EXPROPRIATION

Report No. 12

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Table of Contents

A. Introduction

This subject was one of the first undertaken by the Institute on its establishment in 1968. Our study received the formal support of the Honourable Harry Strom, former Premier of Alberta, and of the Honourable Peter Lougheed, the present Premier.

There were strong reasons for undertaking this project. Although the Expropriation Procedure Act of 1961 was a good step, there are still three tribunals that deal with expropriation: the court (with arbitration as an alternative) for Crown takings, the Public Utilities Board for municipal takings, and the Surface Rights Board (formerly the Right of Entry Arbitration Board) for the taking of rights of way for pipelines and power lines.

In addition there has been wide criticism across Canada of the fact that in many cases the taker can acquire title without even any notice to the owner. Ontario's Royal Commission on Civil Rights (the McRuer Commission) made important recommendations for the giving of notice to the owner so that he could object if he wished. The recent statutes of Ontario, Canada and Manitoba reflect this recommendation.

Another ground of complaint is that there is often a long interval between the taking of the land and of the receipt of compensation.

The criticism of existing law has not been confined to procedures. The principles of compensation have come under attack.

In Ontario, the Law Reform Commission in 1967 made recommendations for changing the basis of compensation. These recommendations together with those of the McRuer Report on procedures form the basis of Ontario's *Expropriation Act* 1968-69. The Ontario Act in turn had great influence on the federal *Expropriation Act* of 1970 and Manitoba's *Expropriation Act* of the same year. In 1972 the Law Reform Commission of British Columbia published a thorough and helpful report on expropriation in that province, accepting in general the changes made by the recent Acts.

While we are indebted to the recent studies and legislation, and have borrowed extensively from them in our Recommendations, we have paid

particular attention to Alberta statutes and decisions. There is one subject in particular on which the recent statutes are largely silent. They do not deal especially with expropriation of rights of way; and they do not deal with rights of entry onto the surface of land by the person who owns the minerals beneath. This right of entry, which is very important in Alberta, has much in common with expropriation. We decided from the beginning that any report on the subject must include rights of entry.

In January 1971 we prepared a Working Paper on Principles of Compensation. It was circulated widely and number of comments were received. In May 1972 we circulated a Working Paper in connection with Procedure, which also produced some comments. This Working Paper did not cover rights of entry because the Surface Rights Bill was then before the Legislature. Later, however, we circulated to those particularly interested a short memorandum of the problems connected with rights of entry as they appeared to us.

While the number of comments is less than we had hoped, those we did receive have been thoughtful and constructive. We obtained much assistance too from discussions from time to time with a number of people. Our acknowledgments appear in Appendix B.

The following monographs have been useful:

John Morden, *An Introduction to the Expropriations Act 1968-69 (Ontario),*
Eric Todd, *The Federal Expropriation Act: A Commentary.*

In this Report we shall refer to the first as Morden and to the second as Todd.

In our examination of procedures we have tried to evolve a machinery that is fair and as expeditious as fairness permits. Procedural fairness seems to us to require:

(1) notice to the owner of a proposed expropriation;
(2) provision for objections by the owner;
(3) if his land is taken, the right to payment of a reasonable proportion of his compensation before he is obliged to give up possession;

(4) that the time from the inception of the expropriation until surrender of possession should be kept to a minimum both in the interest of the public and the owner;
(5) that the procedures be as uniform as possible, while recognizing that some types of expropriation may require variation from the general scheme.

The scheme whereby the owner is afforded an opportunity to object is this:

(1) There is in every case an approving authority who is politically responsible and whose approval is necessary to the taking. Usually he is a Cabinet Minister. In some cases the expropriating authority and the approving authority are one and the same--for example in the case of Crown takings the Minister of Highways might act in both capacities and in municipal takings the Council will be its own approving authority.
(2) The expropriating authority notifies the owner of its intention to expropriate.
(3) If the owner objects his objection is heard by an inquiry officer. The inquiry officer is a person independent of the expropriating authority and he holds a public hearing at which both sides will be represented.
(4) The hearing officer makes his recommendation to the approving authority who either approves or refuses to approve the taking.
(5) On registration of approval in the Land Titles Office, and not before, title vests in the expropriating authority.

After title has been taken, there must be provision for settling of compensation. The scheme we propose, which is like that in the recent Ontario and Canada Acts, is this: the taker is obliged to furnish an appraisal and to notify the owner of his right to an amount based on the appraisal. The notification we call the proffer. The owner may accept it without prejudice to his right to claim further compensation. The scheme of the Act is to require the different steps to be taken within specified times so that the settling of compensation will not be drawn out.

As a device to procure agreement on the amount of compensation both Canada and Ontario provide for negotiation which is designed to bring the parties together. We do not recommend this formalized procedure. Often the parties will negotiate voluntarily. If one or the other is unreasonable the case will have to go to expropriation anyway and the negotiation procedure will simply consume extra time.

We shall make Recommendations with respect to the date as of which compensation is to be fixed, the taker's right to possession, the owner's right to interest, and the costs of the proceedings.

A last basic procedural Recommendation has to do with the tribunal to fix compensation. We think there should be a single tribunal which would include the Surface Rights Board. It would have comprehensive jurisdiction, though in the case of Crown takings the owner would have an option to have the compensation fixed by the court.

Turning from procedures to principles of compensation, the main Recommendations provide for:

(1) market value as the basic method of assessing the expropriated land;
(2) reinstatement as the basis of compensation where the structures on the land do not have a market value;
(3) an allowance to the home owner where the cost of equivalent accommodation is above the market value, of his expropriated home;
(4) damages for injurious affection on a partial taking;
(5) compensation for disturbance including business losses where the owner is compelled to move;
(6) separate valuation of separate interests in the expropriated land.

1. The Power to Expropriate

One preliminary question is whether we should attempt to prescribe a formula as to the bodies that should have the power to expropriate. We all are strongly of the opinion that the Legislature should consider carefully before granting the power to expropriate. We all believe that consideration of present grants

might well be undertaken. We agree with the comment of the Honourable Mr. McRuer (Royal Commission Report No. 1, Vol. 3, p. 980):

> It cannot be too strongly emphasized that the Legislature should not confer the power of expropriation on any body or person unless it is clear that the power is inescapably necessary in the interests of government and that adequate controls over its exercise are provided.

However, the majority of our Board are of the opinion that we should not in our present project, examine the existing grants of the power to expropriate.

A minority view would make an attempt to restrict the power in terms of the concept of public use. Admittedly this is difficult to do. In the United States the Constitution confines the power of expropriation, called "eminent domain," in federal takings to those "for a public use". The cases show that "public use" has been expanded far beyond the original State prerogative on which it was based. It is clearly too late to take the power away from all private corporations, but one of our members would have made an attempt to formulate a test based on public use.

B. The Meaning of Expropriation

The first party to the procedure is the person who owns the fee simple in land or some lesser estate or interest. We call him the "owner". The other party is the "expropriating authority". "Expropriation" is the taking of the land or an interest therein.

Historically, the power to expropriate land, sometimes called the power of eminent domain, was part of the Crown's prerogative. As to the Crown's obligation to compensate, the law was in doubt. In modern times, the power has been spelled out in statutes and extended from the Crown to municipal and other public bodies and sometimes to private corporations. In most cases compensation is specifically provided for.

Usually there is no doubt as to whether there has been a "taking." However, a statute sometimes provides for a restriction on an owner's rights over his land without a literal taking--zoning letters and restrictions on access to land are examples. In the United States there are decisions which say there may be a taking where a statute operates to render the land valueless; but the general Canadian view is that there is expropriation only where there is a

taking. Nevertheless, even under our law there are borderline cases. Examples are rights of entry under section 22 of the *Public Works Act*; the right of a municipality to erect poles on private land under the *Municipal Telephones Act*; the right of the Alberta Research Council to enter upon, take and use land without the consent of the owner; and "replotting" under the *Planning Act*.

We have collected and analyzed in Appendix A the Alberta statutes which give the power to expropriate or something approaching it.

A general Act such as we propose applies to expropriations but this cannot ensure that the Legislature will always confer the power in explicit terms. We would hope that the Legislature will use the word "expropriate" whenever it intends to confer the power.

This Report will recommend a general expropriation act, and it is appropriate at the outset to define "expropriation." The present definition in the *Expropriation Procedure Act* is "the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers." Ontario's definition is the same, while in the Canada Act, "expropriated" means "taken by the Crown under Part 2." We think the Alberta definition is adequate.

RECOMMENDATION No. 1

"Expropriation" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers.

This definition does not cover the case of shutting off access or leaving business premises in a cul de sac. A more difficult situation arises where an authority operates an airport in such circumstances that the planes fly at a very low altitude over neighbouring property. Is this a taking? The United States Supreme Court held that it is, in *United States* v. *Causby* (1946), 328 U.S. 256. In Canada, on the other hand, it has been treated as injurious affection (*The King* v. *Hain,* [1944] S.C.R. 199 and *Roberts* v. *The Queen*, [1956] S.C.R. 28). We are not suggesting that this kind of intrusion on the air space should not be compensated, but as we point out later in connection with

injurious affection where there is no taking, we think that this kind of claim is outside of the law of expropriation. Our definition of taking draws a clearer line than a definition which would include this type of activity.

There are a number of statutes which give a power which is close to a taking, but which is not a true expropriation. To remove doubt we shall list these Acts in a Schedule to our proposed *Expropriation Act*. We deal with this in detail in Recommendation No. 63.

It will be seen that our definition of "land" in Recommendation No. 67(h) covers a lease, agreement for sale, mortgage, and the like. We deal later with the basis of compensation for these interests.

C. Procedure Prior to Taking

Since our proposed scheme contemplates that the owner be given an opportunity to object to the taking, it is desirable to define the grounds on which objection may be made.

Under the *Expropriation Procedure Act*, the Crown can acquire title by expropriation without any prior notice. We do not say that this is the usual practice but it is possible. In municipal takings, the owner must be notified of his right to object, and before enacting the expropriation by-law, the council must have regard to objections. In company takings, there is a hearing before the Surface Rights Board. The taking is almost invariably for a right of way for a pipe or power line. There is no specific provision giving the owner a right to object. Indeed the Act says that the Board “shall" make an order declaring the estate granted to the company, and fixing the compensation.

The Act has a general provision applicable to all types of taking, and which says:

> 45. No person may in any proceedings under this Act dispute the right of an expropriating authority to have recourse to expropriation or question whether the land or estate or interest therein to be expropriated is necessary or essential for the public work or the works, as the case may be, for which it is to be acquired.

What scope does this section leave for objections by the owner in municipal takings? In our opinion, it leaves very little. In a dictum in *Dome*

Petroleums Ltd. v. *Swanson No. 1*, which we discuss later in connection with company takings, Allen J.A. said that in Crown and municipal takings "no one other than the Crown or municipality has anything to say about the area, extent or locale of the lands to be acquired" (p. 382).

In company takings, the problem of the Board's power to give effect to objections twice came before the Appellate Division in *Dome* v. *Swanson*, the official citation for which is *Reg.* v. *Alberta Public Utilities Board* (No. 1) (1970), 9 D.L.R. (3d) 376 and (No. 2) (1971, 18 D.L.R. (3d) 597. In *Dome* v. *Swanson* (No. 1), after a sharp division of opinion, it was held that the Board has jurisdiction to give effect to the owner's argument that the right of way should be narrower than the company had asked for. In *Dome* v. *Swanson* (No. 2) the issue was whether the Board could alter the site of the right of way. The company had received a permit which prescribed the route and fixed the path of the line in a general way, but not specifically. The Appellate Division held that the Board can vary the location or site within the limits of the route, and not otherwise. To alter the point of exit and entry of the right of way on the land would be to create a chain reaction, affecting the site on other lands.

What should the scope of objections be? The Honourable Mr. McRuer thought that the owner should not be entitled to object to the project for which the expropriating authority proposes to take the land. A decision to build a highway or a new jail or to create a park is a political one with which the court should not interfere.

This is not to say that an expropriating authority should lightly embark on a project that may lead to expropriation. Indeed the authority should be under a legal duty to consider the necessity or desirability of the project. This, however, is outside the expropriation itself.

The views of the Honourable Mr. McRuer as to the scope of objections was embodied in section 7(5) of Ontario's new statute. The objection to a taking is confined to the issue whether the taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

The English and Canadian statutes, on the other hand, simply permit objections without specifying the grounds. We have rejected this alternative.

We think that the first limb of section 45 should remain but the second limb should be replaced by a provision along the lines of Ontario' s. However in the case of municipal takings we think the basis of objection should be somewhat wider than in other cases. We understand that the present practice in municipal takings is to permit objections to the scheme itself and that it is meaningful so to do; and the problem is local so a hearing on a wider basis is practicable. The owner should be able to question the scheme itself.

RECOMMENDATION No. 2

(1) No person may in any proceedings under this act dispute the right of an expropriating authority to have recourse to expropriation.

(2) Notwithstanding subsection (1), where the expropriating authority is a municipality, but not otherwise, the owner may question the objectives of the expropriating authority.

(3) In an expropriation by any expropriating authority, the owner may question whether the taking of the land, or estate or interest therein is fair, sound and reasonably necessary in the achievement of the Objectives of the expropriating authority.

1. The Approving Authority

The next matter is to establish the approving authority. As already stated it should be a politically responsible person or body. The following Recommendation provides that it shall be the appropriate Cabinet Minister except in the case of municipalities. The municipal council is politically responsible and so it will be its own approving authority.

Where no Minister is named to administer the Act conferring the power to expropriate, the approving authority will be the Attorney General. This will be true of the *Pipe Line Act*. The Legislature may find another Minister more appropriate.

Our Recommendation follows in general the plan of Ontario's section 5.

RECOMMENDATION No. 3

(1) An expropriating authority shall not expropriate land without the approval of the approving, authority.

(2) The approving authority in respect of an expropriation shall be the Minister responsible for the administration of the act in which the power to expropriate is granted except that where a municipality expropriates land for municipal purposes, the approving authority shall be the council of the municipality.

(3) The approving authority in any case not provided for in this section shall be the attorney general.

2. Notice of Intention

The next matter is that of the procedure on a taking. It has already been described in a general way. The purpose of the following Recommendation is to provide that the expropriating authority must give a notice of intention and that the expropriation is not to be effective until the approving authority has approved the expropriation. This procedure gives an opportunity to object and to have the objection heard before an "inquiry officer."

RECOMMENDATION No. 4

(1) The expropriating authority shall file a notice of intention to expropriate in the proper Land Titles Office.

(2) The expropriating authority shall forthwith serve the notice of intention on the approving authority and on every person shown on the title to have an interest in the land and also on every person whose interest is not shown on the title but who is known to the expropriating authority to have an interest in the land.

(3) The notice of intention shall be published in at least two issues, not less than seven nor more than fourteen days apart, of a newspaper in general circulation in the locality in which the land is situate.

(4) A notice of intention shall contain

(a) the name of the expropriating authority,
(b) the description of the land,
(c) the nature of the interest intended to be expropriated,
(d) an indication of the work or purpose for which the interest is required,
(e) statement of the provisions of Recommendation No. 2 and Recommendation No. 5,
(f) the name and address of the approving authority.

3. Notice of Objection

Provision should be made for the owner to object in writing to the approving authority. An appropriate time for making the objection is twenty-one days.

RECOMMENDATION No. 5

(1) The owner who desires a hearing shall send to the approving authority a notice of objection in writing

(a) in the case of an owner served in accordance with Recommendation No. (2), within twenty-one days of service upon him of notice of intention; and
(b) in any other case, within twenty-one days after the first publication of notice of intention.

(2) The notice of objection shall state the name and address of the person objecting, the nature of the objection and the grounds upon which it is based,

and the nature of the interest of the person objecting in the matter of the intended expropriation.

The above Recommendations confer the right to object on those with an interest in the land. Canada permits anyone to object. We do not favour such a wide provision. On the other hand there may be cases where a neighbouring owner has grounds for objecting. We think it should be open to him to do so, and later we provide for the adding of such parties at the discretion of the inquiry officer.

4. Approval Where No Objection

When the notice of intention has been served, those with a right to object may or may not do so. If no one objects, the approving authority should have power to approve the expropriation as soon as the time for objecting has expired. The following Recommendation so provides:

RECOMMENDATION No. 6

(1) Upon the expiration of the period of twenty-one days and upon proof of service in accordance with Recommendation No. (2) and (3), the approving authority shall approve or not approve the proposed expropriation where it has not been served with a notice of objection.

(2) The approving authority nay approve the expropriation of a lesser interest than that described in the notice of intention.

Where there is an objection, an inquiry officer must be appointed. We provide for this in Recommendation No. 12.

5. Withdrawal of Objection

It is possible that a person having served a notice of objection, may decide to withdraw it. In that event the expropriation should proceed as though the objection had not been made.

RECOMMENDATION No. 7

Where a person having served a notice of objection withdraws it, the approving authority may proceed as though the objection had never been made.

6. Dispensing With Inquiry

a. Urgency

While the general policy is to give the owner an opportunity to object before the inquiry officer, there may be urgent situations where the expropriating authority is justified in proceeding without notice. Canada and Ontario have both provided that the executive may dispense with the right to object in special circumstances. We favour a similar provision. To prevent abuse of this dispensing power, it should be phrased in narrow terms and the power should be vested in the Lieutenant Governor in Council.

