the freedom to connect the inside wire to the systems of whichever suppliers of service they choose."⁷ The CRTC stated that the perceived need for transitional protection of the core cable business stems essentially from concerns about the market power of the telephone companies and any head start they may obtain in packaging telephony and entertainment. The CRTC set out proposed measures,⁸ which would permit the customer to acquire and own the inside wire used to receive broadcasting services. Indeed, the Government's Convergence Policy Statement⁹ stated that the objective is towards implementing competition in local telephony by establishing a framework for interconnection, unbundling, co-location, rate restructuring, and interim number portability.¹⁰

Furthermore, in order to be effective and efficient, interconnection between the local telecommunications facilities of Canadian carriers should allow customers of one local service provider to complete calls to customers of another local service provider in a transparent fashion. The unbundling of the incumbent telephone company's local network makes certain telephone company facilities available for competitors' use. Efficient interconnection and an appropriate degree of unbundling are both important for the successful implementation of competition in local telephony.¹¹ Use of pipeline easements for fiber-optic telecommunication is technically possible and economically practical. More importantly, such use is consistent with the process of utility re-regulation.

A. RE-REGULATION AND COMMODITIZATION.

Commoditization of telecom, natural gas, and electricity transportation involves the evolution of a property right. It is a relatively new expression reflecting public utilities that are increasingly competitive and that require re-regulation. They are so competitive that deregulation is warranted because a fully functioning market offers the best protection to all participants. Commodities are specialized objects available to be exchanged; they are fungible. Most people think of commodities as being physical objects like pork bellies traded on the stock market, or rights such as warrants, yet the provision of services have characteristics of a commodity.¹² Increased choice in the provision of essential public services means that providers are not unique, and that another can be an effective substitute.

Like the sale of generic prescription medicines, there is a terminal commoditization of electricity and natural gas transportation where further exchange is precluded by law.

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6. Canadian Radio-Television and Telecommunications Commission [hereinafter CRTC], Report to the Government entitled *Competition and Culture on Canada's Information Highway* [hereinafter *Convergence Report*], (May 19, 1995).
 7. *Id.*
 8. Public Notice CRTC 1997-25.
 9. *Id.* (citing Government's Convergence Policy Statement (Aug. 6, 1996)).
 10. *Id.*
 11. Applications by Telephone Companies to Carry on Broadcasting Distribution Undertakings, Broadcasting Public Notice CRTC 1997-49 (May 1, 1997).
 12. Indeed, "[e]ducation is a commodity, like Pepsi-Cola or alligator shoes, and freedom is a privilege fully available only to those who can afford it." LEWIS H. LAPHAM, *MONEY AND CLASS IN AMERICA* 22 (1988).
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For instance, the publicly recognized commoditization of natural gas prices operates in conflict with complex schemes for valuation of gas transportation prices, and interest groups. The NEB directly regulates this conflict as opposed to the indirect regulation provided to the general economy by antitrust authorities. The former type of economic regulation tries to maintain the conditions and not the results of competition by prohibiting certain undesirable forms of conduct. Conversely, direct regulation is flawed, perhaps more so than competition tempered by antitrust oversight because it relies on the judgment of non-industry participants—the NEB—to make decisions as surrogates for the marketplace. The over-regulation of an industry also shifts scarce resources away from activities that increase competition, productivity and innovation, and capital investment.

Assessing the effectiveness of regulation recognizes that both the regulatee and the regulator go through different stages of growth and development—a growth cycle. These include its beginning, its youth, where social responsibility strongly favored ratepayers. It seems somewhere between maturity, as regulatory effectiveness peaks, and now old age, where it is faced with difficult choices of imperfect regulation and imperfect re-regulation.¹³ A corollary is that different theories of regulation have different merits at different stages of the life cycle. This article advocates that changes in the marketplace require regulatory changes to accommodate the efficient use of utility easements so as to promote the commoditization of essential utility services.

B. CO-LOCATION: COMPELLING ACCESS TO SUPPORT STRUCTURES.

Parliament has recognized the need for a scheme of co-location, making such provision in the Telecommunications Act¹⁴ in order to facilitate competition in that industry. Although the CRTC has decided in favor of a policy of interconnection, unbundling, and co-location, it is struggling to implement this policy. In particular, the CRTC has considered¹⁵ Access to Rights-of-Way and Support Structures saying that “[r]ights-of-way and similar arrangements allow carriers to construct, maintain and operate transmission structures and cables on public and private property.”¹⁶ Some parties went further, submitting that access to rights-of-way and other similar arrangements should be considered as essential facilities.¹⁷

The Commission noted that the Telecommunications Act provides a comprehensive framework for the provision of access to public and private property, including support structures. For instance, § 43(5), Access by others, provides that:

Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.¹⁸

13. See JAMES C. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITIES RATES* 556 (2d ed. 1992).

14. S.C. 1993.

15. Local Competition; Telecom Decision CRTC 97-8, Canadian Radio-Television and Telecommunications Commission, May 1, 1997.

16. *Id.* at 117.

17. *Id.*

18. Telecommunications Act 1993, § 43(5).

Ostensibly, once an owner of a private transmission facility provides telecommunications services to the public for compensation, it would become a telecommunications common carrier and be liable to provide access to others, on fair commercial terms, to its supporting structure. Parliament defined telecommunications common carrier as a person who owns or operates a transmission facility (first criterion) used by that person or another person to provide telecommunications services (second criterion) to the public for compensation (third criterion).¹⁹ Public Telecommunications Transport Services (Telcos) is one example of the common carrier or public switch telephone provider of basic services²⁰ referred to in the Act. Consequently, resellers²¹ who do not have basic transmission facilities should not be subject to Commission regulation.

While, as the Canadian Cable Television Association (CCTA) noted, access to existing private rights-of-way will be subject to the terms of the original licence granting such rights-of-way, all Local Exchange Carriers (LECs) will have the ability to negotiate new public and private rights-of-way and other arrangements.²² Where negotiations fail to achieve access by a LEC to private or public property on suitable terms and conditions, the Telecommunications Act provides a framework by which such access might be obtained. In light of these considerations, the CRTC considers that access to rights-of-way and similar arrangements should not be treated as essential facilities, and that no specific access to such arrangements should be mandated at this time.

Co-location refers to the rates, terms, and conditions under which competitors of the incumbent telephone company may terminate their facilities at the telephone company's central offices. Co-location refers to an arrangement whereby customers of the telephone company can terminate their own transmission facilities in the telephone company's central office. Physical co-location allows competitors to physically terminate transmission facilities in the telephone company's central office. Virtual co-location allows competitors to terminate facilities at a point outside the central office, but in all material aspects provides the same service at the same rate as would physical co-location.²³ Thus, the CRTC's Convergence Report²⁴ called for "measures [to] be developed to ensure that all telephone and cable subscribers have the freedom to connect the inside wire to the systems of whichever suppliers of service they choose." In order to help implement this freedom of connection, the CRTC encourages²⁵ the cable and telephone industries to explore cooperative opportunities for the shared use of network infrastructures, particularly where this may be key to building the information highway in smaller markets in Canada.

More recently, the Convergence Policy Statement²⁶ concluded that, with regard to the wiring inside a consumer's premises, "the objective should be to ensure that consumer

19. *Id.* § 2(1).

20. Increasingly, Telecom providers must have regard to the Broadcasting Act because of the increased "virtual reality" interaction of data.

21. Exemption of Resellers from Regulation, Telecom Public Notice CRTC 93-62, Canadian Radio-Television and Telecommunications Commission, Oct. 4, 1993.

22. *Id.* at 118.

23. Regulatory Framework Co-location, Telecom Public Notice CRTC 95-13, Mar. 20, 1995 [hereinafter Co-location Notice].

24. Convergence Report, *supra* note 6.

25. Public Notice CRTC 1993-74.

26. Convergence Policy Statement of Aug. 6, 1996, *supra* note 9 (citing Public Notice CRTC 1997-25).

choice is not limited but rather gives the consumer the ability to obtain services from any combination of suppliers they choose, without unnecessary inconvenience." This promotes the idea behind comparably efficient interconnection (CEI). CEI is another term used to refer to arrangements whereby competitors are provided with access to the local network that is equivalent or comparable to that provided to the telephone company's competitive services. CEI requires that the telephone companies unbundle the components of the local network used to provide access to its long distance services and make these components available to competitors.²⁷ As competition and convergence intensifies in the utility industry, litigation may shape the extent of physical co-location.

This shaping process will have to recognize that Canadian public utility tribunals have previously considered the matter and have indeed authorized it. In *Ottawa Cablevision, Ltd. et al.* and *Bell Canada*,²⁸ a cable company was denied the joint use of Bell Canada's poles or conduits. The tribunal lamented the need for up-to-date legislation to regulate the development and provision of service and facilities by all telecommunications carriers.²⁹ Three years later, the Canadian Transport Commission (CTC) appeared to reverse itself.

Unable to obtain permission directly from Bell Canada, in 1975, Transvision sought leave from the CTC to carry certain cables across or near the structure of Bell Canada in the Magog area of Quebec. The CTC noted that Bell was incorporated with authority to construct, erect, and maintain its lines, wires, and poles along the side of, across, or under highways or other public places, provided that Bell did not interfere with the public right of traveling on or using such highways.³⁰ Furthermore, the CTC stated:

We believe that when one devotes one's property to a use in which the public has an interest, one, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest created.³¹

Transvision held a CRTC licence to provide a CATV service and sought to place cables or wires of the type covered by section 317 of the Railway Act near the lines or wires of Bell. The CTC's only reasonable and practical way of effectuating this was by means of attachment to Bell's poles located in that area. Accordingly, the CTC ordered that Bell permit Transvision to affix the cable subject to an annual per pole rental charge as compensation to be agreed upon between the parties for the use of pole space. Failing agreement, the CTC would decide the matter of compensation.³²

In *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.), Ltd.*,³³ a labor arbitration board found that BC Tel was in violation of its collective agreement with TWU when it permitted cable companies to install cables on BC Tel's support structure. At the time of its decision, the CRTC clearly had the jurisdiction to require telephone companies to allow cable companies to use their support structure, and, by virtue of §§ 335 and 340

27. Telecommunications Act, C.R.C., CRTC 94-19 (1994) (Can.).

28. [1973] CTC 522 Canadian Transport Commission.

29. See *id.* at 538.

30. Transvision (Magog), Inc. v. Bell Canada, [1975] CTC 463.

31. *Id.* at 485.

32. *Id.* at 486.

33. [1995] S.C.R. 739, 125 D.L.R. (4th) 443, 183 N.R. 184 (S.C.C.).

of the old Railway Act,³⁴ to regulate the terms of support structure agreements (SSAs) between the telephone companies and cable companies. Therefore, the Supreme Court of Canada upheld the decision of the CRTC.

