LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON

EXPROPRIATION

(PROJECT NO. 5)

LRC 5

1971

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

Honourable E.D. Fulton, P.C., Q.C., LL.D., *Chairman*
Richard Gosse, Q.C., D. Phil.
Ronald C. Bray

Professor Christopher Carr is Director of Research to the Commission.

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, British Columbia.

TABLE OF CONTENTS

TO THE HONOURABLE LESLIE R. PETERSON, Q.C.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON EXPROPRIATION
(Project No. 5)

This Report completes the Commission's study of the law of expropriation, which is Project No. 5 in the Commission's Approved Programme.

In this Report, the Commission puts forward recommendations for the reform of the law relating to the procedure to be followed and the compensation to be paid on the compulsory taking or using, under statutory authority, of a person's property. We have endeavoured to frame proposals that would, if implemented, do justice to property owners but which would be workable from the point of view of expropriating authorities.

There are, at present, many differing statutory provisions in the law of this Province dealing with the procedure to be followed and the compensation to be paid on the exercise of a wide variety of expropriation and other similar powers. The chief reason for the number of these provisions has been the inadequacy of what once was a statute of general application, the *Lands Clauses Act*. That particular statute was first enacted in England in 1845 and became law in this Province in 1858. It is hopelessly out of touch with current needs.

In this Report, the Commission recommends that there should be a single expropriation statute, embodying our proposals with respect to procedure and compensation, which would replace the *Lands Clauses Act* and the many statutory provisions referred to above.

INTRODUCTION

A. General

The law of expropriation was one of eight projects included in the Commission's Approved Programme, announced in July, 1970. Although this topic was the subject of an extensive review by a Royal Commission appointed by the Provincial Government (the "Clyne Commission") over ten years ago, there have been significant developments in this field elsewhere in Canada since that Commission submitted its report.

In 1967, the Ontario Law Reform Commission reported on the basis for compensation and, the following year, the Ontario Royal Commission Inquiry into Civil Rights put forward proposals dealing with expropriation procedures. Legislation based on the recommendations of these two Commissions was enacted in Ontario in December, 1968.

New federal expropriation legislation came into force in July, 1970 and, in Manitoba, a new expropriation statute went into effect at the beginning of this year. The Alberta Institute of Law Research and Reform has, with governmental approval, been studying the subject for some time. Earlier this year, the Institute circulated for comment a working paper on the principles of compensation.

This Commission believed it would be appropriate for it to conduct a review of what was being done in this field and make proposals for reform that would, in its view, represent the best features of the Clyne Report and the recent developments elsewhere. We were encouraged to undertake this review by the Attorney-General, who gave his approval to the inclusion of the law of expropriation in our initial programme.

Certainly, the public has a vital interest in the reform of the law of expropriation. On the one hand, it is fundamental justice that there should be adequate procedural safeguards to protect the individual citizen from the abusive exercise of expropriation powers. In addition, he should be entitled to receive compensation that will provide him with full indemnification for the losses resulting from expropriation.

At the same time, it must be remembered that expropriation powers exist for a reason. There is a point at which the interests of the community must override that of the individual. That is the essence of expropriation. There are instances where the community, to achieve a public benefit, must be able to acquire private property where the owner of that property is unwilling to sell either at all or for what would generally be regarded as reasonable compensation. In those instances, while the community must treat the individual fairly, care must be taken not to impose procedures that will make it virtually impossible for expropriating authorities to carry out their projects nor provide a formula for compensation that is a licence to raid the public treasury.

The instances in which expropriation powers are granted should be restricted to the minimum that is compatible with public necessity.

B. The Commission's Research

This Commission has tried to avoid, so far as it is possible to do so, duplication of the work that has been carried out here and elsewhere. Repetition would be a waste of resources. What the Commission has endeavoured to do is to make use of the research and thinking that others have done as a basis for its proposals. This does not mean, of course, that the Commission has been engaged in a kind of rubber-stamping process. After identifying particular problems, the Commission has given careful consideration to the various solutions put forward in the Clyne Report and in other jurisdictions. Generally, the Commission has found that one of those solutions would be suitable for adoption here. However, in some instances, the Commission has put forward new solutions of its own.

Although the Commission has been able to utilize to a substantial extent work carried out by others, it nevertheless was necessary to conduct certain original research of its own. For example, the provincial statutes were examined with a view to establishing what expropriation powers now exist in this province and the manner in which they must be exercised. That study revealed that it is not always as clear as it should be whether particular statutory provisions create powers of expropriation and that, in some instances, undesirable legislative techniques had been used to confer the power to expropriate. In addition, the Commission found a considerable number of statutory provisions that confer a right to enter and use in some way privately-owned lands without the consent of their owner - but which fall short of authorizing the expropriation of an interest in that land. The Commission concluded that such statutory powers should be dealt with in this study. In addition, the Commission collected data on the number of expropriating bodies and the extent to which expropriation powers are utilized. This further research and the preparation of this working paper have been done by the full-time staff of the Commission.

Also, two research studies were commissioned. Professor S.W. Hamilton, of the Faculty of Commerce and Business Administration at the University of British Columbia, prepared a paper on compensation payable in respect of the expropriation of mortgaged property, a subject in which he has had a special interest. And Mr. John W. Morden of the Ontario Bar, former Counsel to the McRuer Commission, an experienced practitioner in expropriation cases, and author of a number of publications on the recent Ontario expropriation legislation, undertook a critical analysis of that statute for us.

The Commission was fortunate to have the services, in an advisory capacity, of Professor Eric C.E. Todd, of the Faculty of Law at the University of British Columbia, one of the leading authorities on expropriation law in Canada and author of a recently published commentary on the new federal expropriation statute. Prior to his appointment as a member of this Commission, Mr. Ronald C. Bray also acted as an adviser to us on this project. Mr. Bray was one of the Counsel to the Clyne Commission.

The full-time member of the Commission had helpful discussions in Toronto, Winnipeg and Ottawa with a number of persons involved with the application of the Ontario, Manitoba and federal legislation. In Toronto, for example, he had extensive interviews with the chief inquiry officer, the vice-chairman of the Board of Negotiation, the chairman of the Ontario Land Compensation Board, all being officials charged with responsibilities by the new Ontario legislation; senior officers in the Ontario Department of Highways and the Municipality of Metropolitan Toronto, the two largest expropriating authorities in Ontario; and the Honourable J.C. McRuer. The full-time member also had the opportunity to meet with the Board of the Alberta Institute of Law Research and Reform when it was discussing expropriation procedures.

C. Consultation

The Commission makes a general practice of inviting comment and criticism on its research and analysis prior to making a report to the Attorney-General on any particular subject. The usual medium used by the Commission for this purpose, and which was used in this project, is the working paper, which we circulate to persons, groups and organizations to whom the particular subject under study would be of interest. The working paper contains the views of the Commission at the time it is issued. The tentative conclusions and suggestions made in it are reviewed by the Commission in the light of the comment and criticism received. Working Paper No. 6 on Expropriation was completed in September and 200 copies were circulated for comment. We requested that we receive comment by November 12.

The response, on the whole, was very gratifying. We received comments from a number of organizations, including the British Columbia Federation of Agriculture, the Civil Liberties Association, the Vancouver Chapter of the Appraisal Institute of Canada, the Real Estate Institute of British Columbia, the Vancouver Chapter of the Society of Real Estate Appraisers, the Real Estate Board of Greater Vancouver, the British Columbia Division of the Canadian Petroleum Association, and the Council of the Forest Industries of British Columbia. We also received a good response from members of the public, the bar and the judiciary. We had submissions from the Department of Highways and the British Columbia Hydro and Power Authority, as well as comments from a number of other provincial government departments and agencies. A very helpful submission was made by Dean Philip White of the Faculty of Commerce and Business Administration at the University of British Columbia.

The full-time member of the Commission had discussions with a considerable number of persons involved in the expropriation process. These included representatives of various expropriating authorities.

The Commission would like to thank the many persons who responded to our requests for assistance and guidance.

At an early stage in this project, the Commission considered whether or not it should hold public hearings. Public hearings were held by the Clyne Commission. Our Commission did not feel that much would be gained, taking into account its resources in time and personnel and its other projects, in holding public hearings again. we concluded, however, that members of the public should be given an opportunity to express their views and, accordingly, an advertisement was placed near the end of March, 1971, in all the daily newspapers throughout the Province, inviting the public to make submissions in writing to us. We received nearly forty replies, most of which were letters from individuals. Organizations making submissions were the British Columbia Federation of Agriculture, the Corporation of the District of Saanich, and the Real Estate Institute of British Columbia. We much appreciated receiving these submissions, which were helpful to us in the framing of the proposals we made in our working paper.

A synopsis of the proposals made in the working paper was published in the October-November issue of *The Advocate*, which is published by the Vancouver Bar Association and is distributed generally to the bench and bar throughout the Province.

D. The Clyne and other Reports: Related Statutes

These reports and statutes were mentioned briefly at the beginning of the

Introduction.

1. *The Clyne Report*

On January 27, 1961, the Government of British Columbia established a Royal Commission to review the law of expropriation. The Honourable J.V. Clyne was appointed the sole Commissioner. Public hearings were held, the Commission sitting for eighteen days in Vancouver. The transcript of evidence and argument ran to 2,566 pages. Twenty-three organizations or persons appeared before the Commission, and a number of written submissions were made. The Commission was assisted by N.T. Nemetz, Q.C., now a judge of the Court of Appeal of British Columbia, and Mr. R.C. Bray, both of whom were appointed Counsel to the Commission, and Mr. J.N. Lyon, now an Associate Professor of Law at McGill University, who was appointed Registrar. The Honourable Mr. Clyne completed his report on August 24, 1964.[1] The summary of recommendations contained in that report are set out in Appendix "A" of this Report. We refer to these recommendations from time to time throughout the Report.

One of the fundamental changes recommended by the Clyne Commission was the substitution of "market value" plus disturbance damages for "value to the owner" as the basis for determining the compensation payable. This principle has been adopted in the Ontario, Manitoba and federal statutes.

2. *Ontario*

The Ontario Law Reform Commission completed a study on the basis for compensation in September, 1967.[2] In February, 1968, the first report of the Royal Commission Inquiry into Civil Rights, of which the Honourable J.C. McRuer was sole Commissioner, was submitted to the Government of Ontario.[3] In volume 3 of that report, there are 133 pages dealing with expropriation procedures.[4]

Legislation was enacted in Ontario in December, 1968, based on the recommendations of those two Commissions.[5] Some minor amendments were made this year.[6] The statute, as amended in 1971, is set out in Appendix "C" of this Report.

3. *Canada*

The new federal legislation received Royal Assent on June 11, 1970, and came into force on July 7, 1970.[7] It is set out in Appendix "B".

---

1. Report of the Royal Commission on Expropriation, 1961-63. *See* pp. 23-27. Printed by the Queen's Printer, Victoria, B.C. in 1964. Now out of print.

2. Report of the Ontario Law Reform Commission on The Basis for Compensation on Expropriation.

3. Report No. 1, which contained three volumes. The Commission submitted two further reports.

4. Pp. 959-1092.

5. The *Expropriations Act, 1968-69*, c. 36.

6. The *Expropriations Amendment Act, 1971*. *See* Bill 36, which received Royal Assent on May 11, 1971.

7. *Expropriation Act*, S.C. 1969-70, c. 41: R.S.C. 1970, 1st Supp. C. 16.

A Concordance of the federal and Ontario statutory provisions is set out in Appendix "D".

4. *Manitoba*

As mentioned previously, a new expropriation statute came into effect in Manitoba on January 1 of this year.[8]

E. The Report

The Report is divided into three Parts, as follows:

Part One - The Existing Position
Part Two - Proposed Procedure
Part Three - Proposed Basis for Compensation

After Part III, there is a general summary of our recommendations. At the back of the Report are the Appendices, containing a summary of the recommendations of the Clyne Report, the recent Federal and Ontario legislation, and a Concordance of the provisions of those two statutes.

8. *See The Expropriation-Act*, R.S.M. 1970, C. E190, as amended 1971. *See* Bill 109. *See also The Land Acquisition Act*, R.S.M. 1970, c. L40.

Part One - The Existing Position

CHAPTER I THE SCOPE OF THE STUDY

What is expropriation?

The word "expropriation", in its legal sense, means the lawful acquisition by one person of another person's property without the latter's consent. An expropriation results in one person acquiring property rights and another person being deprived of them: it involves a compulsory transfer of property rights.

Expropriation may be of either personal or real property. Although nearly all expropriations in British Columbia are confined to land, there are, as will be seen later, a number of statutory provisions which authorize the expropriation of personal property. Thus, while the main objective of the Commission is to formulate an appropriate procedure and basis for compensation for land expropriation, it will also deal with expropriation of personal property.

Where real property is being expropriated, the expropriating authority may acquire full ownership of the land or it may acquire a lesser interest, such as an easement. In the latter case, the owner of the land affected retains his ownership subject to a limited right in the expropriating authority to use the land in a limited way (e.g., for a sewer-line).

Entry and use

What is a property right for the purpose of expropriation is not altogether clear. For example, the British Columbia Court of Appeal once held that an order granted under the *Petroleum and Natural Gas Act, 1954*[1] by the Board of Arbitration, enabling a petroleum company to enter on and use another person's lands for the purposes of gas exploration and production, did not confer an interest in land on the company.[2] Since that decision, the legislation has been changed to some extent, and it may be that the Court would now reach a different conclusion. This particular problem will be discussed later.

In any event, there are a good many statutory provisions which authorize entry and use by one person of another's land, not amounting to expropriation. Most of these enactments provide for compensation for damage caused by such entry and use.

The Commission believed that this study should include an examination of all statutory provisions conferring rights to enter and use another's land - whether or not those rights amount to property interests in the traditional legal sense. The study thus embraces all statutory authorization of the use of another person's property without that person's consent.

Entry for inspection

---

1. S.B.C. 1954, c. 31.

2. *Re Pacific Petroleums Limited* (1958), 24 W.W.R. 509, reversing Macfarlane, J., 23 W.W.R. 1.

There are also a large number of statutes - some eighty - which authorize the entry of some government official on to private property, but do not confer any right to use the property. Nearly all of these give the right of entry for the purpose of some kind of inspection. These inspections may, for example, be to ensure that laws relating to fire,[3] health,[4] and building requirements[5] are being complied with, to enable the assessment of property for tax purposes,[6] or for the regulation of employment.[7] While these rights of entry should be examined to see whether or not they are all necessary and to what extent there should be safeguards on their exercise, the Commission considered such an examination would be outside the terms of reference of this study of the law of expropriation. The Commission hopes to be able to undertake such a review at some future time.

Use Control

Legislation of various kinds may restrict the use and enjoyment of one's property, but without conferring a right to use that property on another person. Zoning requirements, building and health by-laws, and pollution controls may all place restrictions on the use of land by its owner - and in such a way as to affect the value of that land. Problems in land-use control should perhaps be subjected to examination, but this study is not the vehicle for that purpose.

Conclusion

To sum up, then, the Commission concluded that the purpose of this study should be to make proposals for the reform of those laws which enable a person to use or take another person's property without the latter's consent.

---

3. *Fire Marshall Act*, R.S.B.C. 1960, c. 148, ss. 17, 30(2), and 40; *Municipal Act*, R.S.B.C. 1960, c. 255, s. 642(h).

4. *Health Act*, R.S.B.C. 1960, c. 170, ss. 7, 56, 66, 67, and 70; *Pollution Control Act, 1967*, S.B.C. 1967, c. 34, ss. 11 and 15.

5. *Electrical Energy Inspection Act*, R.S.B.C. 1960, c. 126, s. 10; *Municipal Act*, R.S.B.C. 1960, c. 255, s. 714(f).

6. *Assessment Equalization Act*, R.S.B.C. 1960, c. 18, ss. 11 and 32; *Municipal Act,* R.S.B.C. 1960, c. 255, s. 342; *Taxation Act*, R.S.B.C. 1960, c. 376, s. 12.

7. *Apprenticeship and Tradesmen's Qualification Act*, R.S.B.C. 1960, c. 13, s. 18; *Department of Labour Act*, R.S.B.C. 1960, c. 105, s. 9; *Factories Act*, S.B.C. 1966, c. 14, s. 12(a); *Mediation Commission Act*, S.B.C. 1968, s. 44; *Workmen's Compensation Act*, R.S.B.C. 1960, c. 59, S. 60(3).

CHAPTER II EXISTING POWERS OF EXPROPRIATION

The power of the Province to expropriate must be given in a statute enacted by the Provincial Legislature. The same is true of any body or person deriving from the Province its power to expropriate. There is no prerogative right in the Crown in right of the Province to expropriate for any purpose.

A. The Creation of the Power

The power of the Province to expropriate must be given in a statute enacted by the provincial Legislature. The same is true of any body or person deriving from the Province its power to expropriate. There is no prerogative right in the Crown in right of the Province to expropriate for any purpose.[1]

1. *Terminology*

The Report of the Ontario Royal Commission Inquiry into Civil Rights states:[2]

> ... the Legislature should be precise in expressing its intention when it confers the powers of acquisition of property on any body. It was pointed out in the Report that, while the rule of interpretation is that powers of expropriation are not lightly implied by the courts, there were provisions in Ontario which were open to question. Did, for example, a power given to a Minister of the Crown to "purchase or otherwise acquire" property include compulsory acquisition?

There would be much to be said for a general statutory provision declaring that no provision in any statute be deemed to create a power to expropriate unless the word "expropriate" is used.

A good many of the British Columbia provisions do use the word "expropriate". *See*, for example, section 11(c) of the *Park Act*,[3] section 67(c) of the *Wildlife Act*,[4] sections 74 and 75 of the *Water Act*,[5] section 7 of the *Gas Utilities Act*,[6] section 169(1) of the *Public Schools Act*,[7] section 18(a) of the *British Columbia Hydro and Power Authority Act, 1964*,[8] and sections 465(2)(b), 513(3), 531(4), 534(2), 560(3), 563(2) and 622 of the *Municipal Act*.[9]

---

1. Royal Commission Inquiry into Civil Rights, Report No. 1, vol. 3, at p. 962. (Ontario, 1968). Challies, *The Law of Expropriation*, 2nd ed. (1963), at p. 12.

2. *Supra*, n. 1, at p. 984.

3. S.B.C. 1965, c. 31.

4. S.B.C. 1966, c. 55.

5. R.S.B.C. 1960, c. 405.

6. R.S.B.C. 1960, c. 164.

7. R.S.B.C. 1960, c. 319.

8. S.B.C. 1964, c. 7.

9. R.S.B.C. 1960, c. 255.

Under section 13(1) of the *Housing Act*,[10] the Lieutenant-Governor in Council is empowered to "purchase, acquire and take possession" of lands, and subsection (2) refers to lands "so purchased or acquired or expropriated".

On the other hand, many of the statutory expropriation provisions do not use the word "expropriate" and in some cases there may be doubt as to whether a power has been conferred. The effect of the words used in conferring a power to acquire land may have to he determined by examining the context in which they are used in order to discover whether a power to expropriate has been conferred.

"Otherwise acquire"

The mere granting of a power to "purchase or otherwise acquire lands" cannot be regarded as conferring a power to expropriate. No one would seriously suggest that every company incorporated under the *Companies Act*[11] has the power to expropriate merely because among the ancillary powers normally given to companies include, by section 22(l)(a) of that Act, the power to "purchase, take on lease or in exchange, or otherwise acquire and hold any real or personal property".

Where a similar power to purchase "or otherwise acquire" is granted to a Minister of the Crown and there are no other provisions indicating that an expropriation power has been given, it is difficult to believe that a court would hold that expropriation powers have been created. Examples of Ministers being given such powers may be found in section 3 of the *Mental Health Act, 1964*,[12] section 4(2) of the *Creston Valley Wildlife Management Area Act*,[13] and section 4(1) of the *Archaelogical and Historical Sites Protection Act*.[14] The last of the provisions is coupled with a further provision that the Minister "shall pay as compensation to the owner ... an amount to be fixed by the Lieutenant-Governor in Council". Does this mean that the Minister has the power to expropriate? Is the Lieutenant-Governor in Council fixing the compensation to be paid on expropriation or is he merely authorizing the price to be paid on a voluntary acquisition by the Minister? So far as the Commission is aware, expropriations have not been made under the three statutory provisions above referred to.

A similar and very recent example is contained in the *Vancouver School of Theology Act*,[15] which was enacted during the 1971 Session of the Legislature. Section 43(1) of that statute provides that the School of Theology may acquire property by gift, purchase, or any other manner. Nothing is said about expropriation or compensation. This provision surely was never intended to confer a power to expropriate. Nor do we believe that the courts would so interpret it.

"Take"

Does the word "take" confer the power to expropriate? When used with

---

10. R.S.B.C. 1960, c. 183.

11. R.S.B.C. 1960, c. 67.

12. S.B.C. 1964, c. 29.

13. S.B.C. 1968, c. 14.

14. S.B.C. 1960, c. 15.

15. S.B.C. 1971, c. 72.

"without the consent of the owner" or where provision for the determination of compensation is made where no agreement can be reached, it clearly does confer the power. This kind of terminology is used in section 36 of the *Universities Act*,[16] section 50 of the *Forest Act*,[17] section 3 of the *Mines Right-of-way Act*,[18] section 12 of the *Rural Telephone Act*,[19] section 16 of the *Health Act*,[20] section 791 of the *Municipal Act*,[21] and section 17 of the *Pipe-lines Act*,[22] section 13 of the *Housing Act*,[23] sections 8 and 9 of the *Highway Act*,[24] sections 9 and 10 of the *Department of Highways Act*,[25] and sections 9 and 10 of the *Department of Public Works Act*.[26]

Companies to which section 32 of the *Railway Act*[27] applies are empowered to "purchase, acquire, take, and hold land and other property". The Act does not confer a positive power to expropriate. However, in section 36, it is provided that the lands "which may be taken without the consent of the owner" shall not exceed certain dimensions. Following provisions provide for arbitration on the question of compensation.

Certainly, the power to expropriate in the *Railway Act* could be better stated. The same applies to a number of the provisions mentioned above.

What if the word "take" is used but is not qualified by some expression like "without the consent of the owner" or no provision for the determination of compensation is made in the event that no agreement is reached?

Under section 7 of the *Farmers' and Women's Institutes Act*,[28] institutes are empowered to "acquire and take by purchase, donation, devise or otherwise land and personal property". Nothing is said about compensation and it is therefore highly unlikely that these words could be regarded as implying a power to expropriate.

The same result must surely be true with respect to section 3(c) of the *Petroleum Sales Act*[29] which gives the Lieutenant-Governor in Council the power to "take and acquire

---

16. S.B.C. 1963, c. 52.

17. R.S.B.C. 1960, c. 153.

18. R.S.B.C. 1960, c. 246.

19. R.S.B.C. 1960, c. 343.

20. R.S.B.C. 1960, c. 170.

21. R.S.B.C. 1960, c. 255.

22. R.S.B.C. 1960, c. 284.

23. R.S.B.C. 1960, c. 183.

24. R.S.B.C. 1960, c. 172.

25. R.S.B.C. 1960, c. 103.

26. R.S.B.C. 1960, c. 109.

27. R.S.B.C. 1960, c. 329.

28. R.S.B.C. 1960, c. 139.

29. R.S.B.C. 1960, c. 281.

by purchase, lease or otherwise" any refinery, or storage or distributing plant. Nothing is said elsewhere in the statute indicating an expropriation power was intended to be granted.

Section 15 of the *Health Act*[30] empowers the Lieutenant-Governor in Council to make regulations for "taking possession" of land or any building with respect to the suppression of contagious diseases. Section 16 provides that "such possession may be taken without a prior agreement with the owner and without his consent" in emergency situations. Clearly, expropriation powers exist under section 16, but do they under section 15 when there is no emergency? Section 18 provides for the determination of compensation where no agreement can be reached, but does not confine its operation to section 16. There are now no regulations under section 15, regulations previously in existence having been repealed earlier this year. So far as the Commission is aware, section 15 has never been used to expropriate. There must be some doubt as to whether it could be.

2. *By Reference*

There are several statutory provisions which, by reference to other statutory provisions, confer a power to expropriate without appearing to do so. This is undesirable. Where a power to expropriate is being conferred, the legislation should plainly and openly state that this is the case.

For example, the Minister of Lands, Forests and Water Resources is given, under section 147(2) of the *Forest Act*,[31] "the same powers in respect of entering upon and taking possession of lands and otherwise as are vested in the minister of Highways by Part I of the *Highway Act*." Powers of expropriation appear to be granted to the Minister of Highways in similar fashion by section 33(1) of the *British Columbia Harbours Board Act*[32] and section 19(1) of the *British Columbia Ferry Authority Act*.[33] The same is true of section 3(2) of the *Libby Dam Storage Reservoir Act*,[34] which makes applicable for the purposes of that statute the expropriation provisions of the *Department of Public Works Act*. Whether section 33(1) of the *British Columbia Harbours Board Act* does, in fact, confer a power to expropriate is a question currently before the courts.

Section 5 of the *Great Northern Railway Relocation Act*[35] gives expropriating power to the British Columbia Hydro and Power Authority by providing that the authority shall have the powers conferred by the provisions of the *Railway Act* listed in the Schedule at the end of the former statute. The Schedule contains a list of sections from the *Railway Act* including those dealing with expropriation.

Section 254(1) of the *Public Schools Act* appears to empower colleges to expropriate

---

30. R.S.B.C. 1960, c. 170.

There were for many years regulations in existence under this provision for the prevention of the spread of smallpox. *See* B.C. Reg. 146/59. These regulations were repealed earlier this year. *See* B.C. Reg. 181/71.

31. R.S.B.C. 1960, c. 153.

32. S.B.C. 1967, c. 4.

33. R.S.B.C. 1960, c. 380.

34. S.B.C. 1968, c. 24.

35. S.B.C. 1969, c. 9.

by stating the "provisions of this Act regarding acquisition and disposal of land ... that apply to a school district under the jurisdiction of a Board, extend to a college". However, owing to the fact that colleges are not regarded as having separate legal existence, this provision, we understand, is taken to mean that the expropriating powers of boards of school districts are extended to include expropriations for college purposes.

In none of the above provisions which appear to confer expropriating power by reference is the word "expropriate" mentioned or is it made plain that expropriation powers are being granted.

The Commission does not wish to suggest that any of the persons granted expropriation powers by reference should not have been given those powers, or that the reference technique is in itself improper. The Commission does believe, however, that the right to expropriate should be granted in unequivocal language. This is done now where the reference technique is used in the *Park Act*[36] and the *Wildlife Act*.[37] Section 11(c) of the *Park Act* gives the power to "expropriate land" and makes applicable the provisions of the *Department of Highways Act* for that purpose.

Accordingly, the Commission recommends:

1. *The various statutory provisions which create, or might appear to create, expropriating powers be reviewed, and revised where necessary, to ensure the statutory language creating those powers clearly and expressly demonstrate intention to confer those powers.*

2. *Wherever the power to expropriate is being granted, the word "expropriate" should be used.*

3. *There should be a general statutory provision that no enactment which does not use the word "expropriate" shall be deemed to confer a power to expropriate.*

3. *By Ministerial Discretion*

The Minister of Commercial Transport may, under section 4 of the *Railway Act*, by certificate declare that such of the statute's provisions as may be designated in the certificate shall apply to "any company". Such certificates require the approval of the Lieutenant-Governor in Council under section 7. A "company" is defined, for that purpose, by section 4(1) as any person, firm or corporation (to which the Act would not otherwise apply) which owns, constructs, or operates a railway or tramway within the Province. Thus, the Minister may confer the power to expropriate on such companies by making the expropriation provisions of the statute applicable to them. It is understood that it is not his practice to include the expropriation provisions in his certificate in respect of railways operated by industrial corporations incidental to their main business. We are informed that none of the industrial railways listed on page AA37 of the Annual Report for 1969 of the Department of Commercial Transport have obtained expropriating powers in this manner. On the other hand, the Minister has conferred expropriating powers on the British Columbia Hydro and Power Authority and the British Columbia Harbours Board under section 4 certificates.[38]

The Commission considers it wrong in principle that a Minister of the Crown

---

36. S.B.C. 1965, c. 31.

37. S.B.C. 1966, c. 55.

38. Certificate No. 1786, dated March 18, 1969, and Certificate No. 2038, dated April 13, 1970.

should be able to confer expropriating powers in his discretion. We feel that wherever expropriation powers are being conferred, it should be directly by the Legislature.

Accordingly, the Commission recommends:

Section 4(2) of the Railway Act *be amended so that the provisions of the* Railway Act *which may be made applicable to a company under that provision by the Minister's certificate be limited to those provisions which do not relate to expropriation.*

B. The Powers and Their Exercise

1. *Expropriating Powers*

The existing powers of expropriation that fall within Provincial jurisdiction are set out in Table 1 below. This may not be an exhaustive listing, but it is substantially complete.

Not included in the list are rights of entry granted by the Board of Arbitration under the *Petroleum and Natural Gas Act, 1965*.[39] These are dealt with in Chapter III, "Right of Entry and Use". Compulsory adjustment of boundaries under the *Special Surveys Act*[40] and replotting under the *Municipal Act*[41] are, along with certain other provisions, considered as special problems in Chapter IV, "Miscellaneous Situations".

The power to expropriate does not always exist where one might expect to find it. Hospitals, for example, have no power to expropriate. *See* the *Hospital Act*,[42] the *Regional Hospital Districts Act*,[43] the *Hospital Corporations Act*,[44] and such special statutes as the Vancouver *General Hospital Act, 1902*[45] and the *Royal Inland Hospital Act, 1896*.[46] Another illustration is the British Columbia Telephone Company. It is, of course, a federal company operating its telephone services subject to federal regulation, but this does not alter the fact it carries on its extensive operations in British Columbia without the assistance of an expropriation power.

Table I below sets out:

1. The expropriating authority,
2. the statutory power authorizing expropriation,
3. the purposes for which expropriation may be made,

---

39. S.B.C. 1965, c. 33.
40. R.S.B.C. 1960, c. 368.
41. R.S.B.C. 1960, c. 255.
42. R.S.B.C. 1960, c. 178.
43. S.B.C. 1967, c. 43.
44. S.B.C. 1971, c. 25.
45. S.B.C. 1970, c. 55.
46. S.B.C. 1896, c. 25.

4. what authorization, consent or approval, if any, must be obtained by the expropriating body,

5. the arbitration tribunal to determine compensation, where agreement on compensation has not been reached, and

6. what appeal is provided for from the decision of the arbitration tribunal.

In many instances no appeal is provided for from the award of an arbitration board. This does not mean that the award cannot be attacked. There are a number of grounds for setting aside board awards.[47] These include where there is an error on the face of the award, exceeding jurisdiction, and violations of natural justice. The jurisdiction of the courts to set aside on such grounds exists both at common law and under statute. If the arbitration is one governed by the *Arbitration Act*,[48] the Supreme Court has statutory authority to set aside the award where "an arbitration or award has been improperly procured".[49]

The expropriating authorities are classified under three headings:

1. The Crown in right of the Province,
2. Municipalities, school boards and other local public bodies,
3. Non-governmental bodies.

The Table shows that there are over sixty statutory provisions that confer the power to expropriate.

[TABLE OMITTED]

2. *Expropriating authorities*

The number of expropriating authorities, where ascertainable, has been set out in Table II. The list of authorities in Table II is drawn from Table I.

An overall figure for the number of bodies and persons entitled to expropriate would be misleading. Technically, for example, every holder of a licence issued under the *Water Act* may expropriate for the purposes of his licence. There are over 25,000 such licences issued but expropriations run at only approximately ten a year. In many cases it is unnecessary for the licensee to utilize another person's land and, where it is necessary (usually to run a pipe-line to transport water), agreement is reached between the licensee and the landowner. Under the *Forest Act*, "any person desiring to transport timber or product of the forest" can expropriate land for a right-of-way: a figure cannot be fixed for persons falling in that category. Nor is there any way of determining the number of companies owning ore-reduction works

47. For a discussion of this subject, *see Practice in Arbitrations*, being the transcript of a panel discussion in the Continuing Legal Education Programme, held at Vancouver in March, 1970 and published by the Center for Continuing Legal Education, University of British Columbia. *See also* the British Columbia Annual Law Lectures, 1969, at pp. 122-147, for a panel discussion of arbitration in expropriation, published by the same body.

48. R.S.B.C. 1960, c. 14.

49. *Ibid.*, s. 14(2).

or industrial plant for the purposes of the *Industrial Operations Damage Act*.[50] There must be well over 30,000 bodies or persons who, in theory, have expropriation powers but the vast majority will never have occasion to exercise them.

The Provincial Government's expropriating powers are exercisable through five Ministers of the Crown (Highways, Public Works, Health Services and Hospital Insurance, Recreation and Conservation, and Lands, Forests and Water Resources), two Crown agencies (the British Columbia Hydro and Power Authority and the British Columbia Harbours Board), the Provincial Civil Defence Coordinator, and the Lieutenant-Governor in Council (under the *Housing Act*). The Pacific Great Eastern Railway Company has been listed under Provincial Government since, although it is not technically a Crown corporation, the Crown is sole shareholder.

There are approximately 600 local public bodies with expropriation powers. This includes 144 municipalities, 28 regional districts established under the *Municipal Act*, 77 school districts and 290 improvement districts as defined under the *Water Act*. The three universities to which the *Universities Act* applies (University of British Columbia, University of Victoria, and Simon Fraser University) have been classed as local public bodies for the purposes of Table II.

TABLE II - EXPROPRIATING AUTHORITIES

I Provincial government

Lieutenant-Governor in Council (under the *Housing Act*)
Minister of Highways
Minister of Public Works
Minister of Health Services and Hospital Insurance Minister of Lands, Forests and Water Resources Minister of Recreation
Provincial Civil Defence Coordinator
British Columbia Hydro and Power Authority
British Columbia Harbours Board
Pacific Great Eastern Railway Company

(The Crown is sole shareholder in this company, but it is not a Crown corporation in the legal sense.)

II Municipalities, school boards and other local public bodies

Municipalities	Number
Cities	31
Districts	41
Towns	14
Villages	58
	144
Regional Districts under the *Municipal Act*	28
School Districts	77
Universities	3
Commissioners of drainage, dyking or development districts	6
Improvement districts as defined under the *Water Act*	290
Water, Sewerage and Drainage Districts incorporated by special Acts	

50. R.S.B.C. 1960, c. 189.

6	
Local Boards of Health	20
Medical Health Officers	20
TOTAL	594

III Non-governmental bodies

Licensees under the *Water Act*	Approximately 25,300

(This is the number of licences issued. Since several licences may be held by one body or person, the actual number of bodies or persons holding licences would he considerably less than the number of licences issued.)

Companies incorporated under the *Rural Telephone Act*	Undetermined

(There appear to have been very few such companies incorporated. The office of the Registrar of Companies has no separate record of them. No such companies are operating in British Columbia today.)

Companies under the *Railway Act*	1

(The only non-governmental company is the Kootenay and Elk Railway Company. The British Columbia Hydro and Power Authority, the British Columbia Harbours Board and the Pacific Great Eastern Railway Company also have expropriation powers under the *Railway Act*.)

Gas utilities authorized to carry on business under the *Gas Utilities Act*	7
Pipe-line companies which have had pipeline projects approved by the Minister of Commercial Transport under the *Pipe-lines Act*	Approximately 60
Transporters of forest products under the *Forest Act*	Undetermined

(Since "any person" desiring to transport timber products is empowered to expropriate, it is impossible to give a number of persons entitled to expropriate. Usually it would be logging operators holding timber licences.)

Owners or holders of mining properties, under the *Mines Right-of-way Act*	Undetermined
Companies owning ore-reduction works or industrial plant, under the *Industrial Operations Damage Compensation*	Undetermined

Companies and other bodies granted expropriation powers under special Acts of incorporation — Undetermined

(Estimated to be few - for example, West Kootenay Power and Light Company, Limited and Okanagan Telephone Company.)

3. *Extent of Exercise*

In order to determine suitable procedures, and to have some idea of the financial consequences of introducing a new formula for compensation, it is essential to have some knowledge of the extent to which expropriation powers are exercised.

Figures which give the number of expropriations or arbitrations, however, may be misleading. A person or body with expropriation powers may never or only infrequently use them. The expropriating authority may have a policy of acquisition by negotiation. It may have skilled negotiators. It may avoid expropriation by being generous in its offers.

Where expropriating powers exist, negotiated settlements generally cannot be regarded as voluntary on the part of the vendors. True, in some cases, they may be glad to sell and, in others, although they may have been reluctant to sell initially, the vendors may be happy with the price they bargained for. But the fact of the matter is that, unless the owners agree to sell, the expropriation powers will be exercised. No doubt most expropriating authorities will, at some stage, warn the owner that, if agreement cannot be reached, expropriation proceedings will be commenced.

Thus, in order to have an adequate picture of the dimensions of expropriation, it is necessary to know the extent to which the expropriating authority acquires property by negotiation.

The data the Commission has obtained is far from complete, since expropriating authorities do not always have the kind of information needed readily available. Nevertheless, the information given below has proved helpful. Emphasis has been laid on the position of the Provincial Government.

Provincial Government - By far the largest expropriator is the Province of British Columbia. The two chief expropriating agencies of the Crown are the Minister of Highways and the British Columbia Hydro and Power Authority. Other Provincial Government departments and bodies having expropriation powers infrequently exercise them.

Table III sets out the acquisitions of the Department of Highways for the period covering the last six fiscal years.

TABLE III - DEPARTMENT OF HIGHWAYS PROPERTY NEGOTIATION BRANCH[1]

Fiscal year	Settlements Negotiated	Claims Submitted To Arbitration	Acquisition Expenditure
1965-66	586	3	$ 2,170,552.83[2]
1966-67	595	1	4,329,444.81[3]
1967-68	651	1[4]	2,983,880.24[5]
1968-69	662	5[6]	5,235,105.32[7]
1969-70	973	10[8]	6,011,703.93[9]
1970-71	687	22[10]	4,514,550.45[11]
TOTALS	4,154	42[12]	$25,245,237.58

1. *See* Annual Reports, Minister of Highways. The "settlements negotiated" figure includes claims where arbitrators have made an award.

2. Included purchases on behalf of British Columbia Ferry Authority.

3. Included purchases on behalf of British Columbia Ferry Authority. Of this sum, $2,094,722.16 was expended for right-of-way on the Trans-Canada Highway.

4. Four claims were in the preliminary steps leading to litigation.

5. Included purchases on behalf of the British Columbia Ferry Authority. Of this sum, $645,196.30 was expended for right-of-way on the Trans-Canada Highway.

6. One claim was resolved and four were in process.

7. Included holdings purchased on behalf of the British Columbia Harbours Board for the Roberts Bank project.

8. The Report of the Chief Property Negotiator states that four claims were resolved through arbitration proceedings and preliminary proceedings were instituted in six.

9. Included in this sum was $4,274,538 for land assembly on behalf of the British Columbia Harbours Board for the port area and adjacent sector.

10. Seven claims were settled through arbitration proceedings and formal steps taken to refer a further 15 claims to arbitration

11. Included in this sum was $1,214,070 for land assembly on behalf of the British Columbia Harbours Board for both the port area and adjacent corridor.

12. Some claims included in this figure were settled before the arbitration hearing took place. During the six-year period, 17 claims were settled by arbitration.

The Department of Highways has very kindly supplied the Commission with a breakdown of the 687 property acquisitions made during the fiscal year 1970-71. There were 561 strip takings, 58 other takings involving severance and 68 total takings. In financial terms, there were 485 settlements under $1,000, 132 between $1,000 and $10,000, and 70 over $10,000. In the 687 acquisitions, 43 dwellings were purchased outright and 11 others were moved. Seven farm buildings were purchased and four moved: eight commercial or industrial buildings were purchased and one moved.

Other government departments and agencies do not publish data similar to that of the Department of Highways as set out in Table III, but have cooperated with the Commission in making available information.

The Minister of Public Works has expropriated once in the past eighteen years and that occurred in the fiscal year 1965-66. The Department does not have readily available information showing its acquisitions throughout the Province on a year by year basis. We were informed by the Department, however, that 67 properties have been purchased since 1964, at a cost of $1,076,460 in what is known as the Legislative Precinct Area in Victoria.

The Minister of Recreation and Conservation has had no expropriations during the past six fiscal years for either park or conservation purposes. During that period the Department has made 75 acquisitions, all by negotiated settlements, for an expenditure of $2,309,100 for park purposes. Part of that sum covered expenditures for the West Coast National Park, half of which is recoverable from the federal Government under a 50-50 cost-sharing agreement. In the same period, the Department made eight acquisitions for fish and wildlife conservation purposes, at an expenditure of $191,800.

The Minister of Lands, Forests and Water Resources has made no expropriations under section 147 of the *Forest Act* for Forest Service roads during the past six fiscal years. The Department made 38 negotiated settlements during that period for an overall expenditure of $31,276.

No one can recall the Minister of Health Services and Hospital Insurance (or his predecessor, the Minister of Health and Welfare) ever having exercised the power to expropriate contained in sections 15 and 16 of the *Health Act*.

The Lieutenant-Governor in Council has never exercised the expropriation powers conferred on him under the *Housing Act*.

The Provincial Civil Defence Coordinator has only been authorized to expropriate property by the Lieutenant-Governor in Council under the *Civil Defence Act* on one occasion since that statute was enacted in 1951. That expropriation occurred in 1958 and was of the property of Black Ball Ferries Ltd., which then provided the only ferry services from the Canadian mainland to Vancouver Island and from the Vancouver area to the Sechelt Peninsula. The Order in Council authorizing the Provincial Civil Defence Coordinator to expropriate stated that it was reported that Black Ball Ferries Ltd. had discontinued ferry service, or was about to do so, and proclaimed that a state of emergency existed in those parts of the Province served by Black Ball Ferries Ltd. The property was expropriated for a limited time only, from June 24, 1958 to October 31, 1958.[51]

---

51. British Columbia Orders in Council 1498 and 2282 (1958), passed June 23, 1958, and October 8, 1958.

The British Columbia Hydro and Power Authority made 4,806 acquisitions in the five-year period 1966 to 1970 inclusive, under acquisition powers in the *British Columbia Hydro and Power Authority Act, 1964* and the *Railway Act*. There were 144 expropriations in this group of acquisitions. Of the 144, 46 were settled prior to a valuator's inquiry, 59 concluded by the valuator's determination, and 39 appealed from the valuator's determination. Of those appealed, 12 were settled prior to the appeal hearing, 15 appeals were heard, and 12 are pending and may possibly be settled. The expenditure for the 4,806 acquisitions was $23,462,000.

The above figures include 76 acquisitions under the *Railway Act* for the Roberts Bank project. Seventy-three of these acquisitions have been completed by negotiation, one has gone to arbitration and two are pending. There have been no expropriations by Hydro under the *Water Act or the Gas Utilities Act* for several years, although three arbitrations are still pending under the former and two under the latter.

Acquisition and expropriation statistics may be misleading if one does not take into account the fact that the figures may include unusually large projects or projects of a kind that are unlikely to recur. In the case of Hydro, for example, the Columbia Treaty projects may unduly weight the statistics and the Roberts Bank project was of an exceptional nature.

Of the 4,806 Hydro acquisitions above referred to, 1,004 were in 1968, 851 in 1969 and 833 in 1970. The expenditures for these break down as follows:

Expenditure	1968	1969	1970
Nil (Usually small distribution easements)	160	62	37
To $5,000	690	684	659
$5,000 to $10,000	56	31	46
$10,000 to $25,000	60	51	53
$25,000 to $50,000	17	17	21
Over $50,000	21	6	17

The Pacific Great Eastern Railway Company has had only one expropriation, in 1969, in the past eight years. In the period 1964-1970, the Company made 70 settlements at a total expenditure of $290,234.16.

Other Expropriating Authorities - There is little statistical data readily available in respect of local public bodies and non-public bodies. The Department of Municipal Affairs does not keep statistics on municipal expropriations, nor does the Department of Education on school district expropriations. However, we were able to obtain some figures from the City of Vancouver. It acquired 694 parcels of land (under 413 ownerships) at a cost of $21,160,000 during the five calendar years 1966 to 1970 inclusive. During that period, 194 parcels (under 96 ownerships) were expropriated. From 1950 to date, there have been some 50 City of Vancouver expropriations go to arbitration.

Under the 25,300 licences issued under the *Water Act* (which in theory entitle their holders to expropriate), only about ten expropriations take place each year.

Gas utilities do not in practice expropriate under the *Gas Utilities Act*, but rather under the *Pipe-lines Act*.

C. Property Subject to Expropriation

Most expropriation provisions grant only the power to take "real property" or "land". However, there are a number of instances where the power to expropriate personal property is conferred as well.

Municipalities, for instance, are given the power to expropriate "real or personal property" under sections 504(3), 531(4), 563(2) and 791 of the *Municipal Act*, and "property" under section 465(2)(b). Other expropriation powers under that statute are confined to real property. See sections 513(3), 534(2), 555 and 622. The expropriating power of the City of Vancouver is restricted to real property under section 532 of the *Vancouver Charter*.[52]

The powers of school districts to expropriate under the *Public Schools Act* extends to "land and improvements".[53] "Improvements" are defined 3 as meaning improvements as defined[54] in the *Assessment Equalization Act*.[55] In the latter statute, "improvements" include such things as machinery and storage-tanks erected or placed on any land or building,[56] which might be considered as either real or personal property, depending upon the manner in which they are fixed to the realty.

Under section 5 of the *Civil Defence Act*, the power to expropriate applies to "real or personal property".

The British *Columbia Hydro and Power Authority Act* gives the Authority the power to expropriate "any property, real and personal, and any power-site, power project, or power plant".[57] The Greater Nanaimo Water District is empowered to expropriate "land or property, real or movable".[58]

There are a number of situations in which the expropriation of personal property might be expected to occur. Normally, these would arise in conjunction with the expropriation of real property with which it has some connection. It is conceivable that in some circumstances an expropriation of real property should be extended to machinery and structures which are not attached to the land in such a way as to become part of the realty. In addition, there may be particular kinds of expropriation where personal property is an integral part of what is being taken. Examples are the expropriation of a "works" under section 560(3) of the *Municipal Act* or sections 74 and 75 of the *Water Act*, and the expropriation of a "waterworks,

---

52. S.B.C. 1953, c. 55 (as amended by S.B.C. 1958, c. 72, s. 28).

53. R.S.B.C. 1960, c. 319, s. 169 (1).

54. *Ibid.*, s. 2.

55. R.S.B.C. 1960, c. 16.

56. *Ibid.*, s. 2.

57. S.B.C. 1964, c. 7, s 18 (a).

58. S.B.C. 1953 (2nd Sess.), c. 41, s. 38.

undertaking, plant, or system, or the equipment thereof" under section 29 of the *Greater Vancouver Water District Act*[59] 8 or section 31 of the *Greater Victoria Water District Act.*[60]

"Mineral claims" may be held either as real estate or as chattel interests.[61]

Generally, whatever powers of expropriation of personal property exist, the Commission believes that the expropriation statute later recommended in this report should apply to their exercise. It would create unnecessary confusion and additional expense to have separate procedures applying to expropriation of real and personal property, where both kinds of property were the subject of the same expropriation. Accordingly, the Commission believes that the expropriation statute it proposes should apply to the expropriation of all forms of property.

The interest of a tenant under a lease, although an interest in land, has traditionally been regarded as personal property, and not real property. However, under the recent *Landlord and Tenant Act* amendments,[62] residential tenancy agreements no longer create a property interest at all. Section 35 provides that, in so far as residential tenancies governed by Part II of the Act are concerned, the relationship of landlord and tenant is one of contract only, and a tenancy agreement does not confer on the tenant an interest in land.

The purpose of section 35 was, the Commission believes, to make residential tenancies subject to the law of contract rather than the law of property, which in many respects is archaic. While the Commission has no quarrel with that objective, it does not believe that it was ever intended that one of the consequences of section 35 would be to deprive a residential tenant of the right to compensation should there be an expropriation of the leased premises. Accordingly, the Commission believes that the proposed statute should be made expressly applicable to residential tenancies governed by Part II of the *Landlord and Tenant Act.*

Licences (to divert water), issued under the *Water Act* may be expropriated under section 74 of that Act by municipalities and certain improvement districts, together with the works authorized by the licence. Does the licence itself constitute property? Whether or not the licence being expropriated constitutes property, it may have value and policy now requires that compensation be given for its expropriation. The statute later proposed by the Commission should be made expressly applicable to the expropriation of such licences in order to resolve any doubts about the nature of the licence for that purpose.

The British Columbia Hydro and Power Authority is entitled to "require and compel" any person who generates or supplies power to enter into an agreement to supply the Authority as much power as the Authority desires.[63] Disputes as to the amount of power available, and the price to be paid for the power are to be

---

59. S.B.C. 1924, c. 22 (as amended by S.B.C. 1925, c. 15, s. 4).

60. S.B.C. 1922, c. 28 (as amended by S.B.C. 1948, c. 102, and S.B.C. 1951, c. 112, s. 3).

61. *Mineral Act*, R.S.B.C. 1960, c. 244, s. 16.

62. R.S.B.C. 1960, c. 207 (as amended by S.B.C. 1970, c. 18).

63. *British Columbia Hydro and Power Authority Act, 1964*, S.B.C. 1964, c. 7, s. 18 (c).

determined by the Public Utilities Commission, whose decision is to be final.[64] While it may be arguable whether or not the compulsory acquisition of power constitutes the expropriation of property, the Commission believes that the subject-matter of the taking is of such a special nature that the expropriation tribunal later proposed would not be as suitable a body for dealing with claims relating to compulsory power acquisition as the Public Utilities Commission. That body is much more likely to be conversant with the subject of power and rate-fixing. In its submission to us in response to our working paper the Council of the Forest Industries of British Columbia stated that it did not agree with our conclusion that the Public Utilities Commission should continue to deal with the compulsory supply of power. We can see no sound reason for changing our position. Any expropriation of land by Hydro should, of course, be governed by the general statute we recommend later.

Accordingly, the Commission recommends:

1. The general expropriation statute later recommended should apply to the expropriation of all property interests, whether real or personal.

2. For the purposes of the proposed general expropriation statute, the following should be treated as creating property interests:

   (a) tenancy agreements under Part II of the *Landlord and Tenant Act*, and

   (b) licences under section 74 of the *Water Act*.

3. The proposed general expropriation statute should not apply to the right of the British Columbia Hydro and Power Authority to compulsorily take power under sections 18 and 19 of the *British Columbia Hydro and Power Authority Act, 1964* and matters of dispute in such takings should continue to be determined by the Public Utilities Commission.

D. Procedure and Compensation by Regulation

There are a number of situations in which the procedure for expropriation and even the formula for compensation are not set out by statute but may be determined by regulation. This, the Commission feels is most undesirable. The rights of the citizen on expropriation should be cast in unequivocal language in legislation which has been considered by the Legislative Assembly.

The statutory bases for making these regulations are:

1. *Petroleum and Natural Gas Act, 1965*

Section 37(a) provides that the Lieutenant Governor in Council may make regulations providing for a formula for the determination of compensation under Part III of the Act. While it is true that the right of entry and use which may be granted by the Board of Arbitration may not technically amount to expropriation, the person whose lands are subjected to the right of entry and use may well be justified in feeling that he should be entitled to the same statutory protection as owners whose lands are expropriated.