RECOMMENDATION No. 8

(1) The Lieutenant Governor In Council, at any time before service of notice of intention, where satisfied that the expropriating authority urgently requires the land immediately and that delay would be prejudicial to the public interest, may by order in council direct that an intended expropriation shall proceed without inquiry.

(2) Where an order is made under subsection (1) the expropriating authority shall serve the notice of intention but omitting the requirements of Recommendation 4(4)(e) and (f) and instead including a copy of the order in council.

(3) Where an order is made under subsection (1) the expropriating authority may apply immediately to the approving authority for certificate of approval, and the approving authority shall issue the certificate.

b. Prior Hearing

One important matter has to do with dispensing with the inquiry where there has already been an inquiry that covers the same ground. We refer specifically to the hearings before the Energy Resources Conservation Board. These hearings are held on an application by a company for a permit to construct a pipeline or power line. In some cases, though not all, the proposed route is specific, the landowners know where it is going to go, and the evidence that comes out before the Board is the same as it would be on a hearing before the inquiry officer.

There are other Acts that provide for the hearing of objections in connection with the launching of a statutory scheme: e.g., urban renewal under the *Housing Act* and transportation protection areas under the *City Transportation Act*. The following recommendation is designed to avoid duplication of hearings in cases like these.

RECOMMENDATION No. 9

(1) Where in the opinion of the approving authority, the owner pursuant to the provisions of the *Energy Resources Conservation Act* or the *Housing Act* or the City Transportation Act or any other act has had substantially the same opportunity to object to the expropriation as he would have had on an inquiry under this Act, the approving authority by direction in writing may dispense with the hearing before the inquiry officer.

(2) Where the inquiry is dispensed with under subsection (1) the expropriating authority shall serve the notice of intention but omitting the requirements of Recommendation 4(4)(e) and (f) and instead including a copy of the direction in writing of the approving authority.

(3) where the inquiry is dispensed with under subsection (1), the expropriating authority may apply immediately to the approving authority for a certificate of approval.

7. Period For Completing Expropriation

At this point we turn to another matter, that of compelling the expropriating authority to go forward expeditiously with the expropriation once the notice of intention has been filed and served. The owner should not be left in doubt as to whether the expropriation is to go forward. If the taker does not proceed expeditiously he should be taken to have abandoned the expropriation.

RECOMMENDATION No. 10

Subject to Recommendation No. 18, if within 120 days from the date when the notice of intention was registered the certificate of approval has not been registered, it shall be conclusively deemed that the expropriation has been abandoned.

8. Prior Right of Entry

Expropriating authorities often find it necessary to enter on land to determine whether it is suitable for the proposed works. This need may occur before expropriation proceedings have been started. Surveys, soil tests and a general examination of the land may all be required.

The *Surveys Act*, R.S.A. 1970, c. 358, s. 73, authorizes surveyors and their assistants to enter on land in the performance of their duties. No consent or even notice is required, but the surveyor "shall do no actual damage to the property." This provision is, of course, not confined to a contemplated expropriation, but does include it.

The *Expropriation Procedure Act*, section 42, empowers any expropriating authority, on notice but without consent, to enter on land to determine the location of the proposed works or the description of the land. The authority may cut down trees, but must compensate the owner for damage he has caused.

The Alberta Government Telephones Commission has power to "enter upon and take or use any lands" quite apart from its specific power to expropriate (section 25, *Alberta Government Telephones Act*).

The new *Surface Rights Act* has a provision (section 14) dealing with the mineral owner's right of entry, and giving to the mineral owner (the operator) the right to make surveys on notice to the person in possession; and the operator must pay for any damage.

There should be in the proposed Act a specific provision dealing with right of entry. It should spell out the purposes for which entry can be made. Basically they should be the same as they are in section 42 of the *Expropriation Procedure Act*, namely to make surveys and examinations and to determine the location of works or the description of the land. Specific powers should be given to enter to make soil tests and to make an appraisal of the land. In general, the following Recommendation follows section 42. However, section 42(5) excludes section 42 when an authorizing Act takes express provision for entry. We think that the provisions for notice and compensation in the following Recommendation should prevail over the provision in any authorizing Act. In other words, we have reversed the policy of section 42(5).

RECOMMENDATION No. 11

(1) Whether or not expropriation proceedings have been commenced by registration of notice of intention to expropriate, the expropriating authority may after making reasonable effort to give notice thereof to the person in possession of the land, enter by himself or by his servants or agents, on any Crown or other land for the purpose of making

> **(a) surveys, examinations, soil tests, or other necessary arrangements to determine the location of any proposed works or the description of the land that he may require in connection therewith, and**
> **(b) an appraisal of the value of the land or any interest therein.**

(2) Subject to subsection (3) where it is necessary to effect a survey, an expropriating authority may, by himself or by his servants or agents, cut down any

trees or brush that obstruct the running of survey lines.

(3) An expropriating authority who exercises a power given by the is section shall compensate the registered owner or person in possession of the land, as the case may be, for all damage caused by him or his servants or agents in or by the exercise of all or any of the powers given by this section.

(4) Where the land entered upon is not expropriated, no action lies against the expropriating authority for damage occasioned by him in the exercise of a power given by this section unless notice in writing signed by the claimant is given to the expropriating authority who exercised the power within six months after notice was given to the claimant pursuant to subsection (1).

(5) The provisions of this section for notice and compensation apply notwithstanding that the authorizing act makes express provision with respect to the subject matter of this section.

Before leaving the subject of entry, it is necessary to mention section 22 of the *Public Works Act*. It goes back to section 31 of the original *Public Works Act* of 1906, and clearly has its origin in a section that was in the old *Expropriation Act of Canada* (R.S.C. 1952, c. 106, s. 3). It has to do with the execution of public works and gives the Minister power to enter upon any land: to survey and make soil tests; to take possession; to enter to deposit soil, gravel, etc.; and to dig up earth, gravel, etc., cut down and remove trees; make temporary roads; make drains; and, divert water courses, drains, and electric poles. The section giving this drastic power contains no provision for compensation. However section 9 of the *Expropriation Procedure Act* contemplates the filing by the Minister of a plan or notification in connection with land of which possession is taken for the purpose of section 22, and the compensation provisions apply. Yet the Minister does not have to file the plan for eighteen months, and may extend the time for a further six months, and so from time to time (section 9(5)).

We understand that these powers are used occasionally but that invariably settlement is made with the owner. If it were not made then it seems clear that section 9 would apply. Section 9 assures compensation but it may be delayed indefinitely because of section 9(5).

It is difficult to decide whether the subject matter of section 22 belongs in an *Expropriation Act*. As already stated, it is in the Canada Act and the new Act deals with it in a special part, Part II--Use of Lands. The power of entry is similar to that in the earlier Canada Act but seven days notice to the owner is now required and there is provision for compensation for loss or damage resulting from the exercise of the powers. Professor Todd makes the comment that these provisions "have nothing to do with the law of expropriation" (p. 91). Although the power given by section 22 is very wide, we have received no suggestion that it has been abused, and we do not recommend its abolition. We think, however, that it should be amended to provide for notice, as the new Canada Act does. It should also be amended so as specifically to provide compensation for loss or damage, along the lines of Canada's section 40. We realize that an entry under section 22 can be so extensive as to amount to a temporary expropriation. If the Crown wishes to expropriate (and temporary expropriations are already contemplated by section 9 of the *Expropriation Procedure Act*) then of course it will be under the provisions of the proposed Act.

The *Alberta Government Telephones Act*, section 25, gives the Commission the power to enter, take and use land, and this is in addition to the power to expropriate. We recommend a provision for notice and compensation for damage as we have done in connection with section 22 of the *Public Works Act*.

To avoid confusion with our recommendations for an Expropriation Act, we shall place, in Appendix C, the Recommendations just discussed and affecting the *Public Works Act* and *Alberta Government Telephones Act*.

9. The Inquiry Procedure and the Inquiry Officer

As stated earlier, the owner should have the right to object to the expropriation. The scheme which we propose, like Ontario's and Canada's, is to establish an inquiry officer whose function is to hear the objections. There is one important difference between the Ontario and Canada Acts, namely,

that the Canada Act does not contemplate the appearance of the Crown's representative. In Ontario, on the other hand, the expropriating authority is represented. We think this is preferable because the hearing of both sides gives the inquiry officer a better opportunity to make a sound recommendation.

We understand that in Ontario, hearings are frequent. In most cases, the recommendation of the hearing officer to the approving authority is accepted. We note however that in *Walters* v. *Essex County Board of Education* (1971), 20 D.L.R. (3d) 386, the recommendation was against the expropriation but it was not accepted. This is a useful case to show the working of the inquiry procedure.

A hearing officer should be elected by the Attorney General, and on the basis of his competence. He should be independent both of the expropriating authority and of the approving authority and should be a person who is not employed in the Public Service of the province. He should be obliged to hold the hearing within a specified time. We have already said that the expropriating authority should be a party. Everyone who has objected also should be a party. In addition, the hearing officer should be able to add any person who appears to have a material interest in the outcome and the owner of any land in the neighbourhood whose land will be subjected to the possibility of expropriation if an alternate location is being considered.

The volume of inquiries will probably be such as to require a number of officers. In Ontario there is a large number. The post is not full-time. Some officers are practicing lawyers and some are appraisers or in another calling that makes them suitable for this task. There is a chief inquiry officer who assigns one or other of the officers to each inquiry. At present, the chief inquiry officer is a solicitor in the Department of the Attorney General. He does not himself conduct inquiries. In Alberta the volume will doubtless be considerably less than in Ontario. We are not sure that a chief inquiry officer will be needed, so we have provided that the Attorney General shall assign the inquiry officers, and have added a provision that he may appoint a chief inquiry officer to carry out this function.

As to the conduct of the hearing, the time and place should be selected by the inquiry officer and he should attend to notice of the hearing. Meetings

should be in public. As to the actual procedure, this should be in the hands of the inquiry officer. He should have a power to adjourn, change the venue of the hearing, and to inspect the land. We envisage that the procedure will be informal but that the parties will be entitled to present evidence and arguments and, where fairness requires, to examine and cross-examine witnesses and that the inquiry officer is not bound by the technical rules of evidence. The following formal Recommendation is designed to embody the foregoing.

We point out that subsection (8)(c) in the following Recommendation has the same purpose as sections 5 and 6 of the *Administrative Procedure Act*. Those two sections may be made applicable to a given tribunal by order in council. If they were to be made applicable to inquiry officers, then subsection (8)(c) would not be required.

RECOMMENDATION No. 12

(1) Where the approving authority has received an objection, it shall forthwith notify the Attorney General.

(2) Within five days of receiving notice that the approving authority has received an objection, the Attorney General shall appoint an inquiry officer, who is not a person employed in the public service of the province, to conduct an inquiry in respect of the intended expropriation.

(3) The Attorney General may appoint a chief inquiry officer who shall exercise the power of the Attorney General under subsection (2) and who shall have general supervision and direction over inquiry officers.

(4) The inquiry officer shall fix a time and place for the hearing and shall cause notice of the hearing to be served on the expropriating authority and on each person who has made an objection to the expropriation.

(5) The expropriating authority and each person who has served a notice of objection shall be parties to the inquiry.

(6) The hearing before the inquiry officer shall be public.

(7) The inquiry officer shall inquire into whether the intended expropriation is fair, sound, and reasonably necessary in the achievement of the objectives of the expropriating authority, and in the case of a municipality shall inquire into any objection to the objectives themselves.

(8) For the purpose of subsection (7) the inquiry officer

> **(a) shall require the expropriating authority to attend at the hearing and to produce such maps, plans, studies and documents as the inquiry officer deems necessary for his inquiry;**
> **(b) may add as a party to the inquiry any owner whose land would be affected by the expropriation of the lands concerned in the inquiry and any person who appears to have a material interest in the outcome of the expropriation;**
> **(c) shall give each party to the inquiry a reasonable opportunity to present evidence and argument and may permit examination and cross-examination, either personally or by counsel or agent;**
> **(d) may inspect the lands, intended to be expropriated or the lands of an owner referred to in paragraph (b), either with or without the presence of the parties;**
> **(e) has general control over the procedure at the hearing, including power to adjourn the hearing, and change the venue;**

(f) may combine two or more related inquiries and conduct them as one inquiry;
(g) may provide for a transcript of. the evidence; and
(h) is not bound by the rules of law concerning evidence.

10. Costs of Inquiry

The question arises as to whether provision should be made for payment of the costs of parties to the hearing. Canada's section 8(9) provides for costs on a tariff prescribed by the Governor in Council. The hearing officer fixes them. In Ontario, section 7(10) enables the inquiry officer to recommend to the approving authority the costs of a party to the inquiry, with a maximum of $200. Manitoba simply says that the expropriating authority is liable to pay to the inquiry officer the remuneration and expenses approved by the Attorney General. This does not seem to provide for costs of the parties at all but rather for the costs of the inquiry officer.

We have considered whether to recommend any provision for costs. Our views on this question have fluctuated. On balance, we have concluded that the taker should not be obliged to pay the costs either of the inquiry officer or of the owner. A minority support some provision for payment of the owner's costs, either by naming a maximum or fixing a tariff.

11. Report of Inquiry Officer

The next matter has to do with the preparing by the inquiry officer of his report, and circulation of the report. To avoid undue delay, we think it appropriate to require the inquiry officer to report within thirty days of his appointment. His report should include a summary of the evidence, the findings of fact, and his opinion on the merits. It should go to the approving authority and the parties and should be made available to others on request. The following Recommendation provides for these matters:

RECOMMENDATION No. 13

(1) The inquiry officer shall within thirty days of his appointment make a report in writing to the

approving authority and the report shall contain a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact and his opinion on the merits of the expropriation with his reasons, therefor.

(2) The inquiry officer shall forthwith send his report to the parties to the hearing and shall make it available on request to any person at reasonable cost.

12. Privative Clause

One point that should be specifically dealt with has to do with the right of any person to attack the proceedings before the inquiry officer or his recommendations. Since the inquiry officer merely recommends and does not decide, there is no basis whatever for judicial review. To remove doubt there should be a strict privative clause.

RECOMMENDATION No. 14

No proceedings by or before an inquiry officer shall be restrained by injunction, prohibition or other process or proceedings in any court or are removable by *certiorari* or otherwise into court nor shall any report or recommendation by the inquiry officer be subject to review in any court.

13. Certificate of Approval

When the approving authority receives the report from the inquiry officer, he must consider the report and then decide whether to confirm or reject the taking. We think he should have to give written reasons for his decision, though he should be able to adopt the inquiry officer's reasons. The reasons should be served upon all parties within thirty days from the time the approving authority has received the report of the inquiry officer. Subsection (5) has been included because we have been informed that cases sometimes arise, for example in highway takings and possibly in pipe or power line rights of way, where it is discovered at the last minute that a minor divergence may be necessary, for example, because of the nature of the soil. In those circumstances it would be unfortunate again to go through the whole

procedure of objections and inquiry, so we have provided for this in subsection (5). Subsections (6) to (8) provide for the adjustment of compensation if the parties cannot agree.

RECOMMENDATION No. 15

(1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a person who was not party to the hearing.

(2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within thirty days after the date upon which the report of the inquiry officer is received by the approving authority.

(3) Where the approving authority approves the expropriation when giving the written reasons referred to in subsection (2), it shall also provide the expropriating authority with a certificate of approval in prescribed form.

(4) Where the approving authority and expropriating authority are one and the same, the requirement of subsections (2) and (3) shall be modified accordingly.

(5)After the approving authority has given approval and notwithstanding registration of the certificate of approval, it may vary the size or location or boundary of the expropriated land, but within the boundaries of the parcel from which the land was expropriated, where in the opinion of the approving authority the variation is minor and can be made without prejudice to the owner.

(6) Where the approving authority varies the expropriation under subsection (5), it shall provide the expropriating authority with an amended certificate of approval.

(7) The expropriating authority may register the amended certificate of approval in the Land Titles Office.

(8) Where the amended certificate of approval is registered,

(a) it takes the place of the certificate of approval registered under Recommendation No. 16;
(b) the expropriating authority shall not be delayed in taking possession on account of the amendment;
(c) the owner is entitled to compensation for his interest in the lands described in the amended certificate of approval or to compensation for his interest in the lands described in the certificate of approval, whichever is the greater; and
(d) the provisions of this act for determining compensation, including the provisions for the proffer, apply.

The provision for a prescribed form is taken from Ontario's. In that province a regulation (#73/69) sets out the form of certificate of approval. In Manitoba the form, which is called Declaration of Expropriation, is Form 1 in the Schedule to the Act. In Canada's Act section 12 prescribes the content of the "note of confirmation" as it is called, without prescribing a form. We prefer the Ontario method, though the consent should be framed with the requirements of the *Land Titles Act* in mind including provision for a plan when necessary.[1]

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[1] The Court of Appeal of Ontario held in *Zaichuk* v. *The Ontario Water Resources Commission*, decided 21 December 1972, that *certiorari* does not lie from a certificate of approval. We think this is correct and we have not specifically provided that *certiorari* does not lie.

14. Taking of Title

The next step is to provide for the filing of the certificate of approval in the Land Titles Office so that the expropriating authority will acquire title. This step should be taken by the expropriating authority itself. The following Recommendation provides for the carrying out of this step. Later we provide for service of the notice of expropriation on the former owner.