The CRTC also had jurisdiction to determine which company, the cable company or the telephone company, would be responsible for the installation of a cable company's facilities on the telephone company's support structure. This jurisdiction was held to be a natural extension of the CRTC's jurisdiction to regulate tolls and tariffs. "Indeed, the determination of who is responsible for the installation of the cable facilities is a necessary component of the regulation of the prices charged by the telephone companies for cable company access to their support structure."³⁵ The Supreme Court of Canada also held that a strong element of curial deference should be given to decisions of the CRTC.³⁶

*Ontario Hydro v. UMG Cable Telecommunications, Inc.*³⁷ was a proceeding heard by the Federal Court of Appeals in May 1998. In that proceeding, Ontario Hydro appealed a decision of the CRTC, averring that the CRTC erred in holding that the words "transmission line" in § 43(5) of the Telecommunications Act included transmission lines that are used to distribute electrical power. Hydro submitted inter alia that the CRTC erred in holding that the support structures contemplated by this provision include the supporting structures owned and operated by provincially regulated public utilities like the applicant. At issue was whether the CRTC exceeded its jurisdiction by applying § 43(5) to the applicant.³⁸

Under its provincial enabling legislation, Ontario Hydro "may contract with any corporation, firm or person for joint ownership or joint use of works or for rights to use the works . . ." and for the purposes of this subsection "works" include telephone and telegraph lines and other communication works.³⁹ Hydro suggested that the intent of § 43(5) was to provide a remedy for a person who provides a public service and cannot gain access to the distribution facilities of a telecommunications company that is within the jurisdiction of the commission, and that this remedy is not available against electrical utilities.

In *Ontario*,⁴⁰ the CRTC held that "supporting structure" as referred to in § 43(5) of the Telecommunications Act includes the supporting structures owned and operated by provincially regulated public utilities such as Ontario Hydro.⁴¹ One of the reasons provided by the CRTC was that given the public interest in the telecommunications industry, this section should be read as including electrical utilities. The CRTC outlined the issues relating to the joint use of support structures that were addressed by the local networks convergence committee as early as 1991. According to the committee's report, the sharing of the electrical power utilities support structures will benefit society economically, environmentally, and esthetically.⁴² According to the CRTC, in order to promote the orderly

34. Railway Act, R.S.C. ch. R-3, §§ 335(1) 1985, [rep. & sub. 1991, c. 11, s. 86], 340 [am. 1991, c. 11, s. 87].

35. *Id.* per C.J. LAMER, at para. 38, p. 49-81, DB SCJ (Quicklaw report).

36. British Columbia Tel. Co. v. Shaw Cable Sys. (B.C.), Ltd. [1995] S.C.R. 739, 125 D.L.R. (4th) 443, at 454, 183 N.R. 184 (Justice L'Heureux-Dubé).

37. Memorandum of Applicant, Ontario Hydro v. UMG Cable Telecomm., Inc., (F.C. 1997) (file A332-97).

38. *See id.*

39. Power Corporation Act, R.S.O., c.p.8 § 44(3) (1990) (Can.).

40. *See id.*

41. CRTC decision on Application for Interim Relief dated Mar. 27, 1997, file: 4760-215(L), page 22.

42. *Id.* at 18-19.

development of the telecommunications system in Canada, this provision should be given a broad interpretation to include supporting structures of electrical transmission lines.⁴³

Accordingly, the Federal Court of Appeal dismissed Ontario Hydro's application for leave to appeal from the interlocutory decision of the CRTC. This decision appears to follow foreign litigation and has far-reaching implications for public utilities. For instance, the First District Court of Appeal held that under Florida law, telephone and telegraph companies have the power of eminent domain to place fiber-optic cable underground within the rights-of-way of railroads without obtaining permission from, or paying compensation to, the underlying landowners. The court reasoned that there has been a nexus between railroad and commercial telegraph facilities throughout the nineteenth and twentieth centuries.⁴⁴

Some see mandatory access regulations as creating a perennial right of content control through the one-time grant of a public right-of-way in the government.⁴⁵ U.S. commentators say, ironically, that mandatory access laws that force telecommunication companies to be the mouthpieces of others are required by the First Amendment. Proposed mandatory access laws could burden telecommunication entities with prohibitously high costs. On the other hand, such companies may not be able to build rapidly a comprehensive and advanced information infrastructure if they do not receive a return on their investment. Yet builders of these new networks will use real public property for laying copper wires, coaxial cable, and fiber-optic cable, and will use previously unused electromagnetic frequencies. The obligation to reserve capacity is arguably a reasonable quid pro quo for the right to use available public rights-of-way.

To some extent, the public has a right to demand compensation in the form of public access to such networks by entities that provide substantial benefits to the public.⁴⁶ Convergence of two energy sources, natural gas and electricity, may eventually include other products, such as water, telecommunications, energy management, and meter reading. Convergence increases the range of financial services offered to customers, provides them with services that meet their specific needs, and gives them more for their money. Energy has become a traded commodity, and trade elicits innovation requiring accommodation by the regulatory regime.

III. Eminent Domain and Stewardship of Utility Easements.

This section attempts to provide a theoretical basis for the creation of a new doctrine of public utility easements, contemplating co-location, and reconciling correlative rights. In order to reconcile the tension between the private law nature of easement deeds and public law based utility regulation, it is necessary to describe their interrelation. Because

43. *Id.* at 12.

44. Paul Stephen Kimsey, *Eminent domain: Florida statutes, section 362.02 gives telephone companies the power of eminent domain to place fiber optic cable underground on land where railroads have rights-of-way without obtaining permission from or paying compensation to land-owners*. Davis v. MCI Telecomm. Corp., 606 S.W.2d. 734 (Fla. 1st DCA 1992), 23 STETSON L. REV. 565 (1994).

45. See Andrew D. Auerbach, *Mandatory Access and the Information Infrastructure*, 3 COMM. LAW CONCEPTUS 1, 10 n.102 (1994).

46. See *id.*; citing Congressional debates, H.R. REP. No. 367, 103D CONG., 2D SESS. 13.

easements are an incident of common law, there is a general tendency of the common law to decide the case first and determine the principal afterwards. Often lawyers see how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*.⁴⁷ Only after a series of determinations on the same subject matter does it become necessary to reconcile the cases by a true induction, a principle that has until then been obscurely felt. This initial reconciliation is typically modified more than once by new decisions before the general rule takes its final shape. Indeed, a "well-settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."⁴⁸

However, public utility stewardship involves a strong dose of administrative law. In settling the new legal doctrine concerning public utility easements, it helps to remember that the common law had, until relatively recently in its history, an antipathy towards administrative law. In England, and by persuasive precedent proxy in Canada, a false conclusion existed that there could be no administrative law without a separate system of administrative courts.⁴⁹ Until as late as the 1930s, conservative English judges congratulated themselves on a system of common law that avoided the perceived inadequacies of the civilian French *droit administrative*.⁵⁰

Accordingly, the unreconciled tension between the common law of easement and the public law concerning utility regulation is reflected as late as 1920 in Canada.

The term 'expropriation' is a somewhat new one in the literature of the law. Sweets Law Dictionary (ed. 1882) says: 'The term has been introduced from foreign countries to denote a compulsory purchase of land, etc., for the purpose of a railway, canal, or the like (*expropriation pour cause d'utilité publique*) . . . 'Eminent Domain' is the term used by which the American courts and text writers designate the right of the State to acquire property in invitum and as it is now finding its way into the English law dictionaries (e.g. Wharton's *Law Lexicon* by Aggs, 1911) there seems to be no reason why it should not come into general use in Canada instead of the practice of using the obscure term 'expropriation' as a synonym for it.⁵¹

This definition of Eminent Domain has a connotation that suggests the paramountcy of the greater public good involved in a taking of private lands. In Canada, the newfangled term of Eminent Domain mysteriously lost favor among commentators and jurists in the mid 1920s, yet continues vibrantly in the United States.

47. See Oliver Wendell Holmes, AM. L. REV., I, 5; reprinted in HARV. L. REV. (Mar. 1931).

48. *Id.*

49. See generally, O. HOOD PHILLIPS & PAUL JACKSON, CONSTITUTIONAL AND ADMINISTRATIVE LAW 32 (7th ed. 1987).

50. *Id.* See also Lord Hewart of Bury, The New Despotism 37 (2d ed. 1945) who asserts that administrative law is "substantially the opposite of" the "rule of law." *Id.* The author also states that "happily there is no English name for administrative law." Toward the end of the 1920s the organized bar in England became especially antagonistic toward administrative agencies. See also Lord Hewart, The New Despotism; Cmnd. 4060 (1932) Report of the Committee on Ministers Powers.

51. Editor's Note, *Compensation - Construction*, Canadian Railway Cases, Vol. XXIV, at 441 (1920).

One reason was an antipathy of the common law to the threatening encroachment of administrative law. Another possible reason for the loss from use of the term Eminent Domain in Canadian jurisprudence is that this term reveals the political nature of taking lands for a public purpose. Indeed, the nature of the decision to expropriate is essentially political.⁵²

The Minister . . . having deemed it advisable to expropriate, has exercised his statutory discretion and the Court has no jurisdiction to sit on appeal or in review of such decision. That it cannot go back on that decision is a legal truism. These questions are political in their nature and not judicial.⁵¹

"The courts cannot inquire into the motives which actuate the authorities or into the propriety of their decision."⁵⁴ Hence, the popular term expropriation masks the political nature of taking private lands for a public cause. Canadian courts are sluggish in inducting a rational doctrine of public utility easements by their failure to investigate the full dynamic of utility easement acquisition and stewardship.

In fact, common law practice is supposed to derive a few ideas from close attention to the facts presented via induction, empirically building up a coherent body of case-law jurisprudence. However, the empirical construction of a coherent body of case-law jurisprudence is stunted by an inopportune compartmentalization, which militates against this process. A misguided tension seemingly exists between the private law of easement and the public law of utility stewardship akin to a fear that messing around with the current artificial system will result in a collapse of property law. The law of real property is not that dissimilar than 18th century England, "a fine artificial system, full of unseen connections and nice dependencies: and he that breaks one link of the chain, endangers the dissolution of the whole."⁵⁵ Pending the rational reconciliation of this tension, statutory tribunals may be overstepping their jurisdiction, receiving too much deference from common law courts. Until then, the old forms of property law will inhibit the efficient public utility regulation of essential services as they evolve in this age of interconnection and convergence.⁵⁶

52. See *Favor v. Winnipeg (City)* [1998] 51 D.L.R. 4th 344 Manitoba Court of Queen's Bench, *Jewers J., Manitoba Judgments: [1988] M.J. No. 46 (Quicklaw)* 1, at 20-21.

53. See *id.* citing *Lewis on Eminent Domain*, § 239.

54. *Favor*, approving the dicta of J. Audette, in *The King v. Halifax Graving Dock Co. Ltd.* (1920) 56 D.L.R. 21, at 25, 20 Ex. C.R. 44, at 58.