The Commission understands that no regulations have been passed under section 37(a). The Board of Arbitration relies on section 25 for guidance in

64. *Ibid.*, s. 19.

determining compensation. Section 25 sets out the factors to be considered.

2. *Health Act*

Section 15 provides that the Lieutenant-Governor in Council may issue regulations for taking possession of any land or building, by the authority of the Minister of Health Services and Hospital Insurance, a Local Board of Health or Medical Health Officer for the prevention or suppression of contagious diseases endangering public health.

There are no regulations under section 15. Regulations had been enacted in 1925 under the authority of the *Health Act*, as it appeared in the 1924 Revised Statutes. Those regulations were repealed in July of this year.[65]

3. *Water Act*

Section 24, which gives every licensee the right to expropriate for works authorized by his licence, provides that the procedure to be followed in expropriating land and the method of determining the compensation shall be prescribed in regulations. Section 47(e) empowers the Lieutenant-Governor in Council to make such regulations in respect of expropriations of "land and easements".

The relevant regulations[66] require the Comptroller of Water Rights to decide what body shall determine the compensation, based on the value of the land affected and the probable cost of arbitration. If he concludes that the latter would be disproportionate, either he or an engineer named by him determines the compensation. Otherwise, he directs that matters be determined by three arbitrators appointed as provided by the *Arbitration Act*. Costs of the arbitration, which are determinable by the Comptroller, are payable by the licensee or landowner depending on whether the award is more or less than the amount offered by the licensee.

4. *Civil Defence Act*

Under section 5, the Lieutenant-Governor in Council has the power to do and authorize, and make regulations for, whatever he considers necessary or advisable for the purposes of the Act. He may also authorize the Provincial Civil Defence Coordinator to expropriate. The Provincial Coordinator has on one occasion been given such authority - in the Black Ball Ferries Ltd. expropriation mentioned earlier.[67] The existing regulations do not contain provisions dealing with expropriation.

Summary - The Commission has already stated that the procedures and formula for compensation should be set out by statute and not by regulation. We later recommend a statute governing procedure and compensation of general application. If such a statute were adopted by the Legislature, the regulations under the *Water Act*, referred to above, and the statutory provisions in the *Water Act* and the *Petroleum and Natural Gas Act, 1965* authorizing the making of regulations relating to procedure and compensation, should be discarded.

---

65. *See* B.C. Regs. 146/59, 187/71.

66. B.C. Regs. 4.01 to 4.16, made by Order in Council 2771, approved December 5, 1960, amended by Orders in Council 27/62, 2649/63, 3314/70.

67. *Supra*, at p. 39.

On the other hand, the provisions mentioned in the *Health Act* and the *Civil Defence Act* empower expropriation in what appear to be essentially emergency situations. If such statutory provisions are to be retained as being necessary to public health and safety, then it is obvious that the initial procedures proposed later should not be applicable to them. In urgent circumstances, as occurred in the Black Ball Ferries Ltd. expropriation, the need to take possession may be immediate. However, the compensation provisions of the general statute proposed should be applicable. The Clyne Report recognized that these two provisions required special treatment.[68] They will be discussed again later.[69] We understand that the expropriation provisions in the *Health Act* are no longer considered necessary for dealing with emergency isolation situations. If emergency accommodation is needed at some time in the future, mobile homes would probably be used, or assembly or recreational halls by agreement. The expropriation provisions of the *Health Act*, we have been informed, are unlikely to be included in any substantial revision of that statute.

68. Pp. 86, 87.

69. *Infra*, at pp. 114-115.

CHAPTER III RIGHT OF ENTRY AND USE (WHERE NO EXPROPRIATION)

A. General

The Commission has already stated its belief that this study should include an examination of all statutory provisions authorizing the use of another person's property without that person's consent - where such use did not amount to expropriation. It referred specifically to orders granted by the Board of Arbitration under the *Petroleum and Natural Gas Act, 1965*.[1]

Expropriation is confined, by its very meaning, to the taking of an interest in property. Property interests, particularly those relating to land, fall within a limited number of traditional classifications. The acquisition of a right to use land by the transfer of a property interest can arise by the giving of a freehold estate (estates in fee simple or life estates), lease, easement, or *profit-a-prendre*. Unless a right to enter and use land comes within these traditional categories, established centuries ago under the English feudal system, the right can only amount to a licence. The licence permits what would otherwise amount to a trespass.

The Commission does not believe that a modern expropriation statute should be restricted to the compulsory transfer of "interests" in property, but should apply generally to the statutory authorization of compulsory taking or use by one person of another's property.

A number of statutory provisions authorizing entry and use, but not expropriation, are discussed below.

B. Statutory Provisions

1. (a) *Petroleum and Natural Gas Act, 1965*

The Board of Arbitration, established under the Act, may grant "the right of entry to, the user of, and the right to take the surface" of

(i) land within which is situated the location of the permit, licence, lease or drilling reservation of the applicant;

(ii) such other land as in the opinion of the Board is necessary

(a) for a pipe-line, power-line or road to connect the applicant's exploration, drilling or production operations on adjacent lands, and to permit them to be operated jointly, and for tanks, stations, and structures to be used in such operations;

(b) to give the applicant access between his explorations, drilling or production operation and a public way,[2]

---

1. *Supra*, at p. 26.

2. S.B.C. 1965, c. 33, s. 22.

3. S. 18B.

(iii) privately-owned land for the purpose of constructing and operating extensions of a "petroleum development road" under section 18;[3]

(iv) land outside the tract of land overlying petroleum and natural gas, the removal of which has been authorized by the drilling of a well, where the top of the well is located outside that tract.[4]

(v) land for a field scheme operation as set out in section 24.[5]

In addition, Part III of the Act, which contains sections 8 to 37, is made applicable to flow-lines and necessary works and undertakings connected therewith authorized under the *Pipe-lines Act*.[6]

Compensation for loss or damage in the exercise of a right of entry is determinable by the Board.[7] Principles for determining compensation are set out in the statute and appear to be those generally applied in expropriation cases.[8] In addition the Lieutenant-Governor in Council is empowered to make regulations providing for a formula for the determination of compensation,[9] but has not done so. Depending upon the purpose of the right to enter granted by the Board, the Board will order a lump sum or annual payments.

The Board, which was re-constituted in 1957, made 42 awards in the period from 1957 to 1970 inclusive.

To what extent the Act confers a right of expropriation, if any, is not clear. The Board may make an order granting a right of entry to, the user of, and the right to take the surface of the land, but the Board may subsequently terminate the rights conferred by that order.[10] Does a person acquiring a right to enter and take the surface of land for an indefinite period under an order of the Board "expropriate" an interest in land, i.e., does he acquire an interest in land? The British Columbia Court of Appeal held that in the predecessor statute, the *Petroleum and Natural Gas Act, 1954*,[11] an interest was not acquired.[12] The Court stated:

> (1) There is no divesting of the owner of any interest; (2) The statute gives the operator a right of entry which will preclude his being liable to trespass but requires him to pay compensation to be fixed by the Board; (3) A claim for

---

4. S.23.

5. S.24.

6. R.S.B.C. 1960, c. 284, s. 17(4).

7. S.B.C. 1965, c. 33, ss. 18(5), 18A and 25.

8. S.25(2). With one exception. *See* s. 18B.

9. S.37(a).

10. S.26.

11. S.B.C. 1954, c. 31.

12. *Re Pacific Petroleums Limited* (1958), 24 W.W.R. 509.

> compensation by the owner or occupant does not arise with respect to a transaction completed in the past but on the contrary does arise with respect to a right of entry, and operations, which are to continue into the future for an unknown period."[13]

On this basis, the Court was able to conclude that there was jurisdiction to order annual payments, which would not have been the case if the property interference had been held to be an expropriation.[14] In 1958, the Act was amended to permit lump sum payments,[15] but that provision was not carried forward into the 1965 statute.[16]

The wording of the 1954 statute was, however, different from the current enactment. The Board was given the power to grant "the right to enter and use the surface" of land.[17]

The word "take" was not in the 1954 Act. Does the inclusion of "take" in the current statute confer a right to expropriate? The order is still subject to termination. The Secretary of the Board of Arbitration is required to file the orders in the appropriate Land Registry Office under section 28 (which was not in the 1954 Act), and the Registrar, on the payment of the proper fee, is required to make an entry on the certificate of title of the land affected. However, the statute does not state that an order creates an interest in land.

So far as the owner of the surface of the land is concerned, the granting of a right to enter by the Board may have all the appearances of an expropriation. He will find his property being used without his consent. The only difference may be that the right to enter under the Board's order will not be forever. It may only last for a matter of months.

It should be pointed out, however, that the owner of the surface of the land has no property interest in the petroleum or natural gas, if any, that lies underneath his lands. These minerals are the subject of separate ownership: they belong to the Crown until such time as some person acquires ownership through the Crown. At common law, the owner of minerals had certain rights to enter on the surface of the lands and extract the minerals beneath. However, under the *Petroleum and Natural Gas Act, 1965* the right to enter, to explore for and extract petroleum and natural gas can only be obtained either through agreement with the surface-owner or by order of the Board of Arbitration. It is the policy of the Act that compensation should be paid for the exercise of the right of entry and use - and whether or not that right of entry and ise permits only exploration and extraction of minerals located below the lands specified in the order or facilitates the exploration and extraction of minerals located below other lands.

The vital question is whether rights of entry and the compensation to be paid for them should continue to be governed by the *Petroleum and Natural Gas Act, 1965* or come under the provisions of the general statute later recommended. Would the

---

13. *Ibid.,* at p. 513-514.

14. *Ibid.*, at p. 512.

15. S.B.C. 1958, c. 38, s. 10.

16. *See* S.B.C. 1965, c. 33, s. 25.

17. S.B.C. 1954, c. 31, s. 19.

procedures and the formula for compensation laid down in such a statute be appropriate? If the general statute were to apply, should there be special provisions made to permit lump sum payments? Should any provisions, such as those dealing with the inquiry after objection procedure, be exempted? Would the general compensation tribunal be the appropriate body for determining whether a right of entry should be granted?

Prior to issuing its working paper, the Commission consulted with the Chairman of the Board of Arbitration, Mr. A.W. Hobbs, Q.C., who was most cooperative and helpful in responding to these and other questions. He expressed the view that a general tribunal for hearing claims, similar to the Land Compensation Board in Ontario, would be an appropriate body for dealing with the compensation claims now heard by the Board of Arbitration. He felt, however, that the Board of Arbitration should be retained for the purpose of granting rights of entry.

Mr. Hobbs stated that the general formula for compensation laid down in the new Ontario and federal legislation (market value, disturbance damages and damages for injurious affection) would provide appropriate criteria for compensation claims for rights of entry. He added, however, that if such claims were to be governed by a general expropriation statute, there should be a specific provision in that statute to permit the award of annual or other recurring payments in certain instances.

In its working paper, the Commission stated that, while it had reached no definite conclusion on these various issues, it was inclined in favour of applying the general statute proposed in the working paper at least to the determination of compensation, with special provision being made for annual or recurring payments.

In response to the working paper, we heard from the B.C. Division of the Canadian Petroleum Association. In reference to the existing procedures under the *Petroleum and Natural Gas Act, 1965*, the Association stated:

> We have found these procedures to be both reasonable and workable and the Board of Arbitration established to administer the provisions of Part III has carried out its responsibilities in an efficient manner and with appreciation for the needs of our operations.

The Association, however, went on to say:

> While we would be quite satisfied to leave the entire matter in connection with acquisition of and compensation for surface rights with the Board of Arbitration, we recognize there is a trend in the drafting of expropriation legislation, as exemplified by the Ontario, Federal and Manitoba Acts, to consolidate under one Act and one tribunal all matters bearing on the compulsory acquiring of interests in land including the determination of compensation.
>
> Because of this trend we believe it would be acceptable to remove from the *Petroleum and Natural Gas Act, 1965* the provisions relating to acquisition of surface interests and the determination of compensation and to include them under the umbrella of the proposed new *Expropriation Act.*

The Association stated that, in making such a recommendation, it wished to emphasize it was essential that the present policy with respect to right of entry, particularly the right of immediate entry under section 33, be maintained. Immediate right of entry, it was stated, is essential to oil industry operations.

The Commission has no doubt that the general arbitration tribunal should deal with compensation claims and so recommends. Whether that tribunal would be the

appropriate body to grant rights of entry, instead of the Board of Arbitration, has, however, caused us some difficulty. Certainly, it would seem simpler to have one body dealing with both rights of entry and compensation. The Canadian Petroleum Association would find this acceptable and we, on balance, think this would be the best solution.

Accordingly, the Commission recommends:

The functions of the Board of Arbitration established under the Petroleum and Natural Gas Act, 1965 *should be assumed by the general arbitration tribunal later recommended.*

Other than this proposed change, we make no recommendation in this report with respect to the existing procedure for obtaining rights of entry under the *Petroleum and Natural Gas Act, 1965*.

The Canadian Petroleum Association did recommend to us that, in order to assure efficiency, a separate part of the general tribunal we propose should be designated to act in all right-of-entry matters for the oil industry. We would think that the chairman of the general tribunal would wish to designate a special panel for this purpose. In addition, the Provincial Government, in making appointments to the general tribunal, may well wish to give consideration to the merits of appointing a person having a knowledge of the petroleum industry.

Also, in its submission to us, the Canadian Petroleum Association stated that the general compensation provisions proposed in our working paper were acceptable in so far as they pertained to the oil and gas industry.

The Commission therefore recommends:

The general compensation provision later recommended should apply to the determination of compensation for rights of entry granted under the Petroleum and Natural Gas Act, 1965*, and that special provision be made to permit the awarding of annual or recurring payments.*

(b) *Underground Storage Act, 1964*

The Minister of Mines and Petroleum Resources may:

1. grant a licence to carry out exploratory work to determine the suitability of the sub-surface of an area of land for underground storage of hydrocarbons,[18]

2. recommend to the Lieutenant-Governor in Council that lands be declared a storage area and the reservoir contained in and under the lands to be a storage reservoir (and the Lieutenant Governor in Council may so declare);[19] and

3. grant the exclusive right for a period of not more than 21 years to store hydrocarbons in a storage reservoir.[20]

---

18. S. 4.

19. Ss. 7 and 8.

20. S. 10. *See also* s. 15.

The Act does not expressly confer a right of entry on privately-owned land for these purposes. It does provide for the granting of rights-of-entry and leases where the surface rights are in the Crown.[21] It also states that a person shall not enter upon any lawfully occupied land for any purpose under the Act until he has obtained a written consent of the owner and lawful occupant of the land.[22]

Where a person granted a right to store hydrocarbons under section 10 has not reached an agreement on compensation with the owner of any mineral rights or of any storage rights in the storage reservoir, the Minister may direct that "the fair, just and equitable compensation" payable be determined by the Board of Arbitration under the *Petroleum and Natural Gas Act, 1965* which is to apply for that purpose.[23] We understand the Board has never been called upon to exercise that function. Apparently, underground gas storage is not likely to develop in British Columbia as it has in Ontario.

It appears, therefore, that the power conferred on the Minister to grant storage rights is similar to that conferred on the Ontario Energy Board,[24] which was dealt with in the Report of the Ontario Law Reform Commission on the Basis for Compensation in Expropriation.[25] The Ontario statute, however, expressly gives the Energy Board the power to grant a right of entry and the right to use land for storage purposes,[26] while the British Columbia statute only expressly confers on the Minister the power to give a right to store. That power, however, when coupled with the compensation provision, appears to confer a right to authorize the use of another's property without that person's consent. Yet section 15 of the British Columbia statute states that a person shall not enter on any lawfully occupied land for any purpose under the Act, without the owner's consent.

In the working paper, the Commission suggested that there might be some merit in substituting the general compensation tribunal for the Board of Arbitration in these cases, but stated that it was uncertain as to the extent to which the procedural provisions in the general statute should be applicable.

Mr. Hobbs, the Chairman, indicated to us that the general compensation tribunal would be a suitable body for this purpose and that the general formula for compensation would be appropriate for application.

While it may he unlikely that the general tribunal would ever be called upon to exercise this jurisdiction, we have concluded that the general arbitration tribunal should assume the function given to the Board of Arbitration by the *Underground Storage Act, 1964*. We do not, however, think the procedural provisions in the general statute we propose should have application in respect of obtaining underground gas storage rights. On the other hand, in respect of the determination of compensation, there should be substituted, for the reference to the *Petroleum and Natural Gas Act, 1965* in section 10 of the *Underground Storage Act, 1964*, a reference to the general expropriation statute which we

---

21. Ss. 4(5), 11.

22. S. 13.

23. S. 12.

24. *The Ontario Energy Board Act, 1964* S.O. 1964, c. 74, ss. 20 and 21.

25. At pp. 60-63.

26. S. 21(1).

recommend.

Accordingly, the Commission recommends:

1. *The function of the Board of Arbitration under the* Underground Gas Storage Act, 1964 *should be assumed by the general arbitration tribunal later recommended.*

2. *There should be substituted, for the reference to the* Petroleum and Natural Gas Act, 1965 *in section 10 of the* Underground Gas Storage Act, 1964*, a reference to the general expropriation statute.*

2. (a) (i) *Placer-mining Act*

By section 10, every free miner has the right to enter, locate, prospect and mine for minerals upon any lands in the Province, whether vested in the Crown or otherwise. Certain lands are excepted. These include Government reservations for townsites, land occupied by any building, and any land falling within the curtilage of any dwelling house, and any orchard. The Lieutenant-Governor in Council may approve entry on Government reservations for townsites. The Gold Commissioner is empowered to grant free miners leases for placer mining over lands on which the right to enter and mine is given by section 10.[27]

Where entry is made on lands already lawfully occupied, the free miner shall on the request of the owner or the Gold Commissioner, give adequate security for all loss or damages caused by the entry, and shall from time to time make full compensation to the owner or occupant for such loss or damage. The compensation, in case of a dispute, shall be determined by the Court having jurisdiction in mining disputes, with or without a jury.[28]

Any free miner is at liberty at any period of the year, while actually prospecting or engaged in mining, to kill game for his own use, in accordance with the provisions of the *Game Act*.[29] The *Game Act* was repealed in 1966, its provisions, generally, being replaced in the *Wildlife Act* enacted that year.[30] The latter statute, however, does not contain a provision entitling a free miner to kill game for his own use, although a permit to take fish or game may be granted under that enactment to any resident of the Province who can show need for this source of sustenance.

A free miner under this Act has all the rights and privileges of a free miner under the *Mineral Act*.[31] A reciprocal provision is contained in the *Mineral Act*.[32]

Any free miner may apply to the Gold Commissioner for a licence to run or construct a tunnel or drain in connection with his placer claim, or mine held as real estate, through any occupied or unoccupied lands. The Gold Commissioner has an absolute discretion to grant the licence, and on such conditions as he sees fit. He

---

27. R.S.B.C. 1960, c. 285, s. 15.

28. S. 13.

29. S. 14.

30. S.B.C. 1966, c. 55, s. 81.

31. S. 21.

32. R.S.B.C. 1960, c. 244, s. 23.

may require the free miner to give security for any damage.[33] The tunnel or drain is to be considered as part of the placer claim, or mine held as real estate, for which it was constructed.[34]

A free miner may also apply to the Gold Commissioner for a grant of right-of-way and entry through any "mining ground" for the construction of "a drain for public drainage of mines". "Mining ground" is not defined by the Act, although "mining property" is.[35] Where a grant is made, it shall not be for a longer period than twenty years and shall give power to assess, levy and collect tolls from all persons using the drain, or benefited thereby.[36] The grantee must covenant that he will not, in the construction and maintenance of drains, in any way injure the property of others, and that he will make good any damage done by him.[37]

Free miners may also apply to the Gold Commissioner for a grant of exclusive rights-of-way through and entry on "mining ground" for the purpose of constructing, laying, and maintaining a bed-rock flume.[38] Such grants shall be made for a term not exceeding five years.[39] "Mining ground" is not defined as such, but appears to be described in section 66. It appears that "mining ground" in both sections 55 and 63 could include privately-owned lands, as well as Crown lands.

(ii) *Mineral Act*

By section 12, every free miner (i.e., a person holding a free miner's certificate issued under the *Mineral Act*) has the right tc enter, locate, prospect and mine

(1) for all minerals, on any lands where such right has been reserved to the Crown and its licensees, and

(2) for gold and silver, on any lands where the right to enter and mine gold and silver has been reserved to the Crown and its licensees.

Certain lands are exempted. These include any occupied by a building, any land falling within the curtilage of any dwelling house, and any orchard or land actually under cultivation.

In addition, section 13 of the Act also provides that every free miner is entitled to exercise all the rights, powers, and privileges conferred by the Act upon free miners to prospect for minerals over all lands in the Province, whether owned by railway companies or otherwise. It is not clear what powers are conferred by section 13 that were not already conferred by section 12. There appears to be no other power to prospect apart from that granted in section 12.

---

33. R.S.B.C. 1960, c. 285, s. 55.

34. S. 56.

35. Ss. 2, 57, *see however*, s. 66.

36. S. 60.

37. S. 61(d).

38 7. S. 63.

39. S. 65.

Under section 21, the holder of a mineral claim or lease, is given, subject to certain qualifications, the right to the use and possession of the surface, including the use of timber for the purpose of winning and getting the minerals.

Where a free miner has exercised his right of entry under sections 12 and 13, he is liable to make full compensation to the occupant or owner for any loss or damage, with certain exceptions. In case of a dispute, compensation shall be determined by the court having jurisdiction in mining disputes, with or without a jury.[40]

The free miner may be required to give adequate security, to the satisfaction of the Gold Commissioner or Mining Recorder for any loss or damage that may be caused by the entry.[41]

(b) *Coal Act*

Where the Crown has granted a licence or lease to develop and produce Crown coal, the licensee or lessee is liable to make compensation to the lawful occupant of the land for any loss or damage caused by reason of his entry and operations. The Lieutenant-Governor in Council will direct him to put up adequate security for any loss or damage, if the lawful occupant so requests.[42]

(c) *Conclusion*

The rights of free miners under the *Placer-mining Act* and the *Mineral Act*, and of licensees or lessees under the *Coal Act*, are created by those statutes for similar purposes to those underlying the right of entry obtainable under the *Petroleum and Natural Gas Act, 1965*.

One very significant difference, however, is that petroleum companies will usually have acquired rights to the oil and gas below the surface before obtaining a right of entry, while the free miner only acquires his mineral rights after the right of entry has been exercised and a mineral claim made.

The Commission believes that the damage claims that arise out of the provisions, referred to above, of the *Placer-mining Act*, the *Mineral Act* and the *Coal Act* should be dealt with by the general arbitration tribunal later recommended. Recommendations are made at the end of this chapter that the expropriation statute we propose should contain a general provision making compensable any damage resulting from the exercise of a statutory right of entry, where such entry does not amount to an expropriation, and that the general arbitration tribunal should have exclusive jurisdiction to hear such cases.

We make no recommendation in this report in regard to the procedures that should be followed with respect to obtaining entry under the above three statutes. Before the Commission could make recommendations, it would have to have an appreciation of the problems of mining exploration and development, which would take us far beyond what we consider should be the scope of this report. This does not mean that we have not been caused concern by the right that free miners have to enter without notice to the property owner. We have been informed by the British Columbia & Yukon Chamber of Mines that the giving of advance notice to

---

40. R.S.B.C. 1960, c. 244, s. 12(3).

41. S. 12(2).

42. R.S.B.C. 1960, c. 60, s. 9.

property owners would defeat the present system of prospecting. As soon as they were given notice, the owners would obtain a free miner's certificate and make claims. The Chamber said it could see "no reason for land owners to benefit from the knowledge and efforts of Free Miners simply because they own the surface over minerals".

There is a distinction to be made between giving notice for exploration purposes and notice prior to the commencement of work on a mineral claim. This has been conceded by the Chamber, which has, we understand, made a recommendation to the Provincial Government that the *Mineral Act* be amended so as to require notice to be given to land owners prior to commencement of work. In its submission to us, the Chamber stated that it believed seven days' notice should be given. Such a requirement would obviously be an improvement over the present position. Nevertheless, for the reason stated above, we are not making any recommendations in this report on the procedures which should be followed in respect of obtaining rights of entry.

There is a very interesting and complex problem of a different nature. That is what should be the basis of compensation payable for expropriated mineral rights, a kind of expropriation that occurs infrequently. The problem is extremely difficult with respect to mineral properties not in production, particularly where feasibility studies have not been carried out or completed. The value of such mineral claims will generally be highly speculative. Does this mean that the valuation of mineral claims should receive special treatment in the general statute we propose?

The British Columbia & Yukon Chamber of Mines stated to us that, in respect to mineral properties not in production, there were two general categories which should have a differing basis for compensation. The first of these included properties where no mineral or ore is proven, i.e., where defined tonnages and grade of mineralization have not been established. The second category included properties where mineral or ore is "proven".

The Chamber suggested that expropriated mineral claims in the first category should be valued on the following basis:

> As a general rule we suggest that where a mineral property without defined reserves of mineral or "ore"; i.e. mineral of economic value, is expropriated, the basis for compensation should be all of the costs encountered in acquiring, prospecting and exploring the property. We believe that compensation should be no less than all of these costs. Such a property may be held outright by an individual(s) and/or a companylies). However, mineral property may be held by one party under an option agreement, which transfers title subject to the agreement. Should expropriation occur in the period of agreement, it is possible that the party granting the option would have received less under the option agreement than its previous acquisition, prospecting and exploration costs. As expropriation would terminate the option agreement, we hold the view that both parties receive treatment under the general rule. That is, the optionee and the optionor should receive compensation not less than all costs of acquisition, prospecting and exploration of the property to the time of expropriation.

With respect to the mineral claims in the second category (where mineral or ore is "proven"), the Chamber had this to say:

> Mining properties do exist where mineral reserves have been defined, but for any one, or a number of reasons, the reserves are not yet ore. It may be that the property is in an isolated area without access, or, possibly without access to power; or tonnages are not sufficient for milling on the property and the holder is treating it as an asset while awaiting custom milling. It may be that a metallurgical problem has been encountered which research will overcome. Yet another property may have tonnages and grade which will result in production during a more buoyant

economic period. Singly, or in combination and in variation, the above represent a wide variety or circumstances in which a property with defined mineral reserves could be held. They will make mines and thus have a future value. The basis for compensation would be complex.

Also, there are instances where a mineral property may be held which has economic tonnages and grade of mineral(s). Such a property could be held as a future source of mineral(s) by a company which has sufficient for its needs at the time of expropriation. The basis for compensation on such a property would also be complex. In the case of a mineral property with either defined mineral reserves or ore, we suggest that only independent opinion from competent mineral authority could determine the basis for compensation.

We have concluded that no special provision should be made for mineral claims in our proposed general statute. The general arbitration tribunal in applying the basic formula for compensation, of market value and disturbance damages, as proposed later in the Report, should he able to deal adequately with each expropriated mineral claim that comes before it. Where mineral reserves have been defined, expert witnesses could be called to testify to the extent and value of those reserves, in the process of determining the market value of the particular mineral claim. In so far as mineral claims where reserves have not been defined, the Commission recognizes that the general arbitration tribunal would not have an easy task. We believe, however, that the tribunal would take into account, in determining the market value of the mineral claim, the costs of acquisition, prospecting and exploration. It may be that a provision in the expropriation statute requiring the arbitration tribunal to do so would ensure that this would be done, but we do not think that such a provision would be necessary and accordingly we make no recommendation to that effect.

The suggestion made by the Chamber that these costs of acquisition, prospecting and exploration should be recoverable, where there are no defined reserves, appears at first glance to be an attractive solution. While such a rule might well be fair in cases where the mineral claim, at the time of expropriation, was worth developing. But what of those instances where the mineral claim had turned out to be worthless? In such instances, the owner would recoup his loss through expropriation and obviously that would not be right. We would prefer to have the arbitration tribunal deal with each case on its merits.

3. (a) (i) *Highway Act*

The Minister of Highways may in his absolute discretion, for the purpose of establishing or altering public highways (by himself, his agents, or workmen), enter upon any land for the purpose of:

(1) erecting, maintaining, and removing snowfences,

(2) cutting any necessary drains, or

(3) for the taking of gravel, timber, stone, and other materials required for the construction or maintenance of any highway.[43]

The particular provision conferring these powers, it will be noted, confers only powers of entry for particular purposes. It expressly states that these powers may be exercised without the consent of the owner.

---

43. R.S.B.C. 1960, c. 172, s. 8(l)(f).

Reasonable compensation may be paid by the Minister for materials taken, but this is a matter left to his absolute discretion. Such compensation is payable where the materials:

(1) by virtue of statutory authority or reservation contained in a Crown grant may be taken without the payment of compensation, and

(2) are taken from improved lands.[44]

(ii) *Department of Highways Act*

The Minister of Highways:

(1) may authorize any engineer, agent, servant, or workman employed by or under him, to enter on land to conduct surveys, make such borings and sink such trial-pits as he deems necessary for any purpose relative to the works under the control of the Department;

(2) and his agents may,

(a) enter on any land and take therefrom all timber, stones, gravel, sand, clay or other materials necessary for the construction of public works or property under the control of the Department,

(b) lay any materials upon any land,

(c) construct, take and use all such temporary roads to the materials mentioned above as may be required, and

(d) enter on any land for the purpose of making proper drains to carry off the water from any public work or for keeping such drains in repair.[46]

Provision is made for the payment of compensation for property taken or for damage caused to the lands.[47] Where timber, gravel or other materials belonging to the owner of land is taken without his consent by the Minister, this is an expropriation of property. It is not, however, an expropriation of an interest in land. The Crown does not acquire an interest in the land as a result of the exercise of this power. The power itself does have a similarity to what is called a *profits-a-prendre*, which is an interest in land enabling its owner to enter on another's land to take such things as crops and minerals. In most cases, however, the Crown has a pre-existing right to take sand and gravel by virtue of reservation usually made in the original Crown grant.

An arbitration procedure is established by the statute for situations where the parties have been unable to agree on compensation.[48]

---

44. S.16(4).

45. R.S.B.C. 1960, c. 103, s. 12.

46. S.15.

47. S.16.

In so far as compensation for materials taken is concerned, section 16(4) of the *Highway Act* should be noted.

(iii) *Department of Public Works Act*

The Minister of Public Works has the same powers to enter on and use lands as the Minister of Highways under the *Department of Highways Act*.[49] Similar provision is made for the payment of compensation[50] and a similar arbitration procedure is established.[51]

(iv) *Conclusion*

The Commission believes that compensation for damage or loss resulting from the exercise of the right of entry and use under these statutes should be governed by the general statute later recommended.

(b) *Municipal Act*

Section 478(1) which is the basic compensation provision in the *Municipal Act*, requires the Council to make due compensation to owners, occupiers, or other persons interested in real property "entered upon, taken, expropriated, or used" in the exercise of any of its powers. The "due compensation" payable is for any damages "necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work".

Sections 478 to 503, contained in Division (4) of Part XII of the Act, deal with compensation for property expropriated or injured.

Section 491 enables the Council, by by-law,to provide for entering on real property which may be injuriously affected by the exercise of its powers, for the purpose of carrying out construction, maintenance, or repair in mitigation of injury done or apprehended, or in reduction of compensation. This power includes, in the case of street-grading works, removal of the substance of adjacent lands or the filling in of adjacent lands to produce a grade uniform with the street.

The Council of a district municipality may enter on land and take timber, stone, gravel, sand, clay or other materials which may be required in the construction, maintenance, or repair of any roads, bridges, or other public works. Where compensation is not agreed upon, the municipality shall pay the amount determined under Division (4) of Part XII of the Act for the materials taken or for any damage caused by such taking.

The compensation is to be paid within six months of such determination.[52]

---

48. Ss. 18-37B.

49. R.S.B.C. 1960, c. 109, ss. 12-13.

50. S. 14.

51. Ss. 16-35.

52. R.S.B.C. 1960, c. 255, s. 512.

53. S. 520.

54. S. 555(3), (4).

A municipality has the right of reasonable access to and the right to enter on private property

(1) for maintaining the proper flow of water in any stream, ditch, drain, or sewer in the municipality,

(2) for dyking; and

(3) for reclamation or protection of land from erosion.

There is no express provision for the payment of compensation linked with this power.[53]

Where the Council undertakes works to give effect to agreements with electric light, power or telephone utilities for the placing of utility facilities underground, the municipality has the right of entry upon real property for the purpose of making any necessary surveys, plans, specifications, and estimates in connection with such undertakings, without the consent of the owners or occupiers. The compensation is to be determined, failing agreement, by the provisions of Division (4) of Part XII.[54]

A Council by by-law, may provide for the removal, cutting-down or trimming of trees, shrubs, hedges, or bushes on lands adjacent to a highway, where such vegetation is dangerous or becomes injurious to the road-bed, sidewalk or works, or where the safety or convenience of the public so requires. The carrying out of such a requirement is at the expense of the owner of the lands on which the vegetation grows. If the owner does not remove the vegetation as required, the municipality may do so.[55]

A Council may also, by by-law, declare any building, structure, erection, drain, ditch, watercourse, pond, surface water, or anything on private lands a nuisance and order its removal, pulling down, filling up or otherwise being dealt with as the Council may determine. If the owner fails to comply with such an order, the municipality may enter and carry out the work at the expense of the owner. The section giving the Council such powers states that it applies to any "building, structure, or erection of any kind whatsoever which in the opinion of the Council is in so dilapidated or uncleanly a condition as to be offensive to the community".[56]

The Commission believes that the compensation provided for above should be governed by the general statute later recommended.

(c) *British Columbia Hydro and Power Authority Act, 1964: Power Act*

The Authority may (by itself, or by its engineers, surveyors, agents, contractors, subcontractors, or employees) for any purpose relative to the use, construction, maintenance, safeguarding, or repair of its plants or projected plants, or for better access thereto, and *without the consent of the owner*, enter on land, and

---

55 S. 872.

56. S. 873.

(1) survey and take levels of the same and make such borings, tests, or sink such trial-pits as it deems necessary;

(2) cut down any trees that, in its opinion, might, in falling or otherwise, endanger the conductors, wires, or equipment or other plant of the Authority, or that may obstruct the running of survey-lines;

(3) make or use all roads, trails, bridges, wharves, and other works and facilities, whether permanent or temporary, that may be required for the convenient passing to and from its survey lines, plants and projected plants.[57]

Compensation claims for damage are to be made not later than 60 days after the cause of the complaint,[58] although there is provision for the extension of time.[59] Compensation is to be determined by a single valuator, appointed by the Lieutenant-Governor in Council. The valuator's decision is final and binding and, not subject to appeal.[60]

The Act also appears to authorize entry, possession and use, without amounting to expropriation, for erecting structures, installations or power plants, to make excavations, and to flood and overflow land, and to accumulate and store water. *See* section 18(b), which follows the grant of express expropriating power in section 18(a). Section 24 provides that compensation shall be paid for property expropriated, taken, entered upon or used, and for all damages to property resulting directly from such expropriation, taking, entry, or use.

The Commission believes that all compensable claims arising out of the above provisions should be dealt with under the general statute later recommended.

Similar powers to those above are conferred on the British Columbia Power Commission by section 14 of the *Power Act*. The Power Commission no longer exists, its function having been assumed by the British Columbia Hydro and Power Authority.[61]

(d) *Railway Act*

Railway companies may, subject to the permission or approval of the Minister of Commercial Transport, enter on lands lying in the intended route of a railway, and make surveys, examinations, or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway.[62] Powers are also given for the removal of trees within one hundred feet of a railway right-of-way, to make drains, alter watercourses

---

57. S.B.C. 1964, c. 7, s. 44(1).

58. S. 44(2).

59. S. 44(4).

60. S. 44(3).

60. *Supra*, at p. 46.

61. *Supra*, at p. 23.

and highways or railways.[63]

There is no express provision conferring a right to compensation respect of the exercise of the above powers. There is, however, a general provision in Part VII of the Act, which might be regarded as applicable, although it only comes into operation after the deposit of the plan.[64]

A railway company may enter on land which is no more than 600 feet distance from the centre of the located line of the railway, and occupy the land as long as necessary, for the following purposes:

(1) constructing and repairing its railways,

(2) carrying out the requirements of the Minister of Commercial Transport,

(3) in the exercise of powers conferred on it by the Minister.

Provision is made for payment into court, where consent of the landowner is not obtained, of a sum to be fixed by a judge on principles based on determining compensation for expropriation under the Act. Such a sum is to be security for the compensation awardable. Provision is made for dealing with any surplus or deficiency.[65] It is not clear whether this power to enter and use amounts to expropriation.

A railway company may enter on lands adjacent to a railway route or line and erect and maintain snow-fences. This power is "subject to the payment of such land damages, if any actually suffered, as are thereafter established, in the manner provided by law with respect to such railway".[66]

A railway company may also acquire the right to take materials for construction and a right-of-way to the site of the materials, without the consent of the landowner, with the Minister's approval.[67] Where compensation for land taken, or damage for materials taken, or the exercise of any of the powers granted the railway, cannot be agreed upon, arbitration shall take place as provided for.[68]

A railway company is empowered to use the lands and tracks of other railway companies, subject to the approval of the Minister and, should the companies fail to agree on compensation, the Minister may fix the appropriate amount.[69] Note also the power of the Minister to order the removal of obstructions to the view at

---

62. R.S.B.C. 1960, c. 329, s. 32(a).

63. S. 32(j) to (n).

64. S. 50.

65. S. 38.

66. S. 4Y.

67 S. 39.

68. S. 50 *et seq.*

highway-railway crossings.[70]

The Commission believes that all the compensable claims arising out of the provisions above referred to should be dealt with under the general statute later recommended.

(e) (i) *Gas Utilities Act*

A utility may enter on lands, on seven day's notice to the occupier, for the purpose of making surveys, examinations, or other necessary ground-studies to determine the suitability of such lands for its undertaking and for fixing the site of any land required for the undertaking.[71]

The utility is responsible for damage occasioned by its exercise of this power and, in the case of a dispute as to the amount of compensation, the compensation shall be fixed by the Public Utilities Commission.[72]

There is also a power of entry conferred for the purpose of carrying out construction and maintenance prior to expropriation. But an exercise of this power must be followed by acquisition, by expropriation or otherwise.[73]

(ii) *Pipe-lines Act*

This Act applies to companies having the power to construct or operate pipe-lines for the transportation of oil or gas or solids.[74] The statute empowers such companies, with the permission or approval of the Minister of Commercial Transport, to enter on land lying in the indicated route of its line and

(1) make surveys, examinations, or other necessary arrangements on such lands, for fixing the site of the line, and

(2) set out and ascertain such parts of the land as are necessary and proper for the line.[75]

Companies are also authorized to build, maintain and use pipe-lines and related facilities.[76]

Section 9 directs that the company shall do as little damage as possible and shall make full compensation for damage in the manner provided by the Act. Part III of the *Petroleum and Natural Gas Act, 1965* is made applicable to "flow lines and necessary works

---

69. S.150.

70. S.164.

71. R.S.B.C. 1960, c. 164, s. 6(1).

72. S.6(2).

73. S.26.

74. R.S.B.C. 1960, c. 284, s. 2(1).

75. S.8(a).

76. S.8.

and undertakings connected therewith".[77] This is for the purpose of authorizing and determining compensation for rights of entry.

The Act also provides for the expropriation of land, or interests therein for the building and operation of pipe-lines,[78] and makes sections 36 to 78 of the *Railway Act* applicable.[79]

(iii) *Conclusion*

The Commission believes that compensable damage claims arising under the above provisions of the *Gas Utilities Act* and the *Pipe-lines Act* should be dealt with under the general statute later recommended.

(f) *Water Act*

Certain officials and employees, so far as is necessary in the discharge of their duties or exercise of their rights, have at all times a free right of ingress and egress on any land and premises. These persons are:

(1) the Comptroller of Water Rights, the Deputy Comptroller, and every Engineer, Water Recorder and Water Bailiff, appointed under the Act,

(2) every officer of any municipality, improvement district, development district, water-users' community, or

(3) holder of a licence authorizing the carriage or supply of water or electricity to the public.[80]

No provision is made for compensation where damage is caused by the exercise of the above right of entry.

Although licensees have the right to expropriate,[81] the Act does not expressly confer a right of entry and use short of expropriation for the purpose of carrying out the terms of the licence, except in the case of urgency. The Comptroller is empowered to authorize a licensee to commence entry for construction, prior to expropriation, where delay would not be in the public interest or cause hardship to the licensee.[82] A licensee for power, waterworks and irrigation purposes may fell and remove any tree, rock or other thing that endangers his works, subject to the payment of compensation.[83]

A statutory duty is imposed on all licensees (and persons with the

77. S.17(4).

78. Ss.17(1), (2) and 21.

79. S.17(3).

80. R.S.B.C. 1960, c. 405, s. 30.

81. S.24.

82. S.27.

83. S.18(2).

Comptroller's approval under section 7) to take reasonable care to avoid damaging any land, work, trees or other property. In addition, they are required to make full compensation to owners for any damage or loss resulting from the construction, maintenance, use or operation of the licensee's works.[84]

The Commission believes that all compensable damage claims arising under the above provisions should be dealt with under the general statute later recommended.

4. *Civil Defence Act*

In order to deal with the occurrence of disasters, or emergencies from hostile action, the Lieutenant-Governor in Council may authorize the taking of possession or the use of any real or personal property without the consent of the owner and the retention of such property for such period as may appear to be necessary. While this power would include the power to expropriate, it would also appear to include the right to enter and use lands without expropriating them.[85]

There is provision in the statute for the payment of compensation, which may be fixed by arbitration pursuant to the provisions of the *Arbitration Act*.[86]

The Lieutenant-Governor in Council may also authorize the Council of any municipality by resolution or by-law to authorize any employee of the municipality to demolish or remove any privately owned wall, building, structure, or works made dangerous to the public by enemy action or civil disaster. The provision conferring this power is silent as to compensation.[87]

While the Commission recognizes special procedures may be necessary in the cases of enemy action or civil disaster, it believes that compensable claims should be dealt with under the general expropriation statute later recommended.

5. *Miscellaneous*

In addition to those listed above, there are various other statutes where a right of entry is conferred for the making of surveys and similar purposes. *See*, for example, section 24 of the *Greater Vancouver Sewerage and Drainage District Act*[88] and section 29 of the *Greater Nanaimo Sewerage and Drainage Act*.[89] No provision is made for the payment of compensation where damage results from the exercise of those powers.

6. *Conclusion*

The Commission believes that there would be merit in having one general statutory provision making compensable any damage resulting from the exercise of any of the many statutory rights of entry, where that exercise does not amount to an expropriation. It also considers that the general arbitration tribunal later proposed

---

84. S. 18(1).

85. R.S.B.C. 1960, c. 55, s. 5(i)(ii).

86. *Ibid.*

87. S. 5(l)(vi).

88. S.B.C. 1956, c. 59.

89. S.B.C. 1959, c. 100.

should have exclusive jurisdiction to hear such claims. The chairman of that tribunal should decide whether the claim be dealt with by a single member of the tribunal or by the tribunal sitting in the same manner as it would on expropriation hearings.[90]

Accordingly, the Commission recommends:

1. *The general expropriation statute later proposed should contain a general statutory provision making compensable any damage resulting from the exercise of a statutory right of entry, where such entry does not amount to an expropriation,*

2. *The general arbitration tribunal later proposed should have exclusive jurisdiction to hear such claims.*

90. A recommendation to this effect is made later. *See supra*, at pp. 79-80.

CHAPTER IV MISCELLANEOUS SITUATIONS

There are a number of statutory provisions involving compulsory acquisition of property which require separate discussion.

A. Special Surveys Act

The Attorney-General, in his discretion, may order a "special survey" where:

(1) an error appears, or doubt exists, as to the accuracy of an existing survey or plan,

(2) a discrepancy exists, or is thought to exist, between the occupation of land and any registered subdivision plan or other plan or description under which it is held,

(3) any parcels in which land is held are not shown on any registered subdivision plan, or

(4) doubt exists as to the true location of a highway or a boundary line between parcels, or

(5) he considers it advisable.[1]

In preparing the special survey, it shall be the aim of the surveyor to re-establish as nearly as possible the existing survey, but he may depart from existing boundaries in order to establish boundaries in agreement with occupation and improvements. He is required to endeavour to make such adjustments as will reduce the total amount of compensation to a minimum. He may distribute any shortage in area within a block or group of parcels, having regard to occupation and improvements. He may similarly allot a surplus to a registered owner willing to pay compensation, or create a separate parcel to be disposed of for the reduction of the cost and expenses of the survey.[2]

In addition to the survey, the surveyor is required to make a report which will include a statement containing an estimate of the damage or increased value of each parcel occasioned by the alterations affected by the plan, and showing in detail a just and equitable apportionment among the registered owners of the parcels affected.[3]

A procedure is established for the making of complaints and claims for compensation, which are to be heard by the Attorney-General, or someone appointed by him.[4]

The principle for determining compensation is that the registered owners within the special survey area should in proportion to the area of their respective parcels

---

1. R.S.B.C. 1960, c. 368, s. 3.

2. S. 13.

3. S. 17(d).

4. Ss. 20 *et seq.*

share any loss or any advantage occasioned by the special survey - since the survey was undertaken for the benefit of all the owners. If for the general benefit or for the preservation of individual improvements the surveyor has reduced the area of a parcel, the registered owner should receive compensation from the registered owner benefited or from a general fund formed by payments from the registered owners benefited, as the case may be. Any registered owner who has been benefited should contribute an adequate amount to the general fund or pay the same to the registered owner who has suffered loss, as the case may be.[5]

There is then a procedure for the Lieutenant Governor in Council to confirm the findings of the Attorney-General and approve the special survey.[6] An appeal from the finding so confirmed may be taken to the Court of Appeal.[7]

Upon registration of the plan and the approving Order in Council, title to a parcel of land which shows an increase in area under the special survey plan is automatically transferred to the registered owner of that parcel.[8]

Would a formula for determining compensation laid down in a general expropriation Act be inappropriate for determining compensation where a special survey was carried out? Note that the compensation to be paid here is based on a balancing of benefit and loss and is to be paid by those benefited.

The Commission feels that this scheme for the compulsory settlement of boundaries should not be governed by the general statute later proposed. The purpose of the scheme, to provide a means of settling property disputes between private parties, is essentially different from the public purposes for which compulsory acquisition or use, as set out in Chapters II and III, are authorized.

The submission made on behalf of the Civil Liberties Association, in response to this position as we expressed it in the working paper, was that claims for compensation under the *Special Surveys Act* should be governed by the general expropriation statute we propose, on the ground that damage may be caused to the owner of land by a government agency. We respectfully disagree for the reasons we have stated above. The intervention of the government agency under this statute is to settle boundary disputes between property owners and not, as is the case under expropriation statutes, to enter and take land for its own purposes. Our view was concurred in by Mr. Victor DiCastri, the Director of Legal Services in the Department of the Attorney-General, who has certain responsibilities in the administration of the *Land Registry Act*. It may be that the function of hearing complaints and claims for compensation under the *Special Surveys Act* could, at some time in the future, be assigned to the general arbitration tribunal we propose, but we make no recommendation to that effect in this Report.

The Commission accordingly recommends:

The general statute later proposed should not apply to the Special Surveys Act.

B. Municipal Act: Replotting

---

5. S. 27.

6. S. 28.

7. S. 31.

8. S. 35.

Division (2) of Part XXVII (ss. 823-856) of the *Municipal Act* deals with replotting.

A municipality may initiate a replotting scheme, notwithstanding that an owner of affected land refuses to consent.[9]

The scheme involves taking an area of the municipality as a "common mass" and replotting it. After taking from the common mass lands necessary for highways, parks and public squares, the remainder is to be divided into parcels for allotment to the owners of former parcels in a fair and equitable manner, so that as far as possible the value of the new parcels allotted shall be equal to the value of the old parcels.[10] Endeavour is to be made to allot to owners new parcels in approximately the same location as former parcels. Parcels with buildings, structures, erections, or utilities erected shall, subject to the necessary adjustment of boundaries, be returned to their former owners wherever practicable.[11]

Upon the completion of the replotting scheme, the allotments are binding, subject only to the rights of non-consenting owners to complain as to compensation.[12] Title is transferred from old parcels to the new parcels.[13]

Non-consenting owners may claim compensation. Procedures for making such claims[14] and a formula for compensation is provided.[15] Claims for compensation are heard by a single commissioner, who is appointed on an *ad hoc* basis by the Supreme Court.[16]

The exercise of these replotting powers amounts to expropriation so far as non-consenting owners are concerned. Unlike matters dealt with under the *Special Surveys Act*, where the intent is to settle boundary disputes, replotting is undertaken by municipalities for public purposes - to redevelop areas, including the highways and parks in those areas. In the replotting process, the entire lot of an owner may be taken. No doubt municipalities exercising the replotting powers are conscientious in administering the relevant provisions as fairly as possible. But this can be no justification for not entitling the non-consenting owners under those provisions to the same procedural safeguards and compensation as an owner whose property is expropriated for a school or a highway.

The formula laid down in the general expropriation statute which we later propose is appropriate for determining compensation in a replotting scheme. There is no reason why that formula should not apply to a replotting expropriation in the same way as any other expropriation. There is, however, one exception. Where land is added to the remainder of the owner's former parcel, the value of the land added

---

9. R.S.B.C. 1960, ss. 827 and 838.

10. S. 826.

11. S. 827(1).

12. S. 836.

13. S. 835.

14. Ss. 838, 840-846.

15. Ss. 838 and 839.

16. S. 840.

should be taken into account in determining the owner's loss. We have made a proposal to this effect under "Reparation."[17] There are what we consider certain deficiencies in the formula for compensation contained in sections 838 and 839. That formula, for example, involves comparing market values of the old and new parcels as of different times. A number of expenses or losses are expressly declared to be non-compensable, including the owner's costs of investigating the replotting proceedings or in presenting a claim for compensation. Such deficiencies would be removed if the general statute recommended was made applicable to replotting expropriations.

The Commission also believes that a non-consenting owner should be entitled to invoke the inquiry procedure later recommended by the Commission. It would follow that the approval procedure should also be applicable. Owing to the special procedures laid down in the *Municipal Act* for instituting replotting schemes, there would have to be special provision made to integrate those procedures with those of the general statute we propose. This is particularly true of the notice of intention to expropriate, the inquiry and approval procedures, the vesting of title and the taking of possession.

Certainly the function of the ad hoc commissioners in determining compensation payable should be carried out by the general arbitration tribunal later recommended.

The Commission accordingly recommends:

The replotting provisions contained in Division (2) of Part XXVII of the Municipal Act *be governed by the general statute later proposed.*

C. Company Towns Regulation Act

Where a "Company town" has been established under the Act, roads, streets and ways used by the company and its employees may he declared by the Lieutenant Governor in Council to be open to the general public.[18] No provision is made for the payment of compensation.

The Act provides that where the Lieutenant-Governor in Council has declared the Act to be applicable to roads, streets or ways, such a declaration shall not constitute a dedication or create a highway within the meaning of the *Highway Act*.[19] Nor does such a declaration prevent the company from utilizing for building sites, or for any *bona fide* business or industrial purpose of the company, any such road, street or way.[20]

It is clear that this statute does not confer a power to expropriate, although it does confer the right to require that private property he made available, to a limited extent, for public use. The Act makes provision for making private access public, without really interfering with the company's use of its property. The policy is that existing access in "company towns" should be public without the payment of

---

17. *Infra*, at pp. 389-390.