> **RECOMMENDATION No. 16**
>
> **The expropriating authority may register the certificate of approval in the Land Titles Office, and registration vests in the expropriating authority the title to the lands described as to the interest described.**

15. Curative Section

Once the taker has acquired title, it should not be open to anyone to question the title by raising defects in the procedure. The following Recommendation so provides:

> **RECOMMENDATION No. 17**
>
> **Registration of the certificate of approval is conclusive proof that all the requirements of this act in respect of registration and of matters precedent and incidental to registration have been complied with.**

16. Extension of Time

One matter that should be dealt with at this point has to do with the extension of time. The total period is 120 days, and within that period various acts must be done within a specified time. We provide below for extension of the 120 days and also for extension of the other periods, namely, five days to assign an inquiry officer, thirty days for the inquiry officer to report, and thirty days for the approving authority to make his decision. The Attorney General should have power to extend any of these times for a limited time. An extension of one of these other periods will produce an automatic extension of the 120 days for an equivalent time.

RECOMMENDATION No. 18

(1) The Attorney General may, prior to the expiration of the 120 days referred to in Recommendation No. 10:

(a) extend the time for appointing the inquiry officer for another five days;
(b) extend the time for the inquiry officer to report for another thirty days;
(c) extend the time for the approving authority to make his decision for another thirty days.

(2) Where any extension is granted under subsection (1), the Attorney General shall execute a notice of extension extending the time for registration of the certificate of approval for an equivalent number of days.

(3) Notwithstanding that no extension has been granted under subsection (1), the Attorney General may, prior to the expiration of the 120 days referred to in Recommendation No. 10 execute, a notice of extension extending the time for registration of the certificate of approval beyond the 120 days.

(4) The notice of extension executed under subsection (2) or (3) shall be registered in the Land Titles Office prior to the expiration of the 120 days and shall be served forthwith upon the persons who were served with the notice of intention and upon any other person who has given notice of objection or become a party to the inquiry.

17. Abandonment

One matter that must be provided for is that of abandonment of the proposed expropriation. We think that the expropriating authority should be able to change its mind after filing the notice of intention and any time up to registration of the certificate of approval which of course confers title. We have already provided for deemed abandonment in Recommendation No. 10.

As far as the present law is concerned, the *Expropriation Procedure Act* provides for abandonment in takings by municipalities but not in any other case. We think the provision should be general.

RECOMMENDATION No. 19

(1) An expropriating authority may abandon its intention to expropriate, either wholly or partially, at any time before registration of the certificate of approval in the Land Titles Office.

(2) The expropriating authority shall 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 shall deposit the notice in the appropriate Land Titles Office.

(3) Where an expropriation has been abandoned, the expropriating authority shall pay to the owner any actual loss sustained by him and the reasonable legal, appraisal, and other costs incurred by him up to the time of abandonment, as consequence of the initiation of the expropriation proceedings.

(4) Compensation payable under this section including costs shall be fixed by the tribunal.

D. Procedure For Fixing Compensation

Once the expropriation is complete, then machinery must be established for settling of the compensation, assuming the parties do not agree. The purpose of the following Recommendations is to prescribe this machinery.

1. The Tribunal

One of the major questions is: What body should be the tribunal to settle the amount of compensation that the expropriated owner is to receive? In Alberta the tribunal varies with the expropriating authority. In Crown takings it is the Supreme Court save that if both parties agree, the determination is by arbitration (section 19). In municipal takings the Public Utilities Board fixes

the compensation (section 2(b) and section 28). In connection with companies which are covered by Part 3 and those miscellaneous bodies with power to expropriate that are covered by Part 4, the jurisdiction (with a very important exception) is in the Public Utilities Board (section 32). The exception has to do with companies that are under the *Pipe Line Act;* the *Water, Gas, Electric and Telephone Companies Act*; section 86 of the *Water Resources Act*, and the *Hydro and Electric Energy Act*. In 1970 jurisdiction over the first three was taken from the Public Utilities Board and given to the Right of Entry Arbitration Board, now the Surface Rights Board. In 1971 the last-mentioned Act was included with the others. The reason for the change was that takings by companies under the Acts just mentioned are usually for rights of way and the problems of compensation have a great deal in common with those connected with damage to the surface done by a mineral owner on exercise of his right of entry.

In some jurisdictions the tribunal is the court. Under the *Canada Expropriation Act*, which is confined to Crown takings, the tribunal is the federal Court which has replaced the Exchequer Court. In Manitoba, the Court of Queen's Bench is the tribunal for all expropriations. Ontario's new Act provides for a Land Compensation Board. The British Columbia Report recommends a similar board, rather than the court.

We think there should be a provincially-appointed tribunal and that it should have jurisdiction to fix compensation in all expropriations subject to an option in the owner to choose the Supreme Court where the taking is by the Crown.

The reasons for favouring a tribunal are that the procedure is simpler and tends to be quicker, and there is the advantage of expertise of a board or tribunal that deals with the same type of problem continually. In addition, a board can sit anywhere in the province and not merely in judicial centres.

The reason why an owner should be permitted to elect to have the compensation fixed by the court in Crown takings is that the owner may be concerned that a tribunal appointed by the Crown may not be impartial as between the owner and the Crown.

It will be remembered that the Surface Rights Board now has jurisdiction over an important type of expropriation, namely, that of rights of way, and in addition it has jurisdiction over compensation on the exercise of the mineral owner's right of entry. The Public Utilities Board still has jurisdiction over municipal takings. We do not think that this Board is the most suitable for expropriation. Its main functions lie in a completely different field. On the other hand, the Surface Rights Board was set up to deal with compensation in the context of mineral rights and recently its jurisdiction was expanded to include rights of way for pipe and power lines. We think it proper that the tribunal we recommend should include the Surface Rights Board.

This Recommendation for a single tribunal is not unanimous. One member of our Board would leave the Surface Rights Board and its jurisdiction untouched. He believes that it is because of the structure and specialized function of that Board that it has coped successfully with a difficult and unique problem. He also believes that its function is substantially different from the other functions proposed for the new tribunal.

The tribunal should be large enough to handle all cases without delay. It should include the members of the Surface Rights Board. It is clear that the new tribunal will need additional members. We do not think it advisable to prescribe a maximum number, though we note that the maximum number on the Surface Rights Board is seven (section 3(2)).

The Chairman should be a lawyer. There should be a vice-chairman, chosen for his expertise in connection with surface rights and rights of way. The original vice-chairman should be the present Chairman of the Surface Rights Board. All members should be appointed for ten years on good behaviour and be eligible for reappointment at the expiration of that term. It should be possible for either one member or any odd number, if the chairman thinks it appropriate, to exercise the powers of the tribunal.

In any given case the member or members selected to represent the tribunal should be selected on the basis of expertise in the particular class of taking; for example, takings of agricultural land or of urban land. The vice-chairman or his nominee should preside in agricultural takings.

Our conception of the constitution and function of the Board is set out in the following Recommendation:

RECOMMENDATION No. 20

(1) There is hereby established a board called the Land Compensation and Surface Rights Board.

(2) The board shall consist of a chairman and a vice-chairman and such other members as the Lieutenant Governor in Council considers advisable, provided that the persons who are members of the Surface Rights Board under the Surface Rights Act immediately prior to the commencement of this act shall become members of the Land Compensation And Surface Rights Board without the necessity of an order in council appointing them.

(3) The chairman shall be a member in good standing of the Law Society of Alberta

(4) The first vice-chairman shall be the then chairman of the Surface Rights Board and thereafter the vice-chairman shall be selected for his experience in connection with compensation for agricultural land.

(5) The chairman and each member of the board shall receive such remuneration as may be fixed by the Lieutenant Governor in Council.

(6) In accordance with the Public Service Act there may be appointed a secretary, an assistant secretary, inspectors, land examiners and such other employees as are required to carry on the business of the board.

(7) Each member of the board holds office during good behaviour for a term of ten years from the date

of his appointment and at the expiration of his term of office is eligible for re-appointment

(8) Subject to subsection (10), the chairman may select a member or an odd number of members to deal with a particular case or class or group of cases.

(9) The member or members selected pursuant to subsection (8) may perform the functions of the board and when performing any such function shall have all the powers and jurisdiction of the board.

(10) Where the expropriated land is agricultural, the vice-chairman or his nominee shall be the single member or presiding member, as the case may be for the purposes of subsection (8).

2. Procedural Powers

Having established the Board , it is necessary to confer the usual procedural powers given to administrative tribunals. The *Administrative Procedure Act* should be made to apply, and we so recommend in Appendix C. It now applies to the Surface Rights Board and the Public Utilities Board.

The following Recommendation consists mainly of provisions which are commonplace. We call attention, however, to a provision covering contempt of the Board and another provision which will give the Board power to provide for examinations for discovery. In connection with the recording of evidence, we assume that the *Mechanical Recording of Evidence Act* will apply.

RECOMMENDATION No. 21

(1) The board may make rules of procedure and practice governing the hearings and proceedings before it and, in particular, for the hearing of two or more claims together, notice to admit facts, production of documents, and discovery.

(2) The board may hold its sittings at such place or places in Alberta as it from time to time considers expedient.

(3) The board shall cause all oral evidence submitted before it at a formal sitting to be recorded, and this evidence, together with such documentary evidence and things as are received in evidence by the board, shall form the record before the board.

(4) The board has

(a) all the powers of a commissioner appointed under the *Public Inquiries Act*, and

(b) Such further powers, and duties as may be determined by the Lieutenant Governor in Council.

(5) The board may enter upon and inspect or authorize any person to enter upon and inspect, any land, building, works or other property.

(6) The board

(a) in conducting any hearing shall proceed in accordance with its rules of procedure and practice;

(b) is not bound by the rules of law concerning evidence;

(c) may adjourn any hearing of a proceeding from time to time for such length of time as the board in its discretion considers expedient or advisable.

(7) If any person, other than a party, without just cause

(a) on being duly summoned as a witness before the board makes default in attending; or

(b) being in attendance as a witness refuses to take an oath legally required by the board to be

taken, or to produce any document or thing in his power or control legally required by the board to be produced by him, or to answer any question to which the board may legally require an answer, a member of the board may certify as to the facts of the default or refusal of that person under his hand to the Supreme Court, and the court may thereupon inquire into the alleged offence and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence and after hearing any statement that may be offered in defence, may punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

3. Jurisdiction

Thus far we have not specifically provided for the principal function of the Board, which of course is to fix compensation on expropriation. Its jurisdiction will cover all cases except those Crown takings in which the owner has elected to go before the Supreme Court.

The purpose of permitting an election in Crown takings is to safeguard the impartiality of the tribunal. It does create a problem where there are two or more owners. One may elect to go before the court and the other may be content to go before the Board. Notwithstanding this, the majority think that the election should be permitted. A minority would have declined to permit an election and would have given the Board exclusive jurisdiction even in Crown takings. The following Recommendation carries out the policy of the majority:

RECOMMENDATION No. 22

(1) Where the expropriating authority and the owner have not agreed upon the compensation payable under this act, the board shall determine such compensation.

(2) The board shall also determine any other matter required by this or any other act to be determined by the board.

(3) Notwithstanding subsection (1), where the expropriation is by the Crown, the owner may elect to have the compensation fixed by the court.

4. Notice of Expropriation and Proffer

The next step is to provide machinery for settling the amount of compensation after the expropriating authority has acquired title. The scheme we propose is to require the expropriating authority to notify each person with an interest in the land that his interest has been taken and also to notify him of the amount it is prepared to pay for his interest. We do not call this notification an offer because that term is misleading. Acceptance does not create a contract, for the owner may take the amount without prejudice to his right to ask for more. Canada and Ontario both use the word "offer", but this makes it necessary to speak of a "section 14 offer" under the Canada Act and "section 25 offer" under the Ontario Act, to distinguish them from a true offer which might well be made during negotiation. We think this use of the word "offer" is confusing and shall use the term "proffer." The proffer should be in writing and a separate proffer should be made to everyone with an interest in the land. It should be in the amount which the taker estimates that the owner is entitled to in respect of his interest.

The foregoing applies to a complete taking of the parcel. Where there is a partial taking it is not feasible to set a valuation on each interest (e.g., of the mortgagee's interest where a strip of mortgaged land is taken for a highway), so there should be single offer that goes to all parties. Another factor the comes into play on a partial taking is that of severance damage. The proffer should include the taker's estimate of that damage.

In all cases the notice of expropriation should be given forthwith after acquisition of title, and the proffer within ninety days.

RECOMMENDATION No. 23

(1) Where a certificate of approval has been registered, the expropriating authority shall forthwith serve the owner with a notice of expropriation in Form A.

(2) The owner is entitled to an immediate payment in the amount which the expropriating authority estimates to be equal to the compensation to which the owner is then entitled in respect of his interest in the land.

(3) Within ninety days of registration of the certificate of approval the expropriating authority shall give to the owner a written notification, hereinafter called "the proffer", setting out the amount estimated pursuant to subsection (2) or (4).

(4) Where the expropriated land is part of a larger parcel,

> **(a) the proffer shall be for the estimated value of the expropriated land, and excepting co-owners of the same interest, where there is more than one owner they may agree as to the disposition among themselves of the amount proffered, and in the event of dispute the expropriating authority may apply to the board for an order for payment in the amount set out in the proffer and the board may make directions as to the disposition of that amount; and**
>
> **(b) the proffer shall include the expropriating authority's estimate of severance damage.**

(5) Acceptance by the owner of the amount proffered is without prejudice to his right to claim additional compensation in respect thereof.

(6) The amount of the proffer is irrevocable by the expropriating authority until the hearing but nothing in this section shall prevent the tribunal from awarding an amount less than that of the proffer.

(7) The expropriating authority may, within the period mentioned in subsection (3) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to the court for an order extending the time referred to in subsection (3).

Form A

The *Expropriation Act*

NOTICE OF EXPROPRIATION

To . . . . . .

(name of owner)

. . . . . .

(address)

TAKE NOTICE THAT:

1. The following lands

   . . . . . .

   (set out description)

   have been expropriated on the . . . . day of . . . . . 19 . . and are now vested in the expropriating authority.

   (Where the expropriated estate interest is less than a fee simple, the interest will be stated, e.g., right of way for a pipeline.)

2. The name and address of the expropriating authority for service and further communication is:

   . . . . . .

(name)

. . . . . .
(address)

3. For your information and convenience we will set out the provisions dealing with your right to immediate payment of compensation based on an appraisal report; dealing with the expropriating authority's right to take possession; and dealing with your right to costs. (The relevant sections will be attached; they are Recommendation No. 22, Recommendation No. 23, Recommendation No. 24, Recommendation No. 25, Recommendation No. 29, and Recommendation No. 31.)

4. If you are not satisfied with the amount the expropriating authority is willing to pay, you may take the matter to the Land Compensation and Surface Rights Board at . . . . . .

(Where the expropriating authority is the Crown, add or if you prefer you may commence proceedings in the Supreme Court of Alberta.)

dated at . . . . . this . . . . day of . . . . . 19 . .

. . . . . .
(name of expropriating authority)

. . . . . .
(signature of officer or agent of expropriating authority)

5. Appraisal By Expropriating Authority

It is proper that the taker should be required to substantiate the amount of his proffer by furnishing a written appraisal report. The amount of the proffer should be based upon the appraisal report.

The appraiser must inspect the land and where there are separate interests in it, he may be required to examine documents such as a lease,

mortgage or agreement for sale. The holders of these interests should cooperate and if they fail to do so should be penalized by losing interest they would otherwise get and should be penalized in costs.

The following two Recommendations carry out these policies:

RECOMMENDATION No. 24

The proffer made to an owner shall be based on a written appraisal, and a copy of the appraisal shall be sent to the owner at the time of the making of the proffer.

RECOMMENDATION No. 25

(1) To assist the expropriating authority in making its appraisal, the owner shall furnish on request to the expropriating authority, any information relevant to the valuation of his interest.

(2) Any owner who withholds any relevant information may be penalized in

(a) costs; and
(b) interest that he would otherwise be entitled to.

There may be instances, probably rare, in which the taker cannot obtain the information needed to make a proper appraisal on which to base its proffer. To cover such a case there should be a specific provision whereby the taker can apply to the Board for directions and whereby the Board can determine the amount of the proffer and to whom it shall be paid.

RECOMMENDATION No. 26

Where the expropriating authority is unable to obtain the information necessary to make a proffer, the expropriating authority may apply to the board

for directions and the board may determine the amount of the proffer.

6. Appraisal By Owner

It is always desirable that the parties reach agreement wherever possible, and thus avoid the need to arbitrate the amount of compensation before a tribunal. As a step to encourage settlement we think the owner should be enabled to obtain his own appraisal so he can compare it with that of the expropriating authority. Fairness requires that the authority should pay for this appraisal and incidental legal costs.

RECOMMENDATION No. 27

(1) The owner may obtain an appraisal of his interest that has been expropriated and the expropriating authority shall pay the reasonable cost of the appraisal.

(2) The owner may obtain legal advice as to whether to accept the proffer in full settlement of compensation, and the expropriating authority shall pay the owner's reasonable legal costs.