55. Per J. Blackstone, *Perrin v. Blake*, in I.F. Hargrave, *TRACTS RELATIVE TO THE LAW OF ENGLAND* 489, 498 (1787).

56. Quaere: Under the framework of the forms of action (or formulary) system, a plaintiff who sought relief in the common law courts had to state a case in accordance with one of a limited number of standard forms. Maitland said: "English law knows a certain number of forms of action, each with its own uncouth name. . . . The choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds. . . . The forms of action we have buried, but they still rule us from their graves." (F. Maitland, *THE FORMS OF ACTION AT COMMON LAW* 2 (1962)).

A. LEGISLATION & EASEMENT DEED BOILERPLATE.

A pipeline right-of-way is an easement,⁵⁷ yet the nominal classification is unhelpful unless the functional purpose is clarified in a contemporary context. In other words, the ambit of a public utility easement has to be construed with reference to the utility's enabling legislation and the easement deed boilerplate.⁵⁸ Thus, a right-of-way is an incorporeal hereditament. Furthermore, easements of way typically exist where the owner of fee simple property expressly grants a specific right of user. Her land is called the servient tenement and the right conveyed to the grantee is known as the dominant tenement. If a grantee (owner of the servient tenement) exceeds the use prescribed in the deed granting the right-of-way (excessive user), then sanctions are available to restrain this use. Strictly speaking, a person who makes an excessive use of a servient tenement in purported exercise of a right-of-way commits a trespass.⁵⁹ However, the action of trespass is ephemeral to the extent that the servient tenement is sterilized under principals of public utility stewardship. Nor can the grantee of a right-of-way enlarge the privilege conveyed by the grant.⁶⁰

For instance, the habbendum clause⁶¹ of the easement deeds for principal federal Canadian gas pipelines contemplates pipeline use including things "useful in connection with or incidental to its undertaking." In particular the rights granted to a pipeline usually include:

the exclusive right, license, liberty, privilege and easement on, over, upon, across, along, in, under and through the strip of the lands of the Transferor . . . to lay down, construct, operate, maintain, inspect, patrol (including aerial patrol), alter, relocate, remove, replace, reconstruct and repair a line of pipe together with all the facilities or works of the Transferee" . . . "useful in connection with or incidental to its undertaking including, but without limiting the generality of the foregoing, all such pipes, drips, valves, fittings, connections, meters, cathodic protection to the foregoing as may be useful or convenient in connection therewith or incidental thereto, for the carriage, conveyance, transportation and handling of natural gas . . ."⁶²

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57. See generally, Bruce Ziff, *The Acceptance and Limits of Possessory Easements*, 3 R.P.R. (2d) 129 (1989) (involved is *Husky Oil v. Shelf Holdings*). The Alberta Court of Appeal states that "it appears that the Court of Appeal has moved beyond considering simply whether the easement confers possession or joint possession on the grantee, to the broader and more appropriate functional consideration of whether the easement interferes to an unacceptable extent with the rights of use and occupation of the servient owner. Minimally, the Court is indicating that possessory easements are not invalid per se. Easements must enhance the utility of the dominant land, but this cannot be at the expense of sterilizing the servient tenement; the law should strive to create a proper balance." *Id.*
58. 'Boilerplate' is colloquialism referring to terms borrowed from other contracts. This phrase stemmed from the turn of the century in New York City when some low-overhead telephone salesmen literally took up offices in basements next to boilers. Their transactions were of a recurring nature and some actually named certain clauses after the manufacturer's name on the boilerplates.
59. See *Milner's Safe Co., Ltd. v. Great Northern and City Ry. Co.* [1907] 1 ch. 208, 228.
60. See *Bridgman v. Loblaw's Groceries Co., Ltd.* (1929) 35 O.W.N. 353 (H.C.), *aff'd* 36 O.W.N. 214 (S.C. App. Div.).
61. That part of a deed setting out the amount of the interest conveyed.
62. As expressed in a typical proforma deed of TransCanada Pipelines Limited.
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These words are words of inclusion, not words of exclusion. The onus would be on an opponent to prove otherwise, perhaps by arguing ambiguity and the *contra proferentum* rule.

However, the word pipeline is widely defined in the NEB Act.⁶³ This statute is a primary aid to interpretation. Under this provision, a pipeline includes "interstation systems of communication by telephone, telegraph, or radio," namely:

a line that is used or to be used for the transmission of oil or gas [or any other commodity,] connecting a province with any other province or provinces, or extending beyond the limits of a province or the offshore area as defined in section 123, and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio and real and personal property and works connected therewith; but does not include a sewer or a water pipeline that is used or proposed to be used solely for municipal purposes.⁶⁴

This statutory definition must be read conjunctively with the express grant in the easement deed. It also must be read together with Parliament's intent in providing utilities with discretion over stewardship of their easements.

B. MULTIPLE-PIPELINES AND "CROSSING REGULATIONS."

The NEB policy on multiple use of existing utility corridors is terse and pertains to routing criteria. "[T]he principal route selection criterion of TransCanada, namely the advantage associated with the multiple-use of existing utility corridors, is well recognized by the Board. The rights of affected landowners, however, must not be ignored . . ." ⁶⁵ In other words, the Board appears amenable to the efficiencies of co-location, yet does not have the jurisdiction to decide upon issues concerning substantive property rights. This is the jurisdiction of common law courts.

Indeed, the NEB has interpreted that only single line rights may be obtained unless an easement agreement provides otherwise.⁶⁶ The NEB Act 86(2)(e) states:

A company may not acquire lands for a pipeline under a land acquisition agreement unless the agreement includes provision for restricting the use of the lands to the line or pipe or other facility for which the lands are by the agreement specified to be required unless the owner of the lands consents to any proposed additional use at the time of the proposed additional use, and . . .⁶⁷

63. See National Energy Board Act R.S.C., c. N-6, s.1 (1985) [hereinafter NEB Act] (definition as by Canada Transportation Act, S.C. (1996)).

64. *Id.* For instance, a standard form easement deed for the Alberta Natural Gas Company (ANG) goes further saying "without limiting the generality of the foregoing, all . . . other equipment and appurtenances . . . as may be useful or convenient in connection with or incidental to the undertaking of the Company . . ." *Id.* Another Canadian pipeline, albeit provincially located and regulated (Nova, An Alberta Corporation), has a proforma easement deed similar to the ANG's.

65. National Energy Board, *Reasons for Recission* GH-1-89 (TCPL Facilities Vol II, Dec. 1989), at 129, affirming the Board policy in National Energy Board, *Reasons for Recission* GH-2—87, at 129.

66. See GH-4-90, Phase 1 Pt. 1, Kingston — Oct. 17, 1990, Transcript.

67. NEB Act §§ 87, 88-103 (Negotiation and Arbitration), § 104 (Right of Entry) 1983 amendment to the NEB Act.

This curious provision stems from an amendment Act in 1981.⁶⁸ The effect of the amendment has contributed to the unreconciled tension between easement rights and public utility regulation. According to *travaux préparatoires*⁶⁹ as shown by the legislative debate in the Canadian Senate, this section was intended to guard against a pipeline exceeding the number of lines contemplated in its easement.⁷⁰

Although the NEB has held that land acquisition is a matter between the landowner and the company, the NEB does not approve the right-of-way agreement that results from negotiations. Nevertheless, the NEB ensures that the agreement complies with the Act.⁷¹

The Act, in addition to requiring consent for additional future use in paragraph 86(2)(e), also contains provisions which provide for negotiation or arbitration if the landowner and the company cannot agree on the amount of compensation payable (sections 88 to 103). It is clear that Parliament intended that consent and compensation be dealt with in a distinct manner. . . . However, . . . the Agreement must specifically state that consent is required at the time of any additional use rather than stating only that compensation must be agreed upon at that time.⁷²

It is a matter of interpretation whether an easement agreement contemplates multiple line use. In any event, landowners may consent in advance to such use. Although the NEB purports not to approve right-of-way agreements, it disingenuously does so when ensuring that the agreement complies with the Telecommunications Act. In addition to the co-location of fiber optics on utility easement, the practice concerning conventional multiple line use is ripe for restatement.

Under the National Energy Board Act,⁷³ leave of the NEB is generally required to construct a facility across a pipeline. However, the Pipeline Crossing Regulations⁷⁴ have delegated this decision making to the individual pipeline. Indeed, these regulations are part of a broader trend towards so-called lighter-handed regulation, a general retreat away from *dirigiste* or command and control public utility regulation. These regulations prescribe⁷⁵ the Conditions and Circumstances under Which Leave of the Board is not Required to construct a facility. Thus, a facility is defined to include:

68. See Bill C-60 *Act to amend the National Energy Board Act*, § 74(2)(e).

69. See Senate Special Committee on the North Pipeline, 32nd Parliament, 1st Sess., (1981).

70. See *id.* at 12:26, per Mr. Stewart "I think that the intent of this section is to limit the company's rights to what was planned in the first place and not come along later and say, 'Mr. Farmer, we have an easement; we are going to put another line in', or '[w]e are going to dig up four places and put in four valves.'"

71. See *Intercoastal Pipe Line, Inc. and Interprovincial Pipe Line, Inc.*, GH-4-93, National Energy Board Decision dated Apr. 1994, at p. 55-56.

72. *OH-1-97 Amoco Canada Petroleum Company, Ltd. on behalf of Dome Kerrobert Pipeline, Ltd. and Pan Canadian Kerrobert Pipeline, Ltd.*, National Energy Board Decision dated July 1997, at 15.

73. NEB Act § 122.

74. National Energy Board Pipeline Crossing Regulations, pt. I, SOR/88-528, no amendments since 1997/03/19. This information is consolidated in the NEB's "Excavation and Construction Near Pipelines," Jan. 1997, located on the National Energy Board of Canada Internet web site.

75. NEB Act § 4.

any structure that is constructed or placed on the right-of-way of a pipeline, and (b) any highway, private road, railway, irrigation ditch, drain, drainage system, sewer, dike, telegraph, telephone line or line for the transmission of hydrocarbons, power or any other substance that is or is to be carried across, along, upon or under any pipeline.⁷⁶

In other words, these set out the circumstances under which a pipeline may consent to crossings. Federally regulated pipelines in Canada have the legislative authority to permit third-party commercial use of their rights-of-way, providing it is done safely and on prudent commercial terms. However, the extent of this right has not been judicially nor otherwise critically examined. The following places the issues of crossing arrangements and the corollary of incidental user of easements in historical context.

IV. Administrators of the Incorporeal Right-of-Way.

Pipelines in Canada have the right to operate fiber-optic telecommunications for its own use and for incidental third-party commercial use. The latter right follows the Supreme Court of Canada's decision in *C.P.R. v. Western Union Telegraph Co.* (1889)⁷⁷ where a railway company

had as incident to and necessary for the safe operation of the road the right and power to erect a line of telegraph, and had the exclusive right to do so along their line of railway, and having themselves such exclusive right I can see no reason why they should not confer such exclusive right and other privileges mentioned in the contract whereby they were enabled to secure ample telegraphic services for the operation of the road, instead of erecting and equipping a line of telegraph for themselves.⁷⁸

It was further held that a railway company that had made such a contract had the power to bind by it any company to which the railway was subsequently assigned.⁷⁹ Although this decision concerned the railway legislation, the principle for which it stands is incorporated in the regulations controlling pipeline crossings.