18. R.S.B.C. 1960, c. 69, ss. 2,3,4 and 6. *See also* s. 5 with respect to public access to wharves.

19. S. 8.

20. S. 7.

compensation.

The Commission considers that this statute should remain outside the scope of the general statute later proposed.

Accordingly, the Commission recommends:

The general statute later recommended should not apply to the Company Towns Regulation Act.

D. Ditches and Watercourses Act

Provision is made in this Act for the construction and maintenance of drainage ditches.[21] Where the owners of land affected reach no agreement, there is a procedure by which the engineer, appointed by the municipality concerned, makes an examination of the proposed ditch and reaches a conclusion as to its location and the manner of carrying out its construction and its maintenance.[22]

Where the ditch will cross lands that it will not substantially benefit, the engineer shall, in the case of ditches constructed for the benefit of lands used for mining or manufacturing purposes, determine the compensation to be paid the owner of the former by the owner of the latter.[23]

The engineer may also relieve the owner of lands over which the ditch will cross of any liability for the cost of the construction of the ditch, where the owner will not benefit from the construction sufficiently. Where the damage to the land exceeds the benefits of construction, the engineer may award such compensation as he deems just and reasonable. A person carrying out the construction of the ditch over the lands of an owner who has been thus relieved or compensated is not to be considered a trespasser provided he causes no unnecessary damage and replaces fences.[24]

Appeals from an award of the engineer may be made to a judge of the appropriate County Court.[25]

The putting into effect of a drainage scheme under this statute can result in a drainage ditch being built across a person's property without his consent - and used for an indefinite period. Whether or not this amounts to an expropriation may be arguable. Has an "interest" in land been taken? The award is filed in the appropriate Land Registry Office, and the Registrar of Titles is required to make a note of the award in the proper register against the title of the land to which it relates. The land then becomes subject to the liability of being charged for sums owing.[26] Nothing, however, is said about registering the ditch as a right-of-way.

---

21. R.S.B.C. 1960, c. 117, ss. 4, 8, 16, 19, 20, 39-53.

22. Ss. 6-21.

23. S. 4(4).

24. S. 20.

25. Ss. 25 *et seq.*

26. Ss. 21(5) and 44.

Whether or not the imposition of a drainage scheme under this statute results in expropriation or compulsory use, the Commission believes that such schemes should be subject to the provisions of the general statute later proposed. There seems little to distinguish the position of the person whose property is to be utilized, without his consent, for a drainage ditch under this statute from that of a person from whose lands a municipality has expropriated a right-of-way for drainage under the *Municipal Act*. Futhermore, the statute contemplates drainage schemes which may only be for the benefit of some mining or manufacturing concern.

In the working paper, the Commission stated that, on principle it considered that the general statute later proposed should apply to drainage ditch schemes under the *Ditches and Watercourses Act*. We pointed out, however, that from a practical point of view there might be some argument for special procedures, owing to the very local nature of such schemes, the kind of use involved, and the cost that is likely to be incurred. Only with the authorization of the Lieutenant-Governor in Council may a ditch, the cost of which will exceed $3,000, be constructed under the Act.[27] A similar enactment in Ontario, *The Drainage Act, 1962-63*,[28] was exempted from the application of that Province's new expropriation statute.[29] There has, we understand, been some criticism of that exception.

We have concluded that the procedures in the general statute later recommended are not appropriate to the initiation of drainage ditch schemes and the building of the ditches under those schemes. However, we believe that compensation claims should be determined by the general arbitration tribunal we propose and that, in determining that compensation, the tribunal should apply the compensation provisions of the general expropriation statute.

Accordingly, the Commission recommends:

1. *Claims for compensation under the* Ditches and Watercourses Act *should be dealt with by the general arbitration tribunal later recommended.*

2. *In determining the compensation payable, the provisions of the general expropriation statute should apply.*

E. Archaelogical and Historical Sites Protection Act

The Minister of Recreation and Conservation may designate any site, parcel of land, or structure of historical significance as an "historic site".[30] He may also designate as an "archaeological site" any "Indian kitchen midden", "Indian house-pit", "Indian cave", "other Indian habitation", "cairn", "mound", "fortification", "structure", "grave or other burial place" and similar things of archaeological interest.[31]

It is an offence for any person to interfere with an archaeological or historic site, except where the Minister has issued a permit to allow excavation, alteration or

---

27. S. 7.

28. S.O. 1962-63, c.39.

29. *The Expropriations Act, 1968-69*, S.O. 1968-69, c. 36, s. 2(3).

30. R.S.B.C. 1960, c. 15, s. 3(2).

31. S. 3(1).

removal.[32] Where such a permit has been issued, it appears that the permit-holder must obtain the consent of the owner of the land before undertaking any excavation, alteration or removal.[33] If, as a result of the permitholder's undertaking, the value of the owner's land is diminished, the permit-holder is liable for compensation which, if it cannot be agreed upon, is to be assessed by a judge of the Supreme Court.[34]

There is no provision for compensation where there is merely designation as an archaelogical or historic site, but no authorization for excavation, alteration or removal. In so far as such a designation reduces the value of land, it would seem only just that compensation should be payable and the Commission would so propose. It also proposes that a "designation" of lands should be treated in the same way as an expropriation under the general statute later proposed.

It is further proposed that, where a permit to allow excavation, alteration or removal has been granted, and the value of the land is subsequently diminished by the permit-holder's undertaking, disputes over compensation be dealt with under the general statute later proposed instead of by a judge of the Supreme Court.

To sum up, the Commission recommends:

1. Loss of value of property resulting from the designation of that property as an archaelogical or historic site under the *Archaelogical and Historic Sites Protection Act* should be compensable.

2. A "designation" of property should be treated in the same way as an expropriation under the general statute later proposed.

3. The jurisdiction now given to a judge of the Supreme Court to deal with compensation disputes between an owner and the holder of a permit to excavate, alter or remove, should be transferred to the general arbitration tribunal later proposed.

F. Noxious Weeds Act

An Inspector has the power to enter lands and destroy noxious weeds and weed seeds, or destroy or treat any hay, grain, or other crop containing such weeds or seeds. The power is only exerciseable after giving notice to the owner and where the owner fails to comply with the requirements of the notice.[35]

Where the Inspector exercises this power, the expenses of carrying out the destruction or treatment are chargeable to the owner and occupant of the land.[36]

No provision is made for the payment of compensation for any damage caused by the Inspector.

---

32. Ss. 5, 6.

33. S. 7(1).

34. S. 7(2).

35. R.S.B.C. 1960, c. 267, s. 11.

36. S. 12.

Plant Protection Act

The regulations under the Act may require the owner, occupier or caretaker of any orchard, garden, or other specified area, to spray, prune or otherwise treat any fruit trees or other vegetation in a prescribed manner. Where such regulations are not being carried out, the Minister of Agriculture may direct his Department to carry out the treatment at the expense of the owner. For this purpose any officer or employee of the Department may enter on the land and carry out the necessary work.[37]

Grasshopper-control Act

Where a grasshopper-control area has been established under the Act, the members of the grasshopper-control committee (and its servants or workmen) may enter on any lands within or adjacent to the control area, without the consent of the owner, "for the carrying out thereon of the measures and work determined by the committee, and for the doing of all things necessary or convenient for the purposes of this Act".[38] Damage caused in carrying out such activities is not actionable.[39]

The above three statutes authorize the interference with private property in the public interest without the payment of compensation. The destruction of a crop under the *Noxious Weeds Act* might cause considerable financial loss to its owner.

Similar provisions are contained in the *Health Act*[40] and *Municipal Act*[41] authorizing the removal of hazards to public health or safety, and in the *Fire Marshall Act*,[42] in respect of fire hazards.

These are all special situations. while there should be adequate safeguards on the exercise of the above statutory provisions, compensation would not appear to be justifiable in cases where the powers are being properly exercised.

Furthermore, these are not situations where property is being compulsorily taken for the use of another person.

Accordingly, the Commission recommends:

The general expropriation statute later recommended should not apply to:

(1) the *Noxious Weeds Act*,

(2) the *Plant Protection Act*, or

(3) the *Grasshopper-control Act*.

---

37. R.S.B.C. 1960, c. 287, s. 5.

38. R.S.B.C. 1960, c. 167, s. 7.

39. *Ibid.*, s. 8.

40. R.S.B.C. 1960, c. 170, ss. 6, 8, 12, 74 *et seq.*

41. R.S.B.C. 1960, c. 255, s. 873.

42. R.S.B.C. 1960, c. 148, s. 17.

The submission made on behalf of the Civil Liberties Association stated that, where damage was caused to the owners of land by government agencies under these statutes, the question of compensation should be governed by the general statute we propose. It may be that the general arbitration tribunal would be a suitable body for dealing with damage claims under the three statutes, and similar enactments. But, as we have already pointed out, we do not think that compensation would be justifiable in cases where the powers are being properly exercised. Thus, valid claims could only be made where the intervening body or person exceeded his statutory authority. We have suggested that there should be adequate safeguards in the exercise of that authority, but we believe that a consideration of what those safeguards should be, in reference to each of the statutory provisions referred to, is outside the scope of this Report. Until such time as those various provisions are reviewed, we would prefer to leave jurisdiction in these matters to the Courts.

G. Highway Act

There are several special situations in relation to highways.

1. Crown reservation for road allowance

Most, but not all, Crown grants of lands have reserved to the Crown the right to take back up to one-twentieth of the lands so granted for public roads and other works of public utility. No restrictions were generally contained in the reservation as to the location of the roads, except that the reservation did not apply to lands on which buildings were erected or were in use as gardens or otherwise for the more convenient occupation of such buildings. Nor was the Crown obligated to pay any compensation for the land when it exercised this right. Thus, where the reservation exists, the Crown is in a position to take up to one-twentieth of the lands granted when and where, subject to the above exception, it wishes - and without the payment of compensation. While the absence of liability for compensation is due to the reservation in the Crown grant, it is supported by section 16(l)(b) of the *Highway Act*, which expressly provides that compensation shall be in respect of lands only to the extent that the one-twentieth reservation is exceeded.

Where the Crown has reserved such a right, it would seem at first glance, that the landowner should not complain if that right is exercised in a fair and reasonable manner. Such exercise cannot be regarded as an expropriation. However, the Commission believes that certain of the procedural safeguards later proposed as appropriate for expropriations generally should apply - such as those dealing with notice and the inquiry procedure.

Accordingly, the Commission recommends:

Where the Crown proposes to exercise a reserved right to take back up to one-twentieth of Crown granted land for a public road or other works of public utility:

1. *Notice of its intention to do so should be given in the same way as a notice of intention to expropriate,*

2. *The owners of interests in the land from which the allowance is to be taken should be entitled to invoke the general inquiry procedure later proposed, and*

3. *The general approval procedure later proposed should be applicable and the approving authority for this purpose should be the Minister of Highways.*

The general compensation provisions would not be applicable.

It has, however, been suggested to the Commission that consideration should be given to the question whether the practice of including the reservation, and other similar reservations giving a right to take without compensation (e.g., to enter and take gravel), should be discontinued for the future, and existing rights or powers of this sort be waived.

The Commission has given considerable thought to this problem. There is no question but that the law should set its face clearly and consistently against the possibility of any compulsory taking of another's property without payment of compensation therefor. However, there is equally no question that what is being done in these cases is the exercise of a right to resume possession which right was reserved in the original grant and is clearly covered in the *Land Registry Act* which is the basic statute in this Province dealing with title to land.

It is true that when the right is exercised, the effect is to dispossess the owner; however, it is equally correct to say that what is done is not strictly speaking an expropriation but a resumption of title, the right to which was clearly stated when the Crown originally parted with title.

On this question the Commission has, with some regret, concluded that it would not be right at this time to make a positive recommendation. The Commission did not receive any widespread comment on this matter although we did receive reasoned, and opposing, views from the Department of Highways and the Council of the Forest Industries of British Columbia. A recommendation should only be made, we feel, after considerable further study and discussion, including such questions as who is likely to be affected, the cost to the public of dropping the reservation, whether the reservation (if it is to be continued) should be clearly and specifically endorsed as a charge on the title, and related problems.

We believe the question should be considered as a matter of policy, but it is not an essential part of a study dealing with expropriation. The Commission would be willing to give the matter further consideration in a separate report.

2. *Section 6 Highways*

Sections 6 and 7 of the *Highway Act* provide:

> 6. (1) Where public money has been expended on a travelled road that has not been theretofore established by notice in the Gazette or otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the district in which the road is situate, that travelled road shall be deemed and is declared to be a public highway.
>
> (2) This section does not apply where the expenditure of public money is confined to expenditure in respect of snow-ploughing and ice control or either of them.
>
> 7. Any public highway declared to be a public highway by section 6 that has not a width of at least thirty-three feet on each side of the mean centre line of the travelled road may be enlarged to that width when deemed necessary by the Minister.

It would appear, therefore, that for a public highway to come into existence under section 6, two conditions must exist:

(1) An expenditure of public money on an already existing road, and

(2) That road must be a "travelled" road.

The statute does not say by whom the road must be "travelled" or how frequently. "Travelled", we understand, is taken in practice, by the Department of Highways, to involve use by the public.[43]

The Department of Highways can in theory, by the simple expedient of running a grader, or spreading gravel, along an existing "travelled" private road - against the wishes of the owner or without his knowledge - turn the private road into a public highway. There is some doubt as to how far the Department could go in acquiring lands in this way. Does section 6 apply, for example, where public moneys are expended to clear the brush alongside the edge of the road?

The turning of a private road into a public highway in this manner will only call for the payment of compensation if the land taken exceeds in area the Crown reservation for a road allowance - so far as the land taken is concerned. Compensation, however, is apparently paid for the improvement represented by the road.

Whether or not an expropriation occurs in the declaring of a public highway under section 6, the provision is a thoroughly objectionable one from the point of view of the landowner. In addition, a very serious problem can exist with section 6 public highways with respect to the operation of the land registration system. There will be usually no indication in the Land Registration office records that the road exists as a public highway, since no survey will have generally been made. This is a very unsatisfactory situation so far as persons dealing with the land are concerned. Even if it becomes known that the road is a public one, the road's location, in relation to the existing surveys of the relevant land is unascertained. Also, the width of the road may be a matter of doubt.

When section 6 was first enacted in 1905,[44] it may well have served a useful purpose in areas where there was a shortage of surveyors. Today, however, when the Department of Highways has adequate and mobile survey facilities, there can be little, if any, justification for the retention of section 6, except in so far as providing statutory support for highways that have already come into existence under it. We understand that the Department prefers not to rely on section 6 - and, in practice, will generally proceed under section 8 where public moneys have been expended on a travelled road.

Accordingly, the Commission recommends:

Section 6 should be amended to restrict its application to public highways deemed and declared to be in existence at the time of the amendment.

The Department of Highways has indicated to us that it is in agreement with this proposal. The Branch of another Government Department, however, stated that section 6 has been useful in the past in providing access to recreation areas, where the process of surveying and recording has not kept pace with improvements to private roads. Until there was some assurance of immediate access to publicly - served roads, that Branch felt it would be "reluctant to encourage repeal or

---

43. This practice is based on the unreported decision, in 1963, of Harvey, C.C.J. in *Schaub* v. *Quality Spruce Mills Ltd.* County Court Registry, Smithers: file 10/63.

44. *Highways Establishment and Protection Act, 1905*, S.B.C. 1905, c. 26, s. 2.

amendment". We would point out that our proposed treatment of section 6 is prospective only. We would reiterate again that, for the future, section 6 does not, in our view, provide an appropriate means of creating highways.

The Commission hopes, and feels sure, that in time all public highways now existing by virtue of section 6 will be properly surveyed by the Department and that the surveys will be registered in the appropriate Land Registry Offices. We recognize that this will be a very gradual process.

3. *Gazetted highways*

Under section 8 of the *Highway Act*, the Minister of Highways may in his absolute discretion make public highways of any width and "declare the same by a notice in the Gazette setting forth the direction and extent of such highway". For such a purpose lands may be entered and taken possession of by the Minister or persons acting on his authority, without the consent of the owner of the lands. Such entry operates to extinguish title to the land.

Under Land Registry Act regulations, 3 the Minister may cause a notice of the exercise of the above powers (and also those exercised under the *Department of Highways Act*),[45] in respect of land for which a certificate of title has been issued, to be presented for filing to the appropriate Registrar of Titles. The notice states that "the lands herein described have been acquired by Her Majesty the Queen in right of the Province of British Columbia". The statutory authority, the Gazette reference, and a description of the land taken is then required to be set out in the notice. Attached to the notice, there is required to be a sketch or plan outlining the land affected. The Registrar is required to make a notation of the notice on the relevant certificate of title. The regulations state that such filing and notation of a notice is evidence only of the exercise of the Minister's powers and that the absence of such a notation does not "imply" that land is not affected by the exercise of such powers. Even where there is a notation, the regulation provides that such notation does not "imply that land described in the certificate is not affected by any other exercise of the Minister's powers.

Generally, the description of lands in the Gazette and under the notice in the Land Registry Act are based on engineering surveys, which may be adequate for the purpose of constructing highways but which are not up to the standards required for land registration purposes established under the *Land Registry Act*.

The above procedures create a number of difficulties:

(a) *Entry*

The shift in title appears to depend on "entry" for the purpose of taking possession of lands. Section 9 of the *Highway Act* states that the entry by the Minister for the purpose of taking possession of the lands operates to extinguish title. We understand, however, that is has been argued that the date of publication in the Gazette is the date of expropriation. If the "entry" criterion is correct, there are a number of problems which result:

1. There may be some difficulty in determining what constitutes "entry" for that purpose. It would be preferable if the state of the title did not depend on some physical occurrence on the land - but rather on the filing or

45. B.C. Reg. 171/68, made pursuant to s. 258(l)(c) of the Act.

service of some document.

2. There may be occasions when the Minister has made his declaration in the Gazette but there has been no entry. There may never be an entry and the highway never built. No expropriation can be said to have taken place, title to the land not yet being extinguished. This creates three difficulties:

   (a) Such a situation puts the landowner in an intolerable position, particularly if he wishes to develop or dispose of his lands, and the position may continue indefinitely.

   (b) If no notice were filed by the Minister under the *Land Registry Act*, a purchaser of the lands would have no way of knowing that the expropriation process had been started.

   (c) If a notice is filed by the Minister, the terms of the notice will be in contradiction to the events. The notice states that the Crown has acquired title to the lands, when the Crown has not in fact done so. This appears to mean that the Minister is really not in a position to file notice until there has been an entry under section 9, even though he has published his declaration in the Gazette as required by section 8.

(b) *Land registration system*

The procedure laid down for filing and notification under the *Land Registry Act* regulations is far from adequate, although it is undoubtedly an improvement over the position prior to 1968, when there was no procedure at all. In a number of respects the procedure works adversely to the purposes of the Province's land registration system. Some of the shortcomings are:

1. The Minister appears to have a discretion to notify the Registrar. There should be a mandatory duty to do so in all cases.

2. The description or sketch of the lands affected, which go with the Minister's notice, are generally based on engineering survey standards, which are usually inadequate for land registration purposes. There should be some requirement that a proper survey be made and filed in the appropriate Land Registry Office within a specified time.

3. The Registrar of Titles has authority now, under section 195A of the *Land Registry Act*, to remove the lands taken for a highway from the relevant certificate of title and to issue a certificate of title for the lands taken, on receiving an application from the Minister of Highways. However, it is not mandatory that such an application should be made where there has been an expropriation by entry under the *Highway Act* and, we understand, the policy of the Department of Highways is not to apply for a certificate of title, except in special circumstances. We are not convinced, it should be mentioned, of the necessity of issuing a certificate of title in the name of the Crown for the lands taken. We are convinced that the Registrar should indicate on the certificate of title of the former owner that he no longer owns those lands. The Registrar of Titles should be in a position to accept a proper survey as evidence of a conveyance from the owner to the Crown and to amend the title by a proper exception in the description. The transfer of title should depend on the filing of required documents

and not on entry under section 9.

The Commission believes that these shortcomings would be overcome if the procedures it proposes in Part II are implemented.

Part Two - Proposed Procedure

CHAPTER V GENERAL

A. One General Statute

The numerous expropriation provisions referred to in Part I of this report demonstrate that there is the most pressing need in British Columbia for a modern expropriation statute of general application, containing adequate procedures and a suitable formula for compensation. Such legislation has been enacted recently in Ontario and Manitoba, and also by the Parliament of Canada.

A general expropriation statute does exist in British Columbia now. This is the *Lands Clauses Act*,[1] which was first enacted in England in 1845[2] for the purpose of providing uniformity in the procedures to be followed and the compensation to be paid consequent upon the exercise of the miscellaneous expropriating powers that existed in that country.[3] The English statute became law in this Province in 1858 as part of the received English law.[4] It was expressly made applicable, with certain modifications, to Vancouver Island and its Dependencies in 1863.[5] The Imperial Statute itself was replaced by a provincial statute, with some minor alterations, in 1897.[6]

The *English Act* of 1845 is still law in England, but it lies buried underneath a morass of amendments, excepting provisions, and overlapping general and special statutes.[7] The Act itself was amended in 1860,[8] and 1869,[9] 1883,[10] and 1895.[11] Its application has been severely restricted by general statutes dealing with reform of the basis for compensation and procedure - the most notable of which are the *Acquisition of*

---

1. R.S.B.C. 1960, c. 209.

2. *Lands Clauses Consolidation Act, 1845*, 8 Vict. c. 18, (Imp.).

3. *Ibid., see* preamble. For historical background of the 1845 legislation and its counterparts in Canada, *see* Eric C.E. Todd, *The Mystique of Injurious Affection in the Law of Expropriation*, U.B.C. Law Review, Centennial Edition 1967, p. 127 at pp. 131 *et seq.*

4. *See English Law Act*, R.S.B.C. 1960, c. 129, s. 2.

5. *Vancouver Island Land Clauses Consolidation Act, 1877*. *See* Consol. S.B.C. 1877, c. 101; Consol. S.B.C. 1888, c. 65.

6. S.B.C. 1897, c. 21; R.S.B.C. 1897, c. 112; and S.B.C. 1897, c. 41, s. 6(2).

7. Halsbury's Statutes, 3rd ed. vol. 6. *See also* Cripps, *Compulsory Acquisition of Land*, 11th ed. (1962) and Supp., at p. 428 *et seq.*, and *Halsbury's Laws of England*, 3rd ed., at p. 16 *et seq.*

8. *Lands Clauses Consolidation Acts Amendment Act, 1860*, 23 & 24 Vict., c. 106.

9. *Lands Clauses Consolidation Act, 1869*, 32 & 33 Vict., c. 18.

10. *Lands Clauses (Umpire) Act, 1883*, 46 & 47 Vict., c. 15.

11. *Lands Clauses (Taxation of Costs) Act, 1895*, 58 & 59 vict., C. 11.

Land (Assessment of Compensation) Act, 1919,[12] the *Acquisition of Land (Authorization Procedure) Act, 1946*,[13] the *Town and Country Planning Act, 1947*,[14] the *Lands Tribunal Act, 1949*,[15] the *Town and Country, Planning Act, 1953*,[16] the *Town and Country Planning Act, 1954*,[17] the *Land Compensation Act, 1961*,[18] and the *Compulsory Purchase Act, 1965*.[19]

Like its English counterpart, the British Columbia *Lands Clauses Act* is hopelessly out of date and there are many exceptions to its application. Unlike England, however, no general reforming statutes have been enacted in this jurisdiction. As pointed out by the Clyne Commission, which recommended a new general statute:[20]

> Because of the inadequacy of our *Lands Clauses Act* to meet changing conditions since 1858, a considerable number of special statutory provisions have been enacted from time to time ... In British Columbia the consolidation achieved by the adoption of the *English Act* has gradually been undone ...

Even while that Commission was reviewing the law of expropriation, both the *Department of Highways Act* and the *Highway Act* were being amended so as to provide expressly that the *Lands Clauses Act* would no longer apply to proceedings under those statutes.[21] The City of Vancouver has long had a similar provision in the *Vancouver Charter*.[22]

Nearly all the provisions of the *Lands Clauses Act*, which contains 110 sections, deal with procedure. Compensation is provided for in sections 64 and 69. Among the procedural provisions are those dealing with the establishment of arbitration tribunals. These last provisions now apply to few expropriating bodies, as can be seen if one refers to Table I and examines the list of appropriate arbitration tribunals. Only in three instances does the *Lands Clauses Act* apply for that purpose - in respect of three telephone companies incorporated under special Acts.

Arbitration tribunals for expropriation purposes may be set up under the following statutes, apart from the *Lands Clauses Act*:

1. *Arbitration Act*,

2. *Department of Highways Act*,

---

12. 9 & 10 Geo. 5, c. 57.

13. 9 & 10 Geo. 6, c, 49.

14. 10 & 11 Geo. 6, c. 51.

15. 12 & 13 Geo. 6, c. 42.

16. 1 & 2 Eliz. 2, c. 16.

17. 2 & 3 Eliz. 2, c. 72.

18. 9 & 10 Eliz. 2, c. 33.

19. 13 & 14 Eliz. 2, c. 56.

20. Clyne Report, pp. 3, 5, 12-13.

21. *See* the *Department of Highways Act Amendment Act, 1964*, S.B.C. 1964, c. 16, s. 5 and the *Highway Act Amendment Act, 1964*, S.B.C. 1964, c. 22, s. 2. *See* the *Department of Highways Act*, R.S.B.C. 1960, c. 103, s. 37B, and the *Highway Act*, R.S.B.C. 1960, c. 172, s. 16(2a).

22. S.B.C. 1953, c. 55, s. 557.

3. *Department of Public Works Act*,

4. *Health Act*,

5. *Power Act*,

6. *British Columbia Hydro and Power Authority Act, 1964*,

7. *Railway Act*,

8. *Municipal Act*,

9. *Public Schools Act*,

10. *Water Act*, and

11. Special statutes, such as the *Vancouver Charter*, the *Greater Vancouver Water District Act*, and the *Greater Victoria Water District Act*.

The City of Victoria is an oddity - claims there must be settled by court action instead of arbitration.

Many of the statutes conferring expropriation powers, in addition to providing for arbitration outside the *Lands Clauses Act*, establish other special procedures. Some have special compensation provisions, although the "value to the owner" principle, which developed under the *Lands Clauses Act* is applicable generally. Since such a statute should be applicable to all expropriations under the jurisdiction of the Province, it should be drafted so as to achieve that result. In particular, there should be a provision making the statute applicable to and binding upon the Crown. Such a provision is contained in the Ontario[23] and Manitoba[24] enactments. In addition, the *British Columbia Hydro and Power Authority Act, 1964* should be amended so as to make the general expropriation statute applicable to the British Columbia Hydro and Power Authority. That particular statute provides that, except as that statute otherwise provides, the Authority is not bound by other Provincial statutes.[25]

Certainly, a modern general expropriation statute is much needed. We believe that it should be the fundamental right of every citizen to receive just compensation for the expropriation of his property. This right should be clearly set out in the general expropriation statute we propose. There should he no exceptions. In Table I in Chapter IT, the special powers of the Township of Richmond and the District of Surrey to expropriate, without paying compensation, for public utilities were noted. Mr. W. T. Lane, the solicitor for Richmond, very ably and cogently put to us the position of his municipality. Sections 10D and 100A of the *Municipalities Enabling and Validating Act* provide a procedure that can save the respective municipalities expense and avoid a certain amount of administrative inconvenience. It is also true, no doubt, that under normal circumstances the value of properties will usually be enhanced by the installation of public utilities which will serve those properties. It is also recognized that the general street pattern in Richmond residential areas makes it desirable to lay sewer lines across private property rather than in the streets. Sections

---

23. S. 3.

24. S. 2(3).

25. S. 53(1).

10D and 100A, it should be pointed out, are not confined to the replacement of septic tanks by sewer systems but can be exercised to instal public utilities generally. We do not believe that convenience to a municipality, or the saving of expense, should overbear the individual's right to seek compensation for expropriated property. Implicit in sections 10D and 100A is an assumption that no properties will suffer a loss in value. We think it is wrong for legislation to be enacted based on a prejudgment of this kind. There can be no guarantee that the installation of public utilities under sections 10D and 100A will enhance the value of every property from which an easement is compulsorily taken. The Commission believes that both these sections should be amended so that property owners can, if they wish, invoke the inquiry procedure and claim compensation under the general expropriation statute proposed in this report. It is dangerous to make exceptions. If the making of exceptions were to become acceptable, inroads would be made on what we believe should be the citizen's fundamental right and the very purpose of having a general statute would be defeated.

The Commission therefore recommends:

1. *A general expropriation statute be enacted embodying the proposals on procedure and compensation put forward in this report,*

2. *The* Lands Clauses Act *be repealed,*

3. *The special provisions relating to procedure and compensation contained in the various statutes conferring expropriation powers be repealed,*

4. *The general expropriation statute should contain a provision making it expressly applicable to the Crown and the* British Columbia Hydro and Power Authority Act, 1964 *should be amended so as to make the general expropriation statute applicable to the British Columbia Hydro and Power Authority,*

5. *Sections IOD and 100A of the* Municipalities Enabling and Validating Act *should be amended so as to enable property owners to invoke the inquiry procedure and claim compensation under the proposed legislation, and*

6. *The general expropriation statute should expressly provide that it will prevail in the event of a conflict between one of its provisions and a provision of any other statute, whether general or special.*

B. One General Tribunal

The Commission has no doubt that a single arbitration tribunal would produce better results than the many individual tribunals that are now set up on an *ad hoc* basis under the various statutes by which they may be established. In the preceding part of this Chapter, it was pointed out that there are at least fourteen different provisions under which arbitration tribunals can now be established for the purpose of determining compensation in expropriation cases.

One general tribunal would achieve greater consistency and accuracy in award making. It would be more efficient and less costly. The overall cost of a single arbitration tribunal at the present time to deal with a relatively straight forward compensation claim lasting three days may run as high as $5,000 (apart from the parties' own legal and other costs).

The choice is between conferring jurisdiction on the courts or establishing a permanent board. The Clyne Report recommended the former in preference to the latter on several grounds. It states:[26]

---

26. P. 137.

> ... benefits of paramount importance will accrue if the Courts hear compensation cases. Judges are experienced in hearing and weighing evidence and are traditionally impartial. Their reported judgments will establish a body of precedent and authority. This in turn will facilitate settlements in cases that otherwise might have gone to hearings.

The permanent board was rejected on several grounds.[27] It was doubted that there was sufficient work in British Columbia to justify the high cost of attracting competent people to such a board. The view was expressed that the members of such boards are not generally trained to weigh and assess evidence, the members are appointed for life and do not as a rule give speedy decisions. Furthermore, it was stated that provision would need to be made for the appointment by someone other than the legislature in order tc ensure that justice would not only be done but appear to be done in cases involving the Crown.

The McRuer Report takes the opposite position, recommending a permanent board.[28] That Report states there are two main factors to be considered in establishing a tribunal to fix compensation:

> (1) The independence of the tribunal, both in fact and in law, from all the parties which may have matters before it for decision;
>
> (2) The tribunal's general competence and experience in making decisions concerning all relevant factors.

A tribunal consisting of at least seven members, apparently all full-time, was recommended, with provision for the enlistment of qualified persons to act as ad hoc members of the tribunal. The chairman and two vice-chairmen, it was proposed, should be qualified lawyers; lay members of the Commission should be experienced and qualified appraisers. All members should have a definite tenure of office, the chairman should have the status and salary of a Supreme Court of Ontario judge, and the vice-chairmen should be paid salaries equal to those of County Court judges.

The Ontario legislation adopted the McRuer recommendatiun, establishing a Land Compensation Board[29] to which ton lull-time members have been appointed. (A quorum consists of three). The chairman and the two vice-chairmen are lawyers and the remainder are persons with varied business and municipal background. None are appraisers.

The tribunal under the federal legislation is the newly-constituted Federal Court of Canada, which replaced the Exchequer Court.[30] The latter long had jurisdiction in federal expropriation cases. In Manitoba, the tribunal is the Court of Queen's Bench.[31]

New Brunswick has had for several years a special tribunal, the Land

---

27. Pp. 135-136.

28. Pp. 1045-1047.

29. S. 28.

30. Ss. 29, 2(l)(a).

31 Ss. 37, l(l)(d).

Compensation Board, for hearing compensation claims in expropriations.[32] The fore-runner in this respect was the United Kingdom where, in 1949, special "Lands Tribunals" were established - one for Scotland and one for the remainder of the United Kingdom.[33]

This Commission believes that a permanent board would be more effective than the courts for several reasons:

1. *Specialization*

The development of special knowledge and understanding among the members of the tribunal is essential to do justice to the expropriated owner and at the same time protect the public purse. While it is theoretically possible that one or two judges could be assigned to hear all compensation cases, the present organization of the courts makes such a system unlikely.

2. *Administration*

A permanent board dealing only with the one type of case would be able to provide expeditious hearings, and in this respect would be in a better position than the courts which already have over-crowded lists. At the present time, there is an eight-month time lapse in the Supreme Court from setting down for trial to the date of hearing in most contested civil cases. The procedural machinery of a permanent board would also be more likely to lead to expeditious hearings: the board would have its own special rules appropriate for hearing compensation claims.

It is contemplated that the board should sit in the general area where the expropriated land is located, unless the parties to the proceedings agree on some other place of hearing that the board would consider appropriate.

One benefit of using the courts, put forward in the Clyne Report, was that the reported judgments will establish a body of precedent and authority. There is no reason why the findings of a permanent board cannot do the same. In fact, under the *Ontario Act* the Land Compensation Board is required to furnish the parties with written reasons for its decisions and to publish a summary of such of its decisions and reasons as the Board considers to be of general significance.[34]

We do not agree with the Clyne Commission that there is not enough arbitration work to warrant setting up a board. Ontario has set up a board with ten fulltime members, which expects to hear about 150 cases a year. Our Commission estimates that a board in British Columbia would hear, in its initial years, about 50 cases a year, although this figure could vary with a marked change in the rate of the Province's economic growth. At the present stage of development of the Province, however, it is not likely to drop much below that figure. What the Commission proposes for British Columbia is a seven-man board, consisting for the time being of a full-time chairman and six part-time members, one of whom should be appointed vice-chairman. The chairman or vice-chairman and two members would constitute a quorum for the purpose of holding hearings. Thus it would be possible,

---

32. *See* the *Land Compensation Board Act*, S.N.B. 1964, c. 6, and the *Expropriation Act*, R.S.N.B. 1952, c. 77, as amended by S.N.B. 1967, c. 39.

33. *See* the *Lands Tribunal Act, 1949*, 12 & 13 Geo. 6, c. 42.

34. S. 30(3) and (4).

should the need arise, for the board to have two panels sitting simultaneously. When the work load of the board developed to warrant it, full-time members should replace the part-time members.

Another criticism the Clyne Commission made of a permanent board was that boards are not as impartial as the courts, nor are they trained to weigh and assess evidence. This objection can be met by the appointment of competent properly qualified persons. This Commission proposes that the chairman should be a lawyer who should be given the salary and a position comparable to a judge of the Supreme Court of British Columbia. Three of the other six members should also be qualified lawyers. One of these should be appointed as vice-chairman. The other three members should be experienced in real estate valuation. The quorum of three should consist of the chairman or vice-chairman, one of the lawyer members (which could include the vice-chairman where the chairman presides), and one of the members with a real estate valuation background. In cases involving large amounts or difficult questions, more than three members might sit. This would be at the discretion of the chairman. The Commission also proposes that the members of the board should have definite tenure of office. (This last proposal was also a recommendation of the McRuer Commission, but is not provided for in the *Ontario Act*.[35]) We would propose that full-time members (only the chairman at first) should be appointed for a tenyear term and part-time members for a five-year term. Appointments should be renewable and there should be a mandatory retirement age. Furthermore, we propose that there should be a right of appeal from the decisions of the proposed board to the Court of Appeal on all questions of fact or law, or both. Also, where the jurisdiction of the board or the validity of its process is otherwise questioned, it is proposed that such matters be determined by way of a stated case to the Court of Appeal. Provisions to that effect are contained in the Ontario statute.[36] Appeals from decisions of the Court of Appeal would, of course, be capable of being taken in these matters to the Supreme Court of Canada as is provided in the *Supreme Court Act*.[37]

The responses to our working paper were largely in favour of a permanent board rather than the courts. The British Columbia Federation of Agriculture, the Vancouver Chapter of the Appraisal Institute of Canada, and expropriating authorities generally were in favour of the board. On the other hand, five persons thought the courts should be utilized. One of these argued strongly that more emphasis should be placed on the negotiation procedure so that only "hard cases" would go on to arbitration. If this were done, it was suggested, there would not be a sufficient volume of cases to warrant establishing a separate tribunal. Some of those opposing a permanent board expressed the fear that it might not be as objective as the courts. We remain convinced that the permanent board would provide the better solution. Objectivity will not be a problem if the persons appointed to it are able and well-qualified individuals. So far as the case load of the proposed board is concerned, most expropriating authorities now endeavour to reach agreement with owners in instances where reasonable settlements are a possibility. In most situations, settlements, by purchase, are made without the necessity of bringing expropriation proceedings. Even where proceedings are started, settlements are usually reached without the need for arbitration. We see no reason why that situation would change. On the whole, it is only the "hard cases"

---

35. P. 1046.

36. Ss. 31, 32.

37. R.S.C. 1970, c. S19, as amended S.C. 1969-70, c. 44.

that go to arbitration now.

Several persons suggested that the functions of the board we proposed could be combined with the functions of the Assessment Appeal Board, which is constituted under the *Assessment Equalization Act*.[38] This is an interesting proposal, as the Lands Tribunals in the United Kingdom have, apparently successfully, carried on both these functions, as well as others, since these tribunals were established in 1949. Combining the two functions might well enable the appointment of more (if not all) full-time members to the proposed tribunal. However, we are not aware of any Canadian jurisdiction where the two functions are carried out by the same tribunal. Also, it should be pointed out that valuation for assessment purposes and valuation for expropriation, while having much in common, are not based on the same formulae. The Commission believes that there may be merit in combining the two functions, but it is not prepared to make a recommendation to that effect at this time. A study of assessment and assessment procedures is obviously outside the scope of this Report and we would not propose changes in these procedures without having made such a study. Certainly, the combining of the two functions is something to be considered in the future. Meanwhile, we consider that it is of vital importance that the tribunal we propose should be soundly established for the purpose of hearing expropriation arbitrations. In the light of its experience, additional functions might be given to it at some future time.

We received a number of suggestions regarding the composition of the board. The British Columbia Federation of Agriculture proposed that there should be a member who is a farmer. One person felt that all members should be lawyers, as members without a legal background might not properly weigh evidence and instead allow their own experience in real estate to affect their judgment. The Vancouver Chapter of the Appraisal Institute of Canada would like to see a permanent board of nine members, with three full-time. These three full-time members should be the chairman and a vice-chairman, both to be lawyers, and an ordinary member who should he a qualified real estate appraiser: the part-time members should consist of three lawyers and three appraisers. A somewhat similar proposal was put forward by the President of the Vancouver Chapter of the Society of Real Estate Appraisers, except that there should be in addition four part-time members who would be respected citizens from industry, commerce, education or labour. The Committee of the Real Estate Institute of British Columbia felt it would not be a good idea to appoint part-time appraisers to the tribunal as there would be a conflict with the general nature of their business. The Appraisal Institute suggested that appointments of members be made by the Supreme Court from applications resulting from advertising the positions available. One group suggested that the mandatory retirement age be 70 and another 65. It was also said that our proposed ten year appointment was too long to attract energetic young men and too short to attract people who would be prepared to make a career of the position.

The Commission believes that the proposals made in the working paper with respect to the composition of the board are satisfactory. We have made one change, however, and have recommended that there should be a vice-chairman, who initially should be one of the part-time members with legal background. This would provide greater flexibility in the holding of hearings and enable the board to have two panels sitting at the same time in the event that the work load of the board became heavy.

Two expropriating authorities felt that there should be an upper limit on the damage claims (resulting from the exercise of a right of entry, not amounting to

---

38. *See* the *Lands Tribunal Act, 1949*, 12 & 13 Geo. 6, c. 42, s.1.

expropriation) that could be heard by a single member of the board. The Department of Highways suggested that the limit be $50,000. We would prefer to see this as a matter of discretion on the part of the chairman, as we proposed in our working paper. Monetary limits tend to be artificial and soon become out of date. In any event, we would think the chairman would not, in damage claims of this nature approaching $50,000, designate a single member to conduct the hearing.

To sum up, the Commission recommends:

1. *There should be a single arbitration tribunal for hearing all claims for compensation:*

   (a) *for expropriation,*

   (b) *injurious affection, or*

   (c) *for damages resulting from the exercise of a statutory right of entry.*

2. *The tribunal should be a permanent board of seven members.*

   (a) *The chairman of the board should serve on a full-time basis and be appointed for a ten-year term.*

   (b) *Initially, the other six members of the board should serve on a part-time basis and be appointed for five-year terms.*

   (c) *As the work load of the board warrants it, part-time members of the board should be replaced by full-time members.*

   (d) *Appointments should be renewable, and there should be a mandatory retirement age.*

3. (a) *The chairman of the board should serve on a full-time basis and be appointed for a ten-year term.*

   (b) *Initially, the other six members of the board should serve on a part-time basis and be appointed for five-year terms.*

   (c) *As the work load of a the board warrants it, part-time members of the board should be replaced by full-time members.*

   (d) *Appointments should be renewable, and there should be a mandatory retirement age.*

4. (a) *The chairman of the board and three of the members should be qualified lawyers and the other three members should he experienced in real estate valuation.*

   (b) *The chairman of the board should be given the salary and a position comparable to a judge of the Supreme Court of British Columbia.*

5. (a) *A quorum of the hoard for the purpose of holding heatings with respect to determining matters under paragraph i(a) and (b) above, should consist of the chairman or vicechairman, one of the lawyer members (which could include the vice-chairman where the chairman presides) and one of the other members.*

   (b) *In damage claims arising out of the exercise of a statutory right of entry, the chairman should be able to designate a single member of the board to determine the matter.*

6. (a) *There should be a right of appeal from the hoard to the Court of Appeal on all questions of fact or law, or both.*

   (b) *Where the jurisdiction of the board or the validity of its process is otherwise questioned, such matters should be determined by way of a stated case to the Court of Appeal.*

C. One Provincial Crown Acquisition Agency?

It may be that there would be some merit in having a single agency of the Crown deal with all acquisitions, or at least all expropriations of land, by the Crown in right of the Province. There is such an agency now with respect to the purchasing of personal property. All personal property bought by the various branches of the Provincial Government, with some exceptions, must be acquired through the Purchasing Commission dstablished under the *Purchasing Commission Act.*[39]

The extent to which expropriating powers have been exercised in recent years by the Provincial Government was outlined in Chapter II. The Table below shows cumulatively, for the five-year period from 1966 to 1971, acquisitions of land by the various Ministers and other persons or bodies having the power to expropriate on behalf of the Crown. It does not include all Crown acquisitions - only those where the power to expropriate might have been or was utilized.

39. R.S.B.C. 1960, c. 325.

TABLE IV - TABLE SHOWING CUMULATIVE PROVINCIAL CROWN LAND ACQUISITIONS WHERE POWER TO EXPROPRIATE EXISTS FOR FIVE YEAR PERIOD 1966-1971

Crown Agency	Settlements		Claims Submitted	Acquisition Expenditure
	Negotiated	To Arbitration		
Lieutenant-Governor in Council *(under Housing Act)*	Nil	Nil	Nil	
Minister of Highways	3,568		39	$23,074,684.75
Minister of Public Works[1]	(2)	Nil	(2)	
Minister of Health Services and Hospital Insurance (under ss. 15, 16 of *Health Act*)	Nil	Nil	Nil	
Minister of Lands, Forests, and Water Resources (under s. 147 of *Forest Act*)	35	Nil	28,646.00	
Minister of Recreation and Conservation:				
1. Parks	64	Nil	2,212,300.00	
2. Fish and Wildlife	8		Nil	191,800.00
Provincial Civil Defence Co-ordinator	Nil	Nil	Nil	
British Columbia Hydro and Power Authority[3]	4,806		98[4]	23,462,000.00
British Columbia Harbours Board	Nil		Nil	Nil
Pacific Great Eastern Railway Company	60		1237,594.16	

1. The Department of Public Works does not have this information readily available. The Department did inform the Commission, as indicated in Chapter II, that it has only expropriated once in the past 18 years, in the 1965/66 fiscal year. It also informed us that since 1964 there had been 67 acquisitions by negotiated settlement in the Legislature Precinct area in Victoria, at a cost of $1,076,460.

2. Data not available.

3. *See* Chapter II for explanation of these figure.

4. There were 144 expropriations in this period, of which 46 were settled prior to a valuator's inquiry. Of the remaining 98, 59 were determined by the inquiry.

It should be emphasized once again that the above figures do not include acquisitions by the Crown where no expropriation powers exist. The Liquor Control Board, for example,

has the power to purchase land, and does so, but it has no power to expropriate.[40]

The benefits of a single acquisition agency would be that:

1. It would ensure that there was a uniform policy as to the price that should be paid for land in the negotiating of settlements,

2. It would act as a safeguard against unduly high settlements by individual Departments anxious to avoid having to go through the various procedures proposed for the new general statute,

3. It would result in there being a standard approach in the processes of negotiating and dealing with the owner and the public,

4. It would enable the negotiation and expropriation processes to be carried out by a single group of personnel, who would have a high level of special knowledge and understanding of land acquisition and expropriation problems;

5. It would serve as a focal point for review of governmental expropriation policy.

If a single acquisition agency was set up, it would be essential that it be adequately staffed so as to ensure there would be no undue delays to departments wishing to get ahead with particular projects. At the same time, departments would have to give attention to planning their schedules to avoid last minute requests for immediate acquisitions.

In Manitoba, there has been a single acquisition agency since 1965.[41] It is known as the "Land Acquisition Branch", which is now a branch of the Department of the Attorney General. Formerly, it was a branch of the Department of Public Works. We understand that it functions very effectively.

Under the federal statute, the Minister of Public Works is the single agent through which the Crown expropriates.[42] However, prior to expropriation, federal government departments and other federal Crown agencies may purchase lands themselves. The Minister of Public Works only comes into the picture when a purchase cannot be negotiated outside of expropriation proceedings.

In Ontario there is no single agency for Crown acquisitions generally, or for expropriations. This may be contributing to a tendency to make settlements so as to avoid the application of the procedures in the Ontario statute.

This Commission thinks there is much to be said for what has been done in Manitoba. If such a mechanism were adopted, there might be some argument in favour of excluding the British Columbia Hydro and Power Authority and the Pacific Great Eastern Railway Company from its ambit owing to the fact these two bodies are established as separate corporations and function more independently than government departments.

---

40. *See The Government Liquor Act, R.S.B.C. 1960*, c. 166, s. 137.

41. R.S.M. 1970, c. L40, ss. 3 *et seq.*

42. Ss. 3, 2(1)(g). Except as to expropriations under the *Canadian National Railway Act.* *See* s. 42(3)(b).

However, if it were concluded that a single acquisition agency was not appropriate for British Columbia at this time, the alternative of a single agency for expropriations only might be considered. Such an agency would have some of the advantages of the single acquisition agency but leave departments and other Crown bodies free to negotiate purchases.

In response to our working paper, three provincial government departments indicated to us that they would be opposed to a single acquisition agency, expressing fear that delays would be encountered resulting in the holding up of their particular projects. An individual lawyer made a similar submission and also applied the same reasoning to a single department of the Provincial Government conducting Crown expropriations. The British Columbia Hydro and Power Authority stated, if its acquisitions or expropriations were to be undertaken by a single agency or department, there would be a loss of personal contact with the owner. Hydro also pointed out that their acquisition and damage claims are often tied together, owing to the particular nature of their projects, and owners would naturally resent having to deal with two agencies over something they regard as the same matter. In addition, Hydro stated that its acquisition programme is large enough to be conveniently handled by Hydro itself. The British Columbia Federation of Agriculture, on the other hand, supported the concept of a single acquisition agency and stated that it should apply to Hydro and the Pacific Great Eastern Railway. A private individual made a similar submission.

The Commission was not surprised by the nature of these comments and puts forward as recommendations the proposals made in the working paper. These recommendations, it should be noted, are not that steps should be taken to establish a single acquisition agency or to designate a particular department to be responsible for Crown expropriations, but that the Government give consideration to the advantages of these procedures.

Accordingly, the Commission recommends:

1. *Consideration be given to establishing a single acquisition agency, as a branch of an existing department of the Provincial Government to conduct acquisitions of real property by the Crown in right of the Province.*

2. *As an alternative, consideration be given to designating an existing department of the Provincial Government to have responsibility for the conducting of expropriations by the Crown in right of the Province.*

CHAPTER VI INITIAL PROCEDURES

A. General

The decision to expropriate the property of an individual is an administrative decision of policy - a political decision in which the interests of the individual are sacrificed to the general interests of the community.

----- McRuer Report[1]

The McRuer Report recommended two important general procedures to safeguard the individual from the abuse of the exercise of the power to expropriate:[2]

1. *The Approval Procedure* - This provides for the confirmation or otherwise by a politically responsible "approving authority" of the initial decision to expropriate.

2. *The Inquiry Procedure* - This provides for the holding of an inquiry to hear objections to the proposed expropriation.

The two procedures are related, but are not entirely dependent on one another. The recommended approval procedure was to apply whether or not the inquiry procedure was invoked. On the other hand, it is essential to the inquiry process that there should be a reconsideration of the initial decision to expropriate, once an inquiry has been held.

These two recommended procedures were adopted in the Ontario legislation,[3] and also later in the Federal[4] and Manitoba[5] statutes. They are discussed below.

B. Approval Procedure

In British Columbia, the exercise of approximately half of the existing powers of expropriation now requires some form of authorization, consent or approval, as the information contained in Table I indicates. In most instances, the approving authority is the LieutenantGovernor in Council. There is little consistency in the requirement. For example, the Lieutenant-Governor in Council initiates the expropriation process under the *Department of Highways Act*, but plays no role in expropriations under the *Highway Act*. Another illustration is expropriation for rights-of-way. The Lieutenant-Governor in Council must approve expropriations by the British Columbia Hydro and Power Authority under the *British Columbia Hydro and Power Authority Act, 1964*: the Minister of Commercial Transport must sanction the location of lines for railway rights-of-way under the *Railway Act*, the construction of pipe-line rights-of-way under the *Pipe-lines Act*, and rights-of-way for mining under the *Mines Right-of-way Act*, all of which may

---

1. P. 991.

2. Chap. 66.

3. Ss. 4-8.

4. Ss. 9, 11-13.

5. Ss. 3, 8-9, Schedule A.

involve expropriations - although sanction of the actual expropriations for these purposes is only required under the last of these statutes: no approval is required by anyone expropriating under the *Forest Act* to obtain a right-of-way for the transportation of forest products.

The McRuer Report states:

> ... the power of expropriation is such an infringement on civil rights that jealous and vigilant attention should always be given to the question of upon whom it should be conferred. The less responsible to public opinion a particular body may be, the more reluctantly should the power of expropriation be conferred on it. The same principle should dictate the choice of the approving authority.[6]

The Report recommended that all expropriations be subject to the approval of a politically responsible person or body. With the exception of municipal expropriations, the approving authority is in all cases a Minister of the Crown and usually the Minister responsible for the administration of the particular act in which the expropriation power is contained. For example, the Minister of Education is the approving authority for school board expropriations.[7]

Municipalities were made an exception, since they are self-governing and their councils elected. Accordingly, the Report concluded they should be held responsible for their decisions.[8] The same principle did not apply to school boards as, owing to the presence of two schoolboard systems (the public school and the separate school) with two groups of electors, the power to expropriate might be exercised in respect of lands of persons other than electors.[9] In British Columbia, the power to expropriate is only given to the public school boards so that this difficulty does not arise here.