7. Bringing Of Proceedings

It is now necessary to provide for the bringing of proceedings before the tribunal for the purpose of fixing compensation, assuming of course that the parties have not agreed on the amount of compensation. The Act should provide that either party may initiate proceedings before the tribunal to settle compensation. Ontario's section 26 is such a provision and we propose a similar one:

RECOMMENDATION No. 28

(1) Where the expropriating authority and the owner have not agreed upon the compensation payable under this Act

(a) the expropriating authority may institute proceeding to determine compensation after making the proffer;
(b) the owner may institute proceedings after the making of the proffer or expiration of the time for making the proffer whichever shall first occur.

(2) Where no proceedings have been commenced by either party within one year of the date of making the proffer, the amount of the proffer shall be conclusively deemed to be the full compensation to which the owner is entitled.

As to the details of the procedure before the Board we do not think it necessary to spell them out. We have already empowered the Board to make regulations governing its practice and procedure and we think it appropriate to leave to the regulations the matter of setting proceedings in motion and the order of presentation of evidence and the like.

We note that in Ontario, the regulations of the Land Compensation Board permit either party to begin proceedings by a notice of arbitration. If the former owner does so, his notice includes a statement of claim which is really a statement of particulars. If the taker does so, then the owner makes up a separate statement of claim. In each case the taker files a reply which in essence sets out the facts on which it relies. It serves the role of a statement of defences, by defining the issues.

8. Appeals

Decisions of the tribunal should be subject to appeal. At the present time there is an appeal to the Appellate Division under section 52 of the *Expropriation Procedure Act*, but leave is required where the compensation has been fixed at less than $1,000. Where the appeal is from the Surface Rights Board in connection with rights of way for a pipeline or a power line, the appeal provisions since 1970 have provided for an appeal in the form of a new hearing before a District Court judge with a further appeal to the Appellate Division by leave of a judge of that Division (section 53). In *Caswell* v. *Alexandra Petroleums*, [1972] 3 W.W.R. 706, the Appellate Division said that the District

Court judge should have regard to the decision of the Surface Rights Board and that it "should not be lightly disturbed."

Should the appeal to the District Court be preserved? We think not. The Surface Rights Board now has to give reasons and the tribunal we propose will likewise have to do so. Thus the Appellate Division will have in front of it a record of the evidence (Recommendation No. 21(3)) together with the reasons and the need for an intermediate appeal is diminished. Basically the provision we have in mind is like the present section 52:

RECOMMENDATION No. 29

(1) An appeal lies to the appellate division from any determination or order of the tribunal

(2) An appeal under subsection (1) may be made on questions of law or fact or both and the appellate division

(a) may refer any matter back to the tribunal; or
(b) may make any decision or order that the tribunal has power to make,

And may exercise the same powers that it exercises on an appeal from a judge of the trial division sitting without a jury, and the rules and practice applicable to appeals to the appellate division apply.

9. Stated Case

In addition to the provision for appeals, it should be possible for the Board on request of the parties to state a case for the Appellate Division. The following recommendation, which is based on Ontario's section 31, serves this purpose:

RECOMMENDATION No. 30

(1) Where the jurisdiction of the tribunal or the validity of any decision, order, direction or other act of the tribunal is called into question by any person affected, the tribunal upon the request of such

persons, shall state a case in writing to the appellate division, setting forth the material facts and the decision of the court thereon is final and binding.

(2) If the tribunal refuses to state a case, any person affected may apply to the appellate division for a order directing the tribunal to state a case.

(3) Pending the decision of the stated case, no further proceedings in respect of the application shall be taken by the tribunal save with leave of a judge of the appellate division.

10. Entitlement to Possession

When the expropriating authority acquires title, it is of course entitled to possession, for possession is one of the incidents of ownership. The former owner's interest in the land is replaced by a right to compensation as section 43 of the *Expropriation Procedure Act* now provides. (We have carried section 93 forward in Recommendation No. 61.) Section 47 of that Act provides the machinery whereby the expropriating authority may enforce its right to possession. The court may make an order for possession and issue a warrant to the sheriff directing him to put the expropriating authority in possession.

We think the statute should require the taker to give notice to the former owner to deliver up possession and a reasonable time is ninety days. The right to give this notice should arise only after title has been acquired and after the taker has served on the former owner notice of expropriation, which we have provided for earlier. Moreover, the taker should not be entitled actually to enter into possession until thirty days after he has made the payment pursuant to the proffer.

In the case of the taking of a mere right of way, as distinct from the fee simple, we do not think the taker should have to give ninety days notice before going on the land to construct his pipe or power line. Technically he does not acquire in law possession of the right of way, and his entry is not comparable to that of the taker when all the rights of the former owner in the land have been taken. In the case of the taker of a right of way, he should have to give merely seven days notice instead of ninety and of course the notice is that he

intends to enter on the land, for technically speaking the holder of a right of way does not have possession.

It should also be possible for the taker and the former owner to apply to the court to vary the time for the delivery up of possession.

There may be cases where the taker has been unable to find the former owner so as to make payment pursuant to that proffer. The taker should not be prejudiced in his right to take possession. We will provide, for this situation by providing for payment into court.

RECOMMENDATION No. 31

(1) After notice of expropriation has been served, the expropriating authority may, subject to any agreement to the contrary, serve on the person in possession a notice that it requires the land on the date specified therein.

(2) The date specified shall be at least ninety days from the date of serving the notice, but in the case of the taking of a right of way the period shall be seven days.

(3) After service of the notice either party may apply to the court for an adjustment of the date for possession specified in the notice, and the court may order an adjustment in the date.

(4) Notwithstanding anything in this section the expropriating authority shall not be entitled to take possession unless with leave of the court

(a) except in the case of the taking of a right of way, until thirty days after payment of the amount of the proffer; and
(b) in the case of a right of way, until after payment of the amount of the proffer.

11. Enforcing Possession

The next provision is one to provide the machinery for enforcing the taker's right to possession. In essence, this is what section 47 of the *Expropriation Procedure Act* does. The following is a modification of that section:

RECOMMENDATION No. 32

(1) If any resistance or opposition is made or is threatened to be made by any person to the expropriating authority, or to any authorized person acting for him, desiring to exercise his rights in or over, or to enter upon and take possession of the land, the court may upon application by originating notice of motion issue a writ of possession or such other order as may be necessary to enable the expropriating authority to exercise such rights.

(2) A writ or other order under this section has the effect of a writ of assistance.

12. Costs

The *Expropriation Procedure Act* provides that costs are in the discretion of the assessing tribunal (section 20(7) re Crown; section 28 (4)(c) re municipalities; and section 35(2)(f) re companies). Ontario requires a taker to pay the costs where the amount awarded is 85% or more of the amount offered. We do not think there should be a rigid dividing line such as Ontario has. We think the Act should state the general principle that the owner should be entitled to recover the costs reasonably incurred in determining compensation, but there should be a discretion to reduce the costs or even to refuse them altogether.

RECOMMENDATION No. 33

(1) The reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable shall be paid by the expropriating authority, unless the tribunal finds special circumstances to justify the reduction or denial of costs.

(2) The tribunal may order by whom the costs are to be taxed and allowed.

(3) Where settlement has been made without a hearing the tribunal may determine the costs payable to the owner and subsections (1) and (2) shall apply.

(4) On appeal by the expropriating authority costs of the appeal shall be paid on the same basis. As they are payable under subsection (1) and on appeal by the owner, the owner is entitled to his costs where the appeal is successful and where unsuccessful, the costs are in the discretion of the court.

13. Interest

The *Expropriation Procedure Act* does not provide for interest. However, it has been customary in expropriation cases for the court to award interest just as the court of equity awarded interest to a vendor of land after the buyer had gone into possession. In this province the *Judicature Act* gives the court a discretion to award interest where payment of a just debt is improperly withheld, for such time and at such rate as the court thinks proper.

In *St. Mary Development Co.* v. *Murray* (1960), 21 D.L.R. (2) 203, Boyd McBride J.A. applied the *Judicature Act* in holding that interest should be paid at 5% from date of possession to payment.

In *Powlan* v. *Calgary* (1969), 68 W.W.R. 119, the Public Utilities Board had awarded interest at 7% from the date of the taking, even though the former owner was still in possession. The Appellate Division upheld the award of interest.

The recent Acts of Ontario, Canada and Manitoba all have provisions for the awarding of interest. The basic principle is to allow interest either at a fixed rate or at a rate determined by the tribunal from the date of possession. There is, in addition, in each of these Acts, provision for additional interest when delay in payment is the fault of the taker.

In our opinion, the general principle should be to provide for interest from the date the taker acquires title on any amount that is outstanding and until payment. However, where the owner stays in physical possession after the taker has acquired title, he should not be entitled to interest until he gives up possession. Rather than have a rate fixed by statute, the rate should be prescribed by the tribunal. In addition to the ordinary interest just described, provision should be made for additional interest where the proffer is delayed because of the fault of the taker, and also when the amount of the proffer is inordinately low. The rate of the additional interest should be the same as that of the ordinary interest.

RECOMMENDATION No. 34

(1) An expropriating authority shall pay interest at the rate fixed by the tribunal in its regulations or at such rate as the tribunal determines from the date of acquisition of title on the amount outstanding from time to time until payment with respect to compensation for the land and for severance damage on a partial taking, and on damages for disturbance from the date of the award thereof or until payment.

(2) Notwithstanding subsection (1), where the owner is in possession when the expropriating authority acquires title, he is not entitled to interest until he has given up possession.

(3) Where the expropriating authority has delayed in making the proffer beyond the prescribed time, the tribunal shall order the expropriating authority to pay additional interest on the value of the land and severance damage, if any, from the beginning of the delay until the proffer is made, at the same rate as that prescribed in subsection (1).

(4) Where the amount of the proffer is less than 80% of the amount awarded for the interest taken and severance damage, if any, the tribunal shall order

the expropriating authority to pay additional interest at the same rate as that prescribed in subsection (1), from the date of notifying the owner of the amount of the proffer until payment, on the amount by which the compensation exceeds the amount set out in the proffer.

(5) Notwithstanding subsection (3) and (4), where the tribunal is of the opinion that a proffer of less than 80% of the amount awarded for the interest taken and severance damage, if any, or any delay in making the proffer is not the fault of the expropriating authority, the tribunal may refuse to allow the owner additional interest for the whole or any part of any period for which he would otherwise be entitled to interest.

14. Service: Missing Persons: Payment Into Court

It is appropriate to include a general provision to prescribe the method by which notices and documents may be served, and in the case of service by mail, the date on which service is deemed to be made. Section 51 of the *Expropriation Procedure Act* deals with this subject but we think it should be modified.

RECOMMENDATION No. 35

Where a document is required by this act to be served on any person and no method of service is prescribed, the document may be served personally or by registered mail addressed to the person to be served at his last known address, or if that person or his address is unknown, by publication once in a newspaper having general circulation in the locality in which the land concerned is situate, and service shall be deemed to be made

(a) in the case of service by registered mail, in ordinary course of mail;

(b) in the case of service b y publication on the date of publication.

Sometimes a person is under disability or cannot be found and in these situations power should be given to the court to appoint a person to represent him, and when there is no one to represent him to permit payment of his compensation into court. For this purpose we think that section 44 of the *Expropriation Procedure Act*, modified, is adequate.

RECOMMENDATION No. 36

(1) If the owner of land which is the subject of expropriation is under disability, or not known , or his residence is not known, or he cannot be found, the court may appoint a person to act in his behalf for any purpose under this Act.

(2) Where there is no guardian, committee or other person to represent an owner under disability, or the owner is unknown, or his residence is unknown, or he cannot be found, the expropriating authority shall apply to the court for an order for payment in the amount set out in the proffer and the court may make directions as to the disposition of that amount.

Cases may arise in which the taker cannot be sure who has an interest in the land. This is not likely in a province with a *Land Titles Act*, but it is not impossible. Should a dispute of this kind arise , it must be resolved in court. Canada's section 16 is a suitable provision and the following Recommendation is identical with it:

RECOMMENDATION No. 37

(1) After the expropriating authority has acquired title, where the expropriating authority or the tribunal is in doubt as to the persons who has any interest in the land or the nature or extent thereof, the expropriating authority may apply or the tribunal

may direct the expropriating authority to apply to the Court to make a determination respecting the state of the title of the land immediately before the expropriation, and the court shall determine that issue.

(2) Where any application is made under subsection (1),

(a) notwithstanding Recommendation No. 23(3), the expropriating authority has ninety days from determination of the issue by the court to make its proffer; and
(b) the expropriating authority may apply for leave of the court to take possession of the land as soon as it requires the land.

A problem that may arise has to do with the distribution of an award of compensation. It cannot arise where the interests are valued separately , but on a partial taking there will be only one evaluation. In that situation there is but one proffer, and if the question goes to the tribunal, the mortgagee and the mortgagor may each claim part or all of the compensation. Section 43(3) of the *Expropriation Procedure Act* deals with this problem. Where the parties fail to agree as to the disposition of the compensation, then in Crown takings the Minister pays the money into court, and in other takings the Public Utilities Board or Surface Rights Board, as the case may be, requires the taker to pay into court. Our information is that in practice this is rarely necessary.

In the case of rights of way which are always partial takings, we understand the compensation is normally paid to the registered owner to the exclusion of others who have an interest in the land. In the case of highway takings, we understand that in the case of mortgagor and mortgagee, the parties invariably agree on the disposition as between themselves. The alternative of payment into court by the Crown doubtless helps to induce agreement.

We think that under our scheme the tribunal which fixes the award should also determine its disposition.

RECOMMENDATION No. 38

Where the persons interested , or appearing to be interested, in the compensation, fail to agree as to the disposition thereof among themselves then the tribunal shall determine the claimant or claimants to whom the compensation, or any portion or portions thereof, is payable and shall order and direct the payment thereof in accordance with such determination.

15. Disposal of Expropriated Land

At present, the *Expropriation Procedure Act* does not deal specifically with the situation where the expropriating authority, after acquiring title, finds that it does not need the land. The abandonment machinery is no longer appropriate, and we think it suitable to make specific provision. Ontario's scheme is to provide that the taker shall not dispose of the lands without giving the former owner the right of first refusal, unless the approving authority dispenses with this requirement. We think it is fair to require the taker to give to the former owner, or in the case of a partial taking, to his successor in title to the remaining part of the parcel, during a period of two years after the expropriation, the first refusal where the taker no longer requires the land. We note that Ontario's section 43 forbids the taker from disposing of the land without giving the former owner the first chance to repurchase, and there is no time limit.

The matter of rights of way must be treated separately. The *Expropriation Procedure Act*, section 39, deals with company takings, and provides for the revesting of land in the former owner where the company has not built its works or has discontinued its use of them or has failed to pay any amount that it was ordered to pay. The section gives to the Public Utilities Board or the Surface Rights Board power to issue an order of termination.

We think there should be a provision for takings in general--that is fee simple takings, and another for lesser takings of which the right of way for pipe and power lines is the main example. Subsection (3) of the following Recommendation deals with the latter case and is adapted from section 39:

RECOMMENDATION No. 39

(1) If within two years of completion of the expropriation, the expropriating authority finds that the lands are no longer required for its purposes, and the expropriating authority desires to dispose of them, it shall first offer to sell them to the former owner of the fee simple and if the former owner does not accept the expropriating authority may sell the lands to any other person on terms that are at least as favourable to the expropriating authority.

(2) Where the expropriation is of part of a parcel of land, the offer pursuant to subsection (1) shall be to the former owner or his successor in title, and if there is more than one successor, to such of them as to the expropriating authority seems fair.

(3) In the case of the taking of a right of way where at any time the expropriating authority or its successor has discontinued the use for which the land was expropriated, the expropriating authority or the former owner of the expropriated lands or his successor in title may apply to the court for an order terminating the estate or interest of the expropriating authority and the court may

> **(a) terminate the estate or interest acquired by the expropriating authority; and**
> **(b) grant the estate or interest so terminated to the person from whom it was expropriated or to such other person as the court may order.**

(4) Where the expropriated estate or interest is one to which the *Surface Reclamation Act* applies, the court shall not make an order, under subsection (3) unless a certificate under that Act has been furnished.

(5) An order of the court made pursuant to subsection (3), or a certified copy thereof,

(a) may be registered in the Land Titles Office; or
(b) If the land is not registered in the Land Titles Office, may be filed with the deputy minister of the department charged with the administration of the land affected

And upon registration or filing the estate or interest so terminated is revested in the person from whom it was expropriated or is vested in the other person named in the order, as the case may be.

E. PRINCIPLES OF COMPENSATION

The introduction to this Report sets out the subject matter of our Recommendations on compensation. They cover the principles for valuation of the land, for injurious affection on a partial taking and for disturbance on a complete taking. Here we make the detailed Recommendations.

1. Market Value as Basis of Compensation For Taking

Our Working Paper describes a long line of cases which establish value to the owner as the basis for compensation. In the words of Rand J. in *Diggon Hibben* v. *The King*, [1949] S.C.R. 712, "The question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it." This test has been rejected in the recent Ontario and Canadian Acts in favour of market value. Our Working Paper supports market value , and nearly all the comments we received are in agreement. The main criticism of value to the owner is that it tends to be subjective. Market value may result in lower awards but the important objective elements in value to the owner will be covered by compensation for disturbance which we consider later. Our formal recommendation for adoption of market value as the basis of compensation will be deferred for convenience.

2. Definition of Market Value

Market value should be defined. The recent definitions are similar to one another. We shall use Ontario's.