A pipeline's right-of-way is already devoted to public or semi-public uses. The enabling legislation contemplates and accommodates other utilities by empowering a federally regulated pipeline to enter into crossing agreements. Federally regulated pipelines have been delegated the authority to conclude agreements if a telephone or electricity utility, or indeed another pipeline, needs to cross and/or run along within their right-of-way. The practical consequence of this delegated authority is that a federally regulated pipeline is effectively the administrator of the incorporeal right of public passage within its easement.

The concept of administrator of the incorporeal right of public passage⁸⁰ has been

76. See *id.*

77. See *Canadian Pacific Ry. Co. v. Western Union Tel. Co.* [1889] 17 S.C.R. 151.

78. *Id.* at 158.

79. See *Great North-Western Tel. Co. v. Montreal Tel. Co.* [1888] 20 S.C.R. 170. COYNE, *THE RAILWAY LAW OF CANADA* 498 (1947).

80. See generally, Alexander J. Black, *Establishing Public Rights of Passage*, J. L. SOC'Y SCOTLAND 158, 159 (Apr. 1991) (citing *Stewart Dairy Association, Ltd. v. Kirkcudbright Town Council* 1956 SC 488, 1956 SLT 341, 499).

used in Scotland in situations where a property developer has constructed a road, intended for public use, but the road has not yet formally entered into the local government's list of public roads. By implication, the pipeline is steward of the easement for the public interest in an essential facility. For instance, in *Stewarty Dairy Assoc. v. Kirkcudbright Mags.*,⁸¹ public powers regulating roadways were provided for in the Burgh Police (Scotland) Act, 1903, which was a statutory predecessor of the 1984 Roads (Scotland) Act.⁸² In the Court of Session, Lord MacKintosh said:

By reason of the vesting the Town Council acquired no rights of property which they did not have before, but they became the administrators of the incorporeal right of public passage over the highway or street in question and were given powers under the Burgh Police Acts, including rating powers to enable them adequately to discharge their duties as such administrators.⁸³

In this Scottish case, the local roads authority became the administrators of the incorporeal right of public passage over a road when it is entered into the public register of roads. The conceptual distinction here is between a public right of passage and a public road. In the context of a federally regulated pipeline, the pipeline company is the administrator of the easement, a function bolstered by the delegation to it of crossing responsibility.

The genesis of the NEB Crossing Regulations is the General Order 490 of the Board of Railway Commissioners, dated February 20, 1931. This order approved Standard Conditions and Specifications for Wire Crossings to be constructed along or across railways within the legislative authority of the Parliament of Canada. The jurisdiction of the Board to make such an order was confirmed by the Supreme Court of Canada as early as 1932 in *Canadian Electrical Association v. C.N.R.*⁸⁴ This decision was likewise affirmed by the Judicial Committee of Privy Council. Lord Blanesburgh, referring to an earlier decision on the purpose of crossings said:

[R]ailways stretching as they do over the whole country, of necessity must be crossed from time to time by innumerable telephone and telegraph wires, and to a lesser extent by the wires of electrical power and light companies. . . . All public utilities must be served, railways not more than others . . . the issue on every application must always be how the crossing can properly and safely be made in the particular circumstances of the case under consideration.⁸⁵

Each case for a utility crossing must address the technical specifications and physical construction of the crossing. Likewise, the person seeking the crossing must pay for the construction and invariably, a fee to the pipeline. "The only points to be considered then are whether such telephone connection will be of public benefit, and if so, what terms should be imposed

81. See *Stewarty Dairy*, 1956 SC 488, 1956 SLT 341.

82. See *id.*

83. *Id.* at 499 SC; following *Galbreath v. Armour* (1845) 4 Bell's App. 374; RANKIN ON LANDOWNERSHIP 325 (4th ed. 1980).

84. 39 Canadian Railway Cases 296 [1932] 3 D.L.R. 118, [1932] S.C.R. 451, *aff'd* by the Privy Council 42 Canadian Railway Cases 162 [1934] 4 D.L.R., A.C. 551.

85. *Id.* at 166 (approving an earlier Board of Railway Commissioners decision, *Maritime Telegraph & Telephone Co. v. Dominion Atlantic Railway Co.* (1916) 20 Canadian Railway Cases 213).

on the telephone company seeking the privilege."⁸⁶ In this sense, the utility granting the crossing is the administrator of the incorporeal right of public passage within its easement.

Prior to the crossing regulations, early decisions of the Board of Railway Commissioners (whose successor is the Canadian Transportation Agency) discussed the public stewardship of utility crossings. The practice of the Board was to allow the right-of-way of railway companies to be crossed by the construction overhead or underground of lines of wires or water-pipes without compensation. The Board's order merely creates an easement, which can be canceled or varied as occasion may require from time to time.⁸⁷ This time-honored practice continues. The difference is that the prerogative is delegated to a pipeline under the Crossing Regulations.⁸⁸

Where the Board is called upon to deal with a situation by order and the question of right to compensation in respect of overhead crossings, or the construction of under-crossings by the lines or wires of electrical transmission wires, or water-pipes, or sewers, or anything of the kind arises, it is not the practice of the Board to grant compensation to the railway whose property rights are by such order affected. At best, an easement is obtained and the Board has refused to order any charge by way of compensation where a merely technical violation of property rights is involved.⁸⁹

...

The initial policy of the railways recognized the necessity of these crossings; and in cases where no injury was done to the railway company, it would be difficult, if not impossible, to determine the compensation, if any, which should be awarded the company for the stringing of wire at such a height over its right-of-way as not to, in the slightest degree, interfere with the railway use or occupation. *The practice of the Board has been to allow such crossings without compensation. The railway is not in any way injured by them.* The order merely creates an easement which can be canceled or varied should occasion from time to time require it.⁹⁰

86. *Peoples' and Caledon Tel. Cos. v. Grand Trunk and Canadian Pac. Ry. Cos.*, 9 Canadian Railway Cases 161 (1909) Bd. of Railway Commissioners, at 162 (per Assistant Chief Commissioner D'Arcy Scott). Under § 245 of the Railway Act, the former Board of Railway Commissioners was empowered to grant an order under such terms as it deemed fit, compelling railway companies to permit the installation and maintenance in railway stations of telephones.

87. *See Maritime Tel. & Tel. Co. v. Dominion Atl. Ry. Co. and Baird v. Canadian Pac. Ry. Co.* 20 Canadian Railway Cases 213 (1916) Bd. of Railway Commissioners.

88. *Id.* (referring to National Energy Board Pipeline Crossing Regulations).

89. *Id.* (per The Chief Commissioner, Sir Henry L. Drayton, K.C., at 216-17).

90. *Id.* (per Commissioner McLean, at 214, "[a]s the Railway Act stands, it is not necessary for the Board to issue an order in the case of wires being carried over or under a railway or water-pipes or other pipes being carried under the railway, where the work is done with the consent of the railway and in accordance with the general regulations of the Board.") The sections involved, viz, 7 and 8 of 1-2 Geo.V. ch. 22, do not state whether payment for crossing the right-of-way may be properly charged, but as they stand there is nothing to prevent this being a term of the consent, and if the parties are in agreement the Board is not called to intervene. *Baird* was applied in *A. Demers, LaPrairie v. Grand Trunk Ry. Co.* 31 Canadian Railway Cases 297 (1920) Bd. of Railway Commissioners.

Following the Supreme Court of Canada's decision in *C.P.R. v. Western Union Telegraph Co.*,⁹¹ federally regulated Canadian pipelines have incidental power to use its right-of-way and fiber-optic telecommunications for commercial purposes. Even in the absence of this authority, it would be impossible to assess damages claimed by the servient tenement. It would be absurd to allow a claim for *Mesne Profits*, namely those derived from the land when possession has been withheld improperly.

A fortiori, the pipeline crossing regulations allow installation of telecommunications wires across or along the right-of-way. These regulations represent the public policy in delegating stewardship of the right-of-way to the pipeline company. The pipeline is best suited to assess these day-to-day needs as administrator of the incorporeal hereditament of way. Furthermore, according to *C.P.R. v. Western Union Telegraph Co.*,⁹² the Supreme Court of Canada views telecommunications as a valid incident of public utility provision. The Pipeline Crossing regulations legislatively implements this prerogative. These authorities buttress ancient presumptions in favor of the utility owning a right-of-way. For example, the servient tenement is typically a fee simple estate in land, and the pipeline itself has an estate in land in the nature of an easement running with the land. The practice is to grant the easement rights by deed, hence, a presumption of general user exists in favor of the dominant tenement. Indeed, the court will always presume that a person using another's land is a licensee, not a trespasser.⁹³

V. Co-location and Burdens on Servient Land.

It is not an absolute issue whether fiber-optic installation or other incidental use on a pipeline easement is undue or wrongful burden on the land of the servient tenement. Rather, the issue is one of threshold. Although the adjoining landowner(s) own the solum of the right-of-way, the right-of-way is sterilized since their ability to use it is extremely limited. Indeed, ownership of the right-of-way solum (the land under the right-of-way) by the servient tenement is somewhat fictional since the proprietor has scant control over its use. Lord Watson in the Privy Council described this relativism.

The tunnel has become *pars soli* in the strictest sense of the words. If it had been constructed by one who was a proprietor *a centro usque ad coelum*, it would have passed, in the absence of exception, with his conveyance of the land. As the matters stand the owners of the soil, whoever these may be, are practically divested of interest in that part of it which has been converted into tunnel. They have no right to occupy or to interfere with it in any way whatever; their exclusion is not for a period limited, but for all time coming.⁹⁴

91. See NEB Act § 89.

92. See *id.*

93. *Canadian Pac. Ry. Co. v. Guthrie* [1916] 1 C.R.C. 161, 31 S.C.R. 155; *Micklethwaite v. Vincent*, [1920] 8 Time L.R. 685 (applied).

94. *Re Interprovincial Pipe Line Co.* [1951] 128 C.R.T.C. 135 (cited with approval from the obiter dicta of Lord Watson in *Metropolitan R. Co. v. Fowler* [1893] A.C. 416, 425.

In other words, *de minimis non curat lex* (the law doesn't concern itself with trivialities). For example, in *Classic Communications, Ltd. v. Lascar*,⁹⁵ the defendants purchased a property that was subject to a registered easement in favor of Hydro to maintain its poles and cables. The plaintiff was a provider of cable that had obtained permission from Hydro to attach its cable to the Hydro poles. Subsequently, the defendants tried to force the plaintiff to remove its cable. In the action heard by Justice Pennell, the plaintiff asked for a declaration that an easement or an irrevocable license existed in its favor. The court held that the plaintiff had a right to attach its cable to the Hydro poles so long as Hydro maintained such poles. The decision was based on the plaintiffs having established that an equity existed in its favor. The plaintiff had incurred expense in the belief that its right to continue to use the Hydro poles would be continuing or quasi-permanent, and there was a negligible resultant burden on the land.