Table D in the McRuer Report sets out in detail the recommended approving authorities.[10]

The Ontario legislation followed, on the whole, the recommendations of the Report. Elected school boards were, however, made approving authorities for their own expropriations rather than the Minister of Education, as recommended.[11]

The new Manitoba statute has included an approval procedure much the same as Ontario's.[12] In Manitoba, the procedure is one of "confirming" rather than "approving". The Federal Act also contains a procedure by which the notice of intention to expropriate is either "confirmed" or abandoned. Under the Federal Act, the Minister of Public Works is the sole confirming authority (as well as the sole

---

6. P. 992.

7. Pp. 993 *et seq.*

8. P. 999.

9. Pp. 1000-1001.

10. Pp. 994-998.

11. Ss. 4-8.

12. Ss. 3, 8-9, Schedule A.

expropriating authority).[13]

The courts, it should be pointed out, are not suitable bodies for the purpose of approving or authorizing the exercise of expropriation powers. The McRuer Report was critical of 1966 Ontario legislation which required the authorization by a county or district court judge of the exercise of the power to expropriate by conservation authorities, hospitals and universities. The judge had to be convinced that the expropriation was reasonably necessary for the purposes of the applicant. The Report pointed out, quite properly in our view, that the decision to authorize was essentially political and that the courts should not be put in the position of having to decide what route a highway will follow or whether it is necessary to take land for educational purposes.[14]

The approval procedure serves two distinct functions:

1. It ensures that a politically responsible person or body will assume responsibility for every expropriation, and

2. It enables further consideration to be given to the need for each expropriation, which is essential where the inquiry procedure has been invoked.

This Commission endorses the principle that a politically responsible person or body must accept responsibility for every expropriation that takes place in this Province. Where the expropriating authority is a politically responsible person or body (such as a Minister of the Crown or a municipal council), there is no need, of course, for a different person or body to be the approving authority. There is already somebody who has assumed political responsibility. The approval procedure in such instances nevertheless serves, as it does in expropriations generally, as a mechanism for turning a proposed expropriation into an actual expropriation, and also provides an opportunity for reconsideration of the need for expropriation.

Where the inquiry procedure has been brought into operation, is it wrong that the expropriating and approving authority should be one and the same? Would it, as was asked in the McRuer Report, turn the inquiry procedure into a "formality devoid of any real guarantee of administrative justice to the owner because the expropriating authority is asserting its right and at the same time is acting as judge"?[15] The McRuer Report answered both questions in the negative, pointing out that it was not intended that the approving authority should act as "a judge in the traditional sense and decide applications according to law".[16] The decision of the approving authority must be based on policy and the purpose of the inquiry is to give owners an opportunity to be heard. In addition, with the inquiry and approval, expropriation decisions "should be better considered and should be made with a better understanding of all the relevant facts".[17]

---

13. Ss. 9, 11-13.

14. Pp. 991-993.

15. P. 1003.

16. *Ibid.*

17. *Ibid.* For a case in which the approval (after a negative report by an enquiry officer) was challenged, *see Walters* v. *Essex County Board of Education* (1971), 20 D.L.R. (3d) 386.

This Commission proposes that there should be an approval procedure along the lines recommended in the McRuer Report, and adopted in Ontario and Manitoba. It proposes an inquiry procedure later in this chapter.

In the response to our working paper, no one questioned the principle that a politically responsible person or body ought to take responsibility for approving every expropriation.

In the working paper, the Commission noted that there were two groups of expropriations with which we had difficulty in deciding who should be the approving authority expropriations by municipalities and school districts. Should the municipal councils and school boards be the approving authorities of their own expropriations, as is the case in Ontario and Manitoba? The members of these bodies are, after all, responsible to the local electorate. On the other hand, the Commission felt there was something to be said for making the Minister of Municipal Affairs the approving authority for municipal expropriations and the Minister of Education for school district expropriations. Having a central approving authority might bring some desirable uniformity in the approach to expropriation of the 144 municipalities (excluding 28 regional districts) and 77 school districts that are scattered throughout the Province.[18] Injustice would be more likely to be remedied through the approval procedure where it can be spot-lighted for all to see. Nevertheless, there is a conflict in political responsibility here. Are the wishes of a local electorate, on a subject which is within local jurisdiction, to be overborne by a Minister of the Crown representing the provincial electorate? In its working paper, the Commission expressed the hope it would receive comment on this point that would assist it to reach the right conclusion. At that stage, the Commission was inclined to recommend that the approving authorities be the Minister of Municipal Affairs and the Minister of Education. It pointed out, however, that regional districts established under the *Municipal Act* clearly should not be approving authorities in respect of their expropriations since members of regional boards may be appointed rather than elected.[19]

The majority of those responding to our plea for help on this question were in favour of the municipal councils and school boards acting as approving authorities. Municipal officials in particular, envisaged delays and also objected in principle to a different level of government being brought into the process at that particular stage. John Morden, one of the leading authorities in expropriation law in Canada, thought "it would be an unfortunate intrusion into local government responsibility, and the democratic implications thereof, to make municipal and school board expropriations subject to the approval of members of the Provincial Cabinet". It was also pointed out that, in many instances, the local authority would be in a much more knowledgeable position to decide what would be in the best interests of the locality than a Minister of the Crown and, also, that the local authority, being directly politically responsible to the particular locality, would likely be more sensitive to local complaints. The British Columbia Federation of Agriculture and Dean White, on the other hand, preferred ministerial approval. Dean White pointed out that the powers of local authorities are already subject to the supervision and control of the Provincial Government in a variety of ways.

Our final conclusion is that, both in practice and principle, it would be preferable to have municipal councils and school boards be approving authorities.

---

18. *See* Table II.

19. Ss. 769, 771 *et seq.*

As Stark, J. recently stated, of the approval function of school board members in Ontario, in *Walters* v. *Essex County Board of Education*, " ... they have been elected to office for the very purpose of making such decisions".[20] We should be careful to point out that this does not mean that we propose there should be any change in the existing authorizations required in the exercise of municipal council and school board powers, which were noted in Table I. In so far as regional districts are concerned, we believe that the Minister of Municipal Affairs should be the approving authority since those bodies may have appointed members and thus may not be directly responsible to the electorate.

A table of proposed approving authorities is set out below. Generally, the proposed approving authority is the Minister of the Crown responsible for the administration of the statute containing the particular expropriation power. It may be helpful to compare this table with Table I.

In the event that a single agency of the Crown was given the responsibility for conducting Crown expropriations, the proposed approving authorities would remain the same.

No approving authority is designated for expropriations under the *Health Act* and the *Civil Defence Act*, since the emergency circumstances which are a prerequisite to expropriations under these two statutes would necessitate immediate expropriation. Generally, in these situations, there would be no time for the approval and inquiry procedures to operate. Under both these statutes, the Lieutenant-Governor in Council must authorize the expropriations so that political responsibility is at that level.

[TABLE V OMITTED]

Miscellaneous

In respect of expropriating powers other than those set out above:

(1) Where there is a Minister of the Crown with the responsibility for the administration of the statute containing the expropriation power, that Minister should be the approving authority.

(2) In all other cases the Attorney-General should be the approving authority.

Summary - To sum up, the Commission recommends:

1. The general expropriation statute should contain an approval procedure under which a politically responsible "approving authority" must approve or disapprove the initial decision to expropriate by an expropriating authority.

2. The approving authorities should be as set out in Table V.

3. Written reasons for the decision of the approving authority should be made available to the parties to the expropriation and any persons who objected to the proposed expropriation at an inquiry.

C. Inquiry Procedure

---

20. (1971), 20 D.L.R. (3d) 386, at p. 392.

1. General

> There has always been an understandable and deep-seated resentment on the part of the owners whose property has been expropriated that the action has been taken without their consent and without a hearing. The right to a hearing is fundamental justice.
>
> In addition to reasons based on fundamental justice, a right to be heard will tend to produce expropriation decisions which will reflect more consideration for the rights of the owner and produce better plans, without sacrificing matters of vital public interest.
>
> ----- McRuer Report[21]

The chief purpose of the inquiry procedure recommended in the McRuer Report is, as has already been pointed out, to provide the owners with an opportunity to be heard. The inquiry is not to deal with the question of whether the decision to undertake a particular project was right, but whether the decision to expropriate particular property for that project was the right one.

The McRuer Report states:

> The merits of the expropriating authority's general policy should not be considered relevant ... The necessity of the work should be assumed and treated as being beyond comment.[22]

The place for questioning general policy is elsewhere - the Legislature, the council meeting, the media, and ultimately at the polls.

What should be considered at the inquiry is:

> The soundness and fairness of taking the particular piece of land described in the expropriation plan ... The public interest and the interests of the owner must be considered. Evidence and comment on this issue, and on related issues such as the feasibility of the modification of the expropriation plan, or alternative sites or routes, or the taking of a lesser estate or interest in the land, should be relevant.[23]

It was recommended that the role of the inquiry should not be decision-making. The person holding the inquiry should report to the approving authority a summary of the evidence and arguments of the contending parties, its findings of fact, and its opinion on the merits.[24] The approving authority then would review the report and decide whether or nct to approve the expropriation, with or without modifications.[25] The approving authority was to make its decision on grounds of policy - it might reject the findings of the inquiry but, if it did so, the approving authority would have to bear the political consequences of its decision.

---

21. P. 1002.

22. P. 1007.

23. *Ibid.*

24. Pp. 1004, 1007-1008.

25. P. 1008.

The McRuer recommendations were implemented in the Ontario statute,[26] and later followed in the *Manitoba Act*.[27] The Ontario enactment provides that an inquiry officer shall inquire into whether the proposed expropriation is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority".[28] The Manitoba provision omits the word "sound".[29]

The federal statute also contains an inquiry procedure but under it the inquiry officer is not required to come to an opinion on the merits. The inquiry officer's report is simply to state "the nature and grounds of the objections made".[30] The position of the expropriating authority is not made a matter for the inquiry officer to consider and the Act does not provide for either an appearance or submission by the expropriating authority. Apparently the reason for excluding a requirement that the inquiry officer make a finding on the merits was that it would be improper for the tribunal to conclude that the Minister of Public Works had been wrong in making the decision to expropriate, a basically political decision for which the Minister must take responsibility politically. We think such reasoning shows an undue regard for the position of the Minister and even suggests an infallibility on his part. We agree with the McRuer Report's conclusion[31] that the opinion of the inquiry officer should be helpful to the approving authority in making its decision. Under the federal statute, the approving authority and the expropriating authority are the same, i.e., the Minister of Public Works. The Minister is required, on request and after confirming a notice of intention to expropriate, to furnish a person who objected with a copy of the hearing officer's report and, where effect was not given to the objection, a statement of the Minister's reasons for his decision.[32]

This Commission proposes that an inquiry procedure similar to that adopted in Ontario and Manitoba should be adopted here.

There had been 122 requests for inquiries under the Ontario statute by May 1, 1971. We understand that inquiry officers had found that the proposed expropriation was not fair, sound and reasonably necessary in some six instances. There is a general feeling among those involved in expropriating in Ontario that the procedure is a very useful one. In giving an opportunity to owners to have a hearing, a much healthier relationship is created between the person whose property is being taken and the expropriating authority. In most instances the expropriations will continue, as the above figures indicate, but the intervention of an independent third person who concludes, in effect, that the expropriation is justifiable for the objectives of the expropriating authority, can have the very desirable consequence of clearing the air of ill-feeling. Furthermore, and perhaps most significantly, the very existence of the inquiry procedure is making expropriating authorities more careful in the preparation of their plans and has resulted in more consideration being given to the position of owners. The expropriating authorities themselves regard this as a

---

26. Ss. 6-8.

27. S. 9 and Schedule A

28. S. 7(5).

29. Schedule A, s. 6(2).

30. S. 8.

31. P. 1008.

32. S. 11.

desirable result.

We understand that there have been no inquiries held yet under the *Manitoba Act*. Three objections in connection with a St. Lawrence Seaway expropriation at St. Catherines in Ontario resulted in the only hearing that has so far been held under the *Federal Act* by September of this year.

The Commission recognizes that the inquiry procedure it proposes may, in certain situations, come too late in the day to have any real meaning. The Ontario, Manitoba and Federal inquiry procedures (as well as the procedure we propose) can only be invoked where expropriation proceedings have been commenced. Thus, where a number of properties are required for a particular project, many of those properties may be purchased by negotiation without the necessity of starting expropriation proceedings. It is only against the "hold-outs" that expropriation proceedings will be started. By the time that expropriation proceedings are begun, it may be impractical to make a change and no doubt such a state of affairs would influence both the inquiry officer and approving authority involved. The most obvious kind of expropriation where this would occur would be in respect of rights-of-way for roads, transmission lines or pipe-lines. But it could also occur where properties were being acquired in a city block for re-development, or for a school or park. For this reason, a number of persons have suggested to us that the inquiry procedure should come into operation before expropriation proceedings were initiated.

Perhaps the ideal position, and perhaps the most extreme one, would be to require expropriating authorities to hold an inquiry before acquiring any lands for a particular project. Such an inquiry could extend to the undertaking itself as well as to its location. In some instances, such as the redevelopment of a particular city block, the two concepts cannot be separated and in other instances, such as the construction of an expressway, it would be more realistic to consider the undertaking and its location at the same time.

The problem the Commission is faced with is the extent to which an expropriation statute should be a vehicle for imposing procedures on the earlier stages of the processes by which projects are undertaken. If one takes an overall view of an undertaking from the time that proposals for it are first made to the time when it is completed, or all the consequences of its completion have become manifest, the expropriation aspects are only a segment of the total process. While this total process is a continuous one and the position of the citizen should be safeguarded throughout the process, we have concluded that this report should be confined to the expropriation aspects. We think it would be a mistake to enlarge the scope of the proposed statute so as to include the decision-making processes of all the various types of expropriating bodies in initiating projects. This would necessitate a very careful look at the long-range plans some expropriating authorities have for property acquisitions, particularly municipalities, and the financial consequences of having to commit themselves so far in advance (bearing in mind the recommendation we make later that expropriating authorities should be required to expropriate where public knowledge of their plans has had a depressing effect on property values).

Meanwhile, we believe that the inquiry procedure we propose is a step in the right direction and will play a useful role for the reasons mentioned earlier.

2. *The inquiry officer*

The McRuer Report recommended that the inquiry should be held by a single inquiry officer and that inquiry officers should, to be independent, be appointed by the Attorney-General on either an ad hoc or permanent basis.[33]

The *Ontario Act* follows that proposal.[34] It provides for the appointment by the Attorney-General of a chief inquiry officer and such inquiry officers as he deems necessary. The chief inquiry officer is an Assistant Deputy Minister in the Department of Justice and the role of chief inquiry officer is one of a number of functions he carries out. (He is also, for example, Queen's Proctor.) He holds no inquiries himself. There are no full-time inquiry officers, but there is a roster of some 60 throughout the Province, appointed to conduct inquiries on an *ad hoc* basis. Most of these are practising lawyers, although there are some appraisers, and businessmen with Court of Revision experience.

The *Federal Act* provides for the appointment by the Attorney-General of a "suitable person" who is not in the public service to be the hearing officer.[35] It is understood that this system will be somewhat like Ontario's. The hearing officer at the first inquiry, held at St. Catherines, was a local practising lawyer.

A member of the Civil Justice Subsection made the point to us that without public confidence in the political independence of the inquiry officer, the inquiry procedure would become a farce. To ensure independence, he suggested the inquiry officers, and the chief inquiry officer, should be appointed by an independent non-political person, such as the Chief Justice of the Supreme Court.

The Commission agrees that the inquiry procedure must have the confidence of the public. But we do not believe that the appointment of inquiry officers is a task which should be thrust upon the Chief Justice. We believe that the Attorney-General should have this responsibility. We also believe that inquiry officers should be selected from the legal profession, whose training, skills, and professional approach should enable them to conduct hearings that the public will regard as being fair and impartial.

The Commission therefore recommends that the inquiry procedure be established on the same basis as in Ontario, except that the proposed statute should stipulate that inquiry officers should be appointed from the legal profession.

3. *Who can object?*

Should anyone be entitled to object and be entitied to an inquiry or should it only be those whose property is being expropriated?

The Ontario[36] and Manitoba[37] statutes permit objections only to be made by those with property interests heing expropriated (and in the case of Manitoba, those whose lands may be injuriously affected). Under the federal legislation, any person

---

33. Pp. 1004-1005.

34. S. 7.

35. S. 8.

36. S. 6.

37. Schedule A, ss. 5-6.

may object although he is required to state "the nature of his interest in the matter of the intended expropriation".[38] Apparently, it was contemplated that conservation groups, and other bodies and persons having no direct property interest should be entitled to object to any proposed federal expropriation. There is a provision in the federal statute under which a hearing officer may disregard an objection if he considers it "frivolous or vexatious or is not made in good faith".[39]

It will be recalled that the hearing officer under the federal statute only reports on the "nature and grounds of the objection", while under the Ontario and Manitoba legislation the inquiry officer expresses an opinion on whether the proposed expropriation is justifiable to achieve the objectives of the expropriating authority. Under the Ontario and Manitoba enactments the "objective" of the expropriating authority is not a relevant issue. Presumably, however, objection can be expressed to the purpose of an expropriation at a federal hearing.

This Commission agrees with the approach taken in Ontario and Manitoba. The function of the inquiry procedure should be to deal with the issue of whether the expropriation of the particular land is necessary to meet the intention or plan of the expropriating authority. Whether that intention or plan itself is proper or justifiable should not be an issue at the inquiry.

It may be that there should be greater consultation by expropriating authorities with the public and interested parties in the decision-making processes relating to whether particular projects should be undertaken. But to have utility such consultation should occur well before expropriation proceedings have been begun. Some sort of hearing procedure regarding land use would be an example of this kind of consultation. The recently established Environment and Land Use Committee may hold public inquiries of this nature,[40] (although such inquiries are not formally tied in with the taking of expropriation proceedings under any statute).

Finally, it should be pointed out that the inquiry procedures under the Ontario, Manitoba and federal statutes can only be invoked where expropriation proceedings have been commenced. Thus, if the expropriating authority is able to negotiate settlements with all the owners entitled to compensation without having to initiate expropriation proceedings, there can be no inquiry. In such circumstances, in the case of the Federal statute, this means that persons without a compensable interest do not have the opportunity to call for an inquiry. However, such persons would have had an opportunity if expropriation proceedings had been commenced in respect of one property.

Since the inquiry procedure envisaged for this Province by the Commission is one which would be directed at the question of whether a particular expropriation was justifiable for a conceded objective, we have concluded that the inquiry procedure should be available only to persons whose property interests are being expropriated or are, or would be, injuriously affected. If, at some future time, an inquiry procedure is adopted by which hearings are held prior to the acquisition of any property for a specified project, and particularly if that hearing was to deal with the merits of the project itself as well as its location, then it might well be appropriate for persons or groups not having property interests directly affected by the project

---

38. S.7.

39. S.8(5).

40. S.B.C. 1971, c. 17, s. 4.

to have the right to such hearings.

4. *Urgency: Dispensing with the inquiry*

The Commission does not believe that the introduction of an inquiry procedure will unduly delay projects. Although there are no time requirements for conducting hearings under the Ontario statute, the inquiry process in that Province usually takes about a month. Under the Federal Act a hearing officer must report within 30 days of his appointment.[41]

Nevertheless, the Commission recognizes, as the McRuer Report did, that there may be situations in which urgent conditions may make it desirable to dispense with the inquiry procedure. The McRuer Report recommended that the Lieutenant-Governor in Council have the power to dispense with inquiry in a "proper case" if the economic interests of the Province might suffer.[42] The *Ontario Act* provides that the Lieutenant-Governor in Council may, "in special circumstances where he deems it necessary or expedient in the public interest to do so" dispense with the inquiry procedure in a particular case.[43] Similar provisions are contained in the Manitoba[44] and Federal[45] statutes.

It would be hoped that any government would only reluctantly exercise these dispensing powers. So far as we are aware, the Manitoba and federal governments have yet to do so. In the first two and a half years of experience under the *Ontario Act*, the dispensing power has been used on five occasions. In most of these cases the expropriation had been considered by the Ontario Municipal Board when the funding was arranged and, in some cases, the Minister of Municipal Affairs had approved the project prior to expropriation. In one particular case, the inquiry provision was dispensed with where an easement was required across an owner's property to hasten the installation of water mains in order that an Old Age Home could have adequate sanitary and fire protection at the earliest possible moment.

The Commission proposes that a provision similar to that in the Ontario legislation should be adopted.

5. *Summary* - To sum up, the Commission recommends:

1. *The general expropriation statute should contain an inquiry procedure under which persons could object to a proposed expropriation.*

2. *The function of the inquiry procedure should be to determine whether a proposed expropriation is fair, sound and reasonably necessary for the purpose of achieving the objectives of the expropriating authority.*

3. *An inquiry should be conducted by a single inquiry officer.*

4. *There should be a chief inquiry officer and a roster of inquiry officers, all appointed by the Attorney-General.*

---

41. S. 8(4)(d).

42. Pp. 1002-1003.

43. S. 6(3).

44. S.9(7)(a).

45. S. 8(11).

5. *The function of the chief inquiry officer, who should be an official in the Department of the Attorney-General, should be to assign inquiry officers to particular inquiries.*

6. *The inquiry officers, other than the chief inquiry officer, should not be civil servants and should be appointed from the legal profession in such number as the Attorney-General deems necessary (to conduct inquiries on an ad hoc basis).*

7. *The inquiry procedure should be available to persons whose property is to be expropriated or whose property is likely to be injuriously affected.*

8. *The Lieutenant-Governor in Council should have the power to dispense with the inquiry procedure in special circumstances where it would be necessary or expedient in the public interest to do so.*

9. *The chief inquiry officer should be able to cancel an inquiry if the expropriating authority has been notified in writing by all the persons invoking the inquiry procedure that they no longer wish an inquiry to be held.*

10. *Copies of an inquiry officer's report should be made available to the parties to the expropriation and persons who objected to the expropriation at the inquiry.*

CHAPTER VII NEGOTIATION PROCEDURE

A. Introduction

In all expropriations, there will be some attempt made by the expropriating authority to negotiate a settlement. In some instances, there will have been offers to purchase made prior to the commencement of expropriation proceedings. The volume of compensation claims handled by arbitration tribunals now depends on the success of these negotiations.

The Commission does not wish to suggest that it would be desirable for every expropriation to be settled. If no claims were going forward to arbitration, this could well mean that expropriating authorities were paying too much. The taxpayer, who must shoulder the financial responsibility of providing fair compensation in expropriations for public purposes, should not be expected to pay whatever the expropriated landowner demands.

Nevertheless, the Commission does believe that there are two substantial benefits to be gained from settlements, as opposed to arbitration:

1. Settlements will generally save the expropriating authority money, time, and staff resources. The costs of arbitration are avoided and the authority's staff can devote their energies to other matters.

2. It is probably true to say that the expropriated property owner will feel more fairly treated where he has reached an agreement with the expropriating authority rather than where he feels compelled to go on to arbitration. It should be an objective of every expropriating authority to reduce to a minimum the kind of ill-feeling that can arise through expropriation.

Accordingly, the Commission considers that it is desirable to achieve as many settlements as possible, provided that expropriating authorities are not paying more than what the law requires of them.

With this aim in mind, then, should the general statute contain a provision for a formal negotiation procedure, either on a mandatory or voluntary basis? The Ontario, Manitoba and federal statutes all do so. The negotiation procedures in these enactments are quite different; they are outlined below.

B. Federal

Section 28 of the *Federal Act* provides for mandatory negotiation by a single negotiator by the service of a notice to negotiate by either the expropriating authority (the Minister of Public Works) or the owner on the other. The procedure therefore will be by-passed if neither party serves the notice. It has yet to be utilized.

The procedure may be commenced within 60 days of making the statutory offer. Once it has been begun no arbitration proceedings may be started or continued until 60 days have elapsed, unless the negotiator has meanwhile reported to the Minister that he has been unable to effect a settlement and has sent a copy of his report to the owner.

Negotiators (or one negotiator) are appointed by the Governor in Council, on the recommendation of the Attorney-General of Canada. They must not be persons employed in the Public Service. It is expected that they will be persons with real estate background. When a notice to negotiate has been served, the Minister of Public Works refers the particular expropriation to one of the negotiators appointed by the Governor in Council. The negotiator has 60 days from the service of the notice to negotiate to report to the Minister on his success or failure.

The function of the negotiator is to "endeavour to effect a settlement of the compensation payable". To this end, he shall meet with the respective parties, make such inspection of the land as he deems necessary, and receive and consider any appraisals, valuations, or other written or oral evidence on which either party relies, whether or not such evidence would be admissible in court proceedings. Evidence of anything said or of any admission made in the course of a negotiation proceeding is not admissible in subsequent arbitration proceedings.

The view has been expressed that the 60-day period for serving the notice to negotiate is not sufficiently long. It has heen suggested that there may be occasions when it could be useful to call in a negotiator when proceedings are further advanced.

It is understood that the function of the negotiator will be to encourage the parties to come together at an amount they find mutually acceptable, rather than to impose his view of a suitable figure.

Criticism has been made of the fact that it is the Minister of Public Works who chooses the negotiator to deal with a particular matter. Since he is the Minister who initiated the expropriation proceedings and who has made the statutory offer, it would at least appear somewhat more impartial if another Minister of the Crown, perhaps the Attorney-General, was making the selection.

C. Ontario

Ontario expropriation legislation has had a compulsory formal negotiation procedure since 1965. It applies unless both parties have agreed to by-pass it.[1] Only in a few instances is such an agreement reached. These usually occur where large amounts are involved and both parties believe arbitration is inevitable.

A board of negotiation is established by the Act, consisting of two or more members appointed by the Lieutenant-Governor in Council.[2] There are now seven members of the board, the chairman and vice-chairman being full-time and the others part-time. None are lawyers or appraisers, but all have experience in real estate.

The board is required to proceed in a "summary and informal manner to negotiate a settlement of the compensation". It is to meet with the parties and is required to inspect the land.[3] There has been an increasing trend for persons to appear before the board with solicitors and appraisers. It is estimated that 95 per

---

1. *The Expropriations Act, 1968-69,* S.O. 1968-69, c. 36 S. 26. (*See also* s. 9a of *The Expropriation Procedures Act, 1962-63,* S.O. 1962-63, c. 43, as amended by S.O. 1965, c. 38.)

2. *Ibid.*, s. 27(1).

3 *Ibid.*, s. 27(4).

cent appear with solicitors and 65 per cent with appraisers.

Where no settlement is reached, arbitration proceedings may be commenced "as though the negotiation proceedings had not taken place".[4] No time limit is placed on the board as to the length of the negotiations. Nor is it required to report, as is the federal negotiator, on success or failure.

The general approach of the board is to hold very informal hearings, and they do so in the area where the property is situated.[5] The board uses what is referred to as a "kitchen table" approach. Meetings are usually held in hotel rooms or homes. The holding of hearings in municipal offices is avoided. Two members of the board constitute a quorum. Thus the board is able to run several teams of two at the same time.[6]

The board makes no formal written recommendation, but it does put forward a recommended figure. Notes are kept of what goes on.

The McRuer Report recognized the value of the negotiation procedure:[7]

The beneficial effect of the procedure is that it forces the parties to meet together to discuss any unresolved differences. Negotiations are conducted in an atmosphere of informality. Freedom of discussion is promoted, without prejudice to any subsequent proceedings.

During the year 1970, the board had 232 applications, 51 of these involving the Ontario Department of Highways and 33 the Municipality of Metropolitan Toronto - these two expropriating authorities having the greatest number of applications.

In the first six months of 1970, 94 meetings of the board were applied for. In respect of these applications, there were:

2 settlements prior to the board meeting;
49 settlements following the board meeting;
23 proceeding to arbitration;
15 still negotiating, and
5 unascertainable, meeting cancelled, etc.

It is, of course, impossible to say how many of those which were settled would have been settled without the intervention of a formal negotiation procedure. This Commission feels that the result is quite impressive. Acquisition officials in both the Ontario Department of Highways and Metropolitan Toronto have expressed the view that the negotiation procedure is serving a useful purpose.

D. Manitoba

Manitoba has had, since 1965, a Land Value Appraisal Commission, the function of which is somewhat similar to Ontario's Board of Negotiation.

---

4. *Ibid.*, s. 27(6).

5. *Ibid.*, s. 27(3).

6 *Ibid.* , s. 27(2).

7. P. 1020.

The Commission is established under *The Land Acquisition Act*. It is to consist of not more than six and not fewer than three members appointed by the Lieutenant Governor in Council.[8] There is, at present, a chairman, vice-chairman, and three other members, all of whom are part-time. Four have real estate experience and one is a lawyer. Two members constitute a quorum and the Commission may sit in panels.[9]

The function of the Commission is to determine an amount which, in its opinion, represents due compensation in two situations:

1. Where lands are being *acquired* by the Crown under *The Land Acquisition Act*, or by two specified utilities.[10]

2. Where lands are being *expropriated* under *The Expropriation Act*.[11]

In the first of these situations, the Crown or the utility as the case may be, or the owner of the land being acquired, may apply to the Commission for determination of the compensation. In the second situation, either the expropriating authority or the owner may apply. Thus, under *The Land Acquisition Act* applications may be made to the Commission before expropriation proceedings have been started. This apparently occurs in at least 90 per cent of the cases to which that Act applies, i.e., essentially Crown acquisitions. Municipalities and other bodies, to which that Act does not apply, cannot therefore go to the Commission until after a notice of expropriation has been given.

The consequences of the Commission's certification of the amount it considers due compensation are:

1. The owner is not obligated to accept the amount certified,

2. The certification of the amount is not to be referred to in any subsequent arbitration proceedings,

3. The taker shall not pay other than the amount certified, unless the Commission approves or a different amount is determined as payable in subsequent arbitration proceedings.

We understand that, in respect of the third consequence referred to above, the Crown considers that it must pay the amount certified if the owner wishes to accept that amount. The two statutes, however, do not require in positive terms the payment in such circumstances: they both state the proposition negatively - that payment of a different amount shall not be made. Since this is the case, the procedure established is a mixture of negotiation and arbitration. The Commission's function is to determine what is due compensation, rather than attempt to bring the parties together at a mutually agreeable figure. The determination of the Commission is not binding on the owner, but is on the expropriator (at least to the extent that he must not pay a different amount, except as may be awarded in

---

8. *The Land Acquisition Act*, S.M. 1965, c. 43, s. 11: R.S.M. 1970, c. L40, s. 11.

9. R.S.M. 1970, c. L40, s. 11(7)(9).

10 *Ibid.*, s. 12 (1).

11. *The Expropriation Act*, R.S.M. 1970, c.E190, s. 15(1).

subsequent arbitration proceedings).

In practice, the Crown applies to the Commission as a matter of course. It is too early to tell whether all other expropriating bodies will do the same. Thus it is a rarity for an owner to apply to the Commission.

The Commission's hearings are quite informal. During the year ending April 21, 1971, the Commission was asked to deal with 1,367 properties. Of these, 1,077 were covered by agreements between the Land Acquisition Branch and the owners. These agreements were placed before the Commission for approval.

E. Conclusion

The Commission believes that there is much to be said for having a negotiation procedure formally provided for in the statute. The introduction of a third person or body into the bargaining process would undoubtedly facilitate settlements in some situations, with a consequent financial saving, and could have a generally good effect in reducing the amount of ill-will that can build up in expropriation cases.

At the same time, the Commission is reluctant to put forward as a proposal the relatively elaborate negotiation procedures that have been adopted in Ontario and Manitoba - the board of negotiation and the Land Value Appraisal Commission. It would prefer to see the simpler, although untried, federal solution - with either party to expropriation proceedings having the right to call in a single negotiator.

A number of objections were raised to our negotiation procedure proposal, as we expressed it in our working paper - mainly by persons who are engaged in negotiating on behalf of expropriating authorities. It was feared that the formal negotiation procedure would undermine the informal negotiations carried on directly between the expropriating authorities and owners. If it became known that more compensation might be obtained through formal negotiation, owners might not take the informal negotiations seriously. The same fear could be expressed with regard to the provision for arbitration. We think the fear would not be justified, if expropriating authorities make sound offers in the first place. There appears to have been no problem in this respect in Ontario.

Our proposal was also questioned on the ground that public expropriating authorities might be put in a difficult position in the expenditure of public funds, if, as a result of the formal negotiation, they settled at a higher figure than the statutory offer. This, it was said, would indicate that they were paying more than what they had thought was justified when the statutory offer was made. This would not be such a problem for private expropriations (for pipe-lines, for example), where a commercial firm might be prepared to pay an additional amount so that it could act on with its project and without regard to whether it was paying one owner on one basis and other owners on a different basis. Certainly, we agree that it is desirable for owners to he paid on the same basis, and expropriating authorities should strive to do so. But one of the realities of the expropriation process is that the expropriated owner who feels he is entitled to more than he has been offered is entitled to take his chances by going to arbitration. If he is successful, then what of the owners who have already settled on a different basis? It may be that expropriating authorities should in some situations be prepared to go back to the owners with whom they have settled and pay them more. We have made no recommendation to that effect in this report, because we believe it would be too administratively complicated.

On the other hand, merely because an expropriating authority has made a

statutory offer that it believes was justifiable, does not mean that the authority might not have erred or that there was not some room for a difference of opinion as to the valuation. There would be nothing to prevent the authority from making a higher offer, after the statutory offer, without the benefit of the formal negotiation procedure we propose. However, the Commission believes that the use of the formal procedure may, in some cases, result in making the expropriating authority realize it did not make a good enough statutory offer or that, at least, it would be justified in paying something more. The proposed function of the negotiator, it should be pointed out, is to effect a settlement, *having regard to the formula for compensation laid down in the general statute.* If the expropriating authority, or the owner for that matter, feels the negotiator is trying to bring the parties together at a figure which is not justifiable, they are under no obligation to settle at that figure and can go on to arbitration.

The suggestion has been made that the formal negotiation procedure we propose confuses conciliation and arbitration. This seems to come from our proposal that the negotiator, if he is unable to effect a settlement, should at the end of the negotiation period, advise the parties what he considers would be the appropriate compensation. This is in no sense intended to be a substitute for arbitration. It merely would give the parties a figure to think about prior to going on to arbitration. It is conceivable it might be helpful in effecting a settlement as direct negotiations continue from the time that the formal negotiation procedure is concluded to the start of the arbitration proceedings.

It was suggested to us that the functions of the inquiry officer and the negotiator might be combined in one person, who would be a sort of expropriation ombudsman. This would be a respected and knowledgeable person appointed by the Supreme Court. Having the functions combined would save time and expense. The "ombudsman" would investigate whether the expropriating authority was being unreasonable or unfair. In respect of compensation, if the "ombudsman" thought the authority was being unreasonable, then, but only then, would the owner be entitled to have his legal and appraisal costs paid by the expropriating authority. We do not agree with this suggestion. When an owner is having his property taken without his consent, we firmly believe that he should be entitled to be advised as to his rights by his own lawyer and to have an appraisal made by an appraiser of his choice. We also believe that the inquiry and negotiation procedures serve fundamentally different purposes, for which different skills are needed.

Another objection was the delay that might be caused in the determination of compensation. In our working paper, we proposed that the procedure could be invoked at any time from the making of the statutory offer of compensation until the matter was set down for hearing by the arbitration tribunal. In order to avoid the use of the negotiation procedure as a delaying tactic, we have altered that proposal so that the negotiation procedure could only be invoked within thirty days of making the statutory offer, except with the consent of the parties.

The Commission remains convinced that a formal negotiation procedure should be included in the proposed general expropriation statute. The very fact that an independent third person brings the parties together will, we feel sure, produce settlements in some instances. The success of the procedure will, of course, depend on the appointment of persons who are highly-skilled in negotiating and who have a sound understanding of the principles of compensation in expropriation matters.

The Commission would therefore recommend:

Initiation of Procedure

1. *Either the owner or the expropriating authority should have the right to invoke a formal negotiation procedure.*

2. *The procedure be initiated by the service by one party on the other of a notice to negotiate.*

3. *The procedure be available for 30 days from the making of the statutory offer of compensation by the expropriating authority, or beyond that time with the consent of the parties.*

4. *When the expropriating authority has served or received a notice to negotiate, it shall immediately notify the Attorney-General.*

Negotiators

1. *There be a panel of negotiators appointed by the Lieutenant-Governor in Council.*

2. *The negotiators be appointed on a part-time basis and be paid on a per them basis; they should not be persons to whom the* Civil Service Act *applies.*

3. *When the negotiation procedure is invoked by a party the Attorney-General should refer the matter to one of the negotiators appointed by the Lieutenant-Governor in Council.*

4. *The cost of the negotiator should be borne by the expropriating authority.*

Negotiation Procedure

1. *Once the negotiation procedure becomes operative no arbitration proceedings shall be begun or continued until 60 days has elapsed, or such longer period as the parties may agree upon.*

2. *In the event that a settlement is not reached within the 60-day period, or such longer period as may have been agreed upon, the negotiator shall report in writing at the end of the period applicable to both the parties what, in his opinion, would be the appropriate compensation.*

3. *The function of the negotiator should be to endeavour to effect a settlement of the compensation, having regard to the provisions for compensation in the general statute.*

4. *The negotiator should meet with the parties or their authorized representatives, make such inspection of the land as he thinks necessary, and receive and consider any appraisals, valuations or other written or oral evidence submitted to him on which either party relies (whether or not such evidence would be admissible in proceedings before a court).*

5. *Evidence of anything said or of any admission made in the course of a negotiation procedure should not be admissible in any arbitration proceedings.*

CHAPTER VIII COMPENSATION TRIBUNAL PROCEDURE

In Chapter V, the Commission proposed that a permanent board, consisting initially of a full-time chairman and six part-time members, should be established for the purpose of determining compensation payable. Proposals were also made in that chapter with respect to quorum and appeals.

In general, the Commission believes that the procedures in the Ontario legislation would be satisfactory to follow.[1]

1. *Hearing location*

The board should hold its hearing in the general area where the relevant lands are located, unless the parties agree on some other place of hearing that the board would consider appropriate.[2]

2. *Board staff*

There should be adequate clerical and secretarial support staff so that the board can operate efficiently and expeditiously. The board should have a registrar, who, with such other officers and employees as are considered necessary, should be appointed under the *Civil Service Act*.[3]

3. *Evidence*

The board should have the power to summon witnesses and require them to testify, and to require the production of documents. The procedure for the enforcement of the power to require the giving of evidence and the general conduct of the hearing should be the same as in Ontario.[4] In that province, a member of the Land Compensation Board may certify the alleged offence to the High Court, which may, after holding an inquiry into the alleged offence, punish the offender as if he had been guilty of a contempt of court.

A full statement of the proposed evidence in chief to be given by any expert witness whom a party intends to call at the hearing, should be filed with the board and served on the other party or parties to the hearing at least 10 days before the hearing begins. Surprise evidence should not be an element in the proceedings. In addition, an exchange of the proposed evidence of expert witnesses should have the effect of cutting down the length of hearings by enabling the parties and the members of the board to be better prepared when the hearing commences. A rule in the Federal Court of Canada, which we proposed be adopted in our working paper, requires the statement to be set out in an affidavit.[5] We are now convinced that the requirement of an affidavit would be an unnecessary nuisance and that an

---

1. *See* ss. 28-31.

2. *See* Ontario statute, s. 28(4)(b).

3. *See* Ontario statute, s. 28(7).

4. S. 28(5).

5. Rule 482.

exchange of statements would be sufficient. The requirement should be that no party may adduce the evidence of an expert witness except with the leave of the board, unless he has filed and served a statement of the proposed evidence as indicated above. Where the expert witness is an appraiser, the statement of evidence would be his appraisal report. This would be preferable to the Ontario provision[6] that requires parties to serve other parties with copies of appraisal reports upon which they intend to rely at the hearing. We understand that some solicitors in that province have taken the position that they do not intend to rely on the appraisal report but on the direct evidence of the appraiser, and thus are under no obligation to serve the appraisal report on the opposing side.

The Ontario statute confines the number of expert witnesses that a party may call to three, except where the board gives leave to call more.[7] The Manitoba legislation restricts each side to one witness, unless the judge otherwise orders, except that one additional expert witness on each side may be called to testify as to the value of mines and minerals or damages for business disturbance.[8] The Commission thinks that it would be sufficient if each party was entitled to call two expert witnesses, with the board being able to give leave to call additional witnesses.

The board should be able to make rules governing its practice and procedure and the exercise of its powers. Before coming into effect the rules should be approved by the Lieutenant-Governor in Council.[9] These rules would probably be similar to those of the Ontario Land Compensation Board.[10] The rules deal with such matters as pleadings, service, examination for discovery, the manner of making applications, and settling orders.

In addition to the expert witnesses which each side may call, the board should be able to appoint experts to assist it in interpreting evidence of a special or technical nature. The function of such experts, it should be emphasized, would not be to give evidence, but to assist the arbitration tribunal on evaluating evidence given by others.

At the hearing, all oral evidence should be recorded and, together with such documentary evidence and other materials received in evidence by the board constitute the record.[11]

4. *Availability of Reasons*

The board should furnish the parties with written reasons for its decisions.[12] It should also be required to prepare and periodically publish a summary of all its decisions, and the reasons therefor. The Ontario statute[13] only requires such

---

6. S. 29(1).

7. S. 29(2).

8. S. 40.

9. S. 28(6).

10. Ontario Reg. 484/70, made Nov. 20, 1970.

11. *See* Ontario statute, s. 30(2).

12. *See* Ontario statute, s. 30(3).

13. *See* Ontario statute, s. 30(4).

summaries to be published as the board considers to be of general public significance. We think the board should be required to publish all its decisions. It would be of particular importance in the first few years of the board's functioning for all its decisions to be known.

To sum up, the Commission recommends:

1. *Hearing Location - The board should hold its hearing in the general area where the relevant lands are located, unless the parties agree on some other place of hearing that the board would consider appropriate.*

2. *Board Staff - The board should have a registrar, and adequate clerical and secretarial staff, all of whom should be appointed under the* Civil Service Act.

3. *Evidence*

   (a) *The board should have the power to summon witnesses and require them to testify, and to require the production of documents.*

   (b) *Except by leave of the board, a party should not be entitled to adduce the evidence of an expert witness at the hearing, unless he has filed with the board and served on the party or parties at least 10 days before the hearing begins, where the expert is an appraiser, a copy of the appraisal report and, in all other cases, a full statement of the proposed evidence.*

   (c) *Each party should be entitled to call two expert witnesses, with the board having power to grant leave to call additional experts.*

   (d) *The board should have the power to appoint experts to assist it in interpreting evidence of a special or technical nature.*

4. *Rules - The board should have the power to make rules, subject to the approval of the Lieutenant-Governor in Council, governing its practice and procedure and the exercise of its powers.*

5. *Contempt - Where a person fails to comply with an order of the board with respect to the giving of evidence, or does any other thing that would have amounted to contempt in a court of law, a member of the board should be able to certify the offence to the Supreme Court, which should be able, after holding an inquiry into the alleged offence, to punish the offender as if he had been guilty of a contempt of court.*

6. *Reasons*

   (a) *The board should furnish the parties with written reasons for its decisions.*

   (b) *The board should prepare and periodically publish a summary of all its decisions, and the reasons therefor.*

CHAPTER IX BASIC PROCEDURAL STEPS AND TIMING

A. General Procedures

1. Introduction

(a) General

The Commission has carefully reviewed the general procedural provisions contained in the Ontario, Manitoba and federal statutes and considered their suitability for adoption in this Province. We have endeavoured to propose procedures which are fair to the owners of expropriated property and are workable from the point of view of expropriating authorities. The time in which the various procedures must be followed has been an important element in our consideration. If procedures are to be adopted which will ensure fair treatment to owners of property, it is inevitable that expropriation will take longer than it does at present. This will mean that expropriating authorities will have to plan ahead the implementation of their projects more than many of them do now. Such a result is not without its advantages.

The proposed procedures would only come into operation, of course, when expropriation proceedings were commenced. It is to be expected that nearly all acquisitions will be, as they are now, achieved by negotiated settlements.

(b) *The eight steps*

There are eight basic procedural steps:

1. Notice of Intention to Expropriate,
2. the Inquiry,
3. Approval,
4. Expropriation,
5. the Statutory Offer and Payment,
6. Negotiation,
7. Arbitration, and
8. Possession.

Steps two and six may be by-passed. No one may wish to invoke the inquiry or negotiation procedures, or the Lieutenant-Governor may order that the former be dispensed with.

(c) *Periods of concern*

The length of particular expropriation proceedings will depend on various factors, including whether the inquiry or negotiation procedures are brought into operation.

There are three main periods of concern:

1. From the date of the notice of intention to expropriate to the time at which the expropriating authority can take possession.

The length of this period is important to the expropriating authority that wishes to get on with its undertaking. It is also important to the expropriated owner who must find and move to alternative premises.

2. From the date of expropriation to the date of the statutory offers.

It is important that the expropriated owner be put in funds as soon as practically possible in order that he be able to acquire other premises.

3. From the date of expropriation to the date of the determination of the compensation.

This period is not as important as the other two. The expropriated owner will generally have received, under the procedures proposed, the large part of the compensation that will ultimately be determined as payable, some time before the arbitration takes place. Where an arbitration award is finally dealt with in the Supreme Court of Canada, two or three years may have elapsed since the date of expropriation. Generally, the Commission considers that arbitration proceedings should follow on after expropriation as soon as reasonably possible and that delays should be avoided.

(d) *Land Registry system*

Where an interest in land is being expropriated, the owner of the land should be entitled to know precisely what is being taken from him. There is no satisfactory justification for expropriating authorities being entitled to acquire property by expropriation on a basis that does not meet the requirements that the *Land Registry Act* imposes on the public generally. The purpose of those requirements is to facilitate dealings in land through a system of guaranteed title. This system is backed up by survey requirements so that there will be a reasonable degree of certainty as to the extent of the land owned under a particular title. British Columbia is fortunate in having one of the most advanced land registration systems in the world and, as the population of the Province continues to grow and land use intensifies, it is important to preserve the advantages of that system.

Where land is to be expropriated, the notice of intention to expropriate (dealt with later in this chapter) should be deposited in the appropriate Land Registry Office and noted on the title of the relevant property. This will enable persons dealing with the property to know, at the earliest stage possible, that the property is subject to expropriation proceedings. This is the procedure laid down in the federal legislation,[1] and which we proposed in our working paper.

The land to be expropriated should be described in the notice of intention to expropriate in such a way that it will meet the requirements of the *Land Registry Act*. If those requirements can be met by a description in words, that should be sufficient. However, if the requirements can only be met by the preparation of a plan, then such a plan should be prepared and attached to the notice of intention to expropriate.

Expropriating authorities which are concerned with the construction of

1. S. 4.

rights-of-way for highways, transmission lines and pipe-lines pointed out to us, in response to our working paper, the practical difficulties of carrying out a survey, according to existing Land Registry requirements, prior to expropriation proceedings. The construction process, particularly with respect to highways, usually results in the loss of surveyor's stakes, necessitating a re-survey once the construction is finished. The current general practice of the Department of Highways is to expropriate any necessary lands, carry out the construction on the basis of an engineering survey and, once construction is complete, to have a final survey done by a British Columbia Land Surveyor.

The procedure proposed in our working paper is generally desirable. It is practical where the land to be expropriated has already been surveyed. We recognize, however, that there may be practical problems where land to be taken has not been surveyed, particularly with respect to rights-of-way. What we now propose is that in certain cases a preliminary plan be acceptable. Those cases and the standards to which a preliminary plan should conform should be established by special regulations under the *Land Registry Act*. The preliminary plan should be followed by a final proper survey after construction has been completed, although it might be wise to have a time limit. This should be dealt with by the special regulations. The Ontario statute, it might be noted, makes special provision for single-pole transmission lines being built by Ontario Hydro.[2] The exception enables Ontario Hydro to file a preliminary plan, but a final plan of an Ontario land surveyor must be registered within two years in substitution.

Once the approving authority had approved the proposed expropriation, a notice of the approval would be deposited for registration in the Land Registry Office. On its registration, title would vest in the expropriating authority. This would be the moment at which expropriation occurs. It is by this process that the transfer of title occurs under both the federal and Ontario statutes.[3] Under the Federal Act, vesting occurs on registration of the notice of confirmation and, under the Ontario legislation, on the registering of a plan within three months of the granting of approval by the approving authority.

2. *The eight procedural steps*

An outline of the eight basic procedural steps is given below:

(a) *Notice of intention to expropriate*

Expropriation proceedings should be commenced by the giving of a notice of intention to expropriate by the expropriating authority, as follows:

(i) By depositing the notice in the appropriate Land Registry Office,

(ii) By serving a copy of the notice on each registered owner whose property interests are to be expropriated,

(iii) By publishing the notice once a week for three weeks in a newspaper having general circulation in the locality where the lands to be expropriated are situated, and

---

2. S. 9(5)

3. S. 13 and s. 9 respectively.

(iv) By applying for approval to the appropriate approval authority, where such authority is a different person or body than the expropriating authority, by serving a copy of the notice on the approving authority.

The notice of intention to expropriate should describe the lands to be expropriated in a manner that meets the requirements of the *Land Registry Act*, as discussed earlier in this chapter. Where these description requirements can only be met by the preparation of a plan, the plan should be attached to, and be deemed a part of, the notice. In the case of advertising the notice, it should be sufficient to refer to such a plan as being on deposit in the Land Registry office and by identifying the land affected by a description in words.

Service of the notice of intention on a registered owner should be effected personally or by registered mail addressed to the person to be served at his last known address. Where he is served by registered mail, the advertising requirement will be a safeguard.

Even where personal service on registered owners has been effected, we believe that advertising is essential to ensure that all other persons who might be affected by the proposed expropriation might be given notice. There may be, for example, persons holding unregistered deeds or mortgages, or there may be tenants with unregistered leases.

Where a notice of intention to expropriate has been deposited in a Land Registry Office, the Registrar of Titles should be required to make an entry on the appropriate certificate of title to that effect.

The copy of the notice of intention to expropriate served on each registered owner should be accompanied by a statement setting out:

(i) the owner's right to invoke the inquiry procedure and his entitlement to costs for legal and appraisal advice,

(ii) the name and address of the relevant approving authority,

(iii) the relevant statutory provision which authorizes the proposed expropriation, and

(iv) a description of the undertaking for which the property is to be taken.

We feel that it is of vital importance that owners be made fully conversant with their rights. Expropriating authorities may well wish to give owners further assistance such as translation services where there are language difficulties or lists of housing that may be available for alternative accommodation.

(b) The inquiry

The inquiry procedure was discussed in Chapter VI. A person wishing to invoke the inquiry procedure should be required to notify the approving authority in writing within 30 days of being served or the publication of the notice for the third time, whichever is the later.

After receiving such notification, and when the time for making objections in respect to the expropriated land has elapsed, the approving authority should refer the notice to the chief inquiry officer who should forthwith assign an inquiry Officer to

hold a hearing, notifying the expropriating authority and the person objecting that he has done so.