We considered a suggestion to use the phrase "cash market value." This was originally in the Canada Bill C-200/69 but was removed as the result of strong objections. We do not think it unfair to takers to require them to pay market value without attempting to distinguish between market value and cash market value. Sometimes mortgaged land has a higher market value than it would have were the title clear and payment on the basis of cash value would do an injustice to the owner.

RECOMMENDATION No. 40

The market value of land expropriated is the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

3. Heads of Compensation

It now becomes necessary to specify the heads of compensation. The object is to protect the owner against loss on the one hand and to guard against double damages on the other.

He should receive the market value of the land.

He should also (save in the exceptional case specified in Recommendation No. 42) receive damages for disturbance. Recommendations No. 50 to No. 53 spelling out the particulars of disturbance appear later.

One difficult question is whether the owner should be compensated for the loss of a peculiar economic advantage that is not reflected in the market value of the land. Our Working Paper gives examples of this, e.g., where an expropriated timber limit is close to the owner's lumber mill (*Gagetown Lumber Co.* v. *The Queen*, [1957] S.C.R. 44), where the owner's ice warehouse is on a bend in the river to which the ice floated (*Lake Erie Ry.* v. *Schooley* (1916), 53 S.C.R. 416), and where a building is used for a bakery and the unloading of cars of flour is particularly convenient (*R.* v. *Lynch* (1920), 20 Ex. C.R. 158). One might argue that in allowing compensation for these items, there is a return to value to the owner. We do not think that this is so. We think that these are proper items of compensation and should be covered as they are in section 24(3) of the Canada Act.

The owner should also receive damages for injurious affection to the balance of his land on a partial taking. We go into the details of this item later in Recommendations No. 54 , No. 55 and No. 56.

RECOMMENDATION No. 41

(1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.

(2) Where land is expropriated, the compensation payable to the owner shall be based upon

(a) the market value of the land,
(b) the damages attributable to disturbance,
(c) the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion,
(d) damages for injurious affection.

In connection with item (c) there may sometimes be doubt as to what items will fall under this head but we think it best to use general terms rather than attempt to spell out particular heads. We think it will cover the facts of the *Gagetown, Schooley* and *Lynch* cases.

Ontario has a provision (section 13(1)(d)) which permits compensation for "special difficulties in relocation." We omit this for we think our later Recommendations on disturbance damage are adequate.

4. The Rule In *Horn* v. *Sunderland*

Sometimes the "highest and best use" is the test for arriving at market value. This means that the value is based on a use other than that to which the land is presently put. It raises a special problem in connection with compensation for disturbance. Normally the owner is entitled to damages for disturbance in addition to market value. However, the rule in the leading case of *Horn* v. *Sunderland*, [1941] 2 K.B. 26 is that where land is valued on the basis of highest and best use, the owner should not receive disturbance damage as

well. We agree the owner should not receive the higher price plus the costs that he would have had to incur to realize it.

We received a comment objecting to employment of the term "highest and best use", presumably because it would lead to inflated awards. The fact is, however, that there are many cases in which the value of land is higher when based on a different use than the present one, and the former is the true market value. We do not think it would be proper to insist that market value be based on the existing use. The scheme of the Canada Act is to compensate the owner on the basis of market value or alternatively on the aggregate of the market value based on present use plus disturbance damage, the owner to receive the higher of these two figures (s. 24(3)).

In form we prefer Canada's provision to Ontario's and the following Recommendation is based on it:

RECOMMENDATION No. 42

Where the owner of the expropriated land is in occupation and as a result of the expropriation it is necessary for him to give up occupation of the land, the value of the land is the greater of:

(a) the market value thereof determined as set forth in recommendation No. 40,
(b) the aggregate of
(i) the market value thereof determined on the basis that the use to which the expropriated land was being put at the time of its taking was its highest and best use, and
(ii) damages for disturbance.

5. No Additional Compensation For Compulsion

At this point it is appropriate to note the question whether the tribunal should have power to add a percentage to the value of the land by way of additional compensation. At one time the practice of adding ten percent, although not automatic, was very commonplace in spite of the protests of Mr. Justice Thorson. There was no unanimity as to the reason for adding the percentage.

In *Diggon Hibben* v. *the King,* [1949] S.C.R. 712, Estey J. said that the percentage is given for the "compulsory taking (while Rand J. said that it is confined to cases of difficulty in making the valuation. In *Drew* v. *The Queen*, [1961] S.C.R. 614 the court upheld a refusal to award a percentage, and said that it should only be added in special circumstances.

In this province the leading case is *Saint Mary River Development Co.* v. *Murray* (1960), 21 D.L.R. (2d) 203 (the Medicine Hat Ranch case). In that case twenty four hundred acres were taken from large ranch. The governing statute specified that compensation should cover (a) the value of the land, (b) injurious affection to the remaining land, (c) cost of fencing. The Appellate Division unanimously upheld an award of ten per cent even though there was no specific authority in the statute for adding it. By a majority the Court refused to add the percentage to the award for injurious affection.

Should power to award a percentage be abolished? We are aware that Mr. Justice Challies supports the award. He does so on the basis that there should be compensation for the compulsory taking and costs to which the owner is put. He would allow it as well in connection with injurious affection because this item is hard to estimate. Full compensation is more likely to be achieved if the percentage is added. We are not persuaded. Generally we support the criticisms made by Thorson J. The award of market value and disturbance damage should provide adequate compensation and therefore the percentage is not justifiable.

The recent Ontario, Canada and Manitoba statutes do not specifically abolish the percentage. However, in light of the Medicine Hat Ranch case we think there should be a specific abolition. The following Recommendation is the same as England's *Land Compensation Act, 1961*, c. 33, s. 5, rule (1):

RECOMMENDATION No. 43

No allowance shall be made on account of the acquisition being compulsory.

One of our later Recommendations (Recommendation No. 50(a)(i)) provides for a percentage in connection with disturbance of the owner of a

residence but that Recommendation does not in any sense conflict with Recommendation No. 43.

6. Factors to be Disregarded

The next matter has to do with the question whether it is proper for the tribunal in fixing market value to take into consideration a special value that the land has for the taker and no one else. In the "*Indian*" case, *Vyricherla* v. *Revenue Divisional Officer*, [1939] A.C. 302 the Privy Council held that the special value to the taker is an item to be taken into consideration. In the well known *Canso Causeway* case, *Fraser* v. *The Queen,* [1963] S.C.R. 445, the Supreme Court applied the principle of the *Indian* case, and awarded to the owner the value of the rock in place, though there would have been no market for it apart from the building of the causeway.

This decision is hard to reconcile with *Vezina* v. *The Queen* (1890), 17 S.C.R. 1, where land was taken for its gravel, to be used as ballast on a railway. The judgment of the Privy Council in *Pointe Gourde Quarrying Co.* v. *Sub-Intendent*, [1947] A.C. 565 is to the same effect as *Vezina*. The expropriated quarry was valued as a going concern and no problem arose over that valuation. However the rock was worth $15,000 to the taker. The Privy Council rejected this claim because this element of value "is entirely due to the scheme underlying the acquisition."

The *Canso Causeway* principle, in our opinion, should be abrogated as it has been in England.

A related question is that of the effect of the scheme for which the expropriation is carried out on the value of the land in the open market. The policy of all the recent legislation is to excludes, consideration of that effect, whether it be to raise or lower values. The difficulty is in determining when the facts come within this rule, as the following three cases show. In *Lamb* v. *Manitoba Hydro Commission,* [1966] S.C.R. 209, the province took for a hydro scheme certain land on which a group of hunters and trappers had settled. To resettle them the province sought a townsite on higher land. The only one available was on land owned by Lamb. Apart from its potential value as a townsite, the value was low. The owner contended that he should receive whatever amount the province would have to pay to develop a townsite. The Commission contended that value as a townsite should be ignored. The court

rejected the owner's argument but did make some allowance for the potentiality of the high ground as a townsite. (This is one of a number of cases that illustrate the difficulty of applying *Canso Causeway*. The majority applied it, whereas the dissenters said it had no application.) In *Edmonton* v. *Wong Soo Kui* (1967), 8 P.U.B.D. 35 the city had decided to establish a civic centre and this was publicly known. Values increased in the neighbourhood, and when Mr. Wong's land was expropriated, he received the current rate which was doubtless higher than it would have been without the civic centre. In *Re Victoria and Grey Trust Co.*, (1970), 9 D.L.R. (3d) 134, the land was farm land but there was general knowledge that Trent University planned to establish a new campus in the neighbourhood. There was evidence that land values had increased after the plan became known. The Ontario Court of Appeal held that the owner should be compensated accordingly. The difficult question in these cases is whether the increase in value is attributable to the scheme.

The following Recommendation is based partly on Canada's section 24(9) and partly on Ontario's section 14(4)(b) as amended in 1972. Sub-clause (d) is new. It is designed to embrace in short form, the principle of section 6 of *England's Land Compensation Act*, 1961. As Lord Denning said in *Camrose* v. *Basingstoke*, [1966] 3 All E.R. 161 the purpose of section 6 is "to make it clear that you were not to take into account any increase due to the development of the other land, i.e., land other than the claimed parcel." *St. John Priory* v. *Saint John* (1972), 2 L.C.R. 1 (S.C.C.) deals with this problem. The court held that the owner should be compensated on the basis of highest and best use and that that use was the very one for which the taker expropriated the land. We agree with the dissent of Pigeon J. that this is not a proper principle. Incidentally, an editorial note says that had the Ontario or Canada Act applied "it may be queried whether the majority result would have been possible."

It may be that (d) overlaps (c). However it seems to us better to make sure that cases like *Camrose* and *St. John Priory* are covered. We have considered whether the term "development" is imprecise and might include an earlier development of which the present development is an extension. Such a construction would operate unfairly, but we do not think the term "development" can be so construed.

Sub-clause (e) which excludes any increase from an illegal use is taken from Canada's Act. England and Ontario include in their provisions any use

that is detrimental to health. We prefer Canada's clause on grounds of brevity and certainty (compare Todd, the *Federal Expropriation Act*, pp. 46-47).

RECOMMENDATION No. 44

In determining the value of the land, no account shall be taken of

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

(b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the land, where such transaction or agreement was entered into after the commencement of expropriation proceedings;

(c) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation.

(d) any increase or decrease in the value of the land due to development of other land that forms part of the development for which the expropriated land is taken.

(e) any increase in the value of the land resulting from its having been put to a use that was contrary to law.

7. Zoning Down and "Freezing" as Part of Development

This topic is connected with "Factors to be Disregarded" which we have just considered.

a. Zoning down

There have been cases in which the owner has alleged that the area containing the expropriated lands was deliberately "zoned down" to reduce the value with a view to carrying out the scheme for which the land was taken. This was so in *Kramer* v. *Wascana Centre Authority*, [1967] S.C.R. 238. The City of Regina changed the zoning from "single detached dwellings" to "public service." This was done with knowledge of the proposal to establish Wascana Centre. The statute establishing the Centre was practically contemporaneous with the planning scheme and the zoning by-law which changed the use of the land. The Supreme Court upheld the findings below that the zoning down was an independent enactment and not part of the expropriation proceedings and therefore should not be ignored. This ruling clearly operates to the detriment of the owner.

In a subsequent case involving the same scheme, *Burkay* v. *Wascana Centre Authority* (1972), 2 L.C.R. 9, the Court of Appeal of Saskatchewan held that the restriction on use of the lands was the result of the collaboration of the City, the province and the University of Saskatchewan, and that the purpose "was to control any development to the end that the lands would be available for the authority as the concept developed;" and the landowner "should not be left with the probably depreciated value so arising" (p. 16).

It may be hard to tell in a given case whether the zoning down is a part of the scheme to acquire land. The *Wascana* cases illustrate this. However where it is found, as a matter of fact, that the zoning down is a preliminary to the scheme which confers power to expropriate we think it fair to ignore the zoning down. The following Recommendation is designed to carry out this policy.

(TO BE ADDED TO RECOMMENDATION No. 44.)

(f) Any increase or decrease in value which results from the position or amendment of a zoning by-law, land use classification or analogous enactment made with a view to the development under which the land is expropriated.

b. "Freezing"

The *Public Works Act* provides (sections 25-30) that when an area has been declared to be a Public Works Development Area, the order be filed in the Land Titles Office and the owner and municipality be notified. No person may construct any improvement except with the approval of the Minister.

Reg. v. *McKee* (1967 unreported) illustrates the problem that these provisions raise. In 1965, with a view to acquiring land for the University of Alberta, the Crown declared a substantial residential area to be a Public Works Development Area. Mrs. McKee's residence was in the area. When negotiations with her failed, the province expropriated the land.

On the fixing of compensation the Crown argued that the property should be valued on the basis of its present use, namely, as a residence. The owner argued that the "freeze" should be ignored and that the property should be valued on the basis of highest and best use, which the evidence showed to be for a business block. Milvain C.J. held that the development scheme should be ignored; and that "when land has been given an artificia1 depreciation in value by a public authority which intends to take it over that then and in such event no court in fixing compensation is bound immutably to that artificially decreased value, brought about by the authority which in fact is now doing the expropriation." Had it not been for the "freeze", the court thought that, on the balance of probabilities, a building permit would have been granted.

Do our Recommendations preserve this decision? We think they do. We have recommended that any increase or decrease in value resulting from the development be disregarded. The prohibitions against improvements contained in section 25 of the *Public Works Act* operates to decrease values and we think that the decrease results from the development.

There is another point in connection with the situation where public announcement has been made of a proposed scheme that carries the right to expropriate. The effect is to discourage sales. As the British Co1umbia Report says, the owner becomes "locked in" (pp. 132-4). We note that under the *Public Works Act*, the owner can require the Crown to expropriate at any time after the Public Works Development Area has been enacted (section 26(1). The *City Transportation Act* has a similar provision but it does not permit the owner to call on the city to expropriate until the land has been within a transportation

area for three years. The *Wilderness Areas Act, 1971*, c. 114, requires the Minister of Lands and Forests to acquire, or commence proceedings to expropriate within a year, any privately owned land. We think the policy of these provisions is fair. Comparing the three Acts, we think the *Public Works Act* is the fairest for it does not require the owner to wait. We don't think that the *Expropriation Act* is the appropriate place for provisions enabling an owner to compel the authority to expropriate. In our opinion the three year period should be removed from the *City Transportation Act*. However, we have not examined this problem in detail and may not see all the implications. We recommend in Appendix C that consideration be given to eliminating this three year period.

8. Reinstatement

Canadian jurisprudence recognizes that there are certain properties which do not have a market value, or at least one that does justice to the owner. The leading cases have to do with the taking of a hospital or school or church, though sometimes the problem has arisen in connection with an old house or a golf course. The leading case is *Reg.* v. *Sisters of Charity,* [1952] 3 D.L.R. 358 where the property was a hospital and the owners intended to build a new hospital on another site. Thorson J. held that the ordinary economic and commercial test of value did not apply so that the proper basis was to establish reconstruction costs less depreciation together with cost of moving and increases in construction costs following expropriation. This principle has been applied to the case of a school (*Reg.* v. *Hull School Commissioners,* [1954] Ex. C.R. 453); to a church (*Yorkton* v. *Baptist Church,* [1955] 1 D.L.R. 384) and to an unusual house (*Lethbridge* v. *Tompkins* (1965), 6 P.U.B.D. 1651). England in 1919 enacted a provision, which is now rule 5 of section 5 of the *Land Compensation Act*, 1961, providing that where land is devoted to a purpose of such a nature that here is no general demand or market for that purpose, the compensation may, if reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement. In Ontario, section 14(2) is the same as England's apart from verbal differences and with the exception that "may" becomes "shall '. Canada's section 24 (4) which is designed to the same end, is restricted to land which has a building designed for the purpose of school, hospital, municipal institution or religious or charitable institution or for any other similar purpose. Obviously, this provision is narrower than Ontario's. It provides that the owner shall receive the greater of market value or the

aggregate of the cost of any reasonably alternative interest in land for that purpose, and the cost of moving and re-establishment.

The leading case on Ontario's new provision is *Re Gray Coach Line and City of Hamilton* (1971), 19 D.L.R. (3d) 13. The property was a bus depot and the owner argued that section 14(2) applied. The Court of Appeal held that it did not. The phrase "devoted to a purpose" etc. applies only where the improvements fit the land for that purpose and unfit it for most if not all other purposes. The Supreme Court of Canada affirmed this judgment (1973), 30 D.L.R. (3d) 1.

We think the reinstatement provision should be confined to churches, schools, and the like. It should not extend to commercial property. Compensation in the case of business premises is adequately provided for by the other recommendations. The reinstatement provisions should have a narrow application to the kinds of use specified in Canada's Act. The following Recommendation is based on Canada's, though subsection (2) is new:

RECOMMENDATION No. 45

(1) Where any land had any building or other structure erected thereon that was specially designed for use for the purpose of a school, hospital, municipal institution or religious or charitable institution or for any similar purpose, the use of which building or other structure for that purpose by the owner has been rendered impracticable as a result of the expropriation, the value of the expropriated interest is , if the expropriated interest was and, but for the expropriation, would have continued to be used for that purpose and at the time of its taking there was no general demand or market therefor for that purpose, the greater of

(a) the market value of the expropriated interest determined as set forth in RECOMMENDATION No. 40, or
(b) the aggregate of

(i) the cost of any reasonably alternative interest in land for that purpose; and
(ii) the cost, expenses and losses arising out of or incidental to moving to and re-establishment on other premises, minus the amount by which the owner has improved, or may reasonably be expected to improve, his position through re-establishment on other premises.