Subsequent obiter dicta recognized the evolutionary nature of a utility easement yet left undefined the parameters of permissible evolution. In *Hillside Farms, Ltd. v. British Columbia Hydro & Power Authority*,⁹⁶ an agreement, made through negotiation and arbitration, was phrased in general terms, and was silent as to the specifics regarding size, location, and design of lines and towers to be added in the future. In holding for the utility the court accepted that:

It was logical that as technology progressed the requirements of transmission lines would be modified. Therefore a general grant of right-of-way could not be limited to the original use, as long as future uses were of the same general nature. . . . I am driven to the conclusion that the negotiators of the agreement were striving to provide a power line right-of-way which would be appropriate and valid in perpetuity and which would accommodate upward modifications of user.⁹⁷

Unfortunately, the case law becomes split as judges try to distinguish between quantitative and qualitative increases in use, while uncritically relying upon an eighteenth century paradigm of property law. For instance, in *Descar, Ltd. et al. v. Megaventures Corp. et al.*,⁹⁸ it was argued by the defendant that the change from one door to three doors on the north side of the plaintiffs' premises was an increase in the burden of the alleged easement and accordingly created a new starting point for the twenty-year period for a prescriptive easement. The predecessor court to the Ontario Court of Justice (General Division) stated that it is not the number of doors, but the use of the defendant's land that matters. Although cases of prescriptive easement have their own peculiarities, the court followed high authority⁹⁹ for the view that a mere increase in the number of times a way is used, as opposed to a change in the type of use or in the character of the dominant tenement, is not a change in the burden.

95. *Classic Communications, Ltd. v. Lascar* [1985], 36 R.P.R. 186 (Ont. H.C.) (followed in *Rogers Cable TV, Ltd. v. 373041 Ontario, Ltd.*, [1996] O.J. No. 2033).

96. *Hillside Farms, Ltd. v. British Columbia Hydro & Power Authority* [1977] 3 W.W.R.

97. *Id.* (per Carrothers, J.A., at 753).

98. *Descar, Ltd. et al. v. Megaventures Corp. et al.* [1990] 72 O.R. (2d) 388.

99. *British Rys. Bd. v. Glass*, [1965] 1 Ch. 538, 562.

A. INTERFERENCE WITH "ACQUIRED RIGHTS."

Another pernicious aspect of the unreconciled tension between private-law-based easement and public-law-based utility regulation is the effect of the latter on a utilities' proprietary rights. Generally speaking, the fact that the implementation of the power of the NEB will affect property and civil rights is no objection to the validity of the Telecommunications Act.¹⁰⁰ Yet it is trite law that an act cannot retroactively confiscate acquired rights without express wording. Indeed, it is a fundamental rule of English Law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the act, or arises by necessary and distinct implication.¹⁰¹

Mr. Justice Dickson, in *Gustavson Drilling (1964), Ltd. v. Minister of National Revenue*,¹⁰² reiterated the presumption against retrospective interference with vested rights: "The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils, Ltd. v. Turner Valley Gas Conservation Board*."¹⁰³ The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation.¹⁰⁴ At bottom, *Spooner Oils* does not impose substantive restrictions on provincial authority in the natural resources area. The decision, in effect, conditions the manner in which provincial authority may be exercised.¹⁰⁵ While contractual rights may be altered "*ab extra* by the force of the law,"¹⁰⁶ the legislative intent to alter the terms of existing licenses must be "manifested by unavoidable inference."¹⁰⁷ Similarly, the right to unilaterally alter the terms of a Crown lease must be explicitly reserved in the lease.

Furthermore, in *Attorney General for Alberta v. Majestic Mines, Ltd.*,¹⁰⁸ a unanimous Supreme Court of Canada again declared the principle that a legislative act in derogation of¹⁰⁹ contractual rights must be stated in clear and precise terms. In *Majestic Mines*, the

100. *Northern & Cent. Gas Corp. v. Canada (Attorney General)* [1971] 4 W.W.R. 413.

101. See MAXWELL, *THE INTERPRETATION OF STATUTES* 215 (1980) (under the heading *Retrospective Operation of Statutes*); see also *Re Athlumney* [1898] 2 Q.B. 547, 67 L.J.Q.B. 935). Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation.

102. *Gustavson Drilling (1964), Ltd. v. Minister of National Revenue* [1975] 29 D.T.C. 5451.

103. *Spooner Oils, Ltd. v. Turner Valley Gas Conservation Bd.* [1933] S.C.R. 629, 638.

104. A. J. Black, *Comparative Licensing Aspects of Canadian & United Kingdom Petroleum Law*, TEX. INT'L L.J. 471, 475 (1986).

105. Roland Harrison, *The Legal Character of Petroleum Licences*, 58 CAN. BAR. REV. 483, 487-91.

106. *Dugal v. Lefesure* [1933] 4 D.L.R. 552.

107. *Id.* at 552-56.

108. *Attorney General for Alberta v. Majestic Mines, Ltd.* [1942] S.C.R. 402.

109. *Id.* at 405. The enforceability of an express variable royalty clause was confirmed in *Attorney General for Alberta v. Huggard Assets, Ltd.* [1953] A.C. 420. In that case, a royalty clause in a federal Crown patent provided for royalty payment "upon the said petroleum and natural gas, if any, from time to time prescribed by regulations." *Id.* at 433. Although no royalty rates were in effect at the time of the grant, the privy Council opined that the words "from time to time" sufficiently incorporated future royalty regulations. *Id.* at 436. A variable royal clause was also upheld in the context of quarrying licenses in *Attorney General of British Columbia v. Deeks Sand & Gravel Co., Ltd.* [1956] S.C.R. 336.

plaintiff held a Crown surface and mineral patent executed in 1908. The habendum clause of the patent provided that the patentee would yield to the Crown a royalty "if any prescribed" by regulations of the Lieutenant Governor in Council. The court held that the phrase "if any prescribed" did not refer to the future. If the Crown intends to reserve the right to impose future royalties, such "reservations must be expressly stated."¹¹⁰

B. VALUING THE EASEMENT UPON A SECOND TAKING.

In *Nova v. Will Farms, Ltd.*,¹¹¹ a subsequent taking of an existing pipeline easement only availed the owner of the servient tenement to a token award. Diminution of value to the reversion was not proven. In 1965, Nova obtained a right of entry order¹¹² and built a pipeline having paid compensation to the owner of the land. Twelve years later, Nova obtained a second right of entry order and The Surface Rights Board of Alberta made an award of compensation. The issue was the value of the interest lost in the land that was already subject to an existing entry order. The Alberta Court of Appeal held that there was no reduction in consequence of the second entry as the existing occupational rights of the owner were only marginally affected.

One of the rights remaining with the owner of the servient tenement is the reversion.¹¹³ Mr. Justice Kerans succinctly described the matter¹¹⁴ as concerning the "characterization and valuation of the property interest lost on a subsequent entry" saying that "the value of further diminution of the claimant's ownership interest is negligible and a token award would be appropriate." Indeed, there is no law requiring a pipeline to pay a fee to landowners for its pipeline. The matter is compensatory. No adverse consequences occur to the reversion unless the second pipeline survives the first. As said in *Dome Petroleum, Ltd. v. Hampson*:

If the pipe line located in the right-of-way by the third taking [this was a third taking] is no longer required by the appellant at a time when either first or second pipe lines are still being used, then the respondents' reversionary interest in the land is not affected at all by the current taking. If, on the other hand, pipe lines 1 and 2 are no longer required by the appellants but pipe line 3 is still required, then it is seen that it is the interest acquired from the respondents on the present taking that prevents the fee simple in the right-of-way from reverting to the respondents. If that is the case, then the interest taken does affect the respondents' residual interest in the right-of-way . . .¹¹⁵

The onus of diminution in value of the reversion rests with the owner of the servient tenement. This follows the reasoning applied from the Ontario Court of Appeal,¹¹⁶ which

110. *Majestic Mines* [1942] S.C.R. at 405.

111. *Nova v. Will Farms, Ltd.* [1981] 22 R.P.R. 67.

112. Pursuant to the Surface Rights Act, ch. 91, (1972) (Can.).

113. See *Re Cochin Pipelines, Ltd. v. Rattray* [1981] 1 W.W.R. 732, *sub nom.* *Rattray v. Cochin Pipelines, Ltd.*, 27 A.R. 32, 117 D.L.R. (3d) 442. The leave to appeal to the Supreme Court of Canada was dismissed 27 D.L.R. 359.

114. *Nova* [1981] 22 R.P.R. 67.

115. *Dome Petroleum, Ltd. v. Hampson* [1981] 10 Alta. L.R. 2d 140, 144; 19 A.R. 257.

116. *Murphy Oil Co. v. Dau* [1969] 70 W.W.R. 339, 7 D.L.R. 3d 512, 530 [varied, (1970) S.C.R. 861, 73 W.W.R. 269, 12 D.L.R. 3d 19] (where McDermid J.A. notes: *In re Interprovincial Pipe Line Co.* [1955] O.W.N. 301, at 305).

said that in valuing an easement, "the proper approach to valuation of the easement taken was first to find the value to the owner of the fee simple at the date of expropriation, then find the residual value in the 60-foot strip after expropriation and, by deducting the latter from the former, arrive at the value to the owner of the easement taken." Accordingly, it is axiomatic that the person subject to expropriation is entitled to have such value and its decrease determined on the basis of the most advantageous use, whether present or prospective, to which its property could have been put immediately prior to the enactment of the Regulations.¹¹⁷

C. ZONING, ECONOMICS AND PUBLIC UTILITY LAW.

Classical conceptions about public utilities are premised upon the notion that they are monopolies, which are the opposite of markets that enjoy perfect competition or the optimum efficiency brought about by competitive behavior and performance. In a free market system, competition benefits consumers by eliciting an efficient distribution of resources amongst individuals thereby inhibiting the skewed realization of profits by a business without rivals.

[I]t has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case he is not held to act 'unlawfully and without justifiable cause' . . . The reason of course is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of damage is privileged.¹¹⁸

Yet utility regulators have to move beyond the classical view of natural monopoly¹¹⁹ as expressed in the seminal *Atlantic Seaboard*¹²⁰ case where it was said that "[T]he high fixed costs and immobility of pipeline facilities are economic characteristics of the natural gas industry precluding the sort of competition expected as a norm elsewhere in the economy."¹²¹ This classical statement is no longer the case in a world of interconnection, convergence, and co-location.

117. *Ramey v. Canada* [1987] 1 F.C. 552.

118. Oliver Wendell Holmes quoted in *SILAS BENT, JUSTICE OLIVER WENDELL HOLMES* 181 (1932); 167 Mass. 103, 104-08.

119. E. GELLHORN & R.J. PIERCE, *REGULATED INDUSTRIES IN A NUTSHELL* 19-44 (2d ed. 1987). JAMES C. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* 11 (1961).