Within 10 days of his assignment for this purpose, the inquiry officer should fix a time and place for a hearing and send copies of the notice of hearing to the expropriating authority and all persons who were entitled to a notice of the intention.

The inquiry should be held and the inquiry officer report to the approving authority within 30 days of his assignment to hold that inquiry. This is the period allowed under the Federal Act.[4] There may be occasions where 30 days would be insufficient, and we would therefore propose that the chief inquiry officer have power to extend the period.

On receiving the report, the approving authority should send forthwith a copy to each of the parties to the inquiry.

(c) *Approval*

The approving authority should approve or disapprove the proposed expropriation:

(i) Where no inquiry has been held, within 60 days after the time for invoking the inquiry procedure has elapsed,

(ii) Where an inquiry has been held, within 60 days after the report of the inquiry officer was received by the approving authority.

Where the approving authority does not approve the intended expropriation within these times, the expropriation proceedings should be discontinued. Under the federal statute, if confirmation is not made within 120 days from the day the notice of intention to expropriate was given, the intention to expropriate is deemed to have been abandoned.[5]

Where the approving authority has approved or disapproved a proposed expropriation, a copy of the notice of approval or disapproval, as the case may be, together with written reasons for its decision, should be sent forthwith to:

(i) All persons who were served with a notice of intention to expropriate, and

(ii) the expropriating authority where the expropriating and approving authorities are different persons or bodies.

Under the federal statute, the confirming authority is required to furnish written reasons, on the request of a person who objected to the expropriation, where effect has not been given to the objection.[6]

The approving authority should also send the notice of approval or disapproval to the Registrar of Titles of the appropriate Land Registry office.

---

4. S. 8(4)(d).

5. S. 9(1).

6. S. 11.

(d) *Expropriation*

On receipt of a notice of approval, the Registrar of Titles should forthwith register the notice. The registration of the notice should vest the title to the land in the expropriating authority.

The issuing of a certificate of title to expropriating authorities should be as determined by regulation under the *Land Registry Act*. Account might have to be taken of the possibility of abandonment by the expropriating authority. Possibly the regulations might provide that a Registrar of Titles would issue a certificate of title, on application therefor by the expropriating authority, if he is satisfied that the time in which abandonment might occur had elapsed.

On receipt of a notice of disapproval, the Registrar should delete the entry made on the relevant certificate of title in respect to the notice of intention to expropriate.

The date of valuation for compensation purposes should be the date of registration of the notice of approval.

Within 30 days of the registration of the notice of approval, the expropriating authority should serve the expropriated owner with a notice of expropriation.

(e) *Offer and payment*

Where no agreement as to compensation has been reached, the expropriating authority should be required, within three months after the registration of the notice of approval, and before taking possession,

(i) to serve on the expropriated owner an offer in full compensation, and

(ii) to offer immediate payment of 100 per cent of the market value of the lands expropriated, on the basis of an appraisal by the expropriating authority, without prejudice to the owner's right to claim additional compensation under the arbitration proceedings.

A copy of that appraisal should be sent with the offer. It has been suggested to us that requiring the appraisal to be sent is unfairly making the expropriating authority disclose its position. We do not agree with that view. An expropriation is not like ordinary litigation. We believe that the expropriating authority should disclose the basis of its offer so that the owner will know what has and has not been taken into account in arriving at the statutory offer. While the Commission considers that such disclosure is essential to the fair treatment of the owner whose land is being taken against his will, we also believe that disclosure should lead to a greater number of settlements, which is a desirable objective.

The expropriating authority should be able to apply to a judge of the County Court in which the lands are situate for an extension of the offer period, where it is impractical to make and serve the offers referred to above in such period. Failure to serve the offers in time should not invalidate the expropriation but should result in interest being payable to the owner from the date of registration of the notice of approval.

These are similar to the procedures laid down in the Ontario and federal statutes. Mode of payment is dealt with in Chapter XV.

(f) *Negotiation*

Either the expropriating authority or an expropriated owner should be able to invoke the negotiation procedure, by which a disinterested third person should attempt to negotiate a settlement between the parties. The proposed negotiation procedure is dealt with in Chapter VII.

(g) *Arbitration*

Either the expropriating authority or an expropriated owner should be able to invoke the arbitration procedure.

Subject to the invoking of the negotiation procedure, the arbitration procedure should be available any time after the statutory offer has been made.

Claims for injurious affection should be brought within two years after the damage was sustained. That is the period that the Commission has tentatively concluded in its Limitations Project as being most appropriate for property damage actions generally. Claims for disturbance damage should be made as prescribed in the compensation provisions.

(h) *Possession*

The expropriating authority should be able to require possession of the expropriated land by service on the expropriated owner of a notice for possession, specifying the date on which possession is required.

The date for possession should be at least three months after the date of the serving of the notice of possession. This is the period set in the Ontario[7] statute: under the federal legislation 90 days is the basic period, but possession may be taken immediately by the Crown where the owner was not in occupation on the registration of the notice of confirmation.[8]

An expropriating authority should be able to serve a notice of possession any time after the date of expropriation.

An expropriated owner should be entitled to give up possession any time after the date of expropriation, on notifying the expropriating authority.

An expropriating authority should be able to apply to a judge of the appropriate County Court for an earlier date of possession than that specified in the notice of possession, and an expropriated owner should be able to apply for a later date. The judge should be empowered to fix an earlier or later date as he considers appropriate in all the circumstances.

The expropriating authority should not be able to take possession unless:

(i) the statutory offer to pay has been made, and

(ii) where the statutory offer to pay has been accepted by the owner, payment to him has been made by the expropriating authority.

---

7. S.40.

8. S.17.

It will have been noted that the negotiation and arbitration procedures do not hold up the obtaining of possession.

Where the expropriating authority becomes entitled to take possession and is met with resistance or opposition to its taking possession, the expropriating authority should be able to apply to a judge of the appropriate County Court for a warrant directing the sheriff to take possession. The judge, before making the order, should hold a hearing, with notice of the hearing to be given to such persons as the judge may direct.[9]

Some expropriating authorities expressed the view that the three-month period is too long where the lands are unimproved, unused, or unoccupied. Obviously, there is a difference between the taking of a person's home, forcing him to move, and a strip-taking for a right-of-way from unused barren lands in the wilderness. The problem is what should be the special category and how should it be defined? We can foresee endless arguments arising out of words such as "unimproved", "unused", and "unoccupied". After very careful consideration, we have concluded that the fairest and simplest solution is to require three months' notice. The safety-valve is the proposed procedure by which an application could be made to a judge for earlier possession. There should be no difficulty in obtaining an order for earlier possession in instances where the land is unused and there is urgency on the part of the expropriating authority.

The British Columbia Federation of Agriculture drew our attention to the problem of long-term programmes that may be involved in farming, suggesting that the three-month possession rule should only be invoked in special circumstances. We do not think that it would he fair to create a longer period for possession. It should be pointed out that the notice of intention to expropriate will usually have been given at least two months prior to the notice for possession and in most cases informal negotiations will have been going on for some time prior to that. In addition, an owner could always apply for an extension of time. So far as loss of crops is concerned, this would be taken into account in awarding the compensation.

To sum up, the Commission recommends:

1. *Notice of Intention to Expropriate*

   (a) Expropriating proceedings should be commenced by the giving of a notice of intention to expropriate by the expropriating authority, as follows:

      (i) By depositing the notice in the appropriate Land Registry Office,

      (ii) By serving a copy of the notice on each registered owner whose property interests are to be expropriated,

      (iii) By publishing the notice once a week for three weeks in a newspaper having general circulation in the locality where the lands to be expropriated are situated,

      (iv) By applying to the appropriate approval authority, where such authority is a different person or body from the expropriating authority, by serving a copy of the notice on the approving authority.

   (b) The notice of intention to expropriate should describe the lands to be expropriated, in a manner that meets the general requirements of the Land Registry Act*, except in those instances where regulations under the* Land Registry Act *prescribe that a preliminary plan will be acceptable.*

---

9. *See* s. 41 of the Ontario statute, and s. 35 of the federal statute.

(c) In the case of publishing the notice, it should be sufficient, where the description is by plan, to refer to such a plan as being on deposit in the Land Registry Office and by identifying the land affected by a description in words.

(d) Service of the notice of intention on a registered owner should be effected personally or by registered mail addressed to the person to be served at his last known address.

(e) Where a notice of intention to expropriate has been deposited in the Land Registry Office, the Registrar of Titles should be required to make an entry on the appropriate certificate of title to that effect.

(f) The copy of the notice of intention to expropriate served on each registered owner should be accompanied by a statement setting out:

(i) the owner's right to invoke the inquiry procedure and his entitlement to costs for legal and appraisal advice,

(ii) the name and address of the relevant approving authority, and

(iii) the statutory provision which authorizes the proposed expropriation, and

(iv) a description of the undertaking for which the property is to be taken.

2. The Inquiry

(See also Chapter VI)

(a) A person wishing to invoke the inquiry procedure should so notify the approving authority in writing within 30 days of being served with the notice of intention to expropriate or the publication of the notice for the third time, whichever is later.

(b) After receiving such notification, and when the time for making objections in respect of the expropriated land has elapsed, the approving authority should refer the notice to the chief inquiry officer who should forthwith assign an inquiry officer to hold a hearing, notifying the expropriating authority and the person objecting that he has done so.

(c) Within 10 days of his assignment, the inquiry officer should fix a time and place for a hearing and send copies of the notice of hearing to the expropriating authority, where it is not the approving authority, and all persons who were entitled to be served with a copy of the notice of intention to expropriate.

(d) The inquiry should be held and the inquiry officer report to the approving authority within 30 days of his assignment to hold the inquiry, or such further period as the chief inquiry officer may deem necessary for the holding of the inquiry.

(e) On receiving the report, the approving authority should send forthwith a copy of it to each of the parties to the inquiry.

3. Approval (See also Chapter V)

(a) The approving authority should approve or not approve the proposed expropriation:

(i) where no inquiry has been held, within 60 days after the time for invoking the inquiry procedure has elapsed, and

(ii) where an inquiry has been held, within 60 days after the report of the inquiry officer was received by the approving authority.

(b) Where the approving authority does not approve the intended expropriation within these times, the expropriation proceedings should be discontinued.

(c) Where the approving authority has approved or disapproved an intended expropriation, a copy of the notice of approval or disapproval, as the case may be, together with written reasons for its decision, should be sent forthwith to:

(i) *all persons who were served with a copy of the notice of intention to expropriate, and*

(ii) *the expropriating authority, where the expropriating and approving authorities are different persons or bodies.*

(d) *The approving authority should also send the notice of approval or disapproval to the appropriate* Registrar of Titles.

4. *Expropriation*

(a) *On receipt of a notice of approval, the* Registrar of Titles *should forthwith register the notice.*

(b) *Registration of the notice should vest the title to the land in the expropriating authority.*

(c) *The issuing of a certificate of title to the expropriating authority for the lands expropriated should be governed by regulation under the* Land Registry Act.

(d) *Within 30 days of the registration of the notice of approval, the expropriating authority should serve the expropriated owner with a notice of expropriation.*

(e) *On receipt of a notice of disapproval, the* Registrar *should delete the entry made on the relevant certificate of title with respect to the notice of intention to expropriate.*

5. *Offer and Payment*

(a) *Where no agreement as to compensation has been reached, the expropriating authority should be required, within three months after the registration of the notice of approval, and before taking possession:*

(i) *to serve on the expropriated owner an offer in full compensation, and*

(ii) *to offer immediate payment of 100 per cent of the market value of the lands expropriated, on the basis of an appraisal by the expropriating authority, without prejudice to the owner's right to claim additional compensation under the arbitration proceedings.*

(b) *A copy of the appraisal on which the offer is based should be sent to the owner with the offer.*

(c) *The expropriating authority should be able to apply to a judge of the County Court in which the lands are situate for an extension of the three-month offer period, where it is impractical to make and serve the offers referred to above in such period.*

(d) *Failure to serve the offers in the prescribed time should not invalidate the expropriation, but should result in interest being payable to the owner from the date of registration of the notice of approval.*

6. *Negotiation (See Chapter VII)*

7. *Arbitration*

(a) *Either the expropriating authority or an expropriated owner should be able to invoke the arbitration procedure at any time after the statutory offer has been made, subject to the invoking of the negotiation procedure.*

(b) *Claims for injurious affection should be brought within two years from the time that the damage was sustained.*

8. *Possession*

(a) *The expropriating authority should be able to require possession of the expropriated land by serving on the expropriated owner, at any time after the date of expropriation, a notice of possession specifying the date on which possession is required.*

(b) The date for possession should be at least three months after the date of serving the notice of possession.

(c) An expropriated owner should be entitled to give up possession any time after the date of expropriation, on notifying the expropriating authority.

(d) An expropriating authority should be able to apply to a judge of the appropriate County Court for an earlier date than that specified in the notice of possession, and an expropriated owner should be able to apply for a later date, with the judge having power to fix an earlier or later date as he considers appropriate in all the circumstances.

(e) The expropriating authority should not be entitled to take possession unless the statutory offer to pay has been made and, where that offer has been accepted, payment has been made to the owner by the expropriating authority.

(f) (i) Where the expropriating authority becomes entitled to take possession and is met with resistance or opposition to its taking possession, the expropriating authority should be able to apply to a judge of the appropriate County Court for a warrant directing the sheriff to take possession.

(ii) The judge, before making such an order, should hold a hearing, with notice of the hearing to be given to such persons as the judge may direct.

B. Special Procedures

1. *Civil Defence Act Health Act*

Since expropriations under these two statutes will only take place in emergency situations, it follows that the initial inquiry and approval procedures can have no application. Nor can the procedure relating to possession apply in these special circumstances because possession would usually be required.

The expropriating authority in these instances should be required to serve on owners a notice of expropriation immediately after the expropriation has taken place. Within 30 days after the expropriation, the expropriating authority should register the notice in the appropriate Land Registry Office, accompanied by a description of the lands expropriated. The Registrar should register the notice of expropriation in the same way as he would, in other cases, register a notice of approval.

Once an owner has been served with such a notice of expropriation, the general procedural provisions relating to compensation should apply.

The Commission recommends:

1. *Expropriations under the* Civil Defence Act *and the* Health Act *be exempt from those provisions of the general expropriation statute relating to the notice of intention to expropriate, and the inquiry and approval procedures.*

2. *The expropriating authority in expropriations under these two statutes should be required to serve on the expropriated owners a notice of expropriation immediately after the expropriation has taken place and, within 30 days after the expropriation, the expropriating authority should register the notice in the appropriate Land Registry office, accompanied by a description of the lands expropriated.*

3. *The Registrar of Titles should register the notice of expropriation in such instances in the same way as he would, in other cases, register a notice of approval.*

4. *Once an owner had been served with a notice of expropriation, the general procedural provisions relating to compensation should apply.*

2. *Damage Claims*

Owners making claims for damages resulting from the exercise of a statutory right of entry, not amounting to an expropriation, should make their claims in the manner prescribed by rules laid down for that purpose by the general arbitration tribunal. The tribunal should lay down the rules with respect to pleadings, service and proceedings. We believe that it would be helpful for the negotiation procedure to be available and we so recommend.

The Commission recommends:

1. *Owners making claims for damages resulting from the exercise of a statutory right of entry, not amounting to an expropriation, should do so according to rules laid down for that purpose by the general arbitration tribunal.*

2. *Either the person making the claim, or the person against whom the claim is made, should be able to invoke the negotiation procedure within 30 days of making a claim in accordance with paragraph 1 above.*

3. *Petroleum and Natural Gas Act, 1965*

Whether or not the grant of a right of entry by the Board of Arbitration under the *Petroleum and Natural Gas Act, 1965* amounts to an expropriation, the compensation payable should be based on the proposed formula for compensation applicable to expropriation. The negotiation and arbitration provisions of the proposed statute should be applicable. In addition, the proposed general arbitration tribunal should take the place of the Board of Arbitration in respect of granting rights of entry. These matters are dealt with in Chapters III and XV.

C. Abandonment and Sale

There may be occasions where an expropriating authority may wish to abandon expropriation proceedings before the proceedings are completed. This might occur either before or after the point at which expropriation, and thus transfer of title, occurs. Should the owner be able to insist that the expropriation be carried out, since he may have made arrangements to move elsewhere, or be entitled to damages for losses that he may have incurred?

There may also be situations where, after proceedings are completed, an expropriating authority may decide it no longer needs lands that have been expropriated, or part of them, and wishes to sell or otherwise dispose of those lands. Should the expropriating authority be required to offer the land back to the former owner before disposing of the lands to someone else? And, if so, on what basis should the price be determined?

Abandonment and sale can be dealt with under three headings:

1. Abandonment during expropriation proceedings but prior to expropriation (i.e., where title is still vested in the owner),

2. Abandonment during expropriation proceedings, but after expropriation (i.e., where title has vested in the expropriating authority),

3. Sale (i.e., after proceedings have been completed).

1. *Abandonment prior to expropriation*

The Commission believes that an expropriating authority should be able to abandon its intention to expropriate at any time up to the date of expropriation. Up to the point of expropriation, the expropriating authority should be able to change its mind. The abandonment might be entire or partial. The expropriating authority should be able to amend its notice of intention to expropriate so as to reduce the area of land required or so as to claim a lesser interest. In such a case, it would abandon its intention with respect to the remainder. Where there was a partial abandonment, the inquiry and approval procedures would, of course, continue to apply to the land still intended to be expropriated.

Where an expropriating authority abandons its intention to expropriate, it should be responsible for the legal, appraisal and other costs of the owner reasonably incurred up to the time of abandonment as a consequence of the initiation of the expropriation proceedings.

The expropriating authority should serve a copy of the notice of its abandonment on all persons who were entitled to be served with the notice of intention to expropriate, sending a copy of the notice of abandonment to the approving authority, and depositing the notice itself in the appropriate Land Registry Office.

The Commission therefore recommends:

1. *An expropriating authority should be entitled to abandon its intention to expropriate, either wholly or partially, at any time up to the date of expropriation.*

2. *Where the abandonment is partial, the expropriating authority should amend its notice of intention to expropriate so as to reduce the area of land required or so as to claim a lesser interest.*

3. *The expropriating authority should serve a copy of a notice of abandonment on all persons who were entitled to be served with the notice of intention to expropriate, including the approving authority, and should deposit the notice itself in the appropriate Land Registry Office.*

4. *(a) Where an expropriating authority abandons its intention to expropriate, it should be responsible for the reasonable legal, appraisal and other costs of the owner incurred up to the time of abandonment, as a consequence of the initiation of the expropriation proceedings.*

   (b) In the absence of agreement, such costs should be taxable under the Legal Professions Act.

2. *Abandonment after expropriation*

If the expropriating authority decides that all or part of the expropriated land is not needed for its purposes and the expropriation proceedings are not completed, then the expropriating authority should so notify the persons who were entitled to be served with a notice of expropriation. Those persons should then have the option of:

(a) taking their interest back, and obtaining payment of consequential damages, or

(b) requiring the expropriating authority to retain their interest and complete the expropriation proceedings.

In short, if the expropriating authority wishes to change its mind at this stage, it can only do so if the owner agrees. Owners certainly should not be required to take their

interests back. They may have arranged to buy alternative properties or otherwise made and carried out one kind or another. If the owner elects to take his interest back, he should be required to return dry compunsacion he has received, subject to set-off for any consequential damages he may be entitled to. The expropriating authority should be required to deposit in the appropriate Land Registry Office a notice of abandonment, the depositing of which would revest title in the owner and, where more than one interest revests, restore the legal relationships which existed between the owners of the interests at the time of expropriation.

There are provisions to this effect in the Ontario[10] and Manitoba[11] legislation and the Commission would propose the adoption of a similar one here. It can foresee difficulties, however, where there are several persons with interests that have been expropriated, e.g., a mortgagor, mortgagee, and a tenant of the mortgagor. What if the mortgagor wants his interest back, but the others do not? The mortgagor cannot be restored to his original position. In such a case, we believe the mortgagor should he entitled to the return of his interest, unencumbered by the interests of those who do not wish their interests back and who would therefore have their interests expropriated, on making payment to the expropriating authority of an amount equal to the market value portion of the compensation paid or payable to the persons whose interests were expropriated. This right to obtain an enlarged interest should only extend to mortgagors and purchasers under agreements for sale. A mortgagor exercising this right would, of course, have to return any compensation he had received, as mentioned earlier.

If a mortgagor, or purchaser under an agreement for sale, is thus required in effect to pay off an encumbrance in full rather than in accordance with its original terms, or obtain financing on a different basis from that of the original encumbrance, and this occasions him expense over and above what would have been involved in fulfilling the terms of that original encumbrance, this additional cost should be recoverable as consequential damages.

Up to what point should these abandonment proceedings be available? The Ontario and Manitoba provisions state until the compensation is paid in full. We propose that they be available until expropriation proceedings are completed. By this we mean:

(a) the completion of all arbitration proceedings, including appeals,

(b) the payment of the compensation in full, and

(c) the giving up of possession by the owner to the expropriating authority.

Where an owner wishes the return of his interest and claims consequential damages, those damages should be determined by the proposed arbitration board.

The Commission therefore recommends:

1. *Where land has been expropriated but expropriation proceedings are not completed, and an expropriating authority decides that all or part of that land is not needed for its purposes, the expropriating authority may serve a notice of intention to abandon on those persons who were served with a notice of expropriation.*

---

10. S.42.

11. S.50.

2. *Persons served with a notice of intention to abandon should have the choice of:*

   (a) *taking their interest back, and obtaining payment of consequential damages, or*

   (b) *requiring the expropriating authority to retain their interest and complete the expropriation proceedings in respect to it.*

3. (a) *Where a former owner of an interest elects to have his interest returned, he should be required to return any compensation he has received, less any set-off he may be entitled to for consequential damages.*

   (b) *Where a former mortgagor or a purchaser under an agreement for sale wishes to take his interest back, and the former owner of some other interest does not wish the return of that other interest, then such mortgagor or purchaser should be entitled to the return of his interest, unencumbered by that other interest, on making payment to the expropriating authority (in addition to any sum payable under paragraph 3(a) above) of an amount equal to the market value portion of the compensation paid or payable to the person whose interest is expropriated.*

4. *Where the owner chooses the return of his interest and claims consequential damages, those damages should be determinable by the proposed arbitration tribunal.*

5. *Expropriation proceedings should be regarded as not completed for the purposes of taking abandonment proceedings, until:*

   (a) *all arbitration proceedings, including appeals, are completed,*

   (b) *the compensation is paid in full, and*

   (c) *possession of the relevant lands has been given up to the expropriating authority.*

3. *Sale*

This problem occurs after expropriation proceedings have been completed.

Suppose the expropriating authority no longer needs the expropriated lands, should it be able to dispose of the lands freely or should the former owner be given the first opportunity to acquire them?

On the surface, it may only seem just that a former owner should have priority in these circumstances, but there are difficulties. The McRuer Report points out:[12]

> Where title to land may be affected caution must be exercised in conferring new rights. There are many factors to be considered in giving to previous owners statutory rights concerning land which is no longer required by the expropriating authority. These factors must include:
>
> (1) The length of time which has elapsed since the expropriation;
>
> (2) The difficulty of locating the former owner or his heir, as the case may be; and
>
> (3) The enhancement of the value of the surplus land by reason of work performed by the expropriating authority.
>
> We do not think that it is practical to confer actual property rights of a residual nature on former owners of expropriated land. Each case must be treated in the light of its particular facts.

12. P. 1075.

The McRuer Commission then suggested:[13]

> The practical solution would be to require the consent of the appropriate approving authority before any surplus land could be sold by an expropriating authority ... Before giving approval to a sale of expropriated land, the approving authority should be required to make inquiry into the circumstances of the proposed sale and the position and desires of former owners, who should be given an opportunity, where practical, to purchase the land on equitable terms. Failure to follow legislative provisions of this sort should not affect the title to the land.

The McRuer Commission recognized that determining the price to be paid by the former owners would not be an easy matter. No precise formula was recommended for that purpose, it being suggested that, as each case arose, the approving authority should consider "all the relevant facts when consenting to a sale at a particular price and that the owner should have a right to be heard and make his claim".[14]

The Ontario statute contains a provision implementing the McRuer recommendation, with one exception.[15] The price at which the former owners can purchase is to be on the basis of the best offer received by the expropriating authority. Manitoba adopted the Ontario provision.[16]

The Ontario and Manitoba provision gives rise to a number of problems:

(a) Once property has been expropriated, the provision is applicable. Although the approving authority may consent to a sale to someone other than a former owner, that approval would still have to be obtained if the proposed disposition of the land by the expropriating authority was taking place five, twenty or a hundred years after the date of expropriation.

(b) Does the right of the former owner expire on his death (i.e., is it a right personal to him), or does it pass on to his beneficiaries under his estate, and on their death, to their beneficiaries (i.e., does the provision create a transmissible property right)? One can imagine problems expropriating authorities could face in the future in trying to track down who is entitled to the benefit of the provision.

(c) If the owner acquires a transmissible property right under the provision, presumably it would also be transferrable during his lifetime. This could mean that he could sell his right at any time to persons having a commercial interest in obtaining the property. Is this really the purpose of such a provision?

(d) The provision does not apply to persons who settled with the expropriating authority without expropriation proceedings being commenced. These persons settle knowing that, unless they do so, expropriation proceedings will be commenced. Should such persons not be entitled to the same treatment as those against whose property

---

13. Pp. 1075-1076.

14. P. 1076.

15. S. 43.

16. S. 51.

expropriation proceedings were begun?

(e) Sometimes the expropriating authority has expropriated the property for a particular purpose which has been completed, such as the construction of a subway, and may now wish to dispose of the property, usually along with other property, for the purpose of redevelopment. This may well be in the public interest. It is true that the approving authority could consent to such a disposition, but can it not be argued that the expropriating authority should have the right to redevelop in this way without going to the approval authority?

(f) The procedure of giving the former owner an option to purchase at the best offer received may not be as workable as it appears at first glance, particularly where offers are received under a public tendering system. The fact that the former owner has a right of option may, for example, discourage some persons from tendering who would otherwise put in a bid. In addition, some person interested in acquiring the property may, either in addition to or instead of tendering, attempt to buy the former owner's right (if, indeed, it is transferrable in this way). As a consequence, the normal competitive tendering system might be interfered with.

(g) Under the Ontario provision, it is not clear who the "owners" are who are given the right to purchase. It appears that "owners" include mortgagees, and owners of easements and all other interests in the land. Should all such persons have the right to purchase under such a provision? If not, who should have and on what basis?

In order to avoid the consequences and complexities of the Ontario provision, some expropriating authorities in that province are, we understand, taking waivers from owners with whom they settle after expropriation proceedings have commenced. Whether or not such waivers are valid may be open to question. The expropriating authorities are not, of course, in a position obtain waivers when the proceedings go on to arbitration and an award is made.

In its working paper, the Commission indicated that it was anxious to hear as many views as possible on the question of whether there should be some provision for giving a right to purchase to former owners. We stated that we recognized that a case could he made for giving such a right but we wondered whether the complications were such that it would, on balance, be best to omit a provision for repurchase.

The response was somewhat mixed. Expropriating authorities naturally preferred to be free of any requirement to give former owners a right to repurchase. However, there were others who were also opposed to conferring such a residual special right, on the ground that it suggests that the owner has not been treated fairly or received adequate compensation. On the other hand, some felt the former owner should have a right to purchase, particularly in instances where there had been a partial taking. The Council of the Forest Industries of British Columbia, for example, suggested that former owners should have a right of first refusal, which would lapse after a specified period, such as five or ten years. running from the date of expropriation. The Council pointed out that, in respect of a possible right to purchase at the level of the highest bid under a public tendering system, such a "matched-tender" system has been used by the Provincial Government in the granting of timber sale contracts. Two individuals proposed that former owners should have the right to purchase at the price which the expropriating authority paid.

This would not, in our view, be the correct basis for determining the repurchase price. If there was to be a repurchase procedure, we think the repurchase price should be the market value at the time of the repurchase. Otherwise, if the market value had gone up in the interval, the former owner would receive a windfall. On the other hand, if the value had fallen, the former owner should have the right of repurchase at the current and lower value. Again, if there was to be a repurchase procedure, we think we would prefer the right of first refusal as it is conferred in the Ontario provision as the means of determining the repurchase price. An alternative would be to have the price determined by the general arbitration tribunal on the basis of current market value, but for such a procedure to be workable it would have to he binding upon both parties or at least confer an option on the former owner for a limited time to buy at that price.

However, after the most careful consideration and with some reluctance, we have reached the conclusion that the disadvantage of the complexities involved outweighs the advantage that would be gained on the few occasions when such a provision would be exercised. We should point out, however, that we earlier recommended that the owner should have the right to take his interest back should the expropriating authority decide on abandonment proceedings while the owner has some connection with the property (i.e., he is still in possession, arbitration proceedings are still in process, or he has not yet been paid in full).

Part III - Proposed Basis for Compensation

CHAPTER X GENERAL

A. Basic Principle

What should be the basic principle of the compensation provisions of the proposed expropriation statute? We believe the principle should be that the expropriated owner is entitled to economic reinstatement. The general principle underlying the recent legislation enacted in various Canadian jurisdictions is that the expropriated owner should be put in the same economic position that he was in prior to the expropriation. Although this principle is not expressly articulated in the Ontario, Manitoba and federal statutes, the general effect of those statutes is to provide indemnification for economic loss.

The Ontario Law Reform Commission, the report of which was the basis of the compensation provisions in the Ontario statute,[1] recommended:

> ... it be clearly established by legislative enactment that the basic principle to be applied in fixing compensation is indemnification for losses resulting from the expropriation.

If the individual property owner is to be required to give up his property to an expropriating authority against his wishes, the very least that society can do is to ensure that he does not suffer an economic loss.

Should an expropriated owner be entitled to anything more than economic reinstatement? Should he be entitled to compensation for the element of compulsion that inheres in an expropriation? Should he be compensated for emotional distress or "sentimental value", matters which may loom large for the expropriated owner?

Certainly, there are occasions where there is "loss", over and above economic loss. Usually this occurs where the property taken includes a home, but this is not always the case. It might be a family-owned business, or a farm which has been lived on and cultivated by its owner for 30 or 40 years.

These kinds of circumstances tempt a suggestion that expropriated owners should be entitled to something more than economic loss. There are, however, other factors which in the view of the Commission outweigh the desirability of making a general provision of that sort. First, emotional distress and sentimental value are simply not capable of measurement in terms of dollars. Second, these elements will be different in every case and it would be a virtually impossible task to judge each case on its merits. A flat percentage added on to market value would be preferable from an administrative point of view, but it would result in giving compensation without regard to the position of the individual claimant and, no doubt in some cases, where there was no loss of this kind at all. Finally, the ultimate source of whatever compensation is payable by public expropriating authorities is the taxpayer. It is arguable, at least, that he will carry a sufficient burden if he provides for full economic reinstatement.

---

1. P. 12.

This position may seem hard-hearted to some. The Commission does, however, later propose that special disturbance damages be paid to an owner or tenant dispossessed from his home by expropriation to compensate him for the time and energy expended by him and his family in finding and moving to a new home, the many miscellaneous small expenses which he may not recover under the traditional element of disturbance damages, and, to some extent, for being uprooted from his home. It will be proposed that owner-occupiers of homes should receive five per cent of market value and tenants the equivalent of three month's rent. The Commission also later proposes a "home for a home" provision, which would ensure that a person who is dispossessed from his home by expropriation will be reinstated in accommodation that is at least equivalent.

Generally, however, the Commission has adhered to the basic principle of economic reinstatement in formulating the proposals for compensation that are made in this part of the Report.

The Commission accordingly recommends:

The underlying principle in the compensation provisions of the expropriation statute should be to provide persons whose property has been expropriated with full compensation for their economic losses resulting from the expropriation.

The general response to our working paper endorsed that proposition.

B. The Basic Formula

A formula for compensation set out in an expropriation statute does not merely relate to expropriated properties. That formula underlies the bargaining process which goes on prior to arbitration. Negotiation may be carried on prior to the commencement of expropriation proceedings, or after those proceedings have started but before arbitration. It may even be carried on after an arbitration award has heen made, which is subject to appeal.

The fact of the matter is that most acquisitions, where expropriation powers exist, are settled by negotiation. However, simply because a settlement is reached does not mean that the sale is a "voluntary" one. The vendor knows that, unless he sells at an agreed upon price, his property will be taken away from him for compensation to be determined by arbitration. The compensation that he would be entitled to on arbitration will substantially influence what he is likely to get by negotiation.

Thus a statutory formula has a practical application far beyond providing a basis for determining compensation in the relatively small number of cases that are arbitrated.

The basic principle on which compensation is now paid in British Columbia is "value to the owner". It is a judge-made concept, developed in an attempt to do justice to expropriated owners. On being faced with construing legislation similar to our *Lands Clauses Act*, the courts interpreted the word "value" as meaning "value to the owner". By taking this view, instead of saying "value" meant "market value", the courts were able to include to some extent in the compensation awarded disturbance costs to the owner. All the older statutes authorizing the payment of compensation make no mention of disturbance damages, but refer only to compensation for value and injurious affection.

There are many reported cases on the meaning of "value to the owner". On

several occasions the Supreme Court of Canada has dealt with the principle. In *Diggon-Hibben Ltd.* v. *The King*, Rand, J. stated the principle as follows:[2]

> ... the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

"Value to the owner" has a number of shortcomings. First of all, it means that the expropriated owner must extract a definition of his right to compensation from a mass of case law. As put by the Ontario Law Reform Commission:[3]

> This rationalization of the cases consumes both time and effort. The average competent solicitor without a great deal of time, confused by conflicting statements and decisions, and confounded by the subsequent application of the *Diggon-Hibben* test, appears to believe that the test is a purely subjective one, superimposed on various objective factors. Some fresh legislative statement of the meaning of compensation is necessary to clarify the situation.

Second, what is allowed and what is not allowed by the courts as disturbance damage in "value to the owner" is not altogether satisfactory. These particular shortcomings are dealt with in Chapter XII. Third, the application of the "value to the owner" principle appears to result in excessive awards in some cases. The arbitration tribunals or the courts may make lump sum awards, without breaking down the amounts awarded as applicable to particular categories of loss. In making such lump sum awards, there may be an inclination to be generous to expropriated owners.

The Clyne Report states:[4]

> Not only has the value to the owner rule been difficult to apply but it appears to have led to excessive compensation awards by introducing imaginary and speculative elements of value. In my opinion, market value provides a valuation which is objective and certain. It also facilitates the separation and specification of the other heads of compensation such as disturbance and severance damage claimed by an owner in addition to the value of land taken.

We agree.

The provision of a statement, in the proposed statute, of the elements which should compose the compensation payable would avoid much of the uncertainty and confusion that now exists. That statement should be based on a formula of market value and damages for disturbance.

The Ontario Law Reform Commission found:[5]

> The development and use of the formula "value to the owner" ... may be fairly described as the evolution and failure of a principle of general application.

That Commission recommended that the "value to the owner" test be abandoned in favour of a formula by which compensation would be determined by making

---

2. [1949] S.C.R. 712 at p. 715.

3. P. 15.

4. P. 89.

5. P. 12.

separate assessments of market value and damages attributable to the expropriation.[6]

We believe that such a formula provides the basis for compensation that would best achieve our declared objective of economic reinstatement. It was adopted in the recent Ontario,[7] Manitoba,[8] and Federal[9] statutes.

Accordingly, the Commission recommends:

1. *The basic formula for compensation in the proposed statute should be:*

   (a) *the market value of the interest expropriated,*

   (b) *damages attributable to the disturbance, and*

   (c) *damages for injurious affection.*

2. *The formula should be clearly set out in the statute in the above terms.*

---

6. P. 17.

7. S. 13.

8. S. 26(1).

9. Ss. 23 and 24.

CHAPTER XI VALUATION OF INTERESTS

This chapter is devoted to a number of problems relating to the "market value" component of our basic formula. With regard to most of these problems, recent legislation in other Canadian jurisdictions has, on the whole, embodied common solutions which we consider satisfactory. We have not therefore gone into an extensive analysis of these problems, except with respect to the valuation of mortgages. On that particular question, we have proposed a different solution and we have accordingly dealt with it more extensively than the others.

A. Market Value: Definition

How much guidance should be given in the proposed statute as to the meaning of "market value"?

A very simple definition of the term has worked well in England for over 50 years. It is[1]

> ... the value of the land shall ... be taken to be the amount which the land if sold in the open market might be expected to realize ...

While recognizing that the condition of a "willing buyer" must be imported into such a definition, the Ontario Law Reform Commission thought it would assist in ensuring the abandonment of the "value to the owner" concept if express reference was made to the "willing buyer".[2] The Clyne Commission also took this position.[3]

The Ontario Commission did not think that a more detailed definition was necessary, feeling that it might well "unduly complicate the working out of the compensation payable".[4]

The view of the Ontario Commission was adopted in the Ontario statute,[5] and later in the Manitoba legislation.[6] The federal statute also has this definition, although the wording is slightly different, providing that market value is[7]

> ... the amount that would have been paid for the interest if, at the time of its taking, it has been sold in the open market by a willing seller to a willing buyer.

We prefer the federal definition on grammatical grounds.

---

1. *See* the *Land Compensation Act*, 1961, 9 & 10 Eliz. 2, c. 33, s. 5, Rule 2, and its predecessor, the *Acquisition of Land (Assessment of Compensation) Act*, 9 & 10 Geo. 5, c. 57.

2. Pp. 18-19.

3. P. 99.

4. P. 19.

5. S. 14(1).

6. S. 27(1).

7. S. 24(2).

Accordingly, the Commission recommends:

Market value should be defined as the amount that would have been paid for the expropriated interest if it had been sold, on the date of expropriation, in the open market by a willing seller to a willing buyer.

The question of the appropriate date of valuation is dealt with in Chapter XV. We recommend there that the date of valuation should be the date of expropriation. The effect on market value of general knowledge of a planned undertaking is discussed later in this chapter.

B. Special Value

There are certain circumstances where market value would be insufficient as a measure of compensation. These occur where there is some element which has only value to the owner or an insignificant number of prospective purchasers. This is referred to as special value.

The Ontario Law Reform Commission stated that circumstances of special value may exist in three different situations, giving illustrations:[8]

1. Where unmarketable improvements have been made by an owner.

   Illustrations of this kind of improvement are the installation of a ramp system by a paraplegic or the construction of a bomb-shelter.

2. Where land has particular attributes, such as location or grade, which give that land a special value to the owner over other lands but which do not enhance the market value.

   The location of a service station on a particular corner, for example, may give that property a special value to the owner owing to the increased sales he would have there in relation to carrying on business on adjacent properties. The market value of the corner lot will not necessarily reflect the special profitability to the owner of having that location for this purpose.

3. Where the owner makes use of the land for a particular purpose and there is no market for the land for that purpose.

   This may be illustrated by the use of lands for a church or hospital.

The Ontario Commission concluded, and we agree, that compensation should be payable in all three situations on the principle of indemnification for loss. The Ontario Commission decided to treat the first two situations under the heading of disturbance damage, and the third separately on the basis of cost of reinstatement.[9] The Ontario legislation implemented these proposals.[10] We would prefer to see unmarketable improvements regarded apart from disturbance damage as is the position taken in Manitoba.[11] There may be no disturbance damage in the sense that the displaced owner does not incur cost to make a similar unmarketable improvement in the premises to which he moves. Right to recovery should not

---

8. Pp. 19-20.

9. P. 20.

10. Ss. 14 (2), 18 (1) (a) (ii) and 19 (1)

11. S. 26(2)(a).

depend on making the unmarketable improvement again. It should, however, be confined to residential properties as is done in Ontario. Two persons making submissions to us felt that unmarketable improvements on commercial and industrial properties should also be recoverable. However, as was stated in the working paper, we do not think this should be the case. An example was given by one of the persons making these submissions of a business that builds a "show-case" building in order to present a particular image. We would have thought in that case certainly some of the expense over and above putting up an ordinary building would be reflected in market value. To the extent that such expense is not included in the market value, the business is certainly contemplating risking a loss someday from resale (although not, of course, from expropriation). The Commission does not think that the unmarketable improvement provision should extend beyond the home-owner, for whom it is really a special concession. Unmarketable improvements will seldom be a problem on expropriated commercial or industrial properties. We are not aware of any jurisdiction that provides compensation for them.

So far as the second situation, which relates to special economic advantage, is concerned, we agree that the example of the corner service station given by the Ontario Commission is really one of disturbance damage, resulting from business loss. A better illustration might have been derived from the circumstances that existed in *Gagetown Lumber Co. Ltd.* v. *The Queen*.[12] In that case a tract of forest land was expropriated from the owner of a nearby sawmill and, in such circumstances, it could be said that the proximity of the expropriated tract to the mill gave that tract a special value to the mill owner. Even in those circumstances, however, it can be argued, that the loss is not one in the "value" of the land but a business loss that should be treated under disturbance damage. This appears to be the view taken by the Clyne Commission[13] and we are inclined to agree with it. Perhaps disturbance damage could always cover this kind of loss, but we are not satisfied that this would be so. To ensure that recovery can be obtained in such cases, we think that it would be wise to have a provision, as there is in both the Manitoba[14] and Federal[15] statutes, making compensable "the value to the owner" of "special economic advantage" arising out of his occupation of the land.

For the third situation given by the Ontario Commission, that body recommended,[16] as the Clyne Commission did,[17] that compensation be paid on the basis of the reasonable cost of equivalent reinstatement where there exists a *bona fide* intention on the part of the owner to move to substituted premises. The Clyne Commission recommended, however, the omission of the word "equivalent" in order to leave the arbitration tribunal will full discretion in such matters as depreciation and obsolescence. The Ontario statute incorporates the Ontario Commission's recommendation.

It should not be necessary to spell out in detail, as the federal statute does, the

---

12. [1957] S.C.R. 44. *See* Todd, *The Federal Expropriation Act*, at p. 36 *et seq.*

13. P. 51.

14. S. 26(1)(d).

15. S. 24(3)(b).

16. P. 20.

17. Pp. 107-108.

circumstances in which its equivalent reinstatement provision is applicable. It may be too restrictive. The federal provision:[18]

(a) only applies to land which is improved by a building or other structure,

(b) only applies where the building or structure was specially designed for use for certain specified purposes,

(c) only applies where the purposes were for a school, hospital, municipal institution or religious or charitable institution, or of a similar nature,

(d) sets out a formula for determining the cost of equivalent reinstatement, and

(e) does not expressly require a *bona fide* intention to relocate.

We prefer the Ontario provision, with one modification. The requirement that the owner intend to relocate in similar premises should be omitted. It would be open to any owner to declare that his intention was to relocate and he might conveniently change his mind after receiving his compensation. But a stronger reason has been suggested to us. In cases of churches or fire-halls, for example, there is no way of working out adequate compensation unless it is on a basis of reinstatement. Whether the church organization intends to use the compensation to build a new church or on providing social services, or whether the municipality intends to build another fire-hall to replace the expropriated one, should be irrelevant.

It also has been suggested to us that the meaning of the "reasonable cost of equivalent reinstatement" should be defined, particularly in view of what some consider the unsatisfactory judgment of Thorson, J. in the *Sisters of Charity*[19] case. In that case, the learned judge awarded the market value of the bare land, plus the depreciated reproduction cost of the building. Such an award would not, however, be sufficient to pay for the reasonable cost of reinstatement. It is conceded that the problem of the relationship of depreciation on the building taken to the cost of reinstatement is a difficult one. Should of an old church, which needs a new roof and new entitled to compensation that would enable them new church of equivalent size? What should reinstatement mean? To reinstate themselves in old church, in the same state of disrepair? We believe that, in such circumstances, the owners of the church, whose property has been taken away against their will, should be entitled to reinstatement without taking into account depreciation on the expropriated church. We do not think that the owners should be put in a position reasonable the owners wiring, be to build a equivalent an equally where they have to spend their own money to build a new similar church. This proposed rule that depreciation should not be taken into account should only apply where the particular building is actually being used, at the time the notice of intention to expropriate is given, for the particular purpose which would bring the equivalent reinstatement principle into operation. The proposed rule should not apply, for example, if the church referred to above had been closed down for a number of years.

To safeguard the position of expropriated owners, we consider that it should be

---

18. S. 24(4) and (5).

19. *The Queen* v. *Sisters of Charity of Providence*, [1952] Ex. C.R. 113.

up to the owner to invoke the equivalent reinstatement provision. If the owner would prefer to have compensation on a market value basis, he should have that choice.

Accordingly, the Commission recommends:

1. *(a) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for that land for that purpose, the market value shall, at the option of the owner, be deemed to be the reasonable cost of equivalent reinstatement.*

(b) In the determination of what constitutes the reasonable cost of equivalent reinstatement, depreciation of a building should not be taken into account where that building is actually being used, at the time the notice of intention to expropriate is given, for the particular purpose referred to in paragraph (a).

2. *In addition to the market value of the land expropriated, the owner shall be entitled to the value of*

(a) any special economic advantage arising out of his occupation of the land, and

(b) improvements made by a home-owner in his residence,

where the value of such special economic advantage or improvements is not reflected in the market value of the land.

C. Potential Use

The use to which land may be put is, generally, an element properly taken into account in determining the market value of land. A good example is farm land that is ready for commercial or residential development. In such a case the land is valued according to its highest and best use. This is sometimes referred to as special adaptability or suitability.

There are two problems that cause the Commission concern:

1. The avoidance of double recovery, and

2. The relevance of value to the taker.

1. *Avoidance of double recovery*

Disturbance damage is compensable to enable an owner to relocate without economic loss. He is thus enabled to re-establish his business or farm. If he were awarded compensation on the basis of the special adaptability of the land for a use other than its present one, he should not also be entitled to disturbance damages in order to relocate on the basis of the existing use - if the result would be to put more into his pocket than he would receive on the basis of value of the existing use plus disturbance damages.

The Clyne Report gives an illustration of the double recovery problem:[20]

> Farm property is worth $20,000 as farm land, but, on the basis of its potential use as residential property, it is worth $30,000. Suppose the disturbance loss to the farmer is $5,000.

The Clyne Commission stated that, in the above situation, the farmer should be able

---

20. Pp. 111-112. As to the method of calculating value based on highest and best use, *see Jupiter Estates Ltd.* v. *School District No. 61 (Greater Victoria)* (1965), 54 W.W.R. 655, at p. 660. (BCCA).

to claim either $20,000 plus $5,000 or $30,000. He should not be able to claim $30,000 plus $5,000 as that would be double recovery.

Accordingly the Clyne Report,[21] in recommending the payment of disturbance damage in addition to market value, recommended that in no case should compensation exceed the greater of

(a) existing use value plus disturbance, or

(b) value based on the highest and best use.

The Ontario Commission made a similar recommendation,[22] which is implemented in the Ontario statute[23] and adopted in the Manitoba statute.[24] The federal legislation has a provision which adopts this principle.[25]

One person stated to us that he felt the adoption of a rule against double recovery could cause hardship in some circumstances. He cited the case of a lower mainland farmer, who, on being paid on the basis of development use for residential purposes, rather than agricultural use, might have to move to a farm in the interior at considerable risk. Could such a farmer adapt to the new farming environment where, although he would buy farm land cheaper, he would be faced with new climatic and soil conditions? We are not satisfied that that risk would be an unjust one for him to take, if he chose to move to a different area. We are satisfied, however, that the rule for the avoidance of double recovery will preclude compensation being paid for highest and best use plus disturbance damages in many instances where it would not be justified.

Several persons suggested to us that there should be a definition of "highest and best use" and that the conditions when it should be taken into account should be set out in the statute. We do not agree. The term "highest and best use" is sufficiently well-established to be a term of art to those who are involved in expropriation matters. We are opposed to creating definitions that may tend to constrict the development of the law. We think it would be a mistake to spell out the conditions in which "highest and best use" should be taken into account. It is a matter of evidence, in determining market value, whether there is a potential use which enhances the value of the property above its existing use value.

Accordingly, the Commission recommends:

The compensation payable in respect of market value and disturbance damages should not exceed the greater of:

(a) the existing use value plus disturbance damages, or

(b) the value based on the highest and best use.

---

21. P. 112.

22. P. 23.

23. S. 13 (2), proviso.

24. S. 28(2).

25. S. 24 (3) (a) and (b)

2. *Relevance of value to the taker*

Ought the expropriating authority to be considered in the market for the purposes of determining market value? Should the use to which the expropriating authority will put the land be a relevant factor? Suppose, for example, barren land is taken as a rock supply for a construction project undertaken by the expropriating authority. The land is virtually valueless but for that purpose. The Supreme Court of Canada decided in that case that the value of the rock for the purpose of the expropriating authority should be considered.[26]

Both the Clyne and Ontario Law Reform Commissions[27] recommended that the proposed use by an expropriating authority should not be taken into account in determining the value of land. To take it into account is to give the owner a windfall at the expense of the taxpayer. The Ontario,[28] Manitoba,[29] and Federal[30] statutes all contain provisions giving effect to those recommendations. In the working paper, we suggested that our statute should contain such a provision.

The Vancouver Chapter of the Appraisal Institute of Canada, while agreeing with the basic principle that the taker's purpose should be of no concern to the former owner, suggested that the tribunal might be given some discretion where values have increased since the taking. As an example of an occasion in which that discretion might be exercised, the Institute referred to the enhancement of value in an area generally by a public project, pointing out if value to the taker is excluded the expropriated owner gets no benefit from the enhancement while others do. This difficult problem is discussed later in this chapter under the heading of "Effect of the Planned Development". We can say here that we are opposed to giving the tribunal a discretion in this area. On what basis would it exercise it?

Dean White and John Morden pointed out to us that where the use to which the expropriating authority will put the land is one which other potential purchasers, not possessing expropriating powers, could put the land to, such use should not be excluded. The English legislation contains a provision to that effect. We accept this point in so far as the potential use by others enhances the value of the land. However, we do not believe the potential use should be taken into account where the enhancement in value would be due to the proposed use by the expropriating authority, and that use by others is only a theoretical possibility. We think the proposal we made in our working paper meets our objective in this respect.

The Commission recommends:

In determining market value, no account should be taken of any anticipated or actual use by the expropriating authority after the expropriation.

D. Effect of the Planned Development

---

26. *Fraser* v. *The Queen*, [1963] S.C.R. 455.

27. Clyne Report, pp. 104-105; Ontario Report, at pp. 23-24.

28. S. 14(4)(a).

29. S. 27(2)(a).

30. S. 24(9)(a).

Once there is general knowledge that a public project, such as the building of an expressway or an urban renewal programme, is to be undertaken, two results may follow:

1. Property values in the general area of the project will probably rise or fall, depending on the nature of the project; and

2. Owners of property in the project area may find it difficult or impossible to sell their property, except at a loss.[31]

1. *Rise and fall in value*

Where the market value of a property has fallen as a result of public knowledge of a project, before expropriation takes place, should the compensation exclude the decrease in value? We do not believe that the owner should have to bear this decrease. Otherwise he will not receive sufficient compensation to enable him to purchase equivalent property elsewhere.

On the other hand, where the value rises, we see no justification for giving the owner compensation which will include the increase. The owner should be entitled to be put in a position to buy equivalent property elsewhere, based on what the value of his property would have been if there had been no public knowledge of the project. Otherwise, the owner will receive a windfall.