(2) For the purposes of subsection (l)(b) the cost of any reasonably alternative interest in land shall be computed as of the date at which construction of the new building or the structure could reasonably be begun.

The British Columbia Law Reform Commission would not take into account the depreciation of the original structure. We intend our Recommendation to provide money compensation for that which the owner has lost and not to provide compensation by way of replacement of facilities. We therefore agree with Canada's deduction of the amount by which the owner's position is improved by re-establishment.

9. Home for Home

The next topic is that of expropriation of a residence where the owner is dispossessed and where market value plus the usual items for disturbance would not be a fair compensation. This is colloquially called "home for a home." There are cases where the home owner cannot go out and acquire equivalent housing premises for the amount of the market value of his expropriated home. He is forced to pay more for a home that is at least the equivalent.

Newfoundland has an elaborate statute specially dealing with this subject. Ontario covers it in one section (section 14). This section was not based on an recommendation of the Law Reform Commission which thought this subject to be outside its terms of reference. The Commission had recommended the establishment of financial relocation programmes in connection with urban renewal. Canada's section 24(6) is to the same effect as

Ontario's provision but it specifies the date at which compensation is to be fixed as the earlier of the time of payment or the time when the Crown becomes entitled to possession.

In Alberta, cases like *Brown* v. *Edmonton* (1968), 9 P.U.B.D. 303, have attracted attention to the problem. In that case the City expropriated a number of old homes, occupied by the owners, in order to build a new approach to the Dawson Bridge. The cost of housing was rising and modest homes were hard to obtain. This might be considered as a special kind of re-instatement since it is based on inability to obtain equivalent accommodation. The Public Utilities Board considered the matter of an allowance over and above market value to meet this item of the increased cost of obtaining an equivalent home. Part II of the *Expropriation Procedure Act* does not spell out the basis of compensation, and "value to the owner" applies. The Board took note of a judgment of Chief Justice Cowan of Nova Scotia in *Re Le Blanc and Halifax* (1968), 66 D.L.R. (2d) 15. In that case, the court found the market value of the home to be $11,800 and awarded another $1,000 because the owner was forced to go to another neighbourhood where the cost of housing was higher. In other words the value to the owner was fixed at $12,800. In the *Brown* case the Board made its award to each home owner on the basis of this principle. One of the owners, Mr. J. M. Brown, appealed to the Appellate Division. The appeal was dismissed (unreported). We understand that the Appellate Division found no error in law. There has been in Alberta advocacy of a special "home for a home" provision (e.g., Gibbs, *Comment: Urban Renewal* (1969), 7 Alta. L. Rev. 309, and a private member's Bill (No. 203) introduced in the Legislature in the 1972 session).

On balance, we recommend such a provision, recognizing that it may be difficult to apply fairly. We think Ontario's section 15 is appropriate. It uses the phrase "at least equivalent" in place of Canada's phrase "reasonably equivalent." However, the section should apply only to the principal residence.

In one respect we think Ontario's provision inadequate. Compensation is to be fixed as at the time of the taking. Sometimes there is a considerable time lag between the taking and the ability to acquire a new home. If prices have gone up in the meantime, it is not fair to the owner if he has to assume the difference caused by rising prices. In *Judson* v. *University of Toronto,* [1972] S.C.R. 553 the Supreme Court held that the increase caused by the passage of

time could not be awarded under the Ontario Act. The result was fair in that case because the taker had allowed the owner to remain in the property for four years rent free. However, there may be cases where the owner is dispossessed and where prices increase before he can be expected to acquire a new home. One of our earlier Recommendations in connection with procedures requires the taker to make a proffer of the market value as estimated by the taker. Nevertheless, there may still be a time lag before the owner can buy a new home. We think allowance should be made for increases where he is no longer in possession of his original home.

RECOMMENDATION No. 46

(1) Upon application therefor, the tribunal shall, after fixing the market value of lands used for the principal residence of the owners, and such additional amount of compensation, as, in the opinion of the tribunal, is necessary to enable the owner to relocate his residence in accommodation that is at least equivalent to the accommodation expropriated, and in fixing the additional amount of compensation the tribunal shall include the increase in cost between the time of expropriation and the time where the next accommodation could reasonably be obtained.

(2) In this section "owner" mans a registered owner or purchaser and does not include a tenant.

The exclusion of tenants is, in our opinion, justified. The reason for the provision is to assist an owner who is faced with a capital disbursement greater than the amount he receives for his expropriated home. A tenant does not have this problem and we think he is adequately protected by compensation for disturbance which we provide for later.

We make a comment here in acknowledgment of suggestions. A number of persons who are sympathetic to the plight of the home owner do not think that the matter of assisting him to find a new home belongs in expropriation law but is rather a matter for social legislation. For example, a fund may be set up to help the owner to finance a new home and the assistance of a public

official might be made available to help owners and tenants, particularly the elderly and the ignorant, to thread their way through the problems connected with expropriation. We have sympathy with these suggestions but do not think that they can be embodied in an expropriation act or that they are a substitute for the added compensation that we have recommended. On the other hand, we think that the added compensation for home owners is an aspect of compensation for expropriation.

10. Separate Interests

It is possible for separate interests to exist in the same parcel of land, the principal ones being: lessor and lessee; vendor and purchaser; and mortgagee and mortgagor. One might also include the owner of the fee simple and the holder of an easement, such as a right of way over his land. In all of these cases there is what is called in the United States "the divided fee." A more difficult question is that of the rights of a spouse under Alberta's *Dower Act*. During the owner's life time the spouse has an interest in the home. It can best be described as a contingent life interest. Should the spouse be regarded as having an interest in the home for the purpose of expropriation? In connection with common law dower, in the United States:

> . . . A majority of courts adheres to the view that the inchoate right of dower, before the husband's death, is not such a proprietary interest as to bring the wife within the protection of the constitution, and to entitle her to any portion of the compensation paid for the land turned over to her directly (or set aside for her benefit) on the contingency of her surviving her husband.
>
> 2 Nichols on Eminent Domain, section 5.71[1].

The same text adds (section 5.72[2]):

> . . . The minority view on this question holds to the position that, while inchoate dower is not technically an estate in land, it does constitute a valuable interest and that where her husband's lands are the subject of a proceeding in eminent domain, a wife's inchoate dower interest is transferred to the award which stands in place of the land taken.

In *The Queen* v. *Sonnenberg,* [1971] F.C. 95, the federal government had expropriated Ontario land. It was admittedly worth $18,000. The wife claimed a share to represent her dower rights. A table in use since 1882 showed that her interest would be worth $1,235 on her husband's death but the present value is $735 (all figures rounded to the nearest dollar). The court decided that the best course was to pay her the present value. We know of no case dealing with this problem in connection with the spouse's right in the

homestead under the Alberta *Dower Act*. It is vastly different from common law dower. We do not think it should be treated as an interest in land for present purposes.

Where there are two or more interests in land, they should be valued separately and the following Recommendation so provides.

RECOMMENDATION No. 47

Where there are more separate interests than one in land, the market value of each such separate interest shall be valued separately.

a. Lessor and lessee

Taking first the case where the property is subject to a lease, we have considered whether to spell out the elements of market value of the lease. Market value is the capitalized value of the difference between the rental paid and the going rate, assuming the latter to be greater, together with the unamortized value of improvements. This was held to be the proper basis in *Calgary* v. *Miller* (1968), 9 P.U.B.D. 262. This is generally in line with *City Parking Ltd.* v. *Toronto,* [1961] S.C.R. 336, where value to the owner was still the test and the court affirmed the rule that value to the lessee is the difference between what he pays as rental and what he would pay rather than be dispossessed (the lease was subject to sale.)

It is preferable not to spell out the elements of market value of either the lessee's or the lessor's interest. We think the tribunal will be able to establish the value of each interest without any special difficulty.

Where the whole of the parcel is taken, the expropriation should operate to frustrate the lease. Where only part is taken, the lessee's obligation to pay rent should be abated *pro tanto*. The frustration provision should also apply where only part is taken, provided the remaining part is unfit for the purposes of the lease.

RECOMMENDATION No. 48

(1) Subject to subsection (2), where only part of the interest of lessee is expropriated, the lessee's obligation to pay rent under the lease shall be abated *pro tanto*, as the parties agree, or failing agreement as determined by the tribunal.

(2) Where all the interest of a lessee in land is expropriated or where part of the lessee's interest is expropriated and the expropriation renders the remaining part of the lessee's interest unfit for the purposes of the lease, as determined by the tribunal, the lease shall be deemed to be frustrated from the date of the expropriation.

In connection with leases, the compensation for disturbance of the lessee may well be more than compensation for the value of the lease. Rather than deal with this question here, we deal with it later under the general heading of disturbance after our treatment of disturbance generally.

b. Security interests

The principal security interests are mortgages and agreements for sale. This discussion will deal particularly with mortgages, though the same principles will apply to agreements for sale.

Traditionally, the scheme of Expropriation Acts is to value the land. The security holder (mortgagee or vendor) is paid out and the mortgagor or purchaser receives the balance, if any. Ontario's Act (section 17(3)) so provides. Section 17(4) then has special provisions where the amount payable to the mortgagee is insufficient to satisfy the mortgage in full. Where the mortgage is a purchase money mortgage, it is deemed to be fully paid; where it is not a purchase money mortgage and includes a bonus, the deficiency or the amount of the bonus, whichever is the lesser, shall be deemed to be fully paid. Subsection (5) provides that no amount shall be paid in respect of a bonus until all security holders have been paid all amounts payable other than the bonus.

The effect of the Ontario scheme is that the mortgagee is protected fairly adequately, but we are not satisfied that the mortgagor is always adequately protected, because land with advantageous financing in place will command a higher price than land where the buyer must pay cash for the whole value. We have concluded that, despite some complexity, fairness is best achieved by valuing both the security interest and the "owner's" (mortgagor's or purchaser's) interest separately at market value. We believe there is a reasonably discernible market for housing mortgages, and we suggest that a market value can be reasonably imputed for any mortgage based on comparisons of current interest rates and trends with the interest rate, terms of payment, amount outstanding and soundness of the security of the particular mortgage. There is obviously no problem of placing a market value on the owner's equity; sales of mortgaged land take place every day.

There are special problems which should be covered specifically.

The first is the situation where the amount owing on the mortgage without collateral security (either first or subsequent) is so great as to leave an apparent deficiency. In this case, the market value of the mortgage will be affected by the weakness of the security, and payment to the mortgagee will be calculated to take that factor into account. We see no difficulty there. The more difficult question is, what should be the position of the owner?

We think the fair thing to do is to treat the owner as having discharged his liability in full on the mortgage because he has been denied the time provided by that mortgage in which to pay the obligation. In other words, the taker has converted the owner's obligation from a time payment to a current liability, and that conversion should not prejudice the owner, hence, the owner should be released.

The second problem arises where the amount owing on the mortgage is so great as to leave an apparent deficiency, but there is collateral security in addition to the land taken by the expropriating authority. That collateral could consist of a variety of rights, including one or more of: other land; chattel mortgages; and, guarantees as to repayment of the mortgage debt. The existence of enforceable collateral will, of course, enhance the market value of the mortgagee's security. He should not be prejudiced by the action of the expropriating authority. Similarly, the owner may, and usually will have, a

real equity in the parcel being expropriated, notwithstanding the apparent deficiency.

A last point has to do with a partial taking of mortgaged land. It would be possible to work out a formula for fixing the market value of the mortgagee's interest in the expropriated portion, and then for calculating the amount to be credited on the mortgage. Canada does this in section 24(8)(c). In the typical case, however, we do not think this practical. Most of the partial takings in Alberta are for a highway or for a right of way (as distinguished from a fee simple). The value of the taken land is usually only a fraction of the whole parcel. The mortgage may be well secured and the payments up to date and in that event the whole of the compensation should go to the mortgagor. There may be other circumstances in which fairness requires compensation to be paid in whole or in part to the security holder. We think the best solution is to leave the distribution to the tribunal. At the present time in Crown takings we understand that the parties invariably agree on the distribution rather than have the money paid into court; and on the expropriation of rights of way the payment normally goes to the mortgagor or purchaser. The following Recommendation is designed to carry out the policy described above:

RECOMMENDATION No. 49

(1) Where the expropriated land is subject to a security interest, the market value of each person having an interest in the land shall be established separately.

(2) Where the amount owing to the security holder is greater than the market value of his interest and there is no collateral security other than the purchaser's (or borrower's) covenant to pay the amount of the debt, the security interest shall be deemed to be fully paid, discharged and satisfied on payment to the security holder of the market value of the security.

(3) Where the amount owing to the security holder is greater than the market value of his interest and there is collateral security other than the

purchaser's (or borrower's) covenant to pay the amount of the debt, and whether such collateral is by way of security on other property or a guarantee of a third party or otherwise, the compensation shall not fully discharge the debt, and the tribunal shall determine the balance remaining and the manner in which it is to be repaid.

(4) Where the expropriation is of a part of land that is subject to a security interest, the tribunal shall determine the market value of the expropriated part and shall distribute the compensation between the parties as seems just.

11. Disturbance

We have already mentioned the subject of disturbance in connection with the Rule in *Horn* v. *Sunderland* but have not examined in detail the elements of disturbance. The aim must be to ensure that all proper items are included without allowing double recovery. In general, we have concluded that Ontario's provisions are appropriate.

a. Residences--non-residences

We shall first consider disturbance of the owners' residence, and next disturbance generally and then relocation costs. These are the subject matters of the next Recommendation. Then we shall deal with disturbance of a tenant, disturbance of a security holder, and finally with business loss.

In connection with disturbance of the owner where he resides on the land, Ontario (section 18(1)) allows compensation of five per cent of the market value of the land used for residential purposes where the land was not being offered for sale on the date of the expropriation. The following Recommendation is based on Ontario's except that we remove the maximum of five percent where the costs proved are greater. The allowance authorized in (a)(ii) is designed to cover items such as a paraplegic's ramp and a bomb shelter.

RECOMMENDATION No. 50

The expropriating authority shall pay to an owner other than a tenant in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,

(a) where the premises taken include the owner's residence,

> **(i) an allowance to compensate for inconvenience and the costs of finding another residence of five percent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, or the actual amount proved with respect to those items, whichever is the greater, provided that such part was not being offered for sale on the date of the expropriation; and**
>
> **(ii) a reasonable allowance for improvements, the value of which is not reflected in the market value of the land;**

(b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and

(c) relocation costs, to the extent that they are not covered in (a) or (b), including,

> **(i) the moving costs, and**
> **(ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.**

We realize the opening words of the section are in general terms and there will inevitably be items that are border-line. For example, the Supreme

Court has held (Fauteux C.J. dissenting) that compensation is payable for loss of an exemption of taxes on the property (*Montreal* v. *I.L.G.W.U.* (1972), 2 L.C.R. 26).

b. Tenants

Expropriation disturbs the tenant, and the problem is one of deciding on the basis of compensation for his disturbance.

The compensation a tenant receives, however, depends on many factors. For example, the term of the lease might be almost expired with no possibility of renewal. In that event, the only loss is whatever may be the additional cost of acceleration of the move. The Ontario provision is designed to enable the tribunal to take account of all these factors and we think it is satisfactory.

RECOMMENDATION No. 51

(1) The expropriating authority shall pay to a tenant occupying expropriated land in respect of disturbance so much of the cost referred to in Recommendation No. 50 as is appropriate having regard 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 land.

(2) The tenant's right to compensation under this section is not affected by the premature determination of the lease as a result of the expropriation.

There has been a case on Ontario's sections 18(2) and 19. It is *Becker Milk Co.* v. *Toronto* (1970), 1 L.C.R. 6. The company had a fifteen year lease on part of a shopping plaza and the leasehold interest was taken. The business

operated by the lessee was a "jug milk store" and was one of a chain. There are many factors affecting the location of these stores and the company could not relocate in the area. The arbitrator established the market value of the lease. Then he gave compensation for disturbance under section 18(2) in connection with fixtures that had to be abandoned, depreciating their value by twenty per cent. The loss was only accelerated by that expropriation, not caused by it. In connection with the lessee's claim under section 19(2), the good will provision, the taker argued that it was "feasible" to relocate even though the lessee had not done so. The arbitrator found as a matter of fact that it was not feasible. The lessee was entitled to be compensated "for its loss of market opportunity or good will." The good will was valued at $175,000 and only part of it was lost so that the award of good will was fixed at $75,000.

The Court of Appeal dismissal the city's appeal as without substance.

c. Security holders

The Ontario Act has an elaborate provision (section 20 (a) and (b)) that gives a mortgagee compensation for what might be called disturbance of his investment. In view of our Recommendation that the holder of a security interest be compensated on the basis of the market value of that interest, the only provision that is needed is one that will compensate him for loss of revenue pending re-investment. The amount of the compensation should be three months interest at current rates, together with reasonable costs of re-investment.

As to the person whose interest is subject to the security interest (i.e., mortgagor or purchaser), there is no need for any special provision to compensate for difference in interest rates, such as Ontario's section 20(c); of course, he receives compensation for disturbance under the general provision.