The familiar statement that a public utility is a "natural monopoly" is meant to indicate that this type of business, by virtue of its inherent technical characteristics rather than by virtue of any legal restrictions or financial power, cannot be operated with efficiency and economy unless it enjoys a monopoly of its market. So great are the diseconomies of direct competition that, even if it gets an effective start, the competition will probably not long persist if only because it will lead to the bankruptcy of the rivals. But even if competition is long lived, as has occasionally happened when rivalry has taken a restrained form, it is wasteful of resources because it involves unnecessary duplication of tracks, of cables, of substations, etc.

Id.

120. *Atlantic Seaboard Corp. v. F.P.C.*, 404 F.2d 1268 (D.C. Cir. 1968).

121. AMERICAN GAS ASSOCIATION, *COMPETITION IN THE NATURAL GAS INDUSTRY*, Energy Analysis (1984).

As suggested earlier, the commoditization and reregulation of essential utility services is being driven by the marketplace. Public choice requires that the phenomenon of interconnection, convergence, and co-location be considered with regard to economic policy and political institutions.¹²² Contemporary stewardship of utilities must eschew unwarranted or unsubstantiated interference with business transactions. Indeed, excessive governmental regulation is suspect.

The kind of situation which economists are prone to consider as requiring corrective governmental action is, in fact, often the result of government action. Such action is not necessarily unwise. But there is a real danger that extensive governmental intervention in the economic system may lead to the protection of those responsible for harmful effects being carried too far.¹²³

Accordingly, a reconciliation of the tension between private law easement construction and public utility regulation should accept the fact that utility regulators exercise land-use planning related functions. For example, zoning is a form of legislative and executive action, which finds its counterpart in many community developments. Sometimes the action taken leads to a right to compensation and sometimes it does not. That question is to be resolved according to the applicable statutes adopted by the legislature. Zoning illustrates the process. Ordinarily, in Canada, the United States, and the United Kingdom, compensation does not follow zoning either up or down.¹²⁴

However, it has been said, at least in some U.S. courts, that a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose.¹²⁵ This principle was applied in Canada as long ago as 1913 by the Ontario Court of Appeal:

It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation.¹²⁶

When measuring the amount of money that the owner of expropriated property should receive as the equivalent in value of the property taken from him, it is just as important to ensure that the Crown is not required to pay more for it than it was worth as it is to make sure that its owner receives its fair value. The duty of determining the

122. "Public choice" is sometimes used interchangeably with the "economic theory of legislation." See R. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988). The legislative process is part of the market process: "legislation is good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare." Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

123. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 133 (1960), reprinted in RONALD COASE, *THE FIRM, THE MARKET AND THE LAW* 95-156 (1988). Coase was awarded the 1991 Nobel Prize in economics, partially for his contribution to ideas in law and economics that allocation of property rights may have little effect on the ultimate use of property. *Id.*

124. See *The Queen v. Tener* [1985] 1 S.C.R. 533.

125. See *id.*; see also 4 NICHOLS' *THE LAW OF EMINENT DOMAIN* 12-627, ¶ 12.322 (revised 3d ed. 1973).

126. See *In re Gibson v. City of Toronto* [1913] 28 O.L.R. 20, 28.

equivalence in money of the value of the expropriated property demands fairness to the expropriating public as well as to the owner of the property. An excessive award is a breach of this duty. It is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of trespass to modern conditions where individuals are expropriated for public purposes. There is no element of tort or delict in an expropriation under the Expropriation Act.¹²⁷

This analysis appears to have been tacitly followed in a recent telecom case. In *Bell Canada v. Unitel Communications, Inc.*,¹²⁸ the Federal Court of Appeal considered¹²⁹ whether the CRTC erred in law or exceeded its jurisdiction by ordering the appellant companies to interconnect their telecommunications networks with Unitel and other proposed competitors without ordering compensation. The court distinguished an early precedent concerning interconnection rights, particularly the use of the term expropriation.¹³⁰ Indeed, the Federal Court of Appeal stated that "[i]t is fundamentally erroneous to characterize as an 'expropriation' an order of a regulatory tribunal requiring the construction of facilities by a regulated company."¹³¹

Thus, planning partly attempts to resolve market failure problems through comprehensive policy making for land use on the community level. A physical plan is the translation of values into scheme. Invariably, the aggregate gains of a planning choice cannot be demonstrated. This is because the planner's redistributive values are assumed to be superior to those of the market and will result in a net gain to the aggregate welfare.¹³² To say that the regulator of a public utility cannot contemplate land use planning criteria in its decisions is an abrogation of its public service duty, not to mention a concealed compartmentalization of responsibility.

Planning is generally defined as "deciding in advance what to do," yet to do so rationally.¹³³ Yet the conundrum for public utility regulators is a staging process where the provision of necessary services is achieved before development. However, it is difficult to create staged controls since the provision of public services and facilities is often delegated to authorities operating independent of the planning and land-use regulation system.¹³⁴ In the United States, energy facilities and transmission lines have siting problems pitting state against local government, and the case law concerning preemption of jurisdiction is mixed.¹³⁵

127. *The Queen v. Supertest Petroleum Corp., Ltd.* [1954] Ex. C.R. 105.

128. *Bell Canada v. Unitel Communications, Inc.* [1993] 1 F.C. 669.

129. An issue pertaining to the now repealed National Telecommunications Powers and Procedures Act, R.S.C., ch. N-20 (1985) (Can.).

130. *Ingersoll Tel. Co. v. The Bell Tel. Co. of Canada* [1916] 53 S.C.R. 583.

131. *See Bell Canada* [1993] 1 F.C. 669.

132. DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 12-14 (2d ed. 1990).

133. *See id.*

134. *See id.* at 611.

135. *See id.* at 780.

VI. Evolution Versus Revolutionary Use of Easements in the United States.

A secondary easement is the term used in the United States to incidents like the easement holder's rights to maintain and improve an easement. If details about secondary easements are not spelled out, the general principle is that "reasonable" uses are permitted.¹³⁶ What is reasonable depends upon the surrounding circumstances, most importantly, in the case of an easement appurtenant, the activities that one might be expected to conduct on the dominant tenement. When the creating language is general, an appurtenant easement may be used to support not only the activities conducted on the dominant tenement at the time of creation, but to a certain extent, future activities. Perhaps the best formula is that the purposes may keep up with those changes that might be reasonably anticipated for the dominant tenement—evolutionary not revolutionary.¹³⁷ For instance, a general passway easement permits gradually changing uses, to correspond with normal changes in modes of transportation and normal development of the dominant tenement.¹³⁸

Along this line, a leading Canadian commentator¹³⁹ stresses the policy issues guiding the interpretation of easements. According to the well-known dictum in *Dyce v. Lady Hay*: "The Category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."¹⁴⁰ This strongly suggests that although fiber optics were not contemplated when the deeds were granted, Canadian pipelines have the right to use the right-of-way to an extent that exceeded what was contemplated at the time of the grant, provided it doesn't interfere unreasonably with the enjoyment of the like right by others.¹⁴¹

The next point is that courts take notice of the commercial setting when construing

136. CUNNINGHAM, STOEBOCK & WHITMAN, *THE LAW OF PROPERTY* 458 (2d ed. 1993).

137. See *id.* at 459 (citing *Peterson v. Friedman*, 162 Cal. App. 2d 245, 328 P.2d 264 (1958); *Birdsey v. Kosienski*, 140 Conn. 403, 101 A.2d 274 (Conn. 1953); *Camron v. Barton*, 272 S.W.2d 40 (Ky. 1954)). Much interest has focused recently on the "rails to trails" question: when a railroad abandons a rail line, may its "railroad" easement be used as a recreational trail? Is a recreational trail within the scope of a railroad easement? Courts are divided on this issue. See e.g., *Washington Wildlife Preservation, Inc. v. Minn. Dept. of Natural Resources*, 329 N.W.2d 543 (Minn. 1983), cert. denied 463 U.S. 1209, 103 S. Ct. 3540, 77 L.Ed. 2d 1390 (1983) (yes); *Lawson v. State*, 107 Wash. 2d 444, 730 P.2d 1308 (1986) (no); In *Presault v. Interstate Commerce Comm'n* 494 U.S. 1, 110 S. Ct. 914, 108 L.Ed.2d 1 (1990), the U.S. Supreme Court avoided answering the issue, though they held that if the trail was not within the scope, compulsory conversion would be a taking.

138. See *Birdsey*, 140 Conn. at 403; *Camron*, 272 S.W.2d at 40; see also *Miller v. Street*, 663 S.W.2d 797 (Tenn. App.1983) (right to take water from spring, originally by bucket, could change to allow piping of water).

139. ANGER & HONSBARGER, *REAL PROPERTY* 926 (2d ed. 1985) (discussing the reason for prohibiting an easement in gross).

140. *Dyce v. Lady Hay* [1852] 1 Macq. 305 (H.L.).

141. See *Jelbert v. Davis* [1968] 1 All ER 1182, [1968] 1 W.L.R. 589.

contracts or deeds.¹⁴² What distinguishes a public utility corporation from any other business corporation is dedication of its property or plant to providing utility service to the public on nondiscriminatory terms in its territory of service. When these deeds were concluded and registered years ago, the pipeline business was different, characterized by bundled services with non-transparent pricing terms. Hence, it is unlikely that a monolithic, unchanging pipeline industry was contemplated at that time.

Unlike Canada, the United States constitutionally protects property rights from takings.¹⁴³ In both countries, compensation is due from expropriation for public purposes, a process popularly referred to in the United States as eminent domain. Under Texas law,¹⁴⁴ a railroad could grant a telecommunications company an easement for installation of fiber-optic cable beneath the railroad's right-of-way without compensating the owner of the subservient estate; the right-of-way surface included the non-mineral top soil that would be occupied by a buried fiber-optic line, and the fiber-optic cable was an authorized incidental use which was not inconsistent with railroad uses and did not burden the subservient estate. Telephone, telegraph, and interurban lines are public facilities that are contemplated by the grant of a railroad right-of-way and, thus, do not constitute an additional servitude; rather, the grant in such use is to the public and the public makes use of it. The incidental use doctrine allows railroads to contract with third parties and controls the permissible scope of railroad authorized right-of-way uses and allows third-party commercial uses of the railroad right-of-way.

Earlier, in 1988, the Kansas Supreme Court ruled that a fiber-optic cable constructed in an easement dedicated to a natural gas pipeline represented a use of property sufficiently inconsistent with the original purpose of the easement to constitute a taking of property. The

142. See *Reardon Smith Line, Ltd. v. Hansen Tangen* [1976] 3 All ER 570, 574, 576. Quoting Lord Willberforce:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

This statement was adopted by Laycraft J.A. of the Alberta Court of Appeal in *Bank of B.C. v. Turbo Resources, Ltd.* (1983) 27 Alta. L.R. (2d) 23, B.L.R. 152, 148 D.L.R. (3d) 598, 46 A.R. 22, 29.