One expropriating authority submitted that disregarding the decrease in value would make the expropriating authority an insurer of the value since the decrease might be caused by other factors and it would be difficult to prove what was the cause of the decrease. In answer to this, we would point out that it would be simply a matter of evidence and that the onus of proving that there was a decrease caused by knowledge of the development would be on the person making the allegation, the expropriated owner.

Thus, the Commission considers that the effect on the market value resulting from public knowledge of the project or from the prospect of expropriation should be disregarded in determining the compensation payable. The Clyne[32] and Ontario Law Reform[33] Commissions came to the same conclusion, and the Ontario,[34] Manitoba[35] and Federal[36] statutes contain provisions to this effect.

Is there a problem in determining the time from which one should look at the effect of a proposed particular project on market value? Does one go back to the first occasion when the project was publicly suggested as a possibility? The Ontario draftsman found that there was a difficulty here and qualified the Ontario provision by confining it to changes in value resulting from the "imminence" of the

---

31. P. 24.

32. Pp. 104-105.

33. P. 26.

34. S. 14(4)(b).

35. S. 27(2)(b).

36. S. 24(9)(c).

development or from any "imminent" prospect of expropriation.[37] This wording was adopted in Manitoba, although that province's statute also has a provision, not qualified by the use of "imminence", which states that any depreciation in value attributable to any indication that the land is likely to be acquired by an expropriating authority should not be taken into account.[38] The federal provision is not qualified by "imminence".[39]

We do not think that it is necessary to restrict the proposed provision as was done in Ontario. Each case should be judged on the basis of whether the prospect of the planned development had an effect on market value. Whether it did or did not is simply a matter of evidence, which should not be restricted to the threat of the development taking place immediately. Values may have dropped when the development became a probability and that may have occurred well before it became imminent.

Accordingly, the Commission recommends:

Where knowledge of the development in respect of which the expropriation is made or where the prospect of expropriation has caused an increase or decrease in the market value of the land expropriated, in calculating the compensation payable:

(a) any such decrease should be added to the market value, and

(b) any such increase should be deducted from the market value.

The federal statute also contains a provision, which has no equivalent in the Ontario and Manitoba enactments, whereby no account is to be taken of transactions entered into in respect of the property after the registration of the notice of intention to expropriate.[40] In the working paper we stated that we were inclined to think that such a provision is unnecessary and that the relevance of such transactions can best be left to the arbitration tribunal. We invited any comment to the they would like the protection afforded by a provision contrary. Two expropriating authorities indicated that such as the federal one and two individuals felt, as we did, that such a provision was unnecessary. We can see no compelling reason for changing the view that we expressed in the working paper.

The Commission has taken the position that increases and decreases in the market value of property which is expropriated should be disregarded. What about properties which do not need to be taken for the project but whose values are affected by it? This problem was recognized by the Ontario Commission:[41]

> It may be argued that:
>
> 1. Something should be done for the owner who suffers a loss by the announcement or carrying out of the scheme, but whose lands are not expropriated; and

---

37. S.14(4)(b).

38. S.27 (2) (b) and (c)

39. S.24(9)(c).

40. S.24(9)(b).

41. Pp.25-26.

2. The owner who benefits from the scheme, but whose lands are not expropriated, should pay some sort of compensation, perhaps in the way of a betterment charge.

> In theory, this sounds fair. In practice, it would be difficult to administer. These two questions, of course, raise the very complex matter of the treatment of the individual who suffers a loss because of state intervention, but where there is no expropriation. Government regulation, in the zoning field, for example, may enhance or diminish property values. Whether there should be compensation awarded in such cases is not within the scope of this report ...
>
> It is true that the person whose lands are not expropriated at all will receive a windfall to the extent that the planned development enhances the market value of his property ... should it be felt that he is receiving an unfair advantage, he could be made subject to some kind of special assessment or betterment levy. A further method of dealing with this problem is by "excess condemnation". This calls for expropriating more land than is required for the project, on the fringes of the project area, and ultimately selling the land to members of the public at a profit. In this manner, the owner of neighbouring lands will be deprived of benefits created by the particular scheme and the expropriating authority will gain accordingly. Such profits may be sufficient to pay for the entire project. The objection to this procedure is that the government is not in the real estate business and that to become involved in such arrangements would be an unjustified interference with the free enterprise system.

Like the Ontario Commission, we feel that the general problem posed by it is outside the scope of our study on expropriation. However, the problem of loss by the owner whose lands are not expropriated is discussed in the chapter on injurious affection.

2. *Being "locked in"*

Once an expropriating authority reveals its intentions, it may become difficult or virtually impossible for an owner to sell the property. The owner may be "locked in" his property until the expropriating authority commences expropriation proceedings. This can be very unfair, particularly where the owner has to move for one reason or another. If he is forced to sell, it may be at a loss.

The Clyne Report recommended[42] that, where public knowledge of plans or commitments for the expropriation of land has the effect of *depressing* land values and no expropriation has taken place, the owner should have the right to require the expropriating authority to purchase his land at the fair market price prior to the existence of that public knowledge. It would appear, and we assume, that this proposal was only intended to apply to land which would be required for the planned development, and not to land that would not be required but the value of which would be adversely affected.

In the working paper, we stated that we were in sympathy with the Clyne proposal and put it forward for comment. The Commission recognized, however, the difficulty in determining the time at which an owner should become entitled to require the expropriating authority to expropriate. We asked a number of questions. At what point should public knowledge be regarded as established for this purpose? What decisions should have been reached by the expropriating authority before it should be required to expropriate? Should it be left to the arbitration tribunal to decide? The Commission invited assistance in answering these questions.

---

42. Pp. 125-128.

The proposal made by the Commission in the working paper was:

> Where there is public knowledge of the plans of an expropriating authority which reveal an intention to acquire property by expropriation or otherwise in the foreseeable future, the owner of that property should be entitled to require the authority to expropriate his land.

Generally, the comment we received was in favour of such a provision. A number of persons submitted that the provision should only apply where the public knowledge has the effect of depressing land values. This was, as noted earlier, the view taken in the Clyne Report and it appears to us to be reasonable. If land values have not been depressed, the owner can sell his property in the market place without loss.

In so far as the operation of the provision is concerned, we have concluded that the general arbitration tribunal should decide whether the conditions laid down in the provision have been established. The matter would be brought before the tribunal on the application of the owner of the property involved, notice of the application being given to the expropriating authority. If the owner was successful before the tribunal, the expropriating authority should be required to commence expropriation proceedings within 60 days of the arbitration tribunal's finding. Once the expropriating authority had initiated expropriation proceedings, all the general procedures, including the inquiry and approval procedures, would be applicable. The costs of the parties with respect to an application under this proposed provision should be in the discretion of the arbitration tribunal.

Each kind of expropriating authority (Provincial Government Departments, municipalities, and private corporations, for example) has a different process for decision-making and the channels by which the public would become aware of an expropriating authority will not be the same. The Commission has therefore concluded that there could be no statutory guidelines laid down in these respects which would be satisfactory for application to expropriation authorities generally. The arbitration tribunal should decide on the facts of each case whether there is an intention and whether there is public knowledge.

The expropriating authority should be entitled to change its decision to expropriate. It should be open to the expropriating authority to prove at the hearing of an application under the proposed provision that it no longer has an intention to expropriate. If it can demonstrate that it has changed its intention, then no order should be made which would require it to commence expropriation proceedings. Where the expropriating authority has changed its intention in this way, the depression in land values caused by its earlier intention should disappear. Once an expropriating authority had initiated expropriation proceedings, it could, of course, abandon them under the abandonment procedures we proposed under Part II. In such a case, the owner would be entitled to consequential damages.

Accordingly, the Commission recommends:

1. *Where there is public knowledge of the plans of an expropriating authority which reveal an intention to acquire property by expropriation or otherwise in the foreseeable future, and where such public knowledge has had the effect of depressing the value of that property, the owner of that property should be entitled to require the authority to commence proceedings to expropriate it.*

2. *To require an expropriating authority to commence proceedings to expropriate property under paragraph 1 above, the owner should apply to the general arbitration tribunal for an order that the expropriating authority commence expropriation proceedings.*

3. *The owner should serve a copy of an application on the expropriating authority, and such other parties as the tribunal might direct.*

4. *If the expropriating authority can prove that, at the time of the hearing of the application, it no longer has an intention to expropriate, it should not be required to commence expropriation proceedings.*

5. *After hearing the parties, the tribunal should decide whether or not the expropriating authority be required to commence proceedings to expropriate.*

6. *Where the tribunal decides that the expropriating authority be required to commence proceedings to expropriate, the expropriating authority should be required to commence such proceedings within 60 days of such decision.*

7. *The costs of the parties to such an application should be in the discretion of the tribunal.*

E. Value Due to Illegal or Improper Use

Value attributable to the illegal use of property or a use which is detrimental to health should not be taken into account in determining the compensation payable. The Clyne Report gave, as examples of the property situations here envisaged, illegal gaming houses and overcrowded rooming houses.[43]

Both the Clyne[44] and Ontario[45] Commissions recommended that market value should be adjusted so as to disregard these elements. The Ontario[46] and Manitoba[47] statutes contain provisions to this effect. The federal statute simply provides that no account shall be taken of any increase resulting from a use contrary to law.[48] We believe a similar provision should be contained in our proposed statute.

In response to our working paper, the effect of our proposed provision with respect to illegal suites and non-conforming uses was questioned. Suites that contravened zoning legislation would be caught by this provision and we think that is, in principle, a proper result. On the other hand, what is called a non-conforming use is a use which, although it is not in compliance with general zoning requirements, is permitted under the law and is not illegal. Changes in zoning legislation, for example, may prohibit certain uses in a particular area. Usually such legislation is not retrospective, so that, to the extent that such uses existed at the time the legislation was enacted, those uses may continue to exist lawfully. The proposed provision should not therefore apply to non-conforming uses.

Accordingly, the Commission recommends:

Any increase in the value of the land resulting from the land being put to a use that could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the land, or to the public health, should not be taken into account in determining the compensation payable.

F. Separate Interests

---

43. Pp. 105-106.

44. P. 106.

45. P. 26.

46. S. 14(4)(c).

47. S. 27(2).

48. S. 24(9)(d).

1. *General*

The present practice in British Columbia appears to be to value different interests in land separately, except in the case of mortgages and agreements for sale. Where there is a mortgage or agreement for sale, the amount owing is calculated and deducted from the overall market value of the land; the mortgagor or purchaser, as the case might be, is then entitled to the balance.

The reason for separate valuations is that separate interests may have different standards of value. This has been long-recognized in expropriation law. Thus, the totality of the values of the various separate interests in a parcel of land may exceed, or be less than, the market value of the land, as an undivided fee.

The Ontario Law Reform Commission recommended that the expropriation statute should make clear that separate valuations should be made where there are different interests, except in the case of mortgages and vendor's interests[49] under agreements for sale. This recommendation was implemented in the Ontario statute.[50] The Ontario Commission also recommended that, where such separate valuations are made, they should be made at the same time and by the same body, but this proposal was not implemented.

The Clyne Commission recommended that all interests be valued separately, and by the same judge and at the same time.[51]

We propose, as the Clyne Commission did, that all valuations should be separate. This is particularly important in view of our proposal on mortgage valuation, which is discussed at length in Part G of this chapter.

Accordingly, we recommend:

Where there are separate interests in land, the market value of each should be determined separately.

2. *Leases*

(a) *Residential tenancies: a property interest*

We pointed out earlier in this report that the recent amendments to the *Landlord and Tenant Act* included a provision that residential tenancy agreements should not be regarded as creating property interests.[52] Accordingly, we recommended that, for the purpose of our proposed general expropriation statute, tenancy agreements (for residential premises) under Part II of the *Landlord and Tenant Act* should be treated as creating property interests.[53]

(b) *Frustration*

---

49. P. 27.

50. S. 16.

51. P. 147.

52. *Supra*, at P. 80.

53. *Supra*, at P. 82.

It has long been a matter of debate whether the common law doctrine of frustration applied to leases. The recent *Landlord and Tenant Act* amendments referred to above settled the matter in so far as residential tenancies are concerned by expressly declaring the doctrine of frustration of contract applicable to them.[54] In our Report on the Need for Frustrated Contracts Legislation in British Columbia, we recommended that this provision be extended so as to apply to leases generally.[55]

Here, we are dealing with the effect of expropriation on leases. In our view the proposed statute should deal with this problem in the manner provided for in the Ontario statute,[56] and recommended by the Ontario Law Reform Commission.[57] A similar, although not identical, provision is contained in the Manitoba statute.[58]

Accordingly, the Commission recommends:

1. *A lease should be considered frustrated from the date of expropriation where:*

   (a) all the interest of the lessee is expropriated, or

   (b) the expropriation renders the unexpropriated part of the lessee's interest unfit for the purposes of the lease.

2. *Where part of the lessee's interest is expropriated, the lessee's obligation to pay rent should be abated* pro tanto*, unless the expropriation renders the unexpropriated part of the lessee's interest unfit for the purpose of the lease.*

(c) *Mere possibility of renewal*

Account is now taken, in working out the value of a tenant's interest in a lease, of an option to renew but not of a mere expectation that the lease might be renewed.

The Ontario Law Reform Commission concluded that there should be no change in the law on the ground that the mere possibility of a renewal is "too speculative" a matter to warrant compensation.[59] The Ontario, Manitoba and federal statutes do not provide for taking mere possibility of renewal into account in determining value.

In the working paper we agreed with the Ontario Commission. Like that Commission,[60] we also proposed that disturbance damages should take into account reasonable prospects of renewal. We stated that we were prepared to make a distinction between valuation and disturbance damages in this respect, although that distinction might rest on no better ground than compromise.

---

54. R.S.B.C. 1960, c. 207, s. 41 (as amended S.B.C. 1970, c. 18, s. 2). A recent Ontario case applied the doctrine to an agreement to a lease. *See Re Dennis Commercial Properties Ltd. and Westmount Life Insurance Co.* (1969), 7 D.L.R. (3d) 214 and 8 D.L.R. (3d) 688. *See also Rosenblood v. Plastic & Allied Building Products Ltd.* (1969), 9 D.L.R. (3d) 123, at p. 128.

55. LPC 3 (1971), at p. 16.

56. S. 35.

57. Pp. 27-28.

58. S. 46.

59. P. 28.

60. P. 42.

The Vancouver Chapter of the Appraisal Institute of Canada pointed out that the failure to take reasonable prospects of renewal into account on valuation would result in harsh treatment for a tenant of long-standing, enjoying a good relationship with his landlord, who, because of that good relationship, had been somewhat less than businesslike in not obtaining an option to renew.

We agree with the Appraisal Institute. We have reconsidered our position and now propose that reasonable prospects of renewal should be taken into account on valuation. This view also has the merit of being consistent with the position we take later in respect of disturbance damages. While in some cases reasonable prospects of renewal may be difficult to prove, we do not see a problem with "speculative" claims. The onus of proving that such reasonable prospects existed will, of course, be on the tenant.

On this question of reasonable prospects of renewal, we think it only fair to mention that Professor Todd does not agree with our conclusion and prefers the position we took in the working paper. He feels that there would be too much uncertainty in establishing reasonable prospects of renewal and, even where such prospects could be established, normally the new rent would be at current rates, on the assumption that the landlord and tenant had negotiated as reasonable and prudent businessmen, so that the renewed lease would have no market value.

We believe that in some situations, where the parties are negotiating in a businesslike way, the new rent may be slightly lower than current rates. The landlord may be anxious to keep a satisfactory tenant and wish to avoid the expenses involved in obtaining a new tenant, as well as a possible temporary loss of rent, should his old tenant decide to move.

Accordingly, we recommend:

In the valuation of the term of a lease, the possibility of a renewal of the term where the tenant has no right to renewal, should be taken into account.

G. Mortgages

1. *Introduction*

The determination of compensation payable to a mortgagee on expropriation presents a special set of problems. The various kinds of mortgages, such as standard mortgages, discount mortgages, and participating mortgages, should be treated under a method of valuation which will provide a just result for all concerned - the mortgagee, the mortgagor and others with an interest in the land, and the expropriating authority.

The Commission has had special assistance in this area from Professor S.W. Hamilton, of the Faculty of Commerce and Business Administration at the University of British Columbia. He prepared a paper for the Commission, in which he proposed that mortgagees he compensated on the basis of the market value of their securities rather than on the traditional basis of the balance outstanding at the time of expropriation. His proposal was supported by Professor Todd. The Commission believes it has considerable advantages over the traditional approach and will be very interested in having comment on it from those in the various sectors of the mortgage business.

Compensation for mortgagees on the basis of market value was advocated

before the Clyne Commission. The Vancouver Board of Trade, in making its submission to the Clyne Commission, urged the adoption of market value for discounted mortgages.[61] The Clyne Report did not deal with mortgages as a separate problem. Under the heading of Valuation of Several Interests, however, that Report states that the "market value of the separate interests should be separately assessed ..."[62]

Since market value for mortgages would be a departure from the traditional method of paying the balance outstandimg, the report discusses the alternatives at some length. An appendix at the end of Part G of this chapter contains a series of illustrations, prepared by Professor Hamilton, in which the two methods are compared.

The problem of compensating mortgagees for interest loss during the time that they are reinvesting funds is a separate problem from valuation and is dealt with later under Disturbance Damages.

2. *What is a mortgage?*

A mortgage is a security for the performance of some obligation, most usually a debt. The mortgage document normally contains:

1. A contractual promise (referred to as the covenant) to repay money loaned, and

2. A transfer of property to the lender by way of security.

The property is returnable (redeemable) on repayment of the loan. Generally, while the mortgage is in existence and not in default, the borrower (mortgagor) is entitled to have possession of and use the property. The transfer of property, by way of mortgage security, involves transfer of title to that property to the lender (mortgagee). Should the mortgagor default, the mortgagee has thus two means of obtaining payment. He can realize on the security and he can sue on the personal promise to repay.

To the lender, the mortgage is an investment. In return for an immediate outlay of capital, he is entitled to be paid a sum, or more usually a series of sums, at some time, or times, in the future. The sum or sums to which he becomes entitled includes the return of the capital and the interest thereon. It is very much as if he had purchased an annuity for cash. The value of his investment in the market depends on the rate at which the capital will be repaid, the interest rate set in the mortgage, and the extent of risk. The mortgage investment always has a current market value, which will fluctuate with changes in the prevailing rates of interest. The market value of the mortgage will only be the same as the balance owing under the mortgage when the interest contracted for under the mortgage and the prevailing market rate for mortgages of similar risk are identical.

3. *The effect of expropriation*

Since expropriation will take away the mortgagee's security and will interfere with the relationship between the mortgagor and the mortgagee, what rights should

---

61. At pp. 20-21. *See* paras. 37 and 38.

62. P. 147.

the mortgagee be given in substitution? If rights are given to the mortgagee so as to create a legal relationship between the expropriating authority and the mortgagee, what should the consequences be for the mortgagor?

The present practice in British Columbia, which is the traditional position in jurisdictions which adopted the English *Lands Consolidation Clauses Act, 1845*,[63] is that the mortgagee is paid the balance outstanding (so long as that balance does not exceed the value of the land). The amount so paid is then deducted from the value of the land. The mortgagor is then entitled to what is left. The compensation received by the mortgagor will depend therefore, not on the value of the mortgage at the time of expropriation, but on the balance outstanding under the mortgage at that time.

4. *Methods of treatment*

There are three ways in which the expropriated mortgage may be treated:

(1) Assumption by the expropriating authority of the mortgagor's position,

(2) Payment to the mortgageeof the outstanding balance at the time of expropriation, and

(3) Payment to the mortgagee of the market value of his security at the time of expropriation.

(a) *Assumption by the expropriating authority of the mortgagor's position*

Here, the expropriating authority would assume the liabilities that existed under the mortgage and make the payments coming due until it was paid off. This could be provided for at the option of either the expropriating authority or the mortgagee, or both could have the option.

The consequence of this assumption would be to substantially alter the mortgage contract. The property has been removed as security and in its place there would be imposed on the expropriating authority a statutory obligation to pay. Whether this is a fair exchange would depend upon the continued financial solvency of the particular expropriating authority. Thus the position of a mortgagee may depend on which expropriating authority happened to take over the mortgage. Whether or not such assumption should relieve the mortgagor from his personal covenant to repay would be a matter which would require careful consideration.

Where the mortgagee would get his money through such an assumption, i.e., according to the terms of the mortgage, he could not generally complain, at least where the expropriating authority was the Provincial Government or an expropriating body whose financial prospects were not in question. In fact, in practically all cases he would be in a better position than before. He will now have repayment virtually guaranteed. For example, in the case of a Provincial Government expropriation a high risk second mortgage would be replaced by a low risk government guaranteed annuity. The result would be to enhance the capital value of the mortgage security and provide the mortgagee with a windfall at the expense of the taxpayer. The Government would be paying more than it should.

The Commission believes that mortgagees should be treated in the same way

63. *See* the *Lands Clauses Act*, R.S.B.C. 1960, c. 209, ss. 93-99.

as other persons whose interests in property have been expropriated. No one has ever seriously suggested that landlords should receive, instead of an immediate capital sum, the payments that their tenants would have made under their leases. Mortgagees should receive compensation in the form of an immediate capital payment.

(b) *Payment of the outstanding balance*

This is the traditional method, as has already been mentioned, and the one which has always been applied in this Province.

The Ontario, Manitoba and federal legislation all retain the outstanding balance method, although in Ontario a number of special provisions have been adopted to deal with some of the method's shortcomings.

The Ontario Law Reform Commission recommended that mortgagees should be entitled to be paid the outstanding balance out of the market value of the compensation.[64] That Commission recognized that this would be unfair in two situations:[65]

(i) *Difference in interest rates*

Where the prevailing interest rates at the time of expropriation are such that either the mortgagor or mortgagee would suffer a loss. Where prevailing rates were lower than the rate contracted for in the mortgage, the Ontario Commission recommended that the mortgagee receive disturbance damages for the loss he would sustain based on the difference between those rates and the period (if any) for which the principal payment was postponed, such period not to exceed five years.[66] Where prevailing rates were higher, the Commission recommended that the mortgagor should receive as disturbance damages the value of the difference in rates based on the balance of the term of the mortgage and the manner in which the principal was to be repaid.[67]

(ii) *Relief to mortgagor where deficiency*

The Ontario Commission noted that a purchaser might buy property with a small down payment at an inflated price or at the crest of a boom.[68] If the market value of such property, on subsequent expropriation, was less than the purchase price, the owner might lose part or all of his investment. Not only that, if the compensation was insufficient to pay off the mortgage, the owner would be liable to pay the deficiency to the mortgagee because of his personal covenant. The Ontario Commission concluded that nothing could be done for the owner in so far as the loss of his investment was concerned since "expropriating authorities should not have to protect purchasers from the vicissitudes of the market". It did recommend,

---

64. P. 31.

65. Pp. 32-34, 41-42.

66. P. 41. A provision to this effect is contained in s. 99 of the *Lands Clauses Act,* R.S.B.C. 1960, c. 209.

67. P. 42.

68. P. 32.

however:[69]

(1) Where the mortgage was a purchase money mortgage and the market value portion of the compensation was not sufficient to pay the amount outstanding on the mortgage, the mortgagor should be relieved of any liability on the covenant for the deficiency, and

(2) Where a bonus was paid on any mortgage, and there were insufficient funds to pay out the mortgagee, liability should be reduced by deducting the amount of the bonus from the deficiency.

The Ontario legislation implemented the above recommendations of the Ontario Commission, with one exception.[70] The statute provides that mortgagees shall be paid out of market value and damages for injurious affection,[71] whereas the Commission had recommended that mortgagees be entitled to be paid only out of the market value portion of the compensation.

The Federal legislation,[72] which adopts the outstanding balance principle, contains no special provisions, perhaps for constitutional reasons, to relieve the mortgagor from liability to his mortgagee for deficiencies. It does provide for the giving of disturbance damages to a mortgagor where prevailing rates are higher than the rate contained in the mortgage, but does not provide for damages to a mortgagee where the prevailing rates are lower.

(c) *Payment of the market value*

The Commission believes that the market value principle should be applied to the owners of lands free of encumbrances, to mortgagors, landlords and tenants, and the owners of easements and all other interests in land. Why should mortgagees be an exception? Why is it that they are exceptions in the Ontario and federal legislation?

There appear to be three reasons for the existence and retentirm of the traditional approach. First, expropriating authorities have been entitled to redeem mortgages under regulation based on the English *Lands Clauses Consolidation Act, 1845*.[73] The expropriating authorities were entitled to a discharge of the mortgage on payment of the principal and interest owing (and certain other costs and six months additional interest). Second, the outstanding balance method has the advantage of being readily understood and simple to determine. Third, there has been a kind of hypnotic fascination with the sum owed under the mortgage, even though that sum is payable by deferred payments. The mortgage has been viewed as an isolated contract rather than an investment.

Some of the shortcomings of the outstanding balance method have been met in Ontario by special legislative provisions. But the shortcomings are met by penalizing the expropriating authority. For example, if prevailing interest rates are

---

69. Pp. 32-33.

70. Ss. 17, 20.

71. S. 17(3).

72. Ss. 24(8), 30.

73. *See* the *Lands Clauses Act*, R.S.B.C. 1960, c. 209, ss. 93-99.

higher than the rate set in the mortgage, the mortgagee will be delighted to get the outstanding balance so he can reinvest at the higher rates. Expropriation will have resulted in the substitution of a more valuable investment for him. Meanwhile, the mortgagor does not lose out because he will get disturbance damages to compensate him for having now to pay higher mortgage rates than before. Without a provision to pay disturbance damage, as exists in Ontario, it would, of course, be the mortgagor who would suffer. The mortgagee's compensation, representing an amount greater than the market value of his security, would be deducted from the overall value of the property and the mortgagor would receive the balance.

Using the market value principle would avoid all the difficulties of trying to make the outstanding balance method fair by creating a number of complicated exceptions. It would also meet, to a large extent, the problems created by deficiencies, bonus clauses and participating mortgages.

For the market value principle to work, there has to be a market for mortgages. Is there such a market that will be satisfactory for the purposes of determining compensation for mortgagees? The Ontario Commission thought not, stating that "the mortgage market is a peculiar one and it may not be fair to subject mortgagees to its peculiarities",[74] but its report does not indicate whether an investigation of the mortgage market was carried out. Professor Hamilton, on the other hand, assures us that there is a mortgage market in British Columbia that is appropriate for this purpose. The working paper was sent to a number of lending institutions and others involved in the mortgage business for their views.

Some lending institutions may argue that the market value principle would not produce fair results for them based on their experience in the past twenty years. Many low interest long-term mortgages given fifteen or so years ago have been paid off, usually to enable purchasers to obtain fresh financing. No doubt the lending institutions are glad to get the outstanding balance in these situations, representing as it does considerably more than the market value of their security in these times of relatively high interest rates. One may well ask whether the lending institutions would become more enthusiastic about the market value principle if there was a substantial decline in interest rates.

Generally, the response to the working paper was in favour of applying the market value principle to mortgages. Dean White stated that he strongly supported Professor Hamilton's proposal and that he thought the Ontario provisions in respect of compensation for mortgages are "illogical and entirely inconsistent with the basic principle on which compensation is to be awarded". The Superintendent of a major life insurance company in the mortgage field said that he was in complete agreement with Professor Hamilton, commenting that there is "no logical reason to use market value of the real estate itself while some other yardstick is maintained for financial interests". The District Mortgage Manager of a major banking institution, which has a substantial mortgage portfolio in this Province, stated that "it is difficult to build up a strong argument against compensating mortgagees on the basis of market value", although he questioned the contention that a mortgage investment has a current value using the common definition as a price "a willing seller will accept from a willing buyer". The Commercial Mortgage Department of a large real estate firm wrote us that the market value method should be adopted, stating that "there is no question that a secondary mortgage market exists". On the other hand, a distinguished judge stated to us that he was "not persuaded that there is a sound reason for adopting the proposed market value principle", adding that such a

74. P. 31.

principle might "produce bad effects on corporate financing through bonds and debentures". A practising lawyer wrote us that "the general cost to the public of an inquiry as to the market value would exceed the value of the security itself and therefore is impractical". He said that he could see few inequities arising where a mortgage was paid on the basis of the outstanding balance. Professor W.F. Bowker, the Director of the Alberta Institute of Law Research and Reform, informed us that the Institute had spent considerable time on market value "and have indeed inclined toward it". The Institute, while recognizing that there is a market for housing mortgages, appears to be concerned over difficulties in establishing the market value of mortgages given for commercial purposes, such as those for business complexes and high-rises.

We have concluded that the market value principle should apply to mortgages and we so recommend.

Where the market value principle adopted, Professor Hamilton proposed that the mortgagor's liability on the personal covenant should come to an end and with this the Commission agrees.

What has been said about the valuation of mortgages also applies to agreements for sale. These two forms of security property should be dealt with in the proposed legislation as "security interests". A "security interest" should be defined as an interest in land that is held by its owner as a security for the payment of money, or the discharge of some other obligation, and include all mortgages and agreements for sale.

The Commission therefore recommends:

1. *Owners of a security interest should be paid the market value of the security.*

2. *All the rights of the owner of the security, and any collateral thereto, should be converted into a claim for compensation and the person who gave the security should be relieved from any claim for a deficiency.*

3. *A security interest should be defined as an interest in land that is held by its owner as a security for the payment of money, or the discharge of some other obligation, and includes all mortgages and agreements for sale.*

Apportionment - What should happen to a mortgage when only part of the mortgaged property is expropriated? The Ontario Law Reform Commission recommended:[75]

> Where only part of the mortgaged property is expropriated, the mortgagee should be entitled to be paid out of the compensation for the property taken a sum that would leave the ratio between the balance outstanding on the mortgage, after such payment, and the value of the mortgaged premises remaining the same as existed prior to the expropriation between the balance outstanding at that time and the value of the entire mortgaged property.

The Ontario Commission pointed out this formula could be applied where only part of a parcel of land is taken and also where a mortgage covered several or many parcels of land, contiguous or otherwise.

The Ontario legislation contains a provision implementing the recommendation,

---

75. P. 34.

with two modifications.[76] The statute provides that not only market value but damages for injurious affection should be taken into account in working out the ratio. There is also a proviso that payments made by the security holder after the date of expropriation or injurious affection should be taken into account.

Since claims for injurious affection may arise subsequent to the determination of the compensation payable to the mortgagee, it would appear preferable, for administrative reasons, not to take damages for injurious affection into account in determining the apportionment.

The Federal legislation also adopts the apportionment principle.[77] No reference is made to damages for injurious affection. The proviso in the federal provision differs from that in the Ontario statute, the former being confined to the interest element in any payment. This appears to mean that the capital portion of any payment made after expropriation would be taken into account in the compensation payable, in the case of an Ontario expropriation, and in the balance owing on the mortgage on the unexpropriated land, in the case of a federal expropriation.

Manitoba has a provision which is the same as that in the *Ontario Act*, except that the ratio is based on the compensation payable apart from disturbance damages.[78] This means that, in Manitoba, the value to the owner of any special economic advantage is taken into account.

This Commission recommends an apportionment provision, which is similar to that recommended by the Ontario Law Reform Commission:

> *Where only part of the property subject to a security interest is expropriated, the owner of that security interest should be entitled to be paid a sum that would leave the ratio between the market value of the security interest, after such payment, and the value of the secured premises remaining the same as existed prior to the expropriation between the market value of the security interest at that time and the value of the entire secured property.*

Should some special provision be made for collateral mortgages? One person suggested that they might be dealt with on some sort of apportionment basis. The mortgagee might, for example, be entitled to be paid out of the market value portion of his mortgage an amount that would leave the ratio between the debt secured and all the secured assets, after such payment, the same as existed prior to expropriation. Since there are such a variety of situations in which collateral mortgages can be given, and since the occasions in which such mortgages are expropriated are likely to be very few, we think it would be preferable to have collateral mortgages governed by the general mortgage provisions we propose. We do not, in any event, believe apportionment is a suitable concept in relation to collateral mortgages. The mortgagee should be entitled to the market value of his security interest, which might be the only security he holds. He can always re-negotiate the loan position with the borrower who gave the collateral mortgage. Legislation in other jurisdictions which we have studied makes no special provision for collateral mortgages.

APPENDIX

---

76. S. 17(6).

77. S. 24(8)(c).

78. S. 33(5).

Materials prepared by Professor S.W. Hamilton comparing the "market value" and "outstanding balance" methods of determining compensation for mortgagees:

1. *Definitions*

The "outstanding balance" is defined as the present value of all future mortgage payments discounted at the contract rate of interest.

The "market value" is defined as the present Value of all future mortgage payments discounted at the mortgage rate of interest for a given class (risk) of mortgage.

2. *Outstanding balance: Unfair situations*

The use of the outstanding balance, in its strict interpretation, creates a number of inequities, as illustrated below. (All illustrations in the Appendix are based on semi-annual compounding of interest.)

(a) *Original discount mortgages*

Consider the practice of writing "discount" or "bonus" mortgages. For example, a mortgagee lends $7,832 in cash but received a mortgage for $10,000, at 10 per cent in order to raise the real rate of interest (*see* Illustration 9). If the property were immediately expropriated, the mortgagee would recover $10,000 based on the outstanding balance of the mortgage. If a second mortgagee lends $7,832 in cash and receives a mortgage for $7,832 at 14 per cent which is the market rate, the second mortgagee would receive only $7,832 as an expropriation award. While the practice of initiating "bonus" mortgages is not as common as it was ten years ago, a similar situation may arise in different forms today.

(b) *Assignee discount mortgages*

Consider the case of an investor purchasing a five year old existing mortgage. The mortgage has a remaining term of 20 years at a contract rate of 10 per cent. The outstanding balance at the date of purchase is $18,798 and the purchase price is $20,159 reflecting a general decline in market interest rates over the past five years.[79] If the property were immediately expropriated, the purchaser of the mortgage would receive based on the outstanding balance only $18,798, having just invested $20,159. This is a common situation arising whenever market rates for mortgages are changing over a period of time. As the secondary market for mortgages develops, the situation where mortgagees have purchased and sold mortgages at market value rather than the outstanding balance will become increasingly common.

(c) *Implicit discount mortgages*

One further situation involving implicit bonus financing should be mentioned and this refers to vendor financing involved in the sale of property (*see* Illustration 10). The illustration represents a common practice among vendors. Whether the bonus is implicit or explicit does not alter the fact that a bonus exists in the mortgage.

(d) *Participation mortgages*

---

79. It has been assumed that the mortgage is not one subject to s. 10 of the *Interest Act*, R.S.C. 1970, c. I-18, *e.g.*, the mortgagor is a corporation.

A final weakness of the outstanding balance as a basis of compensation arises from the practice of writing mortgages containing a participation clause. For example, a mortgage loan containing a clause that the mortgagee receives 2 per cent of the gross income from the property in addition to the contract rate on the mortgage. Using the strict interpretation of the outstanding balance, the mortgagee would receive no consideration for the 2 per cent participation when, in fact, the mortgagee has sacrificed something else in the mortgage to obtain this participation.

(e) *Standard mortgages*

It may be argued that the above illustrations are in some way different from the position of a mortgagee who advances the full face value of the mortgage and does not assign the mortgage. Unfortunately, even in this case, valuation based on the outstanding balance will create inequities as between mortgagees facing expropriation at different times in a business cycle. If the current rate for new mortgages exceeds the contract rate on an existing mortgage, the mortgagee is made better off by the expropriation award based on the outstanding balance (*see* Illustration 1). If the current rates are below the contract rate, the mortgagee would be made worse off through expropriation where the award is based on the outstanding balance (*see* Illustration 3). Only in the event that current rates are similar to the existing contract rate would mortgagees be placed in equal positions through expropriation.

3. *Market Value*

(a) *General*

The reasons for dwelling on the weaknesses of the outstanding balance as a basis of compensation were not so much to discredit the approach but rather to identify the weaknesses in order to find a preferred solution. It will be demonstrated that awards based on the market value of the mortgage will overcome each of the weaknesses referred to above in the use of the outstanding balance method.

If the basis of compensating a mortgagee is the *market value* of the mortgage at the date of notice of expropriation, the resulting awards will be more equitable between all parties concerned. Before examining the various situations in relation to the market value, several general observations can be made. While the determination of the outstanding balance on a mortgage is a relatively simple matter subject to little disagreement, the determination of the market value is somewhat more difficult, and subject to appreciably more controversy. In order to determine the market value, some evidence as to the market interest rate for a mortgage in a given risk class is required. To the extent that there is disagreement, it will likely rest with the determination of the appropriate interest rate. While the secondary market for mortgages is not as active as that for bonds and stocks, sufficient volume and expertise exists to resolve the problem. Most certainly, the market information concerning mortgages is more readily available than the corresponding market data for real property, either fee simple or leasehold estates. Several companies specialize in the purchase and placement of mortgage contracts and could provide expert evidence much as an appraiser produces expert evidence on real property.

It is frequently argued that a mortgagee may receive less than the funds advanced and outstanding if the award is based on market value (*see* Illustration 2). This point relates to the rights of the mortgagee prior to expropriation. A mortgagee has a right to receive a series of annuity payments, and aside from any remedies contingent on default, the mortgagee generally does not have a claim for the outstanding balance. It is the time series of payments that is expropriated, not the

capital sum as represented by the outstanding balance. Using the market value as a basis of expropriation enables the mortgagee to reinstate himself in a position of equivalent risk and earnings after expropriation. The market value basis produces awards which are equitable in the case of original discount mortgages (*see* Illustration 9), in the case of assignee discount mortgages (*see* Illustrations 2 and 4), in the case of implicit discount mortgages (*see* Illustration 10) and in the case of participation mortgages.

(b) *The "call clause"*

The use of the "call clause" in mortgages (commonly a five year clause) reduces the difference in the awards based on the two approaches. In general the shorter the term for any given mortgages, the less will be the difference in awards based on the two approaches. (Compare Illustrations 1, 2, 5, 6).

(c) *Mortgagee's preference*

Mortgagees in general may prefer the use of the outstanding balance rather than the market value approach to valuing mortgages. This is due in part to the simplicity in determining the outstanding balance, the fact they receive the amount of the cash advanced in the case of standard mortgages and in part because the economy has experienced a long period of rising interest rates. In a period of rising interest rates, awards based on the outstanding balance will be greater than those based on the market value. In a period of falling interest rates, mortgagees in general would find the market value to be a more acceptable basis of compensation.

In many cases mortgages do not continue to full maturity, usually because the property has been sold and refinancing is necessary to facilitate the purchase. Thus, even in a period of rising interest rates, where it is to the advantage of mortgagors to retain their existing mortgages, a mortgagee may anticipate payment in full, based on the outstanding balance, some years prior to maturity. In these cases, mortgagees may perceive themselves as being placed at a disadvantage if expropriation awards are based on the market value rather than the outstanding balance. This will arise since the market value represents the present value of future payments discounted at a market rate rather than the (lower) contract rate. Two responses to the mortgagee's preference in this respect may be made here. First, for every mortgage that is paid out prior to maturity in a period of rising interest rates, a far larger proportion would be paid in advance during periods of declining interest rates. This would imply that in a period of declining interest rates, mortgagees would be better off receiving awards based on market value relative to awards based on the outstanding balance. Second, if prepayment of mortgages is a common practice, the market discount rate should reflect this fact. If investors expect mortgages to be paid prior to maturity, this information will be incorporated into their investment decision by the discount (interest) rate.

(d) *The Province's Second Mortgage Loans*

Special mention should be made concerning Government of British Columbia Second Mortgage Loans. These loans represent a unique mortgage in that they are (generally) non-transferable and issued at a lower than normal interest rate. Since the mortgagee in these cases would be the provincial government, the problem of compensation could be resolved through a general arrangement with the province to base the claim on the outstanding balance rather than market value. This suggestion reflects the extremely unique nature of these mortgages, and the relationship of the mortgagee and the expropriating parties.

4. *Illustrations of Mortgage Valuation Under Each Approach*

The following illustrations are presented to indicate the differences which would exist under the two approaches. (These examples are not intended to reflect current market conditions and ignore disturbance claims.)

Basic data for Illustrations 1 to 8

Original mortgage loan	$10,000
Amortization term	25 years
Contract interest rate	8 per cent compounded semi-annually
Monthly payments	$76.32

Expropriation occurs at the time of the 24th payment.

Illustration 1

No five year call clause, current mortgage rates 10 per cent compounded semi-annually, award based on the outstanding balance.

> Award = $9,721.78 which is the present value of the remaining 276 payments of $76.32 discounted at 8 per cent semi-annually.

If the mortgagee reinvested $9721.78 for 23 years at 10 per cent semi-annually (current rate), he would receive a monthly annuity of $88.69. Hence he is made better off by $12.37 per month for 276 months.

Illustration 2

No five year call clause, current rates for loans of similar risk is 10 per cent semi-annually, award based on the "Market Value" of the mortgage.

> Award = $8323.31 which is the present value of the remaining 276 payments of $76.32 discounted at 10 per cent semi-annually.

If the mortgagee reinvested $8323.31 for 23 years at 10 per cent semi-annually, he would receive a monthly annuity of $76.32, the same as before expropriation.

Illustration 3

No five year call clause, current interest rates for loan of similar risk is 6 per cent semi-annually, award based on outstanding balance.

> Award = $9721.78 (same as Illustration 1). If the mortgagee reinvested $9721.78 for 23 years at 6 per cent semi-annually, he would receive a monthly annuity of $64.49. Hence he is worse off by $11.83 per month for 276 months.

Illustration 4

No five year call clause, current rates for loans of similar risk is 6 per cent semi-annually, award based on "Market Value" of the mortgage.

> Award = $11,530.43

If the mortgagee reinvests $11,530.43 for 23 years at 6 per cent semi-annually,

he will receive a monthly annuity of $76.32, the same as before expropriation.

Illustration 5

Five year clause, current interest rates for loans of similar risk is 10 per cent semi-annually, award based on the outstanding balance.

Award = $9721.78 (same as Illustration 1).

The five year clause has no impact if the award is based on the outstanding balance.

Illustration 6

Five year call clause, current interest rates for loans of similar risk is 10 per cent semi-annually, award based on the market value.

Award = $9237.75

The award is greater than in Illustration 2 since, in the absence of expropriation, the mortgagee had a claim to receive $76.32 for 60 months plus the outstanding balance ($9213.50) due at the end of the 60th month. If the investor were to reinvest the $9237.75 for 23 years with a 3 year call, he would receive $76.32 per month plus $9213.50 at the end of 3 years, exactly his position before expropriation. In practice, the mortgagee would likely reinvest with a new five year call, not a three year call and require monthly payments to fully amortize the mortgage in 25 years.

Illustration 7

Five year call clause, current interest rates for mortgages of similar risk is 6 per cent compounded semi-annually, award based on outstanding balance.

Award = $9721.78 (same as Illustrations 1 and 3).

Illustration 8

Five year call clause, current interest rates for mortgages of similar risk is 6 per cent compounded semi-annually, award based on market value.

Award = $10,237.04

If the mortgagee were to reinvest $10,237.04 for 23 years at 6 per cent semi-annually with a three year call he would receive $76.32 per month for 36 months plus $9213.50 at the end of three years.

SUMMARY OF ILLUSTRATIONS 1 TO 8

	Current Rate (Per Cent)	Outstanding Balance	Market Value	Difference
No call clause	10	$9,721.78	$8,323.31	$1,398.47
	6	9,721.78	11,530.43	-1,808.65
	8	9,721.78	9,721.78	Nil
Five year call	10	9,721.78	9,237.75	484.03
	6	9,721.78	10,237.04	-515.26
	8	9,721.78	9,721.78	Nil

1. If interest rates remain constant, either method of valuation gives the same answer.

2. As the mortgage term declines (or alternatively the time until the call takes effect) the difference in the awards based on the two methods is reduced. In the case of 10 per cent current interest, no call, the difference is $1398.47, while with the call, it is only $484.03. Hence the shorter the time to maturity, the less the difference between the two approaches.

Bonus and Discount Mortgages

Illustration 9

Consider the following case which arises quite commonly in the market but not in the form which is presented below. A borrower obtains a cash advance of $7832 to be secured with a mortgage. The borrower is offered two alternative repayment plans. The first is to promise to repay $7832 at 14 per cent compounded semi-annually over 20 years with monthly payments; the second is to promise to repay $10,000 at 10 per cent compounded semi-annually over 20 years with monthly payments. In either case the monthly payments are $95.17 for 240 months.

Assume that two years later the property supporting the mortgage is expropriated and that the current mortgage rate for this risk class of mortgage is now 16 per cent compounded semi-annually. Four possible awards might be considered for the mortgagee.

(a) Award based on the outstanding balance where the borrower had selected the first alternative.

Award = $7657 which is the present value of the 216 remaining monthly payments of $95.17 discounted at 14 per cent compounded semiannually.

(b) Award based on the outstanding balance where the borrower selected the second alternative.

Award = $9643 which is the present value of the 216 remaining monthly payments of $95.17 discounted at 10 per cent compounded semi-annually.

(c) Award based on the market value given the first alternative was selected.

Award = $6910 which is the present value of the 216 remaining monthly payments of $95.17 discounted at 16 per cent compounded semi-annually.

(d) Award based on Market Value given the second alternative was selected.

Award = $6910 which again is the present value of the 216 remaining monthly payments of $95.17 discounted at 16 per cent compounded semi-annually.

SUMMARY OF ILLUSTRATION 9

	Straight Mortgage	Bonus Mortgage
Outstanding balance	$7,657	$9,643
Market value	6,910	6,910

Using the market value as a basis of compensation, the mortgagee receives the same award independent of the form in which the mortgage is written while using the outstanding balance as a basis of compensation, a difference of $1986 exists due solely to the form in which the mortgage is written.

Illustration 10

As previously mentioned, bonus mortgages seldom arise in the form presented above. The situation arises in a more subtle manner. Assume a vendor is selling a home subject to an existing first mortgage of $20,000. The vender is offering the home for $33,000 with $3,000 down payment and a vendor second mortgage of $10,000 at 10 per cent compounded semi-annually with a 20 year term. Alternatively the vendor is prepared to sell for $30,832 cash to the existing first mortgage. This is the common manner in which a bonused mortgage arises. If the second mortgage were granted and the current rate for such a mortgage was 14 per cent compounded semi-annually, the vendor could sell the second mortgage and realize $7832 cash plus the $3000 down payment. Hence his willingness to accept $10,832 cash to the existing first mortgage.

CHAPTER XII DISTURBANCE DAMAGES

A. General

In Chapter X, the Commission proposed that the currently applied "value to the owner" formula for compensation should be replaced by a more precise formula of market value and disturbance damages. "Value to the owner", it will be recalled, has been interpreted by the courts over the last hundred years to include disturbance damages of certain kinds.

The purpose of this chapter is to deal with a number of particular problems in disturbance damage.

As a general proposition, however, the Commission would propose that compensation should be paid for all costs, expenses and losses reasonably attributable to the disturbance.

The Commission believes that it would produce the best result if, in disputes over disturbance damage, where the expense or loss has not yet been incurred, the determination of the disputed item of disturbance damage be deferred until expense or loss is actually incurred. While the parties should always have the right to agree that there be a deferral, we believe that either party should be entitled to have the determination of disturbance damages deferred. There would need to be some maximum time limitation for the deferral. We would propose one year from the date of expropriation, or such longer period as the arbitration tribunal might, on application, fix in any particular case. A special provision for deferral with respect to business losses is recommended later. The deferral of determination of such items should not preclude the determination by settlement or arbitration of other elements in the compensation payable.

The Commission therefore recommends:

1. *Compensation should be paid for all costs, expenses and losses reasonably attributable to the disturbance.*

2. *In the event of a dispute over an item of disturbance damage where the loss or expense has not yet been incurred, either party to the expropriation proceedings should be entitled to have the determination of the disputed item deferred until the expense or loss is incurred, or the elapse of a period of one year from the date of expropriation or of such further period fixed by the arbitration tribunal, whichever occurs first.*

B. Percentage Allowance for Compulsory Taking

A 10 per cent allowance was included in "value to the owner" at one time because the taking was compulsory. Later, the allowance was justified as covering contingencies, particularly in matters of business disturbance. Now the position seems to be, so far as this jurisdiction is concerned, that the percentage will only be included in special circumstances.

The market value plus disturbance damage formula makes unnecessary the retention of the percentage allowance. The Clyne[1] and Ontario Law Reform[2]

1. P. 98.

2. Pp. 35-36.

Commissions both recommended that no percentage allowance be given. The Ontario Commission, however, made one exception. It recommended a five per cent allowance be paid to all expropriated homeowners, who were ordinarily resident in the home expropriated, provided that the home was not up for sale at the date of expropriation.[3]

The reasons given for this five per cent allowance were to compensate for uprooting the home-owner, the expenditure of time and effort in finding a new home, and the many miscellaneous small expenses which might not be claimed under the traditional heads of disturbance damage.[4]

The Ontario statute gives effect to that recommendation.[5] The Ontario provision is adopted in the Manitoba statute.[6]

We think there is merit in making a special allowance of this kind to expropriated home-owners, but we believe dispossessed residential tenants should also receive compensation. We would propose that such tenants receive an allowance equal to three months' rent.

One expropriating authority did not consider that this proposal was justified on the ground that the owner should receive full compensation under the other heads of disturbance damage. For the reasons stated above, we do not agree. Without a provision such as we propose, we believe that many residents of expropriated homes might well feel that they were not fairly treated with respect to the costs and inconvenience of finding a new home. An individual submitted that 10 per cent would be a more appropriate figure, but we believe that five per cent would generally do justice. A criticism made of the five per cent allowance was that it is discriminatory in the sense that owners of expensive houses would receive more than those of less expensive homes. It was suggested that there should be a sliding scale (say, 5 per cent on the first $20,000 of market value and 2 ½ per cent on the balance) or a fixed amount (say $500). We recognize that the elements that the percentage allowance are intended to cover will not always be proportional to the value of the home, although the miscellaneous expenses involved in moving will tend to be more in the case of a larger home. Fixed amounts become out of date and should, we think, be avoided. We believe that the straight percentage allowance is the simplest and, overall, the fairest solution.

Accordingly, the Commission recommends:

1. *No percentage allowance should be given on expropriations, except to owner-occupiers of residences.*

2. *To compensate for the inconvenience and the cost of finding another residence, there should he payable, in addition to relocation expenses:*

   (a) *to owner-occupiers of residences, an allowance of five per cent of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided such part was not being offered for sale on the date of expropriation, and*

---

3. P. 36.

4. *Ibid.*

5. S. 18(l)(a)(i).

6. S. 28(i)(a).

(b) to tenants of residences, an allowance equal to three months' rent of the premises expropriated.

C. Relocation Expenses

The Commission believes it would be helpful to set out in the proposed statute the kind of relocation costs that should be payable. These would include moving costs, and the legal and survey and other costs necessarily incurred in acquiring other premises, but which would not be reflected in any increment to the value of those premises.

This is done in the Ontario[7] and Manitoba[8] statutes, which we have used as a guide.

Accordingly, the Commission recommends:

Reasonable relocation costs should be paid as part of disturbance damages, including:

(a) moving costs, and

(b) legal and survey costs and other costs necessarily incurred in acquiring other premises, but which would not be reflected in any increment to the value of those premises.