RECOMMENDATION No. 52

Where the expropriated land is subject to a security interest, the expropriating authority shall pay to the security holder three months interest at the current rate, on the amount of the outstanding principal together with the security holder's reasonable costs of re-investment.

d. Business losses

In connection with business premises, it is proper that compensation should be paid for business loss resulting from the expropriation. Since it may be that this cannot be established until after a lapse of time we agree in general with the Ontario provision. Our Recommendation differs from Ontario's in that we do not make the delay mandatory but leave it in the discretion of the tribunal.

There may be a situation in which the expropriation destroys the good will of an owner's business. We think Ontario's provision satisfactory. The Court of Appeal held in *Becker Milk Co.* v. *Metro Toronto* cited above, that it covers the case of a tenant. We think this is proper.

RECOMMENDATION No. 53

(1) Where a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and the tribunal may defer determination of the business losses until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first.

(2) The tribunal may, in determining compensation on the application of the expropriating authority, or an owner, include an amount not exceeding the value of the good will of a business where the land is valued on the basis of its existing use and, in the opinion of the tribunal, it is not feasible for the owner to relocate.

12. Partial Taking--injurious Affection

Expropriation of part of a parcel of land is commonplace. In such a case, not only does the owner lose the land that is taken but, in most cases, the value of the remaining land is diminished. It is recognized in expropriation law that the owner is entitled not only to compensation for the expropriated land but

for the diminution in value of that which remains. There is a severance of the original parcel and injurious affection to the balance. Ontario has defined "injurious affection" on a partial taking to mean (a) a reduction in the market value caused to the remaining land together with (b) "such personal and business damages, resulting from the construction or use or both, of the works" as the taker would be liable for if the construction or use were not under the authority of a statute (section l(l)(e)(i)).

Sometimes the value of the expropriated land is appraised separately and then the injurious affection to the balance. A good example is *St. Mary River Development Co.* v. *Murray* (1960), 21 D.L.R. (2d) 203 (the *Medicine Hat Ranch* case). In some cases, however, a more accurate estimate of the value of the taken land and the injurious affection to the balance can be reached by appraising the whole parcel and then appraising the value of that which is left as it stands after the taking. The difference between these two amounts represents the value of the taken land and the injurious affection to the balance. Two cases from Manitoba illustrate the use of each method. In *Winnipeg Supply Co.* v. *Winnipeg*, [1966] S.C.R. 336 the prevailing view was that the better way was to appraise the two items separately. Then in *King Edward Properties* v. *Winnipeg*, [1967] S.C.R. 249, where the taking was of a diagonal strip which left two triangular parcels of land, the "before and after" method was held to be preferable.

In Alberta our understanding is that the "before and after" method is not in wide use. In *Re M.D. Sturgeon and Pelletier* (1968), 9 P.U.B.D. 164, a strip along the edge of a parcel of land was taken to widen the highway and the remaining part of the land remained as a unit. The taker argued that the "before and after" method should be used. The Public Utilities Board declined to use this method. Indeed, if one takes the many cases of expropriation for pipelines and power lines which we consider later, the general practice in Alberta seems to be to appraise separately the expropriated land and the injurious affection to the balance.

Ontario has a special provision (section 14(3)) which permits the tribunal to use the "before and after" method where there is no general demand or market for the taken portion. We do not think such a provision necessary.

One possibility is that the expropriation of part of a parcel will increase the value of the balance of the land. This was the case in *King Edward Properties* cited above. The increase should be set off against a claim, e.g., for injurious affection. Should it be permitted to reduce the amount awarded for the part taken? Both Canada (section 23(1)) and Ontario (section 23) have provided that it does not, and we agree with these provisions. The following Recommendation follows in general Ontario's:

RECOMMENDATION No. 54

Where only part of an owner's land is expropriated and, as a result, the value of the remaining land is increased, the owner shall nevertheless be entitled to the market value of the land expropriated.

a. Basis of claim

Under existing law as developed by the cases, three conditions must be met to establish a claim for injurious affection:

(1) There must have been a unity of ownership between the land taken and the remaining land. This does not mean that the two portions must have been a single parcel, but they must have been in close proximity.

(2) The lands taken must have enhanced the value of the remaining lands.

(3) To permit recovery for the injurious affection to the remaining lands, the injurious affection must have been caused by acts on the land taken and not on some other land.

These rules are illustrated by two Privy Council cases. In *Holditch* v. *C.N.O.R.,* [1916] l A.C. 536 the owner had a number of scattered building lots. Some were taken. He could not claim for injurious affection or severance damage in connection with the balance because there had not been one holding, but many holdings.

In *Sisters of Charity of Rockingham* v. *The King,* [1922] 2 A.C. 315 the Sisters had a school immediately to the west of a railway. They also had two small parcels immediately to the east of the railway and bordering on a harbour. The Sisters used the small parcels for a bathing house and wharf. The Crown took the two small parcels for part of a railway yard. The Sisters claimed for injurious affection to the property west of the railway. One item in their claim was for damage from noise and smoke produced by the shunting of cars in the railway yard. The Privy Council held that the three parcels were so near to each other and so situated that the possession and control of each gave an enhanced value to them all. They were held together, so that where the two pieces were taken and converted to uses which depreciated the value of the rest, the owner had a right to compensation. However, it was limited to activities upon the lands expropriated and not to activities on lands that had not belonged to the Sisters.

The first two rules seem to have caused no problems and we see no need to embody them in the statute. The third rule has caused some difficulty. The argument is that it is not fair (see Justice (1969), p. 21). The following example is given: A strip of land along a highway may be expropriated to widen the highway. The traffic does not actually go on the strip, which constitutes the shoulder of a widened road. Assuming that the traffic on the road causes injurious affection to the remaining land, then under the third rule the owner cannot claim for that injurious affection though he could do so if the traffic actually went on the expropriated strip. We acknowledge the force of the criticism and have considered whether to abolish the rule. On balance, however, we are not prepared to recommend a change in this rule. Wherever the line is drawn there are likely to be anomalies. The damage in the example just given is not, strictly speaking, from the expropriation; and as will appear later, we recommend against inclusion in an expropriation act of claims for injurious affection where there is no taking.

A special problem that may arise in connection with a claim for injurious affection is illustrated by *Brown* v. *Peterborough* (1957), 8 D..R. (2d) 626. In that case the property was a farm. The part that was taken was valued on the basis of highest and best use, which was for building lots. The remaining part diminished in value because the farm was operated as a dairy and the dairy would no longer be efficient. In these circumstances the Ontario Court of Appeal held that the owner is not entitled to damages for injurious affection.

> Plainly the claimants are not entitled to the advantages and at the same time to be compensated for the disadvantages. They cannot have their cake and eat it. (Roach J.A at p. 637)

We think this decision is sound and that it should be made statutory.

RECOMMENDATION No. 55

Where only part of the land of an owner is taken, and such part is valued on the basis of a use other than the existing use, then the owner shall not be entitled to claim for injurious affection to the balance of the land.

b. Elements of the claim

The *Expropriation Procedure Act* provides for compensation for injurious affection on Crown takings (sections 15 and 16) and on municipal takings (sections 24, 27, 28). The phrase does not appear in connection with company takings. On the other hand, provision is made for "incidental damages." The Public Utilities Board in *Dome* v. *Swanson* suggested that this phrase might not cover injurious affection but recognized that the Appellate Division has held otherwise (case cited below).

Ontario has defined "injurious affection" on a partial taking (and also where there is no taking, but the latter definition is irrelevant here). It includes reduction in market value of the remaining land together with personal and business losses from "construction or use . . . of the works" (section 1(1)(e)(i)).

We favour a substantive provision saying that on a partial taking, compensation shall be given for injurious affection. Severance is the main item in injurious affection but not necessarily the only one, so we think it should be specified. One question that may arise is whether injurious affection includes damage from the user as well as from construction of the works. The case of *R.* v. *Miller,* [1943] Ex. C.R. 1 at 14 so holds. Canada has covered this in section 25 and Ontario in its definition. We agree that it should be spelt out.

We have considered Ontario's provision for "personal and business damage." An award was made in *Black* v. *Brant* (1972), 1 L.C.R. 325 to cover

miscellaneous items of expense that the owner incurred when a highway was put through his dairy farm. In *Motolanez* v. *Welland* (1972), 2 L.C.R. 74 the owner alleged that the traffic on a new highway on the taken land caused her to develop a nervous condition. She failed for lack of proof and in addition "the claim is too remote." We would not have any objection to including personal and business damages, but we think "incidental damages" is preferable. That term has been applied in Alberta to company takings since 1961. We discuss its application in the next part of this Report, on easements and rights of way. These constitute the great majority of partial takings in Alberta. Most of the rest are for highways. We think that provision for "incidental damage" on highway takings and indeed on all partial takings is as appropriate as it is for company takings. The following Recommendation so provides:

RECOMMENDATION No. 56

Where part of an owner's land is taken, compensation shall be given for injurious affection, including severance damage and any reduction in market value to the remaining land, and also for incidental damages, provided the injurious affection or incidental damages result from or are likely to result from the taking or from the construction or user of the works for which the land is acquired.

F. EASEMENTS AND RIGHTS OF WAY

An easement is an interest in land, so a body with power to expropriate can expropriate an easement. Under the general law of easements there must be a parcel of land (the dominant tenement) for the benefit of which the right over other land (the servient tenement) is created. Thus a right of way for a power line or pipe line is not strictly speaking an easement for there is no dominant tenement. In order to permit the registration of these rights of way as easements under the *Land Titles Act*, that Act was amended many years ago (the present section 71). The holder of a right of way does not have complete possession. The general theory is that the owner of the land which is subject to the right of way retains possession, subject to the right of the holder of the right of way to pass along the land and exercise any other powers on it that the easement gives him. The degree of control assumed by the taker of the

right of way varies from case to case, and from time to time in the same right of way.

We note that the Ontario Act defines land to include easements (section 1(1) (g)) but there is no other reference to them in the Act. The Canada Act specifically says in section 5(b) that the Crown may expropriate an easement. This Act, however, is confined to takings by the Crown. In Alberta the *Pipeline Act*; the *Water, Gas and Electric Companies Act*; the *Water Resources Act* and the *Hydro and Electric Energy Act* all authorize companies to expropriate interests in land. The *Expropriation Procedure Act*, Part 3, provides the machinery for expropriation by companies. Section 35 permits the tribunal (formerly the Public Utilities Board but since 1970 the Right of Entry Arbitration Board--now called the Surface Rights Board) to declare the amount of money payable "for the estate or interest granted to the company," and the amount payable "for incidental damages resulting from or likely to result from the construction of the works for which the land is or was required."

The fixing of compensation for the taking of these rights of way is difficult. There are often sharp differences of opinion between owner and taker as to what is just compensation and as to the proper basis for awarding it.

We shall describe the principles on which compensation has been awarded. Though most of the cases are from Alberta, there is an important Ontario decision, *Re Interprovincial Pipeline Company*, [1955] O.W.N. 301. There the company took a sixty foot strip of land for a pipeline. The arbitrator fixed the value as though the taking were of the fee simple. The pipeline company argued that the strip had a residual value to the owner. At least this was true as long as the land continued to be used for farming. However, it was not clear how long this would be and, besides, the owner still had to pay taxes. To any prospective purchaser the residual value would be negligible. The residual value was unassessable on any logical approach. It was an unknown factor. The Court of Appeal therefore confirmed the award based on full value. In the recent case of *Murphy Oil Co.* v. *Dau* (1969), 7 D.L.R. (3d) 512, aff'd [1970] S.C.R. 861 (a right of entry case which we discuss later) McDermid J.A. quoted this decision with approval. There was "no satisfactory way of placing a value on the residual interest." In Alberta the invariable practice has been to

assess separately the land covered by the easement and then to assess the damage to the rest of the parcel by way of injurious affection.

Our judicial doctrines began with the decisions of Mr . Blackstock as Chairman of the Public Utilities Board. In *Re Valley Pipe Lines,* [1940] 3 W.W.R. 145 the farm, in Turner Valley, was worth $45 an acre. The compensation for the right of way was $75 an acre, just as though the fee simple had been taken. The judgment acknowledges that there was a residual value; that the owner could still use the surface, and apart from the temporary inconvenience of trenching, "can make as ample use of it as if no easement had been taken." On the other hand, there would be loss of fertility, inconvenience in working the land, and weeds on the right of way. The clear inference is that these factors supplied justification for awarding the fee simple value--a set-off against the residual value, so to speak.

The per acre increase of sixty-six and two thirds per cent was because the figure of $45 an acre could hardly be fair compensation for an isolated acre or two. As for future damages to crops or livestock, compensation was not given because the owner would have a common law cause of action.

In *Re Imperial Pipe Line Co.* v. *Pahal*, [1948] 2 W.W.R. 20 , the first reported case after the Leduc discovery, Mr. Blackstock elaborated his reasons for allowing the full value of the land taken for a right of way. Although the owner can make substantial use of the land, the pipe line company "can enter on the land at any time for the purpose of laying additional lines, replacing lines, repairing lines or finally removing lines." This justifies an award on a fee simple basis.

A farmer would not sell a narrow strip for the same price per acre that he would take for the whole farm, so Mr. Blackstock added fifty per cent to the market value (and ten per cent for the compulsory taking). He again refused to deal with future damages, leaving this to a common law action.

In this case, the owner suggested compensation on an annual rental basis of $50. Mr. Blackstock said that this would penalize the company because it took an easement rather than the fee. He said the true rental value was only $5.50 an acre and, on that basis, the owner would get less than the award based on market value.

The Blackstock formula provides for compensation of one hundred and fifty per cent of the market value of each acre of the whole parcel. How does the formula stand today?

In *Calgary Power Co.* v. *Hutterian Brethren* (1961), 35 W.W.R. 227 at 231 the Board said:

> In dealing with land where there is evidence available of sales of small parcels there would be no reason for applying a formula. Each case must be decided or the evidence adduced with respect thereto and a formula cannot be substituted for judgment. In these cases where there is no evidence of the market value of small acreages, and no evidence of the value of easements, other than easements acquired where the alternative was expropriation, no method has been suggested to the Board which appears more reasonable than the method used in the foregoing cases. [*Valley Pipe Line* and *Pahal*].

The Board applied the formula; and it awarded as well compensation at the rate of $30 for each pylon on cultivated land and $5 for each pylon on uncultivated land. This item seems to be for interference with the owner's farming.

The Appellate Division has considered the Blackstock formula in several cases. In *Interprovincial Pipe Line Company* v. *Z.A.Y. Development Co.* (1961), 34 W.W.R. 330 and *Calgary Power Co.* v. *Danchuk* (1962), 41 W.W.R. 124, the court confirmed that the formula should not be used where there is evidence of comparable sales of small parcels. Then in *Copithorne* v. *Shell of Canada Ltd.* (1969), 70 W.W.R. 410, Allan J.A. agreed that the per acre value of the ranch plus fifty per cent was fair in that case. He refrained from expressing approval of any fixed formula. McDermid J.A. rejected the formula. The value of the strip taken may be much more than the average value per acre but it may even be less.

There is one special problem--that of the looping of pipelines. The farmer normally receives the fee simple value on the original taking, though he does not lose title or even possession. It is for this reason then he is not awarded further compensation for the taking when the pipeline is "looped," though he is entitled to compensation for actual damage (*Home Oil Co.* v. *Bilben* (1964), 6 P.U.B.D. 1509; *Alberta Gas Trunk Line* v. *Whitlow* No. 71-4, the Board of Arbitration).

The difficulty in fixing value is shown by a decision of Judge Cormack on an appeal from the Board of Arbitration in *Great Plains Development Co.* v. *Lyka*, [1972] 6 W.W.R. 321. The Board had valued the right of way at $200 per acre. On the new evidence the court held that the value of the whole parcel was $78 per acre; that there was no evidence of residual value; no evidence that the 3.14 acres were worth more than the rest of the parcel; and, that there was no reason to increase the value per acre. The court thought that such increase is allowable only where there has been an increase in the cost of farming the parcel. There was no evidence to that effect. We understand the owner has appealed.

In connection with injurious affection, the *Expropriation Procedure Act* empowers the Board to fix the amount payable "for incidental damages resulting from or likely to result from the construction of the works for which the land is or was required" section 35(2)(e)). This includes injurious affection. Thus in *Danchuk*, severance damage was allowed because the power line went diagonally across the land, and in addition there was damage from the potential loss assuring the land were to be subdivided in future.

> While other uses of the land both permitted and not permitted are admittedly speculative, I think the Board was wrong in accepting an estimate of damage that failed to take these possibilities into consideration.
> [41 W.W.R. 124 at 128, per Johnson J.A.]

Likewise in *Copithorne*, there was evidence that the land might be marketable in subdivisions. The court referred to regulations under the *Planning Act* (*Gazette*, June 30, 1967) which as amended (*Gazette*, Jan. 15, 1969) require a pipeline, in the case of a proposed subdivision, to be on or along a quarter section line or roadway, and habitable buildings to be fifty feet away. There is also a restriction on the proximity of buildings to power lines. Obviously these restrictions lower the value of the land through which the power line runs, if subdivision is likely.

The argument has sometimes been advanced by a company that the existence of a pipe or power line does not diminish the value of the parcel. Our jurisprudence has not accepted this and we do not recommend any change on this point.

Sometimes there is no injurious affection but there are other items of "incidental damages." Indeed the Board of Arbitration, at least in some cases, has appraised injurious affection separately from incidental damages. For example in *Lyka* injurious affection was $100 and incidental damages were $500.