143. Public utilities have traditionally relied on eminent domain to obtain easements and public rights-of-way necessary for the provision of public utility service. Such takings of private property must be supported by a valid public use, from which a direct public benefit will be derived.

144. See *Mellon v. Southern Pac. Transp. Co. & MCI*, 750 F. Supp. 226 (D. Tex. 1990). Railroad granted a telecommunications company an easement for installation of cable beneath the railroad's right-of-way without compensating owner of subservient estate. Owner of subservient estate brought suit alleging an abuse of right-of-way, trespass to try title, inverse condemnation and conversion, and unjust enrichment. Defendants brought motion for summary judgment. The District Court, Bunton, C.J., held that: (1) railroad could grant the company an easement without compensating the owner of the subservient estate; (2) under Texas law, company could have secured an easement from railroad pursuant to condemnation statute; and (3) federal law impliedly occupies entire field so as to preclude any application of state law relating to railroad right-of-ways. *Id.*

taking was authorized, however, because (1) the owner of the cable was held to be a telephone corporation entitled to exercise eminent domain, and (2) the taking was held necessary to serve a public purpose. The state court affirmed lower court findings that the transmission of communications through fiber-optic technology qualified as a transmission of communications by electrical current, which met a necessary condition for the exercise of eminent domain by telephone corporations. Moreover, the fiber-optic cable served a public purpose because it would become part of an interstate system already capable of transmitting communications among several large cities. It was not necessary, the court explained, to prove a direct benefit to a sizable and identifiable segment of the public.¹⁴⁵

In *Bell Atlantic Telephone Cos. v. FCC*,¹⁴⁶ the District of Columbia Circuit slowed the development of the much-heralded information superhighway by invalidating the FCC order mandating physical co-location on a public utility.¹⁴⁷ The phrase public utility generally includes a privately-owned corporation that performs a public service, such as providing energy, electricity, or telephone services to customers.¹⁴⁸ A public utility often has a monopoly or near monopoly in the market where it sells its public services. Public utilities also have extensive and unique operating facilities that are very difficult and expensive for a competitor to replicate. Commentators suggest that a regulator effects a taking when the regulator orders a public utility to give a competitor access to a discrete part of the public utility's physical property in furtherance of legitimate regulatory goals. Generally, where the government as a regulator mandates physical access to a landowner's property, courts find that a taking¹⁴⁹ has occurred in violation of the Fifth or Fourteenth¹⁵⁰ Amendment to the U.S. Constitution. When a taking occurs, the Constitution requires the government to provide just compensation to the landowner. Courts generally have construed "just compensation" to be the "fair market value"¹⁵¹ of the property "taken" as of the time the taking occurred.¹⁵²

145. See *Williams Telecomm. Co. v. Gragg*, 750 P.2d 398 (Kan. 1988).

146. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

147. Physical collocation involves the placement of competitor's equipment in the local telephone companies' central offices. See also Alexander C. Larson & Douglas R. Mudd, *Collocations and Telecommunications Policy: A Fostering of Competition on the Merits?*, 28 CAL. W. L. REV. 263 (1992). This placement facilitates the competitor's access to the information superhighway by reducing the costs of interconnection between the networks of local telephone companies and their competitors. See Alexander C. Larson et al., *Competitive Access Issues and Telecommunications Regulatory Policy*, 20 J. CONTEMP. L. 419 (1994).

148. See Leonard M. Baynes, *A Derailment on the Information Superhighway: Desperately Seeking to Avoid Paying Compensation-A Case Study of Special Access Collocation and its Invalidation in Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), 21 U. DAYTON L. REV. 417, n.8 (1996).

149. See *id.* at 416; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982).

150. The Fourteenth Amendment provides in pertinent part: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. XIV.

151. See BONBRIGHT, *supra* note 13, arguing that the market for part of public utility property is often a monopoly market rather than a competitive market. As such, the fair market value would accordingly be a monopoly price.

152. See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S. Ct. 547, 549 (1950). Courts and commentators have frequently suggested that the just compensation clause was included in the Bill of Rights to prohibit unfair distribution of the costs of government among citizens. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 9-6 (2d ed. 1988) (discussing the compensation clause as an attempt to limit sacrifice by a minority of the population).

The inconsistency in decisions of regulators and courts in their efforts to avoid a rational standard for compensation results in bad law. Courts and regulators should use the just and reasonable rate standard as a basis for compensation, allowing for more honest and straightforward decisions. In addition, the just and reasonable rate standard will allow the regulators to do what they do best—regulate. If they use the just and reasonable rate standard, they could devise the best regulation for a utility instead of devising the best regulation that will sustain a takings challenge or find a way to creatively re-invent the law to avoid paying compensation.¹⁵³

Confusion is rife as to the appropriate amount of compensation chargeable to the users of public rights-of-way, but also as to the very authority of state and local governments to require compensation. This wasn't always the case. It has long been a well-settled legal principle that local governments may receive reasonable rental compensation from private commercial entities for their use of local public property for private economic gain, even where federal statutory law restricts local governments from denying access to rights-of-way for telecommunications services.¹⁵⁴

Indeed, a citywide street franchise is a special kind of contract granted by a municipality. It is a contract that gives the city's permission to a private company—a franchisee—to use the public streets and rights-of-way for private economic gain. The franchisee pays the city for the use of the public streets in the form of franchise fees. These franchise fees are sometimes called street rentals; they are not taxes. A franchise fee is the consideration paid for the rights granted by the franchise, and serves as compensation for use of the public property. The payment of franchise fees is a contractual obligation of the franchisee.¹⁵⁵ Not surprisingly, telephone franchisees or telephone service providers have argued in the past that cities and states violate the Commerce Clause of the U.S. Constitution when they impose state or local charges on interstate access fee revenue.¹⁵⁶

VII. Sharing the Hegemony: NAFTA & Telecom Competition.

Complementary commercial fiber-optic use on the easements of federally regulated pipelines would ostensibly promote increased choice and lower rates for Canadian telecom users. Not only will this be consistent with Canadian telecommunication policies, it will promote the convergence between disparate utilities, helping to redefine the telecommunications industry in Canada. But the commercial inclusion of fiber optics on federally regulated pipeline easements means that the NEB will, to some extent, have to share hegemony with the CRTC.

The CRTC has jurisdiction over the tariffing of fibers. In a recent case,¹⁵⁷ TELUS Communications Inc. (TCI) submitted that the CRTC does not have the jurisdiction to

153. See Baynes, *supra* note 148, at 444.

154. See Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to Be Compensated for the Use of Public Rights-of-way*, 95 MICH. TEL. TECH. L. REV. 2 (1998).

155. See *id.* at nn. 8 & 9.

156. See *id.* at 18. See, e.g., *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893); *Goldberg v. Sweet*, 488 U.S. 252 (1989).

157. See *Tariff Filings Related to the Installation of Optical Fibres Telecom Decision CRTC 97-7*, Canadian Radio-Television and Telecommunications Commission Apr. 23, 1997.

regulate its provision of optical fiber. TCI stated that it is not operating as a telecommunications common carrier when it provisions optical fiber, and that only activities undertaken by entities acting as telecommunications common carriers are subject to a requirement to file general tariffs. TCI submitted that the definition of a telecommunications common carrier requires that telecommunications service be provided to the public for compensation. According to TCI, this criterion is not satisfied in the case of its provisioning of optical fiber, since it supplies unique customer-initiated requests on a case-by-case basis and, consequently, has not provided service to the public. TCI cited cases in Canada and the United States in support of its position. VTL disagreed with TCI's submission. The CRTC was not persuaded by TCI's submissions regarding "service to the public," rejecting TCI's suggestion that when optical fiber is provided only in response to customer-initiated requests, this does not constitute "service to the public."¹⁵⁸ The CRTC found that the provisioning of optical fiber is the provisioning of a "telecommunications service" as defined by the Telecommunications Act.¹⁵⁹

Such complementary commercial fiber-optic use also follows the *opinio juris* of international law, which provides qualified support for the right of connection contemplated under the North American Free Trade Agreement (NAFTA). However, the boundary line between competition law¹⁶⁰ concerning the telecommunications industry in Canada is being addressed on an incremental, case-by-case basis.¹⁶¹ Yet, at first blush, fiber optics on pipeline easements conform with principal characteristics of competition and telecommunications. These principal characteristics¹⁶² include the need to interconnect with the existing local network and resultant concerns over the control of bottleneck facilities. They also include concerns growing out of the heavy subsidization of local rates during the monopoly era, which has now been transposed into an entitlement to universal service at affordable rates.

Competition in the Canadian telecommunications market can generally be divided into three segments: long distance (LD), local, and broadcast/cable. The LD sector consists of switched LD for voice and data, data services, and mobile wireless services. The local sector is primarily the local telephony system, which operates under a nationwide alliance—Stentor. The broadcast and cable sectors round out the market. Competition was introduced into the long distance sector in 1987, while full deregulation occurred in July 1994. This was when equal access to the public telephone system was implemented. The local market was opened to competition in May 1997 without any special breaks for new entrants and with relatively few restrictions on the incumbent regional companies. Beginning in 1998, the barriers to open competition in all cable and broadcasting markets were also removed, enabling telephone companies to compete in the cable-TV business.

Historically, the telephone industry allocated the costs between local exchange plant investment and long distance on a common basis. The cross subsidy increased when long

158. See *id.*

159. See *id.*

160. The leading case on the judicially-created doctrine of regulated conduct of Jabour is Attorney General of Canada v. Law Soc'y of British Columbia [1982] 137 D.L.R. (3d) 1, [1982] 2 S.C.R. 307.

161. See H. N. Janisch, *From Monopoly Towards Competition in Telecommunications: What Role for Competition Law?*, 23 CAN. BUS. L.J. 239, 243 (1997).

162. See *id.*

distance transmission costs began to decline significantly due to technological advances. In *United States v. American Tel & Telco*,¹⁶³ the landmark antitrust settlement concluded that AT&T had managed to keep out competition largely due to its control over local exchange facilities, and that ending that control would stop competitors from being disadvantaged. The divested local exchange companies would not be allowed to provide long distance service and therefore would have no incentive to discriminate between long distance carriers.¹⁶⁴ In Canada, there is reticence to use competition law as effectively as in the United States.¹⁶⁵ The CRTC continuing its stewardship by rate balancing between long distance and local rates, reflects the policy of the CRTC, which until recently mandated a steadily increasing subsidy from long distance to local facilities.¹⁶⁶

Lower long distance prices are also being influenced internationally by NAFTA. NAFTA expands the Canada and U.S. Free Trade Agreement (FTA).¹⁶⁷ Specific provisions are made for telecommunications.¹⁶⁸ NAFTA's Chapter 13 specifically provides for telecommunications; the objective is to "maintain and support the further development of an open and competitive market for the provision of enhanced services and computer services" as well as the use of "public telecommunications transport services."¹⁶⁹ NAFTA provides that foreign resellers¹⁷⁰ may face restrictions on resale, but only if necessary to safeguard the public service responsibilities of the public network operators (the telecom companies), to protect the technical integrity of the networks and to safeguard subscriber

163. *United States v. American Tel & Telco*, 552 F. Supp. 131, 165 (D.C. Cir. 1982).