D. Business Losses

1. *Deferral*

The Commission has already proposed that, in the case of disputes over items of disturbance where the expense or loss has not yet been incurred, that either party to the expropriation should be entitled to have the determination deferred until the expense or loss was incurred, or some specified period elapsed, whichever occurred earlier.

In the case of business loss, the only method of properly determining the extent of the loss may be on the basis of the experience of the relocated business. We think deferral is particularly advantageous in those circumstances. An appropriate period would be, in the absence of an agreement between the parties, the earlier of the expiration of two years from the date of expropriation or nine months from the time the business has moved and been in operation. In our working paper, we proposed six months instead of nine, but it was pointed out to us that six months is not sufficiently long to provide a proper measure for businesses that are seasonal.

The Ontario[9] and Manitoba[10] statutes have deferral provisions. The former has the optional period we propose, except it uses a three-year period instead of two years as one of the alternatives. The Manitoba statute, on the other hand, has a single deferral period based on the operation of the relocated business for six months.

---

7. S. 18(l)(b) and (c), and s. 18(2). *See also* s. 13(2)(d).

8. S. 28 (1) (h) and (c), and s. 28 (3)

9. S. 19(1). 2. S. 29(2). 3. S. 19(2). 4. S. 29(1).

10. S. 29 (2).

An expropriating authority expressed its concern to us over the imprudent businessman who chooses a poor new location and who then expects to recoup his losses. It was suggested that there should be a legislative requirement that the businessman choose a comparable location. We do not think such a requirement practical. It must be left up to the businessman to decide, in his best judgment, where he should relocate. We feel confident that the arbitration tribunal, in applying the case law on business loss, would not allow any unreasonable claim under this head.

Accordingly, we recommend:

Unless the owner and expropriating authority otherwise agree, business losses should not be determined until the business has moved and been in operation for nine months or until a two-year period from the date of expropriation has elapsed, whichever occurs first.

2. *Necessity to Relocate*

We do not believe that the owner of a business should be forced to relocate in order to recover business loss if it is not feasible for him to do so. Where it is not feasible for him to relocate, he should be compensated for the loss of his business. This entitlement should only apply where he is being compensated for his land on the basis of its existing use.

We do not go so far as the Ontario Commission in this respect. It recommended that business loss be payable even if the owner did not wish to relocate.[11] The Ontario legislation only provides for compensation on a test of feasibility.[12] What is feasible should be left to the arbitration tribunal to decide. If a businessman is to be entitled to disturbance damage for business loss of this kind, he must relocate his business if it is feasible for him to do so. It is up to him to choose between relocating and foregoing any claim for this kind of business loss. In the case of an elderly owner, who has neither the energy or desire to relocate, we would expect that the tribunal would find it unfeasible for him to start up his business again. It was this last situation which motivated the Ontario Commission to recommend compensation for business loss where the owner was unwilling to relocate.

The compensation for the loss of a business would, of course, not be the value of his whole business: it should be for the loss suffered. Tangible assets can be liquidated and some recovery will normally be made from their sale. So far as there is a deficiency, there will be a loss. Intangible assets, generally goodwill, cannot be liquidated, and compensation should be payable for that loss. Compensation should be paid, it is clear, on the basis of the value of the business as a "going concern". What is being compensated for is permanent loss, it should be noted, as opposed to temporary loss, which arises when relocation takes place.

Accordingly, the Commission recommends:

Where it is not feasible for an owner of a business to relocate there should be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing use value of the land.

E. Legal and Appraisal Costs

---

11. S.19 (2).

12. S.29 (1).

Expropriation proceedings cannot be regarded in the same light as litigation between two private parties, where the loser will usually be responsible for the costs.

Every owner should be entitled to his reasonably incurred initial legal and appraisal costs. once he has been served with a notice of intention to expropriate, he should be entitled to legal advice from his own solicitor as to his rights and an independent appraisal as to the value of the interest to be taken, both at the expense of the expropriating authority.

We believe that he should continue to be entitled to his reasonably incurred legal and appraisal costs during the negotiations prior to the commencement of arbitration proceedings. There is no reason why he should be out of pocket at this stage as a result of having to pay legal or appraisal fees.

The question is whether there is some point at which he has to assume some element of risk for costs if he chooses to proceed further. We believe there is. Once arbitration proceedings have been commenced, if the amount ultimately awarded does not exceed the statutory offer or a subsequent offer before the hearing of the arbitration tribunal, costs should be in the discretion of the tribunal making the award. The tribunal should, for example, be able to hold that each party pay its own costs, or even that the owner pay the costs of the expropriating authority, if it considers that the owner's claim was unreasonable. In all other cases where an award is made, he should be entitled to his reasonable costs.

The costs should be taxable under the *Legal Professions Act* and, in determining the legal costs, any arrangement for a contingency fee should be disregarded. If our proposal as to costs is implemented, Marginal Rule 983e of the Supreme Court Rules should be removed from the Rules.[13]

A number of expropriating authorities felt, as might be expected, that our proposal is overly generous to the expropriated owner. We stress, once again, that the expropriated owner is not in the position of an ordinary litigant. It may be that entitling him to costs as we propose will tend in some cases to prolong negotiation. In other cases, however, if he receives good legal and appraisal advice, the proceedings may well be shortened. In any event, fairness to the owner in this respect heavily outweighs any disadvantages that may result. The safeguards are that the costs, whether legal, appraisal or of some other nature, should be required to have been reasonably incurred and would be taxable under the *Legal Professions Act.*

This proposal does not go as far as that contained in the federal statute. Under that provision, the owner is entitled to solicitor and client costs if the award exceeds the offer, but apparently to costs on a party and party basis if the award does not exceed the offer providing
his claim was not unreasonable. If his claim was found to be unreasonable, then costs are discretionary.[14]

Under the Ontario statute, where the award is 85 per cent or more than the statutory offer, the owner is entitled to his reasonable legal, appraisal and other costs actually incurred. Where the award is less, the *Land Compensation Board* may make such order

---

13. Rule 10 AA (M.R. 983e), Order LXV, of the *Supreme Court Rules, 1961.*

14. S. 33.

for costs on a party and party basis as it considers appropriate.[15]

We think the approach we propose is fairest.

Accordingly, the Commission recommends:

1. *The legal, appraisal and other costs reasonably incurred by the person entitled to compensation in asserting a claim for such compensation prior to the institution of proceedings to determine compensation should be paid by the expropriating authority.*

2. *The legal, appraisal and other costs reasonably incurred after the commencement of such proceedings should be paid on the following basis:*

   (a) *where the amount awarded exceeds the amount offered, the costs of the party entitled to compensation be paid by the expropriating authority,*

   (b) *where the amount awarded does not exceed the offer, the costs should be in the discretion of the tribunal making the award.*

3. *The above costs should be taxable under the* Legal Professions Act.

4. *In determining the legal costs, any arrangement for a contingency fee should be disregarded.*

F. Mortgages

The market value approach to the valuation of mortgages makes unnecessary special provisions similar to those that exist in the Ontario,[16] Manitoba[17] and Federal[18] statutes with respect to compensating for the difference in prevailing interest rates at the time of expropriation and the mortgage rate contracted for.

Mortgagees should be entitled to compensation for the loss of interest while reinvesting their capital. The standard prepayment period for such interest is three months[19] and we would propose that interest be given for that period unless the mortgage provides for a shorter one or no period at all. The rate should be that set in the mortgage.

A vendor under an agreement for sale should also be entitled to disturbance damages of this kind.

Accordingly, the Commission recommends:

The owner of a security interest should receive, as disturbance damages, the lesser of three months' interest or the amount of the bonus (or its equivalent in notice) for prepayment provided for in the security, whether or not the principal owing under the security was due at the date of expropriation.

G. Tenants

---

15. Ss. 27, 36.

16. S. 20.

17. S. 33.

18. S. 24(8).

19. *See* the statutory provisions referred to above. *See also* s. 10 of the *Interest Act*.

In dealing with the valuation of a tenant's interest under a lease, we concluded that prospects of renewal of a lease, apart from options to renew, should not be taken into account. We also consider that such prospects should be given regard in disturbance damages.

The Commission believes that the position of tenants in respect of disturbance should be set out in the proposed statute. A similar recommendation was made by the Ontario Commission,[20] and a provision was included in the Ontario statute[21] carrying out the recommendation. A similar provision is in the Manitoba statute,[22] except it contains certain notable differences. Under the Manitoba provision, tenant's damages do not include reasonable prospects of renewal and it is expressly stated that the disturbance damages payable to a tenant are not to be less than the tenant's reasonably incurred moving costs. We prefer the Ontario provision.

The Commission recommends:

In determining the compensation for disturbance to tenants, regard should be had to:

(a) the length of the term,

(b) the portion of the tern remaining,

(c) any rights to renew the tenancy or the reasonable prospects of renewal,

(d) in the case of a business, the nature of the business; and

(e) the extent of the tenant's investment in the premises.

---

20. P. 42.

21. S. 18(2)

22. S. 28(3).

CHAPTER XIII INJURIOUS AFFECTION

A. Introduction

In addition to the compensation that is recoverable under the present law of the Province for the value of expropriated land, compensation is also recoverable in some circumstances for consequential damage to other property. The term used to describe such consequential damage is "injurious affection". It has developed a very technical meaning and the remedy has definite limitations.[1]

Loss in value of properties adjacent to public projects may occur in a variety of ways. The building of a penitentiary or an expressway may drive residential values down. Access to a public road may be cut off completely or substantially changed. Vibrations from the operation of a subway may affect the foundations of a building, or the noise of aircraft landing and taking off may make living in homes near an airport intolerable. A person's view may be affected by bridge abuttments. Where a business is conducted on the land involved, not only may there be a loss in the value of the land for commercial purposes but there may be income loss to the business.

The acquisition of property involves risk, which every purchaser recognizes. Property values are going to move one way or another in response to changes in the economic and social environment of the area where the property is located. No one can guarantee the property owner what his land will be worth in 10 or 20 years time.

The question arises, however, as to the extent the individual owning property should be protected from losses in value resulting from projects undertaken for the public benefit. There are, of course, many situations in which the value of land will change as a result of government intervention. The Ontario Law Reform Commission stated the problem of the individual affected by such intervention in this way:[2]

> Government action in the way of planning legislation and planned development raises the complex problem of the relation of the individual and the state where the later interferes in some way with the former. Where the individual suffers by such interference, should he be compensated? Put another way, to what extent should the state be immune from liability? On the other hand, where the individual benefits from the government action, should he compensate the state?
>
> For example, the enactment of zoning regulations may increase or decrease market value. Should the owner who suffers a loss because of such an enactment be indemnified? Should the owner whose lands increase in value contribute to the state the benefit he has received through the regulation?
>
> The same questions arise out of planned developments, such as the building of highways, subways, or schools, or carrying out an urban renewal project. If the announcement or the carrying out of the development depresses market prices, should owners be compensated for their losses? Or if values rise as a result,

1. *See* Challies, Chapter 10.

2. P. 43.

should the owner pass the benefit to the state?

The Ontario Commission then concluded that a study of the interrelationship between the individual and the state in those matters was beyond the scope of its study on the basis for compensation in expropriation. It then confined itself to reviewing the relatively small field occupied by the existing law of injurious affection in Ontario.

The law of injurious affection has obviously no application to an owner where all his land has been expropriated. It only applies to unexpropriated lands, and these fall into two categories:

1. Where there has been a partial taking of the owner's land, the law of injurious affection applies to the lands that have not been taken, and

2. Where no lands of a particular owner have been taken, the law of injurious affection applies to his lands.

The two categories will be discussed separately. The law relating to each of them is not at all the same.

The statutory basis for the law of injurious affection is to be found in the English *Lands Clauses Consolidation Act, 1845*[3] and this Province's counterpart, the *Lands Clauses Act.*

Section 64 of the British Columbia statute provides that, in estimating the compensation for expropriated property, regard should be had

> ... not only to the value of the land ... but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers ...

This provision applies only where there is a partial taking.

The provision which is the basis for an injurious affection action, where there is no taking, is section 69 of the provincial statute, also adopted from the English enactment of 1845.[4] It begins:

> If any party is entitled to any compensation in respect of any land or interest therein which has been taken for or injuriously affected by the execution of the works ...

The section then goes on to provide a procedure for determining the compensation payable. While, at first glance, it might be thought that section 69 merely provided a procedure for determining the compensation referred to in section 64, the courts have long ago declared, and it is now well-established, that section 69 will support a claim for injurious affection where there has been no taking.

The *Lands Clauses Act* gives no guidance as to the meaning of "injurious affection" or to the kind of circumstances in which it should apply. It is judge-made law that informs us on these matters.

---

3. 8 & 9 Vict., c. 18, s. 63.

4. 8 & 9 Vict., c. 18, s. 68.

In British Columbia, the situation has become complicated by the fact that some expropriating statutes exempt the application of the *Lands Clauses Act*. Section 16 (2a) of the *Highway Act*, which was enacted in 1964, provides:

> The *Lands Clauses Act* does not apply to any proceedings under or pursuant to this Act.

Similar provisions are contained in the *Department of Highways Act*[5] and the *Vancouver Charter*.[6] The effect of these exempting provisions in the *Highway Act* and the *Department of Highways Act* on the law of injurious affection is not clear. Unlike those two statutes, the *Vancouver Charter* has provisions relating to injurious affection.[7]

Since this Commission is proposing that the *Lands Clauses Act* be repealed and that there be a new expropriation statute of general application, it is of vital importance that the right to damages for injurious affection be preserved in the new statute.

The Commission firmly believes that, as a minimum, the law of injurious affection as it now exists, should be retained. It also believes that certain improvements could be made and proposals are set out below for that purpose.

Surely we live in a kind of society today where, if an individual suffers losses because of undertakings carried out in the public interest, the public interest requires that the individual be compensated. Society cannot afford not to compensate him.

It should be mentioned here that the Provincial Government established in 1957 what is called the Air, Light and View Committee for the purpose of examining claims by property owners for certain kinds of losses which are akin to those for which the law of injurious affection provides a remedy. The Committee was set up by a resolution of the British Columbia Toll Highways and Bridges Authority to evaluate claims related to property damage by way of loss of air, light and view in respect to realty affected by projects constructed by the Authority and approaches thereto chargeable to the Authority.

The Air, Light and View Committee now consists of the Deputy Minister of Highways, who acts as chairman, the Chief Property Negotiator in the Department of Highways, and the Surveyor of Taxes in the Real Property Taxation Branch of the Department of Finance. We understand it is the present practice for the Committee to make a recommendation to the Minister of Highways, which, if the Minister approves it, goes forward to the Lieutenant-Governor in Council for his consideration. The Lieutenant-Governor in Council may then authorize the making of an "*ex gratia*" payment to the claimant. The Air, Light and View Committee has established some general guidelines on which to base its considerations.

Thought should be given to whether the general expropriation statute proposed by this Commission should contain a provision entitling persons, as of right, to claim compensation for the kind of losses for which the Lieutenant-Governor in Council is now giving compensation in the form of "*ex gratia*" payments. It may be that the application of the law of injurious affection generally, as proposed by the

---

5. R.S.B.C. 1960, c. 103, s. 37B (as amended S.B.C. 1964, c. 16, s. 5).

6. S.B.C. 1953, c. 55, s. 557.

7. Ss. 541-544.

Commission, would cover some of these claims. Thought should also be given to whether or not the function of the Air, Light and View Committee could be appropriately carried out by the general tribunal proposed by the Commission.

B. Partial Takings

The courts have developed three general rules in respect of claims for injurious affection on partial takings: [8]

(1) The lands taken need not be contiguous to those remaining, but they must be owned by the same person and the same unified ownership must enhance the value of the lands remaining.

(2) If the remaining property falls in value by reason of the execution or use of the works, the owner is entitled to compensation regardless of whether the injury would have been actionable at common law if not authorized by statute.

(3) The injury must be caused by the construction or user of the works on the lands taken and not on some other lands.

Two problems require attention, one relating to severance damage and the other to method of computation.

1. *Severance damage*

The cases have generally regarded severance as a form of injurious affection, although the statutes authorizing compensation have not always been clear on this point. Section 64 of the *Lands Clauses Act* speaks of damage "by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands ..." Any doubt would be removed by providing explicitly that injury arising from severance be included within the meaning of injurious affection. The Commission would propose that a provision of this kind be contained in the proposed statute. The Ontario Commission so recommended,[9] and the Ontario statute so provides.[10]

2. *Method of computation*

"*Before and after*" - What is called the "before and after" test is now generally applied in working out compensation payable in partial takings.

How the "before and after" test operates was described in the report of the Ontario Law Reform Commission, as follows:[11]

> Initially, the procedure for determining compensation in partial taking cases consisted of taking the value of the lands expropriated and then adding to that

---

8. *See* Challies, at p. 139 *et seq.*

9. P. 44.

10. S. 1(e).

11. P. 45. The Ontario statute, however, appears to make the "before and after" test the exception. S. 14(3) provides that the test is to be used in certain circumstances. Does this mean that the test will not generally be applied?

> sum the damages occasioned to the lands retained. However, it was soon realized that a more accurate method would be to value the whole parcel before expropriation and subtract from that sum the value of the remaining lands, taking into account any benefit or detriment to those remaining lands resulting from the project for which the expropriation was made. This latter method of working out compensation is referred to as the "before and after" test and is now used by the courts in all cases where it is practical to do so. There is one instance where it is not used; where a very small percentage of the land is taken, the value of the remainder may not change. In such a case, the authorities pay compensation on the basis of the lands taken ard not on the basis of the injury to the owner's entire holding.

Like the Ontario Commission, we consider the "before and after" test to be generally satisfactory. We believe that the test should be incorporated into the proposed statute to ensure that it would be applied.

Appropriate as it may be for general application, the "before and after" test should, nevertheless, be subject to qualification. There are two problems.

(a) *Small percentage taken*

As pointed out by the Ontario Commission, there may be instances where such a small percentage of the land is taken that the value of the remainder may not charge. For example, a few feet might be taken for highway widening from the edge of a field, which was part of a 160-acre farm, without affecting the overall value of the farm. The farmer should, in the view of this Commission, be entitled to the value of what has been taken.

(b) *Set-off*

If the value of the remaining land is enhanced by the taking, should the resulting benefit be set-off against the value of the land taken and the damages for injurious affection, or only against the damages for injurious affection? The arguments for the alternatives are set out in the report of the Ontario Commission:[12]

> There is a strong argument to be made in favour of a set-off against the total sum. The claimant is entitled to recover for any loss which he suffers, but if his remaining land is benefited by the works beyond any loss which he suffers by way of diminution of the size of his parcel, he is subject to no material loss. The reduction in quantity is off-set by an increase in quality. The result should be that the owner is indemnified for his loss, although he will not receive the value of the lands taken.

The opposing position was stated:[13]

> However, there are a number of arguments against setting-off the benefit against the overall compensation. First of all, it may be said that it is unjust for the owner not to receive at least the value of the land taken. Second, to permit set-off against the value of the lands taken would place the owner in an unfair position with respect to persons whose lands have benefited but are not expropriated at all. In so far as expropriated lands are concerned, the Commission has already recommended that the effect of the planned development be disregarded. Otherwise the owner would receive more than indemnification for his loss; he

12. Pp. 45-46.

13. P. 46.

> would obtain a windfall. In coming to that recommendation, the Commission recognized that owners whose lands were not expropriated at all and benefited from the work would obtain an enhancement of their values. In the case of a partial taking, the owner will receive the market value of the land taken disregarding the effect of the work. In respect to the land that he retains, the owner should, in principle, be in the same position as those whose lands were not expropriated at all. If his benefit exceeds his damages, then the same considerations which apply to the unexpropriated owner should apply to him.

We are in agreement with the position taken by the Ontario Commission. The Clyne Commission also took that view. The Clyne Report stated that, if the taker felt the result was unjust, it could elect to take the whole property (under a special provision proposed by the Clyne Commission), and pay compensation accordingly.[14] Both the Ontario[15] and Manitoba[16] statutes contain provisions stating that the benefit is to be set-off only against the damages for injurious affection.

Both the "small percentage" and the set-off problems could be solved by providing that in no case should the owner receive less than the market value of the land taken. The Commission recommends that a proviso to this effect follow immediately after the "before and after" provision it proposed earlier.

To sum up, the Commission recommends:

1. *It should be made clear that, on a partial taking, damages for injurious affection include damages for severance.*

2. *The "before and after" test should be incorporated into the proposed statute so as to have general application in partial takings, except as stated in paragraph (3) below.*

3. *In determining the compensation payable in respect of market value and injurious affection (if any) on a partial taking, the owner should be entitled to not less than the market value of the land taken.*

C. Where No Lands Taken

1. *General*

An owner may, in certain circumstances, be able to claim damages where his lands are injuriously affected by the activities of an expropriating authority, although none of his land has been expropriated.

An owner's claim for damages for injurious affection, where no land of his has been taken, is not, strictly speaking, a claim of compensation for expropriated property. The remedy has been said to be[17]

> ... really a question of tort law and of the interaction of the nuisance concept with the defences of statutory authority and the immunity of the Crown.

It might be argued, therefore, that such claims should not be dealt with in a general expropriation statute. The federal statute, for example, contains no provisions with

---

14. Pp. 123-i24.

15. S. 23.

16. S. 32.

17. Report of the Ontario Law Reform Commission, at p. 46.

respect to injurious affection where there is no taking. Presumably it leaves the law unchanged.

Traditionally, however, the law on compensation for injurious affection, where no land has been taken, has been treated as a part of expropriation law. Indeed, it owes its existence to a provision in the English *Lands Clauses Consolidation Act, 1845*. In British Columbia today, the equivalent provision, as mentioned earlier in the chapter, still exists.[18] It is section 69 of the *Lands Clauses Act*. Since our Commission proposes the repeal of the *Lands Clauses Act*, it is essential that we deal with this subject. The reports of the Clyne and Ontario Law Reform Commissions both made recommendations with respect to it, and the Ontario and Manitoba statutes have provisions relating to it.

The law on this topic is both stunted and confused. As mentioned previously, it is not at all the same as the law relating to injurious affection on partial takings. In developing the law where there is no taking, in the latter part of the last century, the English courts were on occasion overcome by a fear that they might be opening the door to wide and indefinite claims beyond the contemplation of Parliament. The result was the creation of a number of restrictive rules by the English courts, which have, on the whole, been adopted by the Canadian judiciary. These rules were, to some extent, based on narrow interpretation and there have been a number of instances where courts have been able to avoid their application by distinguishing the particular statutory provisions which they were interpreting from those that gave rise to the rules. The consequence has been a mixture of conflict, confusion and lack of logic.

The position in British Columbia is made more complicated by the fact that several statutes which confer expropriating powers provide that the *Lands Clauses Act* does not apply to their exercise. The consequences of these exempting provisions cannot be said to be certain. These statutes were referred to earlier in this chapter.[19]

There is an excellent exposition on this area of the law contained in an article entitled "The Mystique of Injurious Affection in the Law of Expropriation", written by one of our advisers, Professor Eric C.E. Todd, and published in the 1967 Centennial Edition of the University of British Columbia Law Review.[20] We highly recommend it to those who wish to grapple closely with this subject.

There are four restrictive rules that have been laid down by the courts, for application to "no taking" situations.[21]

1. Damage must result from an act rendered lawful by the statutory powers of the authority.

2. The damage must be such as would have been actionable at common law, but for the statutory powers.

3. The damage must be an inquiry to the land itself and not a personal injury or an injury to business or trade.

---

18. *Supra*, at P. 349 *et seq.*

19. *Supra*, at P. 350 *et seq.*

20. At P. 127.

21. Challies, at p. 133 *et seq.*

4. The damage must be occasioned by the construction of the public work, not by its user.

Since the first two rules state the same proposition, there are really only three rules altogether. The need for these rules will be discussed separately.

2. *The actionable rule* (Rules 1 and 2)

The Clyne Report states:[22]

> The rationale of the first two conditions is that an owner whose land has been injured by acts, tortious if done without statutory authority, should be given a right to compensation in place of the right of action removed by the statute. The limitation imposed by these two conditions is, in my opinion, sound. These two conditions, incidentally, introduce the common law of private nuisance with its requirement that injury done must be peculiar to the claimant's land, over and above any general injury suffered by all land in the area.

The problem is whether this rule is too restrictive. Are there situations where a person suffers a loss for which he ought to be compensated, although the activities which cause the loss would not have been actionable in the absence of statutory authority.

Let us take two examples:

1. X owns a $60,000 home, which faces on a pleasant shady avenue. On the other side of the avenue is a row of housing which backs on to a busy two-lane road, Market Street. The municipality in which the home is located decides to turn Market Street into a six-lane expressway. To accomplish this the municipality acquires the properties on either side of Market Street and takes down the houses on those properties. X's home now faces a six-lane expressway. The effect of this is to drive down the value of his house to $50,000, not because of any nuisance or trespass that his property will become subject to but because the location is not as desirable as it was before. It is accepted that he can prove he has suffered a loss of $10,000.

   Is this a loss which X should bear? Or should society, through the municipality, recompense him? When a person buys property does he assume a risk that its value may fall because of public (or private) developments in the area?

2. In a rural area, Y owns a small general store and service station, located on an old highway. A new highway is constructed nearby, siphoning off much of the traffic. The loss in business to Y is such that he is forced to close down his store.

   Was the possibility of such a loss a risk which Y assumed when he went into business?

In these two examples, if there had been a partial taking, no matter how small, from the properties of X and Y, both would receive full compensation for their losses. The law of injurious affection as it now is with respect to situations in which there is no taking would leave X and Y with no compensation.

Professor Todd has been critical of the position taken in the Clyne Report. He stated in his article:[23]

---

22. P. 114.

23. P. 143 *et seq.*

> The actionable rule equates the liability of statutory bodies which cause injurious affection to neighbouring land and the liability of private landowners who cause similar damage without the sanction of statutory powers. It thus appears to be both logical and just. However there are two arguments which may be advanced against the rule, one historical and the other modern.

The historical argument is simply that the courts, in developing the actionable rule, did not carry out the intentions of Parliament. Professor Todd concluded that an examination of the legislative background shows that Parliament assumed that "the promoters and speculators involved in the development of railways would pay in full measure for any damage to private property caused by their activities". The "modern" argument is that the equating of liability for damage done under statutory authority for public purposes with liability of private persons for similar damage under the law of nuisance is not sound. There is an alternative premise, says Professor Todd:[24]

> ... as a matter of public policy it may be preferable that the general public, rather than a private landowner, should bear the burden of a loss which occurs without "fault" on the part of either.

Professor Todd would discard the actionable rule. He believes that any provable economic loss should be recoverable, providing it is not too remote. He concluded in his article that the owner should be entitled to full indemnity for his economic loss, subject to the following limitations:[25]

1. The onus of proof of economic loss should be on the claimant,

2. The general rules of remoteness of damage should apply,

3. There should be a limited period for bringing action after the commencement of the use of the particular public work alleged to have caused the damage, or after any substantial change in the nature or use of the work,

4. The value of any economic benefit accruing to the claimant as a result of the public work should be offset against his economic damage, the onus of proving such benefit to be on the person or body from whom the damages are claimed,

5. The authority from whom damages are claimed should have the option of paying the damages or buying the property, with the owner having the right to refuse to sell if he foregoes his claim for damages.

The Ontario Law Reform Commission avoided facing the issue raised by Professor Todd by stating:[26]

> Until such time as an extensive study has been made of the general problem of immunity from liability because of statutory powers, the Commission believes that placing the authority in the same position as a private person is a satisfactory,

---

24. P. 145.

25. P. 167 *et seq.*

26. P. 48.

if temporary, solution.

In its working paper, the Commission stated that it believed the general proposition suggested by Professor Todd merited serious consideration and put it forward for comment.

Submissions received on behalf of the Civil Liberties Association, a member of the Civil Justice Subsection, and the Council of the Forest Industries of British Columbia were in favour of Professor Todd's proposal. On the other hand, expropriating authorities were generally opposed to it. It was said that not all claims for economic loss should be compensable. Their view was that there is no justification for giving compensation in respect of the two examples we set out. A business, it was stated, has "no vested interest in the passing trade and should not be able to claim for loss of business if traffic moves to a new route or fails to patronize the business because of circuitous travel". Compensation should not be payable where a business loss is caused by temporarily blocking off a street for repaving or some other local improvement. Nor should it be payable where traffic flow is changed from two directions to one-way and a business on one side suffers a loss. These losses, it was argued, should be at the risk of the owner of the business. Fears were expressed that compensation based solely on economic loss could impose intolerable financial burdens on expropriating authorities (and on the taxpayer), with the result that many worthwhile projects might never be undertaken.

Dean White submitted that the position taken in the Clyne Report is to be preferred to that of Professor Todd. He stated:

> The actionable rule puts comparable actions in the public sector on all fours with the private sector and in so doing it provides a rough measure of justice as between the expropriating authority and the owner. Further, it would maintain consistency between similar cases in the public sector. For example, outside the field of expropriation where the actions of governmental agencies depreciate the value of land in a general way by land use controls or changes in taxation or changes in tariffs, no compensation is payable and it would not seem to be fair to impose a particular burden on expropriating authorities by making them pay compensation for action which would not give rise to damages if carried out by private owners.

We have concluded that it would be wrong for us in this Report to recommend compensation based purely on economic loss. The economic consequences to the community would have to be carefully investigated before such a recommendation could be made and such an investigation should cover the whole question of economic loss falling on the individual citizen as the result of state intervention. Such an investigation is obviously outside the scope of this study. If it were not for our recommendation that the *Lands Clauses Act* be repealed, we would have been inclined to omit from this Report any consideration of the law of injurious affection in situations where there has been no taking. It is not an expropriation problem. In some instances where such a claim might lie, there may have been no expropriations at all.

The position we are taking does not mean that we prefer the view of the Clyne Report to that of Professor Todd. We are simply not prepared to reach a final conclusion on the question in this report.

We think that, for the time being, the best solution is to retain the present law of injurious affection, with the modifications and clarification which are recommended in the following parts of this chapter.

To sum up, the Commission recommends:

The law of injurious affection, as it now exists in this Province with respect to lands from which there has been no taking, should be retained, except in so far as the Commission recommends modification.

If this recommendation is implemented the need for the Air, Light and View Committee established by the Provincial Government, referred to in the introduction to this chapter, would be greatly diminished. Most of the claims it deals with now would, it appears, be covered by the law of injurious affection as we propose that law should be. Such claims should, in the future, be dealt with by the general arbitration tribunal recommended in this report under its general jurisdiction. The Provincial Government may well wish to keep the Committee in existence to deal with special hardship cases for which there would be no legal liability under the legislation we propose. We think there would be merit in retaining the Committee for that purpose and, in fact, there is something to be said for other expropriating authorities considering setting up some similar mechanisms for dealing with special hardship situations for which no legal liability would exist on their part.

3. *The nature of the damage rule* (Rule 3)

Is the rule which excludes personal and business damage in "no taking" situations justifiable? Such damage is recoverable on a partial taking. Is there any merit in this inconsistency?

The Clyne Commission appears to have been of two minds on this issue. Its report states:[27]

> ... this principle is generally sound since to allow claims for personal and business injury might render the cost of essential public development prohibitive. However, in cases where an owner suffers a loss of profit of a permanent nature which is not fully reflected in a diminished market value of the property, there can be severe hardship inflicted without redress.

The Clyne Report then recommended the recovery of compensation for loss of business profits of a permanent nature, subject to a proviso against duplication of compensation awarded for diminished market value of the property.[28]

Loss which was not "permanent" should be borne where it fell since it was "the unavoidable price of the use of land by the state for essential public purposes".

The Ontario Law Reform Commission concluded that personal and business damage should be recoverable in "no taking" situations, there being no justification for treating owners in those situations differently from those where there have been partial takings.[29] Its recommendation was implemented in the Ontario statute.[30]

We agree with the position taken in Ontario. It is neither rational or just to deny compensation for business loss. To do so creates a distinction between damage to the land, in the form of lowering its commercial value, and personal loss to the

---

27. P. 115.

28. Pp. 115-116. *See also* pp. 118-119.

29. Pp. 48-49.

30. S. 1(e)(ii) b.

owner of the business. This distinction is, as Professor Todd has noted, "both artificial and unworkable".[31]

Accordingly, the Commission recommends:

Compensation should be payable for personal and business damage in all claims for damages for injurious affection, if in the absence of statutory authority, liability would have existed.

This recommendation should be read in relation to the discussion which preceded on the actionable rule.[32]

4. *The construction rule* (Rule 4)

Should the owner who suffers a loss as a result of the use of the works be indemnified? He is indemnified now under the present law, on a partial taking. And, both where there is a partial taking and where there is no taking, he can recover for damage caused by the *construction* of the works.

The rule which excludes loss resulting from use of the works, in no taking situations, was first enunciated in England, but the courts have gone out of their way in that country to distinguish the case that gave rise to the rule. Indeed, it has been argued that the case which gave rise to the rule was decided by an incorrect interpretation of the particular statute before the court.[33]

The extent of the rule's application in Canadian jurisdictions is both doubtful and varied. The Clyne Report concluded that the rule did not apply in British Columbia and that it should not be applicable. The Hon. J.V. Clyne stated:[34]

> I consider there is no rational basis for limiting compensation to injurious affection resulting from the construction of works and not from their maintenance and continued operation. I therefore do not recommend the enactment of this fourth condition in the proposed statute.

The Ontario Law Reform Commission did not agree, recommending that, in cases where there is no taking, expropriating authorities should remain exempt from liability where damage is caused by the use of the work. The Ontario statute follows that recommendation. The report of the Ontario Commission states:[35]

> ... the cost of imposing such a liability is such an unknown and might be so great that the burden on the public purse would be unacceptable. In addition, it might prevent the carrying out of numbers of projects which are essential from the community point of view. For example, the use of a newly-completed ten-lane highway in Metropolitan Toronto might cause damage in varying degrees to lands not only immediately adjacent to the highway but those 100 yards, a quarter of a mile, or even further distant. When one considers a wide swath of potential claimants along both sides of the highway for so long as the highway is used, it is clear that potential liability could be great.

---

31. P. 161.

32. *Supra*, at p. 360 *et seq.*

33. Pp. 146-154.

34. P. 118.

35. P. 49.

> No doubt a study on statutory immunity would examine the cost of extending the liability of expropriating authorities in this way. Until some such study reveals what the cost is likely to be, the Commission feels it cannot recommend that liability be extended in cases where there has been no taking to include coverage of damages flowing from the use of the works.

We prefer the position taken by the Clyne Commission. We agree with the statement in the Scott Report,[36] which provided the basis for modern expropriation legislation both in England and Canada, that "there is no rational distinction between damage caused by construction and damage caused by user".

This Commission agrees with the Clyne Report that the rule should not operate in this Province. To ensure that it does not, the proposed legislation should make clear that the expropriating authorities are liable for damage caused by the construction and the use of the works in cases where there is no taking.

Accordingly, the Commission recommends:

In cases where there is no taking, expropriating authorities should be liable for damages caused by the construction and use of the works.

Again, this recommendation should be read in relation to the discussion, which preceded earlier, on the actionable rule. Damages would only be recoverable where the expropriating authority would, in the absence of statutory authority, have been liable at common law. We think that is a fair result.

---

36. First and Second Reports of the Committee Dealing with the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes, 1918, Cd. 8998 and Cd. 9229. *See also* Todd, at pp. 154-155.

CHAPTER XIV HOME FOR A HOME

The expression "home for a home" has an appealing ring to it that is difficult to resist.

What does it mean? It could mean that the expropriated home-owner finds, or is found, an alternative home which the expropriating authority would then give him the funds to purchase, or purchase for him. Instead of giving the expropriated home-owner the market value for the expropriated home and leaving him to use funds as he sees fit, he has, in effect, an alternative home bought for him.

Such a method of compensating could not, of course, be a complete substitute for the awarding of market value. There are occasions when an expropriated home-owner may not wish to buy another home. He might prefer, for example, to rent an apartment or live with relatives. At the most, therefore, a "home for a home" provision as described above would have to be an optional method of compensating.

It has already been stated that the underlying philosophy of the Commission's formula for compensation is economic reinstatement. The determination of the market value of an expropriated home will normally be largely based on the market value of similar homes. Is not this sufficient? Once he receives his compensation, the expropriated owner should therefore be in a position to buy an equivalent home if he so chooses. If he wishes to buy a cheaper home and use the funds left over for some other purpose that is his business. So it is also, if he buys a more expensive house by adding in funds of his own to the compensation he receives. These choices naturally depend on normal financing being available.

It may be that there are some situations where the payment of market value (and disturbance damages) will not do justice. It is for this reason that the Ontario, Manitoba and federal statutes, all of which adopt the market value principle, contain "home for a home" provisions. These provisions, which are set out and compared in detail later, provide for the payment of additional compensation to enable the expropriated home-owner to acquire a new home, where the market value of the property taken is insufficient for that purpose. Thus, where these provisions come into operation, the owner receives market value and an additional amount. It is not clear from these provisions what circumstances must exist before they become applicable. The application of the Ontario provision in one respect is now before the Supreme Court of Canada.[1]

The "home for a home" provisions are set out below:

Ontario[2] - The Board shall, *after fixing the market value* of lands for *residential* purposes, award such additional amount of compensation as in the *opinion of the Board* is *necessary* to enable the owner to relocate his residence in accommodation that is at *least equivalent* to that expropriated.

---

1. *Re Judson and Governors of the University of Toronto* (1970), 11 D.L.R. (3d) 22.

2. S. 15. *See also* s. 13(2)(d).

Manitoba[3] - The due compensation for land occupied by the owner for his residence shall include an amount, in *addition* to the *market value* of the land (and value of unmarketable improvements), *necessary* to enable the owner to acquire other land that will afford him residential accommodation *at least equivalent* to that expropriated.

Federal[4] - Where the value *is less* than the *minimum amount sufficient* to enable the owner to relocate his residence in premises *reasonably equivalent* the difference *shall be added to the value.*

Notes

1. In all three cases the compensation is to be paid as an *additional* amount to market value (i.e., the "home for a home" principle is not substituted as a basic formula for market value, but operates to supplement it).

2. In Ontario, the Board is given a discretion.

3. In Ontario and Manitoba, the amount awardable is such as is *necessary* to enable the owner to relocate in premises that are *at least equivalent.* Under the federal statute, the amount awardable is such as is *sufficient* to enable relocation in premises *reasonably equivalent.*

4. All three provisions could apply to tenants as well as persons who have "owned" their homes. "Owner" is defined in the Ontario and federal statutes so as to expressly include tenants, and in the Manitoba statute so as to include any person with an estate or interest in land or in actual occupation of land.

5. None of the provisions expressly require actual relocation or a bona fide intention to relocate.

The Ontario "home for a home" provision, which was the first of these provisions to be enacted, was not recommended by the Ontario Law Reform Commission in the form that it appears.

The Ontario Commission pointed out that there were two special problems, which usually, but not exclusively, occurred in urban renewal projects, where the payment of market value alone would be insufficient. That Commission noted.[5]

> Fair compensation for housing in substandard or blighted areas may not be sufficient to place persons dispossessed by expropriations in what the government may regard as adequate accommodation consistent with its general housing policies and programmes.

It recognized that market values in areas that become subject to urban renewal projects might become depressed and that the market value of housing on the periphery of the renewal area may rise relatively to other alternative housing, as a substantial number of the expropriated owners might wish to stay in the same general neighbourhood.

The Ontario Commission gave a concrete example:[6]

> Take as an example a retired couple in their sixties who have lived for years in

---

3. S. 26(2)(b).

4. S. 24(6).

5. P. 56.

6. Pp. 57-58.

> an area that has now become blighted. They have paid off the mortgage before retirement and can thus manage to live there on their low income of, say, $200 or $250 a month. Their house is expropriated for $10,000. The couple do not wish to rent but want to buy another home. Suppose that a suitable house of a minimum standard could be obtained for not less than $15,000, are the couple to be forced to take a mortgage for the difference? And what if their very limited income would not permit the financing of such a mortgage? What of the increase in property tax and in other items that they will have to bear in maintaining themselves in a more expensive home?

The Commission then asked what kind of assistance should be given:[7]

> If assistance is to be given in these cases, the question is what should be its nature and its extent. The most generous help would be to make an outright grant to the owner-occupier of the difference in value between the expropriated property and the new property. However, it may be that this would be considered by many to be an undeserved windfall. On the other hand, loan assistance might be made available to whatever extent is needed, having regard to the personal circumstances of the particular owner-occupier. Such a loan could be secured by a mortgage on the new property and be either at a low rate of interest or interest-free.

After referring to several assistance programmes that were then operating in Ontario, the Commission concluded:[8]

> Financial assistance to place dispossessed persons in better accommodation than they had previously is entirely distinct from the payment of adequate compensation for the property taken. If the recommendations of this Report were implemented, owners should receive a just price for their homes, whether or not they are located in urban renewal areas and whether or not they are substandard. They should also receive adequate compensation in the form of damages to cover the cost of finding and moving to new premises.
>
> The compensation received should thus be sufficient to reinstate them in equivalent premises. However, as was pointed out earlier, it is socially desirable to reinstate persons dispossessed from substandard housing in superior housing. The question is to what extent and in what manner should the improvement in accommodation be financially assisted. This is really a problem in social welfare and should be kept apart from the payment of compensation for the property taken.

It then recommended:[9]

> 1. In addition to providing fair compensation for property expropriated and damages for disturbance as recommended in this Report, the legislation should require expropriating authorities to ensure that financial relocation programmes are available to meet the special needs of persons being dispossessed in urban renewal projects;
>
> 2. Such financial relocation programmes should be available to persons dispossessed by other types of expropriation where like problems arise.

The Ontario (and Manitoba and federal) legislation did not follow this

---

7. P. 58.

8. P. 59.

9. P. 60.

recommendation. Instead of requiring the separate establishment of relocation programmes, as recommended, legislation was introduced which included within the compensation formula a rather vague "home for a home" provision.

In its working paper, the Commission stated that it was inclined to propose the adoption of something like the Ontario "home for a home" provision as a means of ensuring that justice will be done. It indicated, however, that it might be useful to lay down some guidelines as to when the provision should be applicable in view of the problems which may arise under the "home for a home" provisions. Some of these problems are outlined below:

1. *Bona fide intention to purchase*

Are the home for a home provisions going to be applied only where an owner purchases a new home, or at least has a *bona fide* intention of so doing? How is the amount to be determined unless a new home is purchased? At what point in compensation proceedings is the determination of the additional amount in the "home for a home" provisions to take place? Those are questions which are not yet resolved.

What should be the purpose of a "home for a home" provision? Should it only come into operation in special circumstances to assist those who have received fair compensation for the property taken but who need additional funds to acquire a new home? If so, a case can be made for requiring relocation in such a new home, or at least a demonstrated intention to so relocate. On the other hand, is it fair that the owner who meets such requirements should receive compensation while the owner who chooses to make other arrangements for his future accommodation, such as living in an apartment or with relatives, should not?

2. *Improved housing*

Where substandard housing is expropriated (usually but not necessarily in an urban renewal area), it is socially desirable to relocate the owner-occupier in a better standard of housing, which will have a higher market value than the property expropriated. This is a problem in subsidization of improved housing. Do the "home for a home" provisions apply in such situations?

It would appear that the Ontario and Manitoba provisions could be applied. They both refer to the payment of additional compensation to enable relocation in premises that are at least equivalent to those expropriated. The federal legislation may not, however, be adequate for this purpose, unless it is generously interpreted. It refers to relocation in "reasonably equivalent" premises.

In the working paper, we stated that we had some doubt as to whether subsidization of improved housing should be included in the formula for compensation for expropriation. Certainly expropriated home-owners should have the opportunity to relocate in what would he generally regarded as adequate housing. But there is much to be said for the view of the Ontario Commission that the financial assistance for this purpose should be under a relocation programme that is distinct from the formula for compensation for the property taken.

Nevertheless, there are arguments in favour of giving the arbitration tribunal jurisdiction to award additional compensation. It would ensure uniform treatment by expropriating authorities throughout the Province: it would have the administrative advantage of avoiding the creation of a multiplicity of relocation

programmes and the hiring of persons to administer them.

If a "home for a home" provision was to be used for subsidizing improved housing, should there be some criteria to guide the tribunal? For example, should the legislation state the assistance is available to enable relocation in "adequate" housing, or in housing that meets generally accepted minimum standards? The Commission expressed the view in the working paper that the tribunal should be entitled to some direction on this particular issue and that a "home for a home" provision should give more guidance than simply stating, as the Ontario provision does, that the additional compensation shall be whatever is *necessary* to enable relocation in premises that are *at least equivalent.*

3. *Shopping around*

Are the "home for a home" provisions going to result in expropriated home-owners shopping around for somewhat better housing and making a claim for an additional amount to enable them to relocate in premises that are "at least" or "reasonably" equivalent? Is a person whose home is expropriated for $60,000 going to be able to successfully claim $5,000 in addition when he buys a $65,000 house to relocate? Suppose he lives in a small community where the home which is nearest to being equivalent has a value of $65,000? Suppose that owner chooses to purchase a superior house for $75,000, should he be able to argue that $65,000 (out of the $75,000) was equivalent reinstatement?

The Commission does not think that the "home for a home" provision should become applicable in these kinds of situations. Certainly it should not be regarded as an invitation to shop for something better. It may be that the use of the word "necessary" in the Ontario and Manitoba provision will rule out shopping around. If the provision were limited to the giving of assistance for the purchase of housing that meets generally recognized minimum standards, the difficulty would be avoided. But such a limitation might undesirably restrict the scope of the provision.

4. *Nearby housing*

The market value of similar housing immediately outside the periphery of the area under expropriation may rise relatively to the market value of other alternative housing, and a substantial number of the expropriated owners may wish to stay in the same general neighbourhood.

A similar problem in rising values of equivalent housing occurs when the values of unexpropriated homes in the same neighbourhood rises because of the beneficial effect in the market of the particular planned development (say a rapid transit operation). The effect of the planned development is not to be taken into account in determining the value of the expropriated home (under the Ontario, Federal and Manitoba statutes), yet the market value of an unexpropriated but equivalent home may have risen. Has such a home ceased to be equivalent - because of the advantage it will have in being close to the rapid transit? Does equivalence depend on the state of things before the planned development had an effect on market values? The Ontario provision may be wide enough to enable additional compensation to be paid in the above situations.

5. *Delay*

There is a time-gap problem, caused by the period which can occur between the date of valuation and the date of purchase of the new home. While interest payable

on the compensation, and continued use of the expropriated premises are factors that may be off-set against the loss that can result from the rising-price phenomenon, this particular problem could be solved by the "home for a home" provisions.

An extreme example of this situation is the *Judson* case, which came before the Ontario Court of Appeal in 1970[10] and is now before the Supreme Court of Canada. The date of valuation was April, 1963 but the owners had remained in possession (and not bought a new house) until March, 1969. During the 47-month period, it was established that prices for comparable homes had increased at one per cent a month. The Ontario Municipal Board awarded the owners additional compensation under the "home for a home" provision of 47 per cent of the market value. For the Judsons this meant an additional $9,200. However, the Court of Appeal reversed the Ontario Municipal Board's decision on the ground that the date for determining the additional compensation was the date for determining compensation generally - i.e., in April, 1963.[11]

Should the "home for a home" provision be adapted to clearly take care of the Judson kind of situation? One feels sympathy for persons who, whether out of inertia or nostalgia, or lack of means (because the compensation has not been paid or settled), remain in their old home as long as possible. However, a better solution may be found in the improved procedures which have been proposed earlier. Under the proposed procedures, the expropriating authority must, within three months of the expropriation, offer to pay immediately, and without prejudice to the owner's rights to claim more, 100 per cent of the market value of the lands taken. This will place the owner in a position to buy a new home. In addition, expropriating authorities should encourage owners to find new premises at an early stage as a matter of policy, and warn them of the danger of being caught in a rising market.

6. *Tenants*

Since, in theory, the Ontario provision could be applied to tenants, in what sort of actual circumstances would tenants be claiming additional compensation under that provision? Perhaps where the rent of alternative accommodation available is higher? Or in order to subsidize an improvement from substandard rental accommodation to that which would be regarded as the generally accepted minimum standard?

The Commission has already recommended that tenants should receive the equivalent of three months' rent by way of disturbance damages to assist them to relocate. May tenants also need assistance under the "home for a home" provision in addition to this?

7. *Loss of equity*

Where an owner had a heavily mortgaged house, it would be possible that his interest would have no market value. He might, for example, have bought the property for a small down payment at an inflated price, giving the vendor a large second mortgage at high interest. He could receive no compensation in the form of "market value" and would thus lose his investment. This situation was referred to earlier in the report, in dealing with mortgage valuation.

---

10. *Re Judson and Governors of the University of Toronto* (1970), 11 D.L.R. (3d) 22.

11. *Ibid.*, at pp. 27-28. The Commission received word on the day after this Report was completed that, on December 21, 1971, the Supreme Court of Canada affirmed the decision of the Ontario Court of Appeal on this point.

While his investment was undoubtedly a bad risk, he may have been desperate for accommodation for his family and had no other real alternative.

All the "home for a home" provisions would appear to authorize the giving of compensation which enable him to make a similarly bad investment. If he had no intention of purchasing a second time, it is not clear whether the provisions would enable him to recoup, at least to some extent, his lost investment.

8. *Farms*

Where a farm includes residential premises, there would appear to be no reason why the "home for a home" provisions should not apply to the residential portion of the farm. The Commission agrees that this should be the case.

In its working paper, the Commission proposed that a provision similar to that in Ontario should be adopted, but suggested that there should be some statutory guidelines as to the circumstances in which the provision should be applicable.

One solicitor for an expropriating authority was opposed to a "home for a home" provision on the ground that "it would be a dangerous step to make provisions so that the amount of compensation would be related to the financial situation of the owner". Referring to the problem we raised under "loss of equity", he applied the same reasoning. He stated that the question of assistance in such cases should be referred to some welfare or social assistance agency or department, adding that to leave it to the compensation tribunal "would lead to no end of work and result in inconsistencies and inequalities which surely is not a desirable prospect to contemplate". Other expropriating authorities, accepting the basic principle of a "home for a home" provision, felt the owner should have a *bona fide* intention to relocate for the reason that the purpose of the provision should be to give assistance in cases of demonstrated need. One major expropriating authority stated that our "home for a home" proposal was similar to its present practices.

We have concluded that a "home for a home" provision will ensure that justice is done to the expropriated home-owner who is dispossessed. The question of statutory guidelines we have found difficult. In the end, we have come to the conclusion that, rather than attempt to lay down guidelines, it would be best to leave the arbitration tribunal to apply the provision on the basis of what would be reasonable in each case.

The Commission therefore recommends:

There should be a "home for a home" provision in the proposed statute which would empower the arbitration tribunal, in the case of an owner-occupied residence, to award such compensation, in addition to the compensation otherwise awardable, as would be necessary to enable the owner to relocate his residence in accommodation that is at least equivalent to the accommodation expropriated.

CHAPTER XV MISCELLANEOUS

A. Reparation

To what extent, if any, should an expropriating authority be able to lessen its liability for compensation by making reparations of some kind, e.g., by carrying out accommodation works or granting property rights in substitution for those taken?

The Clyne Commission recommended a provision to permit an expropriating body to "mitigate" damages "by constructing accommodation works, granting easements or in other ways". Such acts were to be considered when compensation is assessed.[1] Reparation was not dealt with by the Ontario Law Reform Commission.

The Ontario,[2] Manitoba[3] and Federal[4] statutes all contain reparation provisions.