164. See Janisch, *supra* note 161, at 247.

165. See CANADIAN COMPETITION LAW AND POLICY AT THE CENTENARY 427 (N.R.S. Khemani & W. T. Standbury, eds., (1991)).

[W]hile parliament has been prepared to amend the Competition Act from time to time over the last century to exempt specific trades and industries - labour unions, fishermen, amateur hockey players - no one wants to address such a fundamental policy issue as the degree to which this legislation applies to regulated industries. Instead, in true Canadian fashion, a regulated industry exemption has developed inadvertently through a series of court decisions where the issue has nothing to do with public policy or public interest, but rather weaving through ancient doctrines of constitution interpretation.

166. See *id.*, citing Richard J. Schultz, *Old Wine in New Bottle: The Politics of Cross-Subsidies in Canadian Telecommunications* (paper for the national conference on the future of telecommunications policy in Canada (Toronto, Apr. 1-2, 1993)).

167. Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter U.S./Canada FTA]. Ratified by the United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) (codified at 19 U.S.C. § 2112 (1988)); codified in Canada by the Canada-United States Free Trade Agreement Implementation Act, R.S.C. 65 (1988).

168. See John D. Hylton, *Free Wheeling and Dealing? - NAFTA and GATT and Telecom*, 4 MEDIA & COMM. L. REV. 173 (1996).

169. NAFTA Article 1301.3 provides that "[e]ach party shall ensure that . . . persons are permitted to: . . . (b) interconnect private leased or owned circuits with public telecommunications transport networks in the territory, or across the borders of that party."

170. See Trunk-side Access by Resellers to the Public Switched Telephone Network, Telecom Decision CRTC 93-8 Canadian Radio-Television and Telecommunications Comm'n. July 23, 1993 (the Commission notes that "investment in transmission facilities in Canada, whether by resellers or others, must comply with Canadian ownership and other requirements").

confidentiality.¹⁷¹ However, under the Canadian Telecommunications Act, if a reseller¹⁷² is deemed to be engaged in the activity of telecommunications common carrier, then it would be subject to regulation by the CRTC and therefore, subject to restrictions on foreign ownership.

The 1989 FTA reaffirmed the right of Canada to manage direct foreign investment. This right was reaffirmed in NAFTA. Although Canada's ability to restrict or condition U.S.-sourced FDI is circumscribed,¹⁷³ the Investment Canada Act generally controls review of foreign investment; yet it largely delegated its bailiwick to the CRTC for the regulated industry of telecommunications.¹⁷⁴ The FTA and NAFTA do not create common markets as in the European Union.¹⁷⁵ The provisions of the FTA and NAFTA concerning foreign direct investment (FDI) are mild compared to the European Union's right of establishment. The Canadian-U.S. version is a form of "managed FDI," which recognizes that while FDI brings advantages to the host country there are justifications for limiting investment access in certain circumstances.¹⁷⁶ Because Canadian investors effectively enjoyed open FDI access to the United States, the United States sought to introduce an EU-type of establishment right for U.S. firms in Canada. The United States wanted to be released from the ambit of the Foreign Investment Review Act (FIRA) and its successor Investment Canada and to be assured equal treatment with Canadian nationals with respect to establishing and operating businesses in Canada.

Rather than a right of establishment, there is merely liberalization of existing investment limitations. Investment Canada was grandfathered into the FTA and NAFTA. This means that U.S. investments still face controls with respect to acquisitions of sizable Canadian firms. An asymmetry exists since Canadians largely have open access to the United States where FDI is largely decontrolled. Investment questions were not high on Canada's agenda, which was satisfied with the status quo.

Like the General Agreement on Tariffs and Trade (GATT), NAFTA provides for most-favored-nation (MFN), meaning that a party to the treaty must treat service

171. See Hylton, *supra* note 168, at 180. See also NAFTA, Art. 1310: Definitions. "Public Telecommunications Transport Service" means any telecommunications transport service required by a party, explicitly or in effect, to be offered to the public generally, including telegraph, telephone, telex and data transmission, that typically involves the real time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of customers information. *Id.*

172. Resale means the subsequent sale or lease on a commercial basis, with or without adding value, of a telecommunications service leased from the Company. "Reseller" means a person engaged in resale.

173. U.S./Canada FTA Article 1602(1) and NAFTA Article 1102(1) provide for national treatment for investors, but this national treatment is qualified by the continuing vigor of certain "existing measures" such as Investment Canada pursuant to FTA Article 1607 and NAFTA Article 1108(1). Under the FTA Article 1607(3), Investment Canada was modified to raise the dollar threshold amounts for investment review of U.S. sourced investments as set forth in FTA Annex 1607.3.

174. See Jean Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 84 AM. J. INT'L L. 394, 421-26 (1990).

175. See Douglas E. Rosenthal, *Antitrust Implications of the Canada-United States Free Trade Agreement*, 57 ANTITRUST L.J. 485 (1988).

176. See Jeffrey Atik, *Fairness and Managed Foreign Direct Investment*, 32 COLUM. J. TRANSNAT'L L. 1, 16 (1994).

providers no less favorably than it treats service providers from any non-NAFTA country. The FTA and NAFTA exclude basic telecom services so that national monopolies can still continue as sole providers of basic services. However, any person or corporation, such as a reseller or enhanced service provider, has the right to access public networks. This right of connection represents an important step in facilitating the free flow of information between parties to the NAFTA treaty.¹⁷⁷ NAFTA allows users in a number of states to connect private lines with other private lines for their own persons. Typically, such connection is used by corporations for internal communications of voice and data or teleconferencing. Service providers are empowered to perform switching, processing, and signaling functions on their own without having to rely on the monopoly providers of basic service to carry out these services for them. Providers are free to offer "enhanced services"¹⁷⁸ to third parties. This reflects the fact that communication is an increasingly important section of the economy and that the value added and resale sub-section has become the fastest growing and one of the most profitable niches in the marketplace.¹⁷⁹

Under NAFTA, providers and users of telecommunications services are expressly permitted to access, manipulate and move information both within their own borders and across national borders free of restrictions.¹⁸⁰ The NAFTA provisions are further reflected in the General Agreement on Trade and Services (GATS), reached as part of the Uruguay round of talks on GATT. The GATS annex on telecommunications sets out minimum standards to be implemented by member states with regard to the regulation of their domestic telecommunications sector. The pivotal aspects include access to a host country's public telecommunications network by foreign service supplies.¹⁸¹

VII. Conclusion.

Like Stentor, public utilities are singular persons with attributes of many. They also have multiple capacities that need to be accommodated in the public interest by regulators. Indeed, public utilities are the administrators of the incorporeal hereditament of way. As essential services, public utilities are charged with public purposes in the stewardship of their rights-of-way. However, these public purposes often conflict with private law land rights. Until recently, it has been relatively easy to compartmentalize the traditional user of a utility easement.

For instance, authorization of the construction of a federal pipeline, including the route hearings, the certificate of public convenience, and enabling legislation is a legal process tantamount to the exercise of eminent domain. Indeed, the *raison d'être* of the utility is to promote the public interest. Yet in order to be fair, the process must not be

177. See Hylton, *supra* note 168, at 181.

178. NAFTA Article 1310 broadly defines "enhanced services" or "value-added services" to mean "those telecommunication services employing computer processing applications that: (a) Act on the format, content, code, protocol or similar aspects of a customer's transmitted information; (b) Provide a customer with additional, distant, or restructured information; or (c) Involve customer interaction with stored information."

179. See Hylton, *supra* note 168, at 182.

180. See *id.* at 184.

181. These "rights of connections" are for the most part mirrored in NAFTA. See *id.* at 186.

static; rather, it must be fair, balancing of the public interest as against the private interest of the owner. Accordingly, the issuance of a certificate of public convenience is akin to a form of zoning for which compensation is not payable.

No express language or judicial authority authorizes nor prohibits commercial use by a Canadian pipeline of fiber-optic telecommunications on its right of way. Indeed, no express words against such use exist in the easement deeds. However, such change in user of a pipeline right-of-way (dominant tenement) is not an increased burden on the adjoining land (servient tenement). Analogously, attaching coaxial cable on Hydro poles places a negligible resultant burden on the land. The difference in the Hydro case¹⁸² is that a third-party must pay a commercial fee to the owner of the easement (dominant tenement). Conversely, federal pipelines have a stewardship right over their easement permitting construction of commercial fiber-optic telecommunication cable following the exercise of business judgment. Indeed, private property is not a castle in isolation, it is a castle in a community and draws its support and security of existence from the community. The law recognizes many compromises and outright intrusions on the literal sense of this concept, including the right of eminent domain and the right of the community in applying zoning restrictions and safety standard.¹⁸³

Typically, the grant of right-of-way to pipelines is a general grant. The right is not limited to the pipeline use contemplated when the grant was made. More uses are permitted. Arguably, the commercial use of fiber optics on a pipeline right-of-way does not radically alter the character of the right-of-way, namely, that of one concerning direct and incidental pipeline uses. This is consistent with common law principles that allow for a consideration of the commercial setting in which the parties are operating including convergence of utilities.

From a public policy standpoint, contemporary commercial use and economic argument supports such use by the owner of the dominant tenement who, as mentioned, is effectively the administrator of the incorporeal hereditament of way. It would be grossly inefficient to settle the matter with sole reference to a right-of-way action that is expensive, technical, and often calls many witnesses. First of all, the capital costs inherent in the construction of duplicate infrastructures may otherwise operate as a barrier to entry and a disincentive for the deployment of networks essential to an information-based society. Secondly, although the adjoining landowner(s) own the solum of the right-of-way, the right-of-way is sterilized since their ability to use it is extremely limited. Ownership of the right-of-way solum (the land under the right-of-way) by the servient tenement is somewhat fictional since the proprietor has scant control over its use. In other words, a federally regulated Canadian pipeline is the administrator of the incorporeal right-of-way for pipeline with statutory power to discharge its duties as administrators. This expansion of stewardship is consistent with the globalization of politics and markets, a process which one commentator¹⁸⁴ suggests is creating forces that militate in favor of various forms of deregulation. "Indeed, successful government regulation often takes its structure and form from the entities it seeks to regulate."¹⁸⁵ Canadian utility regulators may therefore be lagging in a market approach, which could secure an important public interest objective—one that is economically and politically pragmatic for network public utilities in an era of convergence and co-location.

182. See Ontario Hydro (F.C. 1997) (file A332-92).

183. See *Regina v. Lyons* [1984] 2 S.C.R. 63.

184. See Alfred C. Aman, Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention?*, 2 IND. J. GLOBAL LEGAL STUD. 429, 439 (1995).

185. *Id.*