The Ontario statute[5] enables the expropriating authority, before the compensation is agreed upon or determined, to undertake accommodation works or grant other lands. Where it does exercise this power, the compensation is to be adjusted accordingly. If an undertaking or grant has not been carried out when the particular expropriation goes to arbitration, the Land Compensation Board may declare that, in addition to the compensation determined (if any), the owner is entitled to have the accommodation work constructed or the grant made to him.

The Manitoba[6] and Federal[7] reparation provisions also deal with the effect of abandonment by the expropriating authority on the determination of compensation. Abandonment is dealt with separately in the Ontario statute.[8] This Commission has already made proposals on that topic.[9]

There are two particular problems with respect to reparation that have caused the Commission concern.

(1) Should the expropriating authority be able to make reparations by taking unilateral action, or should the consent of the owner be required?

---

1. P. 129.
2. S. 11.
3. s. 34.
4. S. 26. *See also* s. 24(5) which provides that (1) continuance in occupation by the owner after the Crown became entitled to possession and (2) relocation assistance should be considered in awarding certain elements in the overall compensation.
5. S. 11.
6. S. 34(1)(a).
7. S. 26(1)(a).
8. S. 42.
9. *Supra*, at p. 252 *et seq.*

(2) Where an undertaking has not been carried out as it should have been, and the compensation has been awarded on the basis that the undertaking would be carried out, how can the owner enforce the undertaking?

The Ontario and federal statutes enable expropriating authorities to make reparations by taking unilateral action. Under the Manitoba enactment an undertaking to make reparations becomes enforceable by the owner, if he has accepted it and the compensation has been agreed on.[10] The Federal Act says nothing about the enforcement of unfulfilled undertakings. The Ontario statute, as mentioned earlier, empowers the Land Compensation Board to declare that the owner is entitled to the carrying out of the undertaking.

This Commission does not believe that an owner should be forced to take property rights in whole or partial substitution for those that have been taken. The Commission considers that such an exchange of property rights should only be by agreement, with one exception. The one exception is replotting schemes under sections 823 to 856 of the *Municipal Act*. It is essential to the replotting system that property can be added to parcels of land from which property is taken.[11] There should be a procedure, however, under which the parties could have the value of the property to be transferred determined by the arbitration tribunal. That value could be offset against the compensation payable in respect of the expropriated property.

On the other hand, the Commission believes that expropriating authorities must be free to carry out accommodation works unilaterally. Usually, these works would be tied in with the carrying out of the project for which the expropriation was made and it is essential that expropriating authorities be able to proceed with construction without having, perhaps, to bargain with a series of owners on the periphery of their project on the manner in which work will be accomplished. In such cases, the compensation should be determined having regard to any accommodation works that have been constructed or for which an undertaking has been given. Where an undertaking to construct accommodation works has not been carried out at the time compensation has been agreed on or determined, the arbitration tribunal should, on application by the owner, be empowered to fix a time for the carrying out of that work. In the event that the work is not carried out in the time specified, the owner should be entitled to apply to the arbitration tribunal for an appropriate adjustment of compensation.

Accordingly, the Commission recommends:

1. An expropriating authority and owner may agree

(a) that the authority grant to the owner, in whole or partial substitution for the property expropriated,

(i) land,

(ii) an easement or licence over the lands expropriated or other lands, and

(b) that the value of the rights to be granted be determined by the

---

10. S. 34(3).

11. *See discussion, supra*, at pp. 227-229.

arbitration tribunal and be deducted from the compensation otherwise payable for the property expropriated.

2. Where, under the replotting provisions of the *Municipal Act*, land is substituted for land taken, the owner should be entitled to compensation in respect to market value only to the extent that the market value of his former parcel would, as at the date of expropriation, exceed the value of his new parcel.

(a) In the absence of an agreement between the expropriating authority and the owner, allowance should be made, in determining the compensation payable in cases of partial takings for the expropriated land or for injurious affection, for any work carried out or undertaken to be carried out by the expropriating authority which will accommodate the remaining land of the owner.

(b) Where an expropriating authority has not carried out an undertaking to construct accommodation works at the time compensation has been agreed upon or determined, the arbitration tribunal should be empowered to fix a time for the carrying out of that work.

In the event that the work is not carried out in the time specified by the arbitration tribunal, the owner should be entitled to apply to the tribunal for an appropriate adjustment of compensation.

4. The proposed arbitration tribunal should be given jurisdiction for the above purposes.

B. Date of Valuation

The object should be to select a date (or dates) which will be fair to the expropriated owner and is administratively workable.

A major difficulty in recent years has been the time lag between the date of expropriation and the time at which the expropriated owner receives compensation. In a rising market, the owner may find the funds he receives will not be sufficient to purchase equivalent property. This problem becomes particularly severe where the owner stays on in possession for a substantial time and negotiations on compensation become protracted. In the *Judson* case, discussed in the last chapter, it will be recalled that the Judsons had remained on in possession for nearly four years and that the market value of equivalent housing had risen 47 per cent in the interval.

The Ontario Law Reform Commission had recommended that the owner should have the option of choosing as the valuation date either the date of expropriation or the date when possession is required, in instances where the expropriating authority did not make an offer within six months of expropriation. This recommendation was not acted upon.

Under the Ontario legislation, the owner has three choices:[12]

1. Where there has been an inquiry, the date of the service of the notice of hearing,

2. the date of expropriation, or

12. S. 19(2).

3. the date he is served with the notice of expropriation.

The federal legislation adopts the date of expropriation, except where the notice of confirmation is sent more than 90 days after expropriation.[13] In such a case, the owner has the choice of the date of expropriation or the date the notice was sent to him: the election must be made before any compensation is paid. In Manitoba, the relevant date is that on which the declaration of expropriation is signed by the expropriating authority.[14] The Clyne Report recommended the date of filing of the notice of expropriation in the appropriate Land Registry Office.[15]

This Commission believes that, in view of its proposals for offering payment, the adoption of the date of expropriation would be most suitable. This Commission has proposed elsewhere in this Report procedures which would require expropriating authorities to offer immediate payment of 100 per cent of the market value of the lands expropriated (which the owner may take without prejudicing his rights to claim more) within three months of the expropriation. That offer will be based on an appraisal and the logical date for valuation would be the date of expropriation.

Since the expropriated owner will thus be put in funds, he will be in a position to acquire other premises. Even if he stays on in possession for a lengthy period under some agreement with the expropriating authority, he can invest the funds. Thus, if the market value of property rises while he stays on in possession, and he chooses not to buy, he cannot justifiably complain.

The Commission has also proposed procedures by which the expropriated owner would be able to hand over possession anytime after expropriation and by which he can initiate the arbitration process. The owner could not be locked into the expropriation process if these proposals were adopted.

One expropriating authority expressed a preference for the date of filing the notice of intention to expropriate in the Land Registry Office as the date of valuation. No other comments were received on this point, which would indicate to us that the date of expropriation was generally regarded as satisfactory. We do not think that the date of the filing of the notice of intention is a logical point in time to use as the date of expropriation. Any fear that prices in the relevant area would rise in the interval between the filing of the notice and the date of expropriation in such a way as to prejudice the expropriating authority would not be justified in the light of our earlier recommendation that any increase in value resulting from public knowledge of the proposed undertaking should be disregarded in the determination of compensation. The date of taking is, we think, the logical date of valuation.

The Commission therefore recommends:

The date of valuation should be the date of expropriation.

C. Interest Adjustment

1. *General*

---

13. S. 23(2).

14. S. 25. *See also* s. 6(2).

15. Pp. 99-100, Rule 2.

Interest should be awarded as compensation for the temporary loss of capital. This principle is generally recognized in expropriation legislation elsewhere.[16] Interest should therefore be payable on the unpaid portion of the compensation consisting of market value from the time that the owner no longer has the use of his land. The Commission considers that interest on the market value should run from the earlier of

1. the date on which possession is turned over, or

2. the date three months from the date of expropriation.

The three month period represents the shortest time in which the expropriating authority could require possession. After that period had elapsed, where the owner still had the use and occupation of the lands taken, it would be up to the expropriating authority to make a rental arrangement with the owner for that use and occupation. Such a procedure would encourage expropriated owners to think in terms of alternative accommodation.

In order to encourage expropriating authorities to make reasonable offers, the Commission proposes that there should be an interest penalty to the extent that an arbitration award exceeds the statutory offer.

Where the amount awarded by the arbitration tribunal exceeds the amount of the statutory offer, the owner should be entitled to additional interest at the rate of 5 per cent on the amount of the excess from the date of the offer to the date of the award.[17]

Three expropriating authorities objected to the additional interest proposal. One stated that it seemed in keeping with the concept that the owner is being placed in a favoured position in comparison with ordinary litigants. Another said it would result in a "windfall" to the owner. And the third felt that the "expropriating authority had already been penalized in every way possible, e.g. paying preliminary costs, etc.". It was stated that the provision would lead to attempts by expropriating authorities to avoid the penalty by placing the statutory offer well above market value and, in fact, buying its way out of possible trouble. We doubt that this would be the case. The 5 per cent penalty is only to be paid on the amount by which the award exceeds the statutory offer. It would only amount to a significant sum if the statutory offer was substantially less than the award. In such a case, we think a penalty should be paid.

In addition, interest should be payable on damages for disturbance and injurious affection, from the date on which the damages were incurred until the damages are paid.

The legislation should establish what the basic interest rate should be on a basis that will take into account prevailing interest rates. The approximate cost of borrowing by an owner is the chief factor that should be taken into account. A suitable criterion would be one per cent above the current prime lending rate of the

---

16. The Ontario statute: s. 34(1), and *see also* s. 25(4). The Manitoba statute: s. 35. The Federal statute; s. 33. *See also* the Clyne Peport, at p. 30, and the Ontario Law Reform Commission Report, at pp. 51-52.

17. The Federal legislation contains a provision to this effect, although the penalty only applies to the extent that the amount of the offer is less than 90 per cent of the compensation.

Bank of British Columbia.[18] "Prime lending rate" is a term well understood in banking circles and means that rate at which a bank would lend to its most favoured customers.

Accordingly, the Commission recommends:

1. *Interest should be paid, where applicable and unless otherwise specified, at one per cent above the current prime lending rate of the Bank of British Columbia.*

2. (a) *Interest should be paid on the unpaid balance of the market value portion of the compensation from the earlier of:*

   (i) *the date of possession, or*

   (ii) *three months from the date of expropriation,*

   (b) *Interest should be paid on the unpaid balance of disturbance damages from the date on which such damages were incurred,*

   (c) *Interest should be paid on the unpaid balance of damages for injurious affection from the date on which such damages were incurred.*

3. *Where the amount awarded by the arbitration tribunal for market value exceeds the amount of the statutory offer, the owner shall be entitled to additional interest at the rate of 5 per cent on the amount of the excess from the date of the offer to the date of the award.*

2. *Penalties for delay*

Should some penalty be imposed if a delay in the expropriation proceedings is caused through the fault of one of the parties? The Commission thinks so. There is no reason why an expropriating authority should have to pay interest covering a period of delay brought about by the owner's fault. The arbitration tribunal should have the discretion to deprive the owner of all or part of the interest payable for that period.

On the other hand, if delay is attributable to the fault of the expropriating authority, it should be penalized. The Commission believes the tribunal should have the discretion to require the authority to pay up to double the amount of interest for the period of delay. One expropriating authority indicated that this penalty was too severe. We do not agree. It would be in the discretion of the tribunal and the penalty would vary, in the circumstances of the case. It is only the maximum penalty that would be double. In addition, a penalty for delay is recommended for imposition on the owner and we think there should be a corresponding penalty in respect of expropriating authorities.

The legislation should make clear that the owner is not to be deprived of interest, on grounds of delay, merely because the amount of the tribunal's award is less than what he has been offered.

Similar proposals were recommended by the Ontario Law Reform Commission.[19] That Commission's recommendations were carried forward into the

---

18. For the rate-setting provisions in other statutes, *see* s. 34(1) of the Ontario statute, s. 35(1) of the Manitoba statute, and s. 31(a) of the Federal statute.

19. Pp. 52-53.

Ontario legislation.[20]

This Commission also proposes that an owner may be deprived of interest, wholly or partially, in the discretion of the arbitration tribunal, where the owner fails to deliver up possession within a reasonable time after demand. A provision to this effect is contained in the federal statute.[21]

To sum up, the Commission recommends:

1. (a) *Where a delay in expropriation proceedings has been the fault of the owner, the tribunal should have the discretion to deprive him of interest, in whole or in part, for the period of delay.*

   (b) *The owner should not be deprived of interest merely because the amount of any award is less than the amount offered.*

   (c) *The owner may be deprived of interest, wholly or partially in the discretion of the tribunal, where he has failed to deliver up possession within a reasonable time after demand.*

2. *Where a delay in expropriation proceedings has been the fault of the expropriating authority, the tribunal should have the discretion to require the authority to pay up to double the amount of interest for the period of delay.*

D. Mode of Payment

1. *Compensation*

The Commission believes it essential that the owner should receive his compensation as soon as reasonably possible after the date of expropriation. His property has been taken away from him without his consent and justice demands that he should be paid promptly. In addition, the receipt of funds will enable him to acquire alternative property.

The Commission recommends that, with the statutory offer of full compensation, the expropriating authority should offer immediate payment of 100 per cent of the market value of the lands expropriated, without prejudice to the owner's right to claim additional compensation.

This is the procedure adopted in the Ontario,[22] Manitoba[23] and Federal[24] statutes.

Provision should be made, of course, to cover the unlikely situation where the accepted offer to pay exceeds the subsequent award. The expropriating authority should be given the right to set-off against any future compensation payable (i.e., disturbance damages or damages for injurious affection) or to sue for the excess. Such a provision is contained in the federal legislation.[25] The Ontario statute only

---

20. S. 34(2), (3), and (4).

21. S. 33(5).

22. S. 25 (1)(b).

23. S. 16 (1)(b).

24. S. 14 (1)(b).

25. S. 32.

26. S. 25 (1)(b).

provides for adjustment by set-off.[26]

Accordingly, the Commission recommends:

1. *The expropriating authority in making an offer should be required, at the time of making the statutory offer of full compensation, to tender immediate payment of 100 per cent of the market value portion of the statutory offer, and*

2. *The payment to and receipt of such sum by the owner should be without prejudice to his right to compensation under the expropriation statute and be subject to adjustment in accordance with any compensation that may be subsequently agreed upon or determined under the statute.*

2. *Legal and appraisal costs*

The Ontario Law Reform Commission recommended:[27]

> ... an owner be entitled to receive from the expropriating authority from time to time during the determination of the compensation sufficient funds to cover the reasonable cost of retaining legal and appraisal services.

This recommendation was not implemented.

The reasoning behind the recommendation was:

> When the land is expropriated, the owner should feel free to seek legal and appraisal advice. He should not be deterred from doing so by the fear of the cost involved or from lack of funds. It has already been recommended that he be indemnified for his costs. Should he lack funds, however, he might still be reluctant to go to a lawyer or an appraiser. The lawyer may require a retainer and there may well be such a time lag between the rendering of the professional services and the payment of the compensation that the lawyer or appraiser will look to the owner for payment before the owner is put in funds. One solution is to advance the owner all or part of his anticipated costs. The difficulty here is in not knowing what the anticipated costs will be. These will vary depending on the stage at which the matter is finally determined. The answer is to advance to the owner sufficient funds from time to time during the determination of compensation to cover the reasonable cost of retaining legal and appraisal services. Not all owners will wish such assistance and it should therefore be optional on the part of the owner. If he wishes it, he will apply to the expropriating authority.

We are convinced by this reasoning that owners should be entitled to receive sufficient funds to cover the reasonable cost of obtaining legal and appraisal services up to the institution of proceedings to bring the determination of compensation before the arbitration tribunal.

One expropriating authority did not like this proposal as it would provide the owners with the "sinews of war", which would place them in a favourable position in comparison with the ordinary litigant. We do not think this objection is valid; we have said before that the owner whose property is taken against his will is in a special position. Another expropriating authority did not object to the principle, but thought that the proposal was too broad. It was suggested that some limits should be imposed to prevent owners from running up large bills or unreasonable commitments. We do not think this should be a problem. It has already been

---

27. P. 55.

28. P. 54.

recommended that the owner should only be entitled to costs *reasonably* incurred and that these should be taxable under the *Legal Professions Act*. We think that most expropriating authorities would, in practice, develop a scale of advanceable costs which would be acceptable to owners. If the owner and the expropriating authority could not agree, the appropriate amount could be settled by the arbitration tribunal, on application by the owner.

Accordingly, the Commission recommends:

1. *Owners be entitled to receive from the expropriating authority from time to time, sufficient funds to cover the reasonable cost of retaining legal and appraisal services during the period from the notice of intention to expropriate until the institution of proceedings to bring the determination of compensation before the arbitration tribunal.*

2. *Where the owner and the expropriating authority are unable to agree on the appropriate amount to be advanced, such amount should be determinable by the arbitration tribunal, on application by the owner.*

E. Personal Property

In Part C of Chapter II, the Commission pointed out that there are a number of statutory provisions that empower the expropriation of personal property. These powers are likely to be infrequently exercised.

The basis for compensation recommended in Part III of the Report has been with respect to the expropriation of interests in land. Provision also must be made for personal property, where such personal property is not an interest in land.

Compensation for such personal property should be paid on the basis of market value and disturbance damage. The provisions of the proposed statute relating to market value and disturbance damage in respect of interests in land should govern in so far as those provisions can be applicable.

Accordingly, the Commission recommends:

1. *The basis of compensation for expropriated personal property, not being interests in land, should be market value and disturbance damage,*

2. *The provisions of the proposed statute relating to market value and disturbance damage in respect of interests in land should govern the determination of the compensation to be paid to the owners of such personal property, in so far as those provisions would be applicable.*

F. Recurring Payments

In dealing with rights of entry under the *Petroleum and Natural Gas Act, 1965* in Part B of Chapter III, the Commission recommended that the compensation be determined under the provisions of the general statute we propose, but that special provision be made for annual or other recurring payments.

We believe that it would be useful for the general arbitration tribunal to have the discretion to make awards requiring recurring payments in other special situations where the expropriating authority needs to use the expropriated property for a limited but uncertain period of time. This would be particularly applicable to logging and other rights-of-way.

Accordingly, the Commission recommends:

The arbitration tribunal should have the discretion to make awards requiring recurring payments, instead of a lump sum payment, where the expropriating authority needs the use of the expropriated property for only a limited but uncertain period of time.

If such a provision were adopted, there should be a complementary provision in the expropriation statute which would enable interests to be taken for uncertain periods of time.

SUMMARY OF RECOMMENDATIONS

The recommendations of the Commission are set out below. The page at which each recommendation may be found in the body of the Report is indicated. The recommendations are divided into:

I GENERAL

II PROCEDURE

III COMPENSATION

I - GENERAL

1. A general expropriation statute be enacted embodying the proposals on procedure and compensation put forward in this Report,

2. The *Lands Clauses Act* be repealed,

3. The special provisions relating to procedure and compensation contained in the various statutes conferring expropriation powers be repealed,

4. The general expropriation statute should contain a provision making it expressly applicable to the Crown and the *British Columbia Hydro and Power Authority Act, 1964* should be amended so as to make the general expropriation statute applicable to the British Columbia Hydro and Power Authority,

5. Sections 10D and 100A of the *Municipalities Enabling and Validating Act* should be amended so as to enable property owners to invoke the inquiry procedure and claim compensation under the proposed legislation, and

6. The general expropriation statute should expressly provide that it will prevail in the event of a conflict between one of its provisions and a provision of any other statute, whether general or special.

7. The general expropriation statute should apply to the expropriation of all property interests, whether real or personal.

8. For the purposes of the proposed general expropriation statute, the following should be treated as creating property interests:

   (a) tenancy agreements under Part II of the *Landlord and Tenant Act*, and

   (b) licences under section 74 of the *Water Act*.

9. The general expropriation statute should not apply to the right of the British Columbia Hydro and Power Authority to compulsorily take power under sections 18 and 19 of the *British Columbia Hydro and Power Authority Act, 1964* and matters of dispute in such takings should continue to be determined by the Public Utilities Commission.

10. (a) The general expropriation statute later proposed should contain a general statutory provision making compensable any damage resulting

from the exercise of a statutory right of entry, where such entry does not amount to an expropriation,

(b) The general arbitration tribunal later proposed should have exclusive jurisdiction to hear such claims.

11. (a) The functions of the Board of Arbitration established under the *Petroleum and Natural Gas Act, 1965* should be assumed by the general arbitration tribunal later recommended.

(b) The general compensation provisions in the general expropriation statute should apply to the determination of compensation for rights of entry granted under the *Petroleum and Natural Gas Act, 1965*, and that special provision be made to permit the awarding of annual or recurring payments.

(c) (i) The function of the Board of Arbitration under the *Underground Gas Storage Act, 1964* should be assumed by the general arbitration tribunal later recommended.

(ii) There should be substituted, for the reference to the *Petroleum and Natural Gas Act, 1965* in section 10 of the *Underground Gas Storage Act, 1964,* a reference to the general expropriation statute.

12. The replotting provisions contained in Division (2) of Part XXVII of the *Municipal Act* be governed by the general expropriation statute.

13. (a) Claims for compensation under the *Ditches and Watercourses Act* should be dealt with by the general arbitration tribunal later recommended.

(b) In determining the compensation payable, the provisions of the general expropriation statute should apply.

14. (a) Loss of value of property resulting from the designation of that property as an archaeological or historic site under the *Archaeological and Historic Sites Protection Act* should be compensable.

(b) A "designation" of property should be treated in the same way as an expropriation under the general expropriation statute.

(c) The jurisdiction now given to a judge of the Supreme Court to deal with compensation disputes between an owner and the holder of a permit to excavate, alter or remove, should be transferred to the general arbitration tribunal later recommended.

15. The general expropriation statute should not apply to:

(a) the *Special Surveys Act,*

(b) the *Company Towns Regulation Act*,

(c) (i) the *Noxious Weeds Act*,

(ii) the *Plant Protection Act*, or

(iii) the *Grasshopper-control Act*.

16. (a) Section 6 of the *Highway Act* should be amended to restrict its application to public highways deemed and declared to be in existence at the time of the amendment.

(b) Where the Crown proposes to exercise a reserved right to take back up to one-twentieth of Crown granted land for a public road or other works of public utility:

(i) Notice of its intention to do so should be given in the same way as a notice of intention to expropriate,

(ii) The owners of interests in the land from which the allowance is to be taken should be entitled to invoke the general inquiry procedure later proposed, and

(iii) The general approval procedure later proposed should be applicable and the approving authority for this purpose should be the Minister of Highways.

17. (a) The various statutory provisions which create, or might appear to create, expropriating powers be reviewed, and revised where necessary, to ensure the statutory language creating those powers clearly and expressly demonstrate intention to confer those powers.

(b) Wherever the power to expropriate is being granted, the word "expropriate" should be used.

(c) There should be a general statutory provision that no enactment which does not use the word "expropriate" shall be deemed to confer a power to expropriate.

18. Section 4(2) of the *Railway Act* be amended so that the provisions of the *Railway Act* which may be made applicable to a company under that provision by the Minister's certificate be limited to those provisions which do not relate to expropriation.

19. (a) Consideration be given by the Provincial Government to establishing a single acquisition agency, as a branch of an existing department of the Provincial Government, to conduct acquisitions of real property by the Crown in right of the Province.

(b) As an alternative, consideration be given to designating an existing department of the Provincial Government to have responsibility for the conducting of expropriations by the Crown in right of the Province.

II - PROCEDURE

A. Arbitration Tribunal

1. There should be a single arbitration tribunal for hearing all claims for compensation:

   (a) for expropriation,

   (b) injurious affection, or

   (c) for damages resulting from the exercise of a statutory right of entry.

2. The tribunal should be a permanent board of seven members.

3. (a) The chairman of the board should serve on a full-time basis and be appointed for a ten-year term.

   (b) Initially, the other six members of the board should serve on a part-time basis and be appointed for five-year terms.

   (c) As the work load of the board warrants it, part-time members of the board should be replaced by full-time members.

   (d) Appointments should be renewable, and there should be a mandatory retirement age.

4. (a) The chairman of the board and three of the members should be qualified lawyers and the other three members should be experienced in real estate valuation.

   (b) The chairman of the board should be given the salary and a position comparable to a judge of the Supreme Court of British Columbia.

5. (a) A quorum of the board for the purpose of holding hearings with respect to determining matters under paragraph l(a) and (b) above, should consist of the chairman or vice-chairman, one of the lawyer members (which could include the vice-chairman where the chairman presides) and one of the other members.

   (b) In damage claims arising out of the exercise of a statutory right of entry, the chairman should be able to designate a single member of the board to determine the matter.

6. (a) There should be a right of appeal from the board to the Court of Appeal on all questions of fact or law, or both.

   (b) Where the jurisdiction of the board or the validity of its process is otherwise questioned, such matters should be determined by way of a stated case to the Court of Appeal.

7. The board should hold its hearing in the general area where the relevant lands are located, unless the parties agree on some other place of hearing that the board would consider appropriate.

8. The board should have a registrar, and adequate clerical and secretarial staff, all of whom should be appointed under the *Civil Service Act*.

9. (a) The board should have the power to summon witnesses and require them to testify, and to require the production of documents.

(b) Except by leave of the board, a party should not be entitled to adduce the evidence of an expert witness at the hearing, unless he has filed with the board and served on the party or parties at least 10 days before the hearing begins, where the expert is an appraiser, a copy of the appraisal report and, in all other cases, a full statement of the proposed evidence.

(c) Each party should be entitled to call two expert witnesses, with the board having power to grant leave to call additional experts.

(d) The board should have the power to appoint experts to assist it in interpreting evidence of a special or technical nature.

10. The board should have the power to make rules, subject to the approval of the Lieutenant-Governor in Council, governing its practice and procedure and the exercise of its powers.

11. Where a person fails to comply with an order of the board with respect to the giving of evidence, or does any other thing that would have amounted to contempt in a court of law, a member of the board should be able to certify the offence to the Supreme Court, which should be able, after holding an inquiry into the alleged offence, to punish the offender as if he had been guilty of a contempt of court.

12. (a) The board should furnish the parties with written reasons for its decisions.

(b) The board should prepare and periodically publish a summary of all its decisions, and the reasons therefore.

B. The Procedural Steps

1. *Notice of Intention to Expropriate*

1. Expropriation proceedings should be commenced by the giving of a notice of intention to expropriate by the expropriating authority, as follows:

(a) By depositing the notice in the appropriate Land Registry office,

(b) By serving a copy of the notice on each registered owner whose property interests are to be expropriated,

(c) By publishing the notice once a week for three weeks in a newspaper having general circulation in the locality where the lands to be expropriated are situated,

(d) By applying to the appropriate approval authority, where such authority is a different person or body from the expropriating authority, by serving a copy of the notice on the approving authority.

2. The notice of intention to expropriate should describe the lands to be expropriated, in a manner that meets the general requirements of the *Land Registry Act*, except in those instances where regulations under the *Land Registry Act* prescribe that a preliminary plan will be acceptable.

3. In the case of publishing the notice, it should be sufficient, where the description is by plan, to refer to such a plan as being on deposit in the Land Registry office and by identifying the land affected by a description in words.

4. Service of the notice of intention on a registered owner should be effected personally or by registered mail addressed to the person to be served at his last known address.

5. Where a notice of intention to expropriate has been deposited in the Land Registry Office, the Registrar of Titles should be required to make an entry on the appropriate certificate of title to that effect.

6. The copy of the notice of intention to expropriate served on each registered owner should be accompanied by a statement setting out:

   (a) the owner's right to invoke the inquiry procedure and his entitlement to costs for legal and appraisal advice,

   (b) the name and address of the relevant approving authority,

   (c) the statutory provision which authorizes the proposed expropriation, and

   (d) a description of the undertaking for which the property is to be taken.

2. *The Inquiry*

1. The general expropriation statute should contain an inquiry procedure under which persons could object to a proposed expropriation.

2. The function of the inquiry procedure should be to determine whether a proposed expropriation is fair, sound and reasonably necessary for the purpose of achieving the objectives of the expropriating authority.

3. An inquiry should be conducted by a single inquiry officer.

4. There should be a chief inquiry officer and a roster of inquiry officers, all appointed by the Attorney-General.

5. The function of the chief inquiry officer, who should be an official in the Department of the Attorney-General, should be to assign inquiry officers to particular inquires.

6. The inquiry officers, other than the chief inquiry officer, should not be civil servants and should be appointed from the legal profession in such number as the Attorney-General deems necessary (to conduct inquiries on an ad hoc basis).

7. The inquiry procedure should be available to persons whose property is to

be expropriated or whose property is likely to be injuriously affected.

8. The Lieutenant-Governor in Council should have the power to dispense with the inquiry procedure in special circumstances where it would be necessary or expedient in the public interest to do so.

9. The chief inquiry officer should be able to cancel an inquiry if the expropriating authority has been notified in writing by all the persons invoking the inquiry procedure that they no longer wish an inquiry to be held.

10. Copies of an inquiry officer's report should be made available to the parties to the expropriation and persons who objected to the expropriation at the inquiry.

11. A person wishing to invoke the inquiry procedure should so notify the approving authority in writing within 30 days of being served with the notice of intention to expropriate or the publication of the notice for the third time, whichever is later.

12. After receiving such notification, and when the time for making objections in respect of the expropriated land has elapsed, the approving authority should refer the notice to the chief inquiry officer who should forthwith assign an inquiry officer to hold a hearing, notifying the expropriating authority and the person objecting that he has done so.

13. Within 10 days of his assignment, the inquiry officer should fix a time and place for a hearing and send copies of the notice of hearing to the expropriating authority, where it is not the approving authority, and all persons who were entitled to be served with a copy of the notice of intention to expropriate.

14. The inquiry should be held and the inquiry officer report to the approving authority within 30 days of his assignment to hold the inquiry, or such further period as the chief inquiry officer may deem necessary for the holding of the inquiry.

15. On receiving the report, the approving authority should send forthwith a copy of it to each of the parties to the inquiry.

3. *Approval*

1. The general expropriation statute should contain an approval procedure under which a politically responsible "approving authority" must approve or disapprove the initial decision to expropriate by an expropriating authority.

2. The approving authorities should be as set out in Table V of the Report.

3. Written reasons for the decision of the approving authority should be made available to the parties to the expropriation and any persons who objected to the proposed expropriation at an inquiry.

4. The approving authority should approve or not approve the proposed expropriation:

(a) Where no inquiry has been held, within 60 days after the time for invoking the inquiry procedure has elapsed, and

(b) Where an inquiry has been held, within 60 days after the report of the inquiry officer was received by the approving authority.

5. Where the approving authority does not approve the intended expropriation within these times, the expropriation proceedings should be discontinued.

6. Where the approving authority has approved or disapproved an intended expropriation, a copy of the notice of approval or disapproval, as the case may be, together with written reasons for its decision, should be sent forthwith to:

(a) all persons who were served with a copy of the notice of intention to expropriate, and

(b) the expropriating authority, where the expropriating and approving authorities are different persons or bodies.

7. The approving authority should also send the notice of approval or disapproval to the appropriate Registrar of Titles.

4. *Expropriation*

1. On receipt of a notice of approval, the Registrar of Titles should forthwith register the notice.

2. Registration of the notice should vest the title to the land in the expropriating authority.

3. The issuing of a certificate of title to the expropriating authority for the lands expropriated should be governed by regulation under the *Land Registry Act*.

4. Within 30 days of the registration of the notice of approval, the expropriating authority should serve the expropriated owner with a notice of expropriation.

5. On receipt of a notice of disapproval, the Registrar should delete the entry made on the relevant certificate of title with respect to the notice of intention to expropriate.

5. *Offer and Payment*

1. Where no agreement as to compensation has been reached, the expropriating authority should be required, within three months after the registration of the notice of approval, and before taking possession:

(a) to serve on the expropriated owner an offer in full compensation, and

(b) to offer immediate payment of 100 percent of the market value of the lands expropriated, on the basis of an appraisal by the expropriating authority, without prejudice to the owner's right to claim additional compensation under the arbitration proceedings.

2. A copy of the appraisal on which the offer is based should be sent to the owner with the offer.

3. The expropriating authority should be able to apply to a judge of the County Court in which the lands are situate for an extension of the three-month offer period, where it is impractical to make and serve the offers referred to above in such period.

4. Failure to serve the offers in the prescribed time should not invalidate the expropriation, but should result in interest being payable to the owner from the date of registration of the notice of approval.

6. *Negotiation*

1. Either the owner or the expropriating authority should have the right to invoke a formal negotiation procedure.

2. The procedure be initiated by the service by one party on the other of a notice to negotiate.

3. The procedure be available for 30 days from the making of the statutory offer of compensation by the expropriating authority, or beyond that time with the consent of the parties.

4. When the expropriating authority has served or received a notice to negotiate, it shall immediately notify the Attorney-General.

5. There be a panel of negotiators appointed by the Lieutenant-Governor in Council.

6. The negotiators be appointed on a part-time basis and be paid on a per them basis: they should not be persons to whom the *Civil Service Act* applies.

7. When the negotiation procedure is invoked by a party, the Attorney-General should refer the matter to one of the negotiators appointed by the Lieutenant-Governor in Council.

8. The cost of the negotiator should be borne by the expropriating authority.

9. Once the negotiation procedure becomes operative no arbitration proceedings shall be begun or continued until 60 days has elapsed, or such longer period as the parties may agree upon.

10. In the event that a settlement is not reached within the 60-day period, or such longer period as may have been agreed upon, the negotiator shall report in writing at the end of the period applicable to both the parties what, in his opinion, would be the appropriate compensation.

11. The function of the negotiator should be to endeavour to effect a settlement of the compensation, having regard to the provisions for compensation in the general statute.

12. The negotiator should meet with the parties or their authorized representatives, make such inspection of the land as he thinks necessary, and receive and consider any appraisals, valuations or other written or oral

evidence submitted to him on which either party relies (whether or not such evidence would be admissible in proceedings before a court).

13. Evidence of anything said or of any admission made in the course of a negotiation procedure should not be admissible in any arbitration proceedings.

7. *Arbitration*

1. Either the expropriating authority or an expropriated owner should be able to invoke the arbitration procedure at any time after the statutory offer has been made, subject to the invoking of the negotiation procedure.

2. Claims for injurious affection should be brought within two years from the time that the damage was sustained.

8. *Possession*

1. The expropriating authority should be able to require possession of the expropriated land by serving on the expropriated owner, at any time after the date of expropriation, a notice of possession specifying the date on which possession is required.

2. The date for possession should be at least three months after the date of serving the notice of possession.

3. An expropriated owner should be entitled to give up possession any time after the date of expropriation, on notifying the expropriating authority.

4. An expropriating authority should be able to apply to a judge of the appropriate County Court for an earlier date than that specified in the notice of possession, and an expropriated owner should be able to apply for a later date, with the judge having power to fix an earlier or later date as he considers appropriate in all the circumstances.

5. The expropriating authority should not be entitled to take possession unless the statutory offer to pay has been made and, where that offer has been accepted, payment has been made to the owner of the expropriating authority.

6. (a) Where the expropriating authority becomes entitled to take possession and is met with resistance or opposition to its taking possession, the expropriating authority should be able to apply to a judge of the appropriate County Court for a warrant directing the sheriff to take possession.

(b) The judge, before making such an order, should hold a hearing, with notice of the hearing to be given to such persons as the judge may direct.

C. Special Procedures

1. *Civil Defence Act and Health Act*

1. Expropriations under the *Civil Defence Act* and the *Health Act* be exempt from those

provisions of the general expropriation statute relating to the notice of intention to expropriate, and the inquiry and approval procedures.

2. The expropriating authority in expropriations under these two statutes should be required to serve on the expropriated owners a notice of expropriation immediately after the expropriation has taken place and, within 30 days after the expropriation, the expropriating authority should register the notice in the appropriate Land Registry Office, accompanied by a description of the lands expropriated.

3. The Registrar of Titles should register the notice of expropriation in such instances in the same way as he would, in other cases, register a notice of approval.

4. Once an owner had been served with a notice of expropriation, the general procedural provisions relating to compensation should apply.

2. *Damage Claims*

1. Owners making claims for damages resulting from the exercise of a statutory right of entry, not amounting to an expropriation, should do so according to rules laid down for that purpose by the general arbitration tribunal.

2. Either the person making the claim, or the person against whom the claim is made, should be able to invoke the negotiation procedure within 30 days of making a ciaim in accordance with paragraph 1 above.

3. *Abandonment prior to expropriation*

1. An expropriating authority should be entitled to abandon its intention to expropriate, either wholly or partially, at any time up to the date of expropriation.

2. Where the abandonment is partial, the expropriating authority should amend its notice of intention to expropriate so as to reduce the area of land required or so as to claim a lesser interest.

3. The expropriating authority should serve a copy of a notice of abandonment on all persons who were entitled to be served with the notice of intention to expropriate, including the approving authority, and should deposit the notice itself in the appropriate Land Registry Office.

4. (a) Where an expropriating authority abandons its intention to expropriate, it should be responsible for the reasonable legal, appraisal and other costs of the owner incurred up to the time of abandonment, as a consequence of the initiation of the expropriation proceedings.

(b) In the absence of agreement, such costs should be taxable under the *Legal Professions Act.*

4. *Abandonment after Expropriation*

1. Where land has been expropriated but expropriation proceedings are not

completed, and an expropriating authority decides that all or part of that land is not needed for its purposes, the expropriating authority may serve a notice of intention to abandon on those persons who were served with a notice of expropriation.

2. Persons served with a notice of intention to abandon should have the choice of:

   (a) Taking their interest back, and obtaining payment of consequential damages, or

   (b) Requiring the expropriating authority to retain their interest and complete the expropriation proceedings in respect to it.

3. (a) Where a former owner of an interest elects to have his interest returned, he should be required to return any compensation he has received, less any set-off he may be entitled to for consequential damages.

   (b) Where a former mortgagor or a purchaser under an agreement for sale wishes to take his interest back, and the former owner of some other interest does not wish the return of that other interest, then such mortgagor or purchaser should be entitled to the return of his interest, unencumbered by that other interest, on making payment to the expropriating authority (in addition to any sum payable under paragraph 3(a) above) of an amount equal to the market value portion of the compensation paid or payable to the person whose interest is expropriated.

4. Where the owner chooses the return of his interest and claims consequential damages, those damages should be determinable by the proposed arbitration tribunal.

5. Expropriation proceedings should he regarded as not completed for the purposes of taking abandonment proceedings, until:

   (a) All arbitration proceedings, including appeals, are completed,

   (b) the compensation is paid in full, and

   (c) possession of the relevant lands has been given up to the expropriating authority.

III - COMPENSATION

A. General

1. *The Basic Principle*

The underlying principle in the compensation provisions of the expropriation statute should be to provide persons whose property has been expropriated with full compensation for their economic losses resulting from the expropriation.

2. *The Basic Formula*

1. The basic formula for compensation in the proposed statute should be:

(a) the market value of the interest expropriated,

(b) damages attributable to the disturbance, and

(c) damages for injurious affection.

2. The formula should be clearly set out in the statute in the above terms.

B. Valuation of Interests

1. *Market Value: Definition*

Market value should be defined as the amount that would have been paid for the expropriated interest if it had been sold, on the date of expropriation, in the open market by a willing seller to a willing buyer.

2. *Special Value*

1. (a) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for that land for that purpose, the market value shall, at the option of the owner, be deemed to be the reasonable cost of equivalent reinstatement.

(b) In the determination of what constitutes the reasonable cost of equivalent reinstatement, depreciation of a building should not be taken into account where that building is actually being used, at the time the notice of intention to expropriate is given, for the particular purpose referred to in paragraph (a).

2. In addition to the market value of the land expropriated, the owner shall be entitled to the value of

(a) Any special economic advantage arising out of his occupation of the land, and

(b) Improvements made by a home-owner in his residence,

where the value of such special economic advantage or improvements is not reflected in the market value of the land.

3. *Potential Use*

Avoidance of double recovery - The compensation payable in respect of market value and disturbance damages should not exceed the greater of:

(a) The existing use value plus disturbance damages, or

(b) The value based on the highest and best use.

Value to the taker - In determining market value, no account should be taken of any anticipated or actual use by the expropriating authority after the expropriation.

4. *Effect of the Planned Development*

Rise and fall in value - Where knowledge of the development in respect of which the expropriation is made or where the prospect of expropriation has caused an increase or decrease in the market value of the land expropriated, in calculating the compensation payable:

(a) Any such decrease should be added to the market value, and

(b) Any such increase should be deducted from the market value.

Being "locked in"

1. Where there is public knowledge of the plans of an expropriating authority which reveal an intention to acquire property by expropriation or otherwise in the foreseeable future, and where such public knowledge has had the effect of depressing the value of that property, the owner of that property should be entitled to require the authority to commence proceedings to expropriate it.

2. To require an expropriating authority to commence proceedings to expropriate property under paragraph 1 above, the owner should apply to the general arbitration tribunal for an order that the expropriating authority commence expropriation proceedings.

3. The owner should serve a copy of its application on the expropriating authority, and such other parties as the tribunal might direct.

4. If the expropriating authority can prove that, at the time of the hearing of the application, it no longer has an intention to expropriate, it should not be required to commence expropriation proceedings.

5. After hearing the parties, the tribunal should decide whether or not the expropriating authority be required to commence proceedings to expropriate.

6. Where the tribunal decides that the expropriating authority be required to commence proceedings to expropriate, the expropriating authority should be required to commence such proceedings within 60 days of such decision.

7. The costs of the parties to such an application should be in the discretion of the tribunal.

5. *Illegal or Improper Use*

Any increase in the value of the land resulting from the land being put to a use that could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the land, or to the public health, should not be taken into account in determining the compensation payable.

6. *Separate Interests*

(a) *General*

Where there are separate interests in land, the market value of each should be determined separately.

(b) *Leases*

Frustration -

1. A lease should be considered frustrated from the date of expropriation where:

   (a) All the interest of the lessee is expropriated, or

   (b) The expropriation renders the unexpropriated part of the lessee's interest unfit for the purposes of the lease.

2. Where part of the lessee's interest is expropriated, the lessee's obligation to pay rent should be abated *pro tanto*, unless the expropriation renders the unexpropriated part of the lessee's interest unfit for the purpose of the lease.

Possibility of Renewal - In the valuation of the term of a lease, the possibility of a renewal of the term where the tenant has no right to renewal, should he taken into account.

(c) *Mortgages*

1. Owners of a security interest should be paid the market value of the security.

2. All the rights of the owner of the security, and any collateral thereto, should be converted into a claim for compensation and the person who gave the security should be relieved from any claim for a deficiency.

3. A security interest should be defined as an interest in land that is held by its owner as a security for the payment of money, or the discharge of some other obligation, and includes all mortgages and agreements for sale.

4. Where only part of the property subject to a security interest is expropriated, the owner of that security interest should be entitled to be paid a sum that would leave the ratio between the market value of the security interest, after such payment, and the value of the secured premises remaining the same as existed prior to the expropriation between the market value of the security interest at that time and the value of the entire secured property.

C. Disturbance Damages

1. *General*

   1. Compensation should be paid for all costs, expenses and losses reasonably attributable to the disturbance.

   2. In the event of a dispute over an item of disturbance damage where the loss or expense has not yet been incurred, either party to the expropriation proceedings should be entitled to have the determination of the disputed item deferred until the expense or loss is incurred, or the elapse of a period of one year from the date of expropriation or of such further period fixed by the arbitration tribunal, whichever occurs first.

2. *Percentage Allowance*

   1. No percentage allowance should be given on expropriations, except to owner-occupiers of residences.

   2. To compensate for the inconvenience and the cost of finding another residence, there should be payable, in addition to relocation expenses:

      (a) To owner-occupiers of residences, an allowance of five per cent of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided such part was not being offered for sale on the date of expropriation, and

      (b) To tenants of residences, an allowance equal to three months' rent of the premises expropriated.

3. *Relocation Expenses*

   Reasonable relocation costs should be paid as part of disturbance damages, including:

   (a) Moving costs, and

   (b) Legal and survey costs and other costs necessarily incurred in acquiring other premises, but which would not be reflected in any increment to the value of those premises.

4. *Business Loss*

   Deferral - Unless the owner and expropriating authority otherwise agree, business losses should not be determined until the business has moved and been in operation for nine months or until a two-year period from the date of expropriation has elapsed, whichever occurs first.

   Necessity to relocate - Where it is not feasible for an owner of a business to relocate there should be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing use value of the land.

5. *Legal and Appraisal Costs*

1. The legal, appraisal and other costs reasonably incurred by the person entitled to compensation in asserting a claim for such compensation prior to the institution of proceedings to determine compensation should be paid by the expropriating authority.

2. The legal, appraisal and other costs reasonably incurred after the commencement of such proceedings should be paid on the following basis:

(a) Where the amount awarded exceeds the amount offered, the costs of the party entitled to compensation be paid by the expropriating authority,

(b) Where the amount awarded does not exceed the offer, the costs should be in the discretion of the tribunal making the award.

3. The above costs should be taxable under the *Legal Professions Act.*

4. In determining the legal costs, any arrangement for contingency fee should be disregarded.

5. Owners be entitled to receive from the expropriating authority from time to time, sufficient funds to cover the reasonable cost of retaining legal and appraisal services during the period from the notice of intention to expropriate until the institution of proceedings to bring the determination of compensation before the arbitration tribunal.

6. Where the owner and the expropriating authority are unable to agree on the appropriate amount to be advanced, such amount should be determinable by the
arbitration tribunal, on application by the owner.

6. *Mortgages*

The owner of a security interest should receive, as disturbance damages, the lesser of three months' interest or the amount of the bonus (or its equivalent in notice) for prepayment provided for in the security, whether or not the principal owing under the security was due at the date of expropriation.

7. *Tenants*

In determining the compensation for disturbance to tenants, regard should be had to:

(a) the length of the term,

(b) the portion of the term remaining,

(c) any rights to renew the tenancy or the reasonable prospects of renewal,

(d) in the case of a business, the nature of the business; and

(e) the extent of the tenant's investment in the premises.

D. Injurious Affection

1. *General*

Compensation should be payable for personal and business damage in all claims for damages for injurious affection, if in the absence of statutory authority, liability would have existed.

2. *Partial Takings*

1. It should be made clear that, on a partial taking, damages for injurious affection include damages for severance.

2. The "before and after" test should be incorporated into the proposed statute so as to have general application in partial takings, except as stated in paragraph 3 below.

3. In determining the compensation payable in respect of market value and injurious affection (if any) on a partial taking, the owner should be entitled to not less than the market value of the land taken.

3. *Where No Lands Taken*

1. The law of injurious affection, as it now exists in this Province with respect to lands from which there has been no taking, should be retained, except in so far as the Commission recommends modification.

2. In cases where there is no taking, expropriating authorities should be liable for damages caused by the construction and use of the works.

E. Home for a Home

There should be a "home for a home" provision in the general expropriation statute which would empower the arbitration tribunal, in the case of an owner-occupied residence, to award such compensation, in addition to the compensation otherwise awardable, as would be necessary to enable the owner to relocate his residence in accommodation that is at least equivalent to the accommodation expropriated.

F. Miscellaneous

1. *Reparation*

1. An expropriating authority and owner may agree

(a) That the authority grant to the owner, in whole or partial substitution for the property expropriated,

(i) land,

(ii) an easement or licence over the lands expropriated or other lands, and

(b) That the value of the rights to be granted be determined by the arbitration tribunal and be deducted from the compensation

otherwise payable for the property expropriated.

2. Where, under the replotting provisions of the *Municipal Act*, land is substituted for land taken, the owner should be entitled to compensation in respect to market value only to the extent that the market value of his former parcel would, as at the date of expropriation, exceed the value of his new parcel.

3. (a) In the absence of an agreement between the expropriating authority and the owner, allowance should be made, in determining the compensation payable in cases of partial takings for the expropriated land or for injurious affection, for any work carried out by the expropriating authority which will accommodate the remaining land of the owner.

(b) Where an expropriating authority has not carried out an undertaking to construct accommodation works at the time compensation has been agreed upon or determined, the arbitration tribunal should be empowered to fix a time for the carrying out of that work.

In the event that the work is not carried out in the time specified by the arbitration tribunal, the owner should be entitled to apply to the tribunal for an appropriate adjustment of compensation.

4. The proposed arbitration tribunal should be given jurisdiction for the above purposes.

2. *Date of Valuation*

The date of valuation should be the date of expropriation.

3. *Interest*

General

1. Interest should be paid, where applicable and unless otherwise specified, at one per cent above the current prime lending rate of the Bank of British Columbia.

2. (a) Interest should be paid on the unpaid balance of the market value portion of the compensation from the earlier of:

(i) the date of possession, or

(ii) three months from the date of expropriation,

(b) Interest should be paid on the unpaid balance of disturbance damages from the date on which such damages were incurred,

(c) Interest should be paid on the unpaid balance of damages for injurious affection from the date on which such damages were incurred.

3. Where the amount awarded by the arbitration tribunal for market value exceeds the amount of the statutory offer, the owner shall be entitled to additional interest at the rate of five per cent on the amount of the excess

from the date of the offer to the date of the award.

Penalties for Delay

1. (a) Where a delay in expropriation proceedings has been the fault of the owner, the tribunal should have the discretion to deprive him of interest, in whole or in part, for the period of delay.

(b) The owner should not be deprived of interest merely because the amount of any award is less than the amount offered.

(c) The owner may be deprived of interest, wholly or partially in the discretion of the tribunal, where he has failed to deliver up possession within a reasonable time after demand.

2. Where a delay in expropriation proceedings has been the fault of the expropriating authority, the tribunal should have the discretion to require the authority to pay up to double the amount of interest for the period of delay.

4. *Mode of Payment*

1. The expropriating authority in making an offer should be required, at the time of making the statutory offer of full compensation, to tender immediately payment of 100 per cent of the market value portion of the statutory offer, and

2. The payment to and receipt of such sum, by the owner should be without prejudice to his right to compensation under the expropriation statute and be subject to adjustment in accordance with any compensation that may be subsequently agreed upon or determined under the statute.

5. *Personal Property*

1. The basis of compensation for expropriated personal property, not being interests in land, should be market value and disturbance damage.

2. The provisions of the proposed statute relating to market value and disturbance damage in respect of interests in land should govern the determination of the compensation to be paid to the owners of such personal property, in so far as those provisions would be applicable.

6. *Recurring Payments*

The arbitration tribunal should have the discretion to make awards requiring recurring payments, instead of a lump sum payment, where the expropriating authority needs the use of the expropriated property for only a limited but uncertain period of time.

CONCLUSION

This Report sets out the procedures and the basis for compensation which the Commission believes should apply to all expropriations carried out under the authority of provincial legislation. The Commission recommends that the many and different provisions dealing with procedure and compensation, which are scattered throughout our statutes, and the *Lands Clauses Act*, should be replaced by a single statute of general application.

In the conduct of this project, the Commission has made use of research carried out both here and elsewhere, and also the legislative experience of other jurisdictions. We have been committed to the principle of consultation. We have done our best to seek the views of those who we believed could help us frame proposals for expropriation laws that would meet the needs of contemporary society. The Commission is grateful indeed to the many persons who responded to our request for assistance.

E. D. FULTON
Chairman

R. GOSSE
Commissioner

R. C. BRAY
Commissioner

December 20, 1971.