Another recent case that is useful for illustrative purposes is *Northwestern Utilities Limited* v. *Yurchak* (No. 72-10, 10 March, 1972). The company's pipeline ran through the owner's dairy farm. The value of the land was based on evidence of arms length transactions for pipeline rights of way in the area. This was found to be $100 an acre (though the general selling price for large parcels was $40 per acre). The Board found no injurious affection to the remaining lands, but had to deal with substantial claims for incidental damages in connection with disruption of the owner's business of dairy farming, including breeding and haying. There were thirteen special items for which he was awarded $4,386.30, though he had claimed $15,596.30.

The last decision of the Public Utilities Board in connection with a pipeline right of way was *Dome Petroleum Ld.* v. *Swanson* (No. 30470, 22nd September, 1972). Two parcels, one in Edmonton and one just outside, were involved. There was great variation in the valuations placed on each parcel. Sales of other land, the prospect of commercial development, and the effect of existing pipelines were all considered in estimating value to the owner. The Board's award for the small acreage of the right of way was on the basis of a fee simple taking for a small acreage. No mention was made of the Blackstock formula. There was no reduction because of residual value. In connection with damages for injurious affection, the judgment suggests that on a strict reading of section 35 of the *Expropriation Procedure Act* there may be doubt as to whether this item comes within "incidental damages." However, the Board pointed out that the courts have assumed that it does, and made an award accordingly. We understand that this decision has been appealed.

It will assist to recapitulate here the principles established over the past thirty-two years and which since 1961 have been applied under authority of Part 3 of the *Expropriation Procedure Act*.

(1) The land taken for the right of way is valued or the basis of a small irregular parcel. The Blackstock formula, one hundred and fifty

percent of the average per acre value of the whole parcel does not have the force of law. The Appellate Division has not formally rejected it, but evidence of value, such as comparable sales, is better evidence and where available renders the formula inapplicable.

(2) The award is the fee simple value, although in many cases there is in fact a substantial residual value.

(3) As to the items properly to be considered under " incidental damages" there is no all-inclusive list. It is clear that injurious affection on the whole parcel is included, even though the term "injurious affection" does not appear in Part 3. In addition, there are items such as (a) expense of farming over the right of way, e.g., a round power pylons; (b) disruption of breeding and farming operations; (c) depreciation in the value of the whole parcel by reason of the existence of the right of way--this probably belongs under injurious affection; and (d) miscellaneous specific losses or expense which the owner can prove.

One of the most difficult questions in the whole of this study is whether the present basis of compensation is as fair as legislation can make it. The inherent difficulty in establishing the proper principles, or at least in applying them, is manifest from the reported cases.

What statutory changes can be made by way of improvement? One possibility, which we reject, would be to provide a statutory formula, Blackstock or other, or a "ready-reckoner" of the kind that has been used, at least in the past, in Saskatchewan. We have received little support for a statutory formula. We agree with the objection stated by McDermid J.A. in *Copithorne* v. *Shell Oil Co*.

Another possibility, urged by a farmer's group, and to which we have given anxious consideration, is to provide for annual or other periodic payments along the lines of "rent," similar to the annual payments which are awarded under the *Surface Rights Act*. The argument seems to be particularly strong in connection with above-the-ground installations. Psychologically at least, the farmers would prefer to receive periodic payments. We think,

however, that they would not necessarily result in higher total awards and that, on balance, it is best to remain with the single award as in other expropriation cases.

Should the statute deal with the question of the residual value? Specifically, should it require that cognizance be taken of that value?

In this connection we note that in Saskatchewan the *Power Commission* Act specifically says that residual value is to be deducted in the case of power transmission rights of way. Yet in *Campbell* v. *Saskatchewan Power Commission* (1970), 71 W.W.R. 182 the court found the residual value to be nil. If there was any, it was offset by the hazard and difficulties of farming around low structures.

In the case of transmission pipelines, Saskatchewan Provides for compensation for the entry plus compensation for damage. In *Producers Pipe Lines* v. *Vilcu*, [1971] 2 W.W.R. 366, the court awarded the value of the fee simple or the basis of the per acre value of the whole parcel. The court in effect canceled out two factors: the greater value per acre of small acreages, and the residual value to the farmer.

On balance, we do not think the legislation should require that residual value be deducted. The following is our Recommendation:

RECOMMENDATION No. 57

On the expropriation of an easement or right of way the tribunal, in making its award for the value of the interest taken, may ignore the residual value to the owner of the right of way.

1. Damages Off the Right of Way

The next point has to do with a problem that farmers have raised, namely, incidental damage off the right of way after the taking. This complaint extends to rights of entry. The new *Surface Rights Act*, section 23(3), enables the tribunal with consent to deal with these matters. Assuming that our general provision respecting "incidental damages" does not cover these items, we think it appropriate to include in the *Expropriation Act* a provision like that

in the *Surface Rights Act*. The following Recommendation is based on section 23(3):

RECOMMENDATION No. 58

Where the expropriation is of an easement or right of way, the tribunal may determine the amount of compensation payable by the taker

(a) for damage caused by or arising out of the operations of the taker to any land of the owner or occupant other than the area granted to the taker;

(b) for the loss of or damage to livestock or other personal property of the owner or occupant caused by or arising out of the operations of the taker; and

(c) for time spent or expense incurred by the owner or occupant in repairing or recovering any of his personal property, or in recovering any of his livestock that have strayed, due to the act or omission of the taker;

And shall direct the person to whom the compensation is payable.

There are however two changes. Section 23(3)(a) gives jurisdiction only where the parties consent. This may be because of doubt as to whether a provincial board can be given this jurisdiction. There is an argument that such jurisdiction can be exercised only by a judge appointed by the Governor General under section 96 of the *British North America Act*. We think, however, that this argument will not prevail, so we have removed the provision that requires consent. The other difference is that in subclause (c) we have included personal property as well as livestock. Both are included in (b) and we think (b) and (c) should be co-extensive.

G. MISCELLANEOUS MATTERS

We note here four problems related to expropriation: (1) contents of easements; (2) registration not only of the easement against the title but

frequently of a mortgage for a large amount given by the company to secure a bond issue; (3) the *Surface Reclamation Act*; and, (4) the *Landmen Licensing Act*.

Landowners sometimes allege that easements are drawn in favour of the company. However, we do not think that expropriation legislation is the place to deal with this complaint.

As to registration of a mortgage of the easement, which may be in the millions of dollars, it does appear on the title but of course is only against the easement, not the fee simple of the whole parcel. No practical solution to this problem has been proposed to us.

Some ten years ago the government had prepared a draft real property act to replace the *Land Titles Act*. A committee of the Law Society submitted a commentary on the draft. We understand that the commentary makes detailed suggestions on this matter, but we have not had the document before us. As a minor improvement, the form of memorial on the title might be amended to indicate more clearly than it now does that it is only the easement that is mortgaged. This whole subject, however, is outside our terms of reference.

As to the *Surface Reclamation Act*, we appreciate the argument that under that Act the Surface Reclamation Council has extensive power to require reclamation of the surface in connection with pipe line easements and indeed with respect to a large number of activities which disturb the surface. In *Alexandra Petroleum* v. *Caswell*, [1972] 3 W.W.R. 706, a case of right of entry, the Appellate Division held that the *Surface Reclamation Act* should not be considered in connection with compensation for permanent damage to the land. We think the same applies here. Moreover, the Act is not confined to expropriation. It extends to all holders of easements and indeed applies to a fee simple owner. The obligation to reclaim is a general one, and a matter of public interest. Moreover, we understand it is impossible to tell at the time of the hearing for compensation for the taking of right of way as to the extent to which the land can be put back in its original condition. In any case, the *Surface Reclamation Act* is not within our terms of reference.

As to the *Landmen Licensing Act*, section 8 requires a landman to leave a proposed agreement with the owner for forty-eight hours. However, the

owner may waive this and some farmers have complained of the working of the waiver provision. We do not think this matter is within our terms of reference.

H. INJURIOUS AFFECTION WHERE NO TAKING

On a partial taking it is reasonable to provide in the *Expropriation Act* for compensation of the owner for "injurious affection" to the balance of the parcel. Where, however, none of an owner's land has been expropriated, one might wonder how he could ever have a claim under an expropriation act. The explanation goes back to the *Land Clauses Consolidation Act,* 1845, of England providing for expropriation by railways. Section 68 says:

> If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works . . . such party may have the same settled either by arbitration or by the verdict of a jury. . . .

This section has been construed to apply where none of the claimant's land has been taken, and indeed where nobody's land has been expropriated. Many Canadian statutes contain similar provisions, though they are not all identical.

A long line of cases interpreting the *Land Clauses Consolidation Act* and similar legislation in Canada has established a number of conditions which a claimant must meet in order to receive damages in the case where none of his land has been taken. In *Reg.* v. *Loiselle*, [1962] S.C.R. 624 they were stated as follows:

> (1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
>
> (2) the damage must be such as would have been actionable under the common law, but for the statutory powers;
>
> (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
>
> (4) the damage must be occasioned by the construction of the public work, not by its user.

Professor Todd in his helpful article "The Mystique of Injurious Affection in the Law of Expropriation" (1967), U.B.C.L. Rev. 127 points out that the first two rules are really different ways of stating the same proposition, namely,

that the action of the taker has been made lawful by statute and would not have been lawful without the statutory authority. The third deals with the type of damage that may be awarded him, namely, decrease in market value but not business losses. The fourth says that the damage must be from the construction of the work that is authorized by statute and not from the user.

We have mentioned that the statutes are not all identical, and some of them are so worded that the four rules are not all applicable.

The first two rules require that the conduct be of a kind that would have been actionable without statutory authority. The cases under these rules fall into two categories: (1) deprivation of access; and, (2) nuisance.

In connection with the first, there can be many exercises of statutory power, such as changing the route of highways, creating one-way streets and putting up dividers, which do not provide the basis for a claim:

> *Reg.* v. *MacArthur* (1904), 34 S.C.R. 570 (change in canal route causing inconvenience).
>
> *Gross* v. *Saskatoon* (1970), 73 W.W.R. 272 (building a new highway that reduced traffic past the claimant's store).

However, a public work may block off access so severely that a claim lies:

> *C.P.R.* v. *Albin* (1919), 59 S.C.R. 151 (access to shop practically destroyed by subway).
>
> *Reg.* v. *Loiselle,* [1962] S.C.R. 624 (relocation of highway leaving the claimant's garage in a cul de sac).

One might argue that the complete removal of access is a taking but it has not been so treated in Canada in spite of a dictum of Duff J. in *Toronto* v. *Brown* (1917), 55 S.C.R. 153 at 196 to the contrary.

In connection with nuisance, vibrations caused by a railway, or contamination from a sewage lagoon, or odours amounting to a nuisance, are

sufficient to form the basis of a claim, at least if the statute covers damage from user as well as construction.

There has been criticism of the third rule, which includes compensation for damage to business, though it is firmly established as *C.P.R.* v. *Albin* shows.

In connection with the fourth, which excludes compensation for damage from user as distinct from construction, the cases are not unanimous. In *Toronto* v. *Brown* the city built a lavatory under its sidewalk and in front of the claimant's store. The value of the property was depreciated but the depreciation was from the user, not the construction of the works. Was the damage caused “by the exercise of the city's power?" Other cases had confined "exercise" to construction of works but the court here extended it to user.

The new Canada Act does not mention injurious affection where there is no taking. Ontario provides for compensation for injurious affection (section 21) and section 1 defines the term. Injurious affection on a partial taking has a vastly different meaning from that which it bears where there is no taking. In the latter case the definition says:

> 1(1)(e)(ii) where the statutory authority does not acquire part of the land of an owner,
>
> a. such reduction in the market value of the land of the owner, and
>
> b. such personal and business damages,
>
> resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute.

It will be seen that this definition preserves all the rules except the third, which it extends by including compensation for personal and business damage in addition to reduction in market value. (The British Columbia Report (pp. 159-165) agrees with the Ontario provision on personal and business damage but recommends inclusion of damages from use which Ontario excludes.)

In *Four Thousand Yonge Street* v. *Metro Toronto* (1972), 2 L.C.R. 191 the city built a storm sewer which diverted the course of a river which, in turn,

caused erosion of the claimant's land on the river bank. No land was expropriated from the claimant or from anyone else. An award was made for injurious affection.

Thus far we have not made specific reference to Alberta legislation.

a. The Crown

Section 15(1) of the *Expropriation Procedure Act* says:

> An owner of land expropriated by the Crown and an owner of land injuriously affected by the exercise of the power of expropriation is entitled to due compensation for any damages necessarily resulting from the exercise of the power of expropriation beyond any advantage that he, may derive from any public work for which the land was expropriated or by which the land was injuriously affected.

In one important respect this section differs from most comparable ones. Usually a section of this kind applies where property has been injuriously affected "by the exercise of any of the statutory powers" of the authority (e.g., the *Municipal Government Act*, section 131, quoted immediately below). Section 15, on the other hand, applies only where the Crown has acquired land by expropriation and not otherwise. There is a certain logic in this, especially where the section is in an expropriation statute. However in terms of rationality of the law, the right to claim for injurious affection should not vary with the means by which the defendant acquired title.

b. Municipalities

The right to claim for injurious affection appears by implication in section 27(1) of the *Expropriation Procedure Act*, which says:

> A claim for compensation for injurious affection caused by the expropriation of other land . . . shall be made by an owner by filing the claim and particulars thereof with the Clerk or Secretary Treasurer. . . .

The substantive provisions, however, are in the *Municipal Government Act*.

Section 131:

> The municipality . . . shall pay damages for any land or interest therein injuriously affected by the exercise of such powers [i.e., the powers conferred by the Act], and the amount of such damages shall be such as necessarily result from the exercise of such

powers beyond any advantage that the claimant may derive from the contemplated work.

This seems to have its origin in section 303(1) of the old *City Act* (R.S.A. 1955, c. 42) which in specific terms gave a claim for injurious affection resulting from statutory works, even though none of the claimant's land was taken. The Legislature must have thought that more specific provision for compensation was needed, for in 1960 it added section 303a (now section 135(1), *Municipal Government Act*). It applied to damage to land “immediately adjacent" to a "work or structure" of the city. If the work or structure permanently lessened the use of the land the claim could be made.

In *Edmonton* v. *Woods,* [1964] S.C.R. 250, the building of an overpass materially reduced access to Woods’ business premises. The main issue was whether Woods could claim for business losses as well as for reduction in the value of the land. The section was construed to include business losses.

The cities may have feared that claims could be made under this section for loss resulting from the dividing of streets and from making them one-way. In 1965, section 303a of the *City Act* was amended to exclude claims for damage caused by the construction of boulevards or the creation of one-way streets. When this provision was re-enacted as section 135(5) of the *Municipal Government Act*, "the placement of dividers" was added. In *Bayco* v. *Camrose* (P.U.B.D. No. 30042, 14 Oct. 1970) the Board dealt with a case where the claimant alleged loss in his bakery business from construction of a median strip on an adjoining street. At the time this was done the *City Act* was still in force, so the question was whether the median strip was a boulevard. The Board held not and so inferred that Bayco had a status to claim. The award was $800.

The cities were presumably not satisfied with the decision in *Woods*, so in 1966 the *City Act* was amended (now section 135(4), Municipal *Government Act*) to limit compensation under section 303a to the decrease in the value of the property plus a maximum of ten percent.

To sum up the provisions just discussed, section 131 is a general provision providing compensation both for a taking and injurious affection, while section 135 is a much more detailed provision for compensation for damage caused by a municipal work. In addition, section 175 deals with the

closing of streets. It provides for compensation to a landowner who sustains damage through the closing of a street (subsection (4)). In *Lopetinsky* v. *Lamont* (P.U.B.D. No. 29706, 28 Jan., 1970) the town closed a street with the result that the owner's lot was no longer a corner lot. The claim failed because the close street had never been developed as a road and any loss of advantage was not sufficient to establish a claim.

c. Companies and other expropriating bodies

Parts III and IV of the *Expropriation Procedure Act* do not contain the term "injurious affection." Part III compensates for "incidental damage" and the cases are clear that on a partial taking damages for injurious affection can be awarded under that head. We know of no attempt to make a claim for injurious affection in the absence of a taking from a claimant. There is, however a section in the *Water, Gas, Electric and Telephone Companies Act*, R.S.A. 1970, c. 387 that is an injurious affection provision, confined of course to companies under that Act.

Section 14:

> A company shall make satisfaction to the owners or proprietors of any building or other property . . . for all damages caused in or by the execution of all or any of the powers given it by this Act.

We know of no claim made under this section. It is cited by the Privy Council in *Northwestern Utilities Limited* v. *London Guarantee Co.* (the Corona Hotel case), [1936] A C. 108, but only incidentally.

Other Acts which contain a provision very much like section 15(1) of the *Expropriation Procedure Act* are the *Universities Act* (section 17(3)) and the *Colleges Act* (section 37(3)).

The Railway Act, R.S.A. 1955, c. 276, is excluded from the terms of the *Expropriation Procedure Act*. It has its own provisions for compensation of ." . . persons . . . interested in lands that might suffer damage from . . . the exercise of any of the powers herein granted" (sections 104 and 106).

In our opinion, the provisions for injurious affection where none of the claimant's land is taken, do not belong in an expropriation statute. Injurious affection where there is no taking is completely different from injurious

affection on a partial taking, as appears clear from the Ontario definition and from the four rules quoted above. Judges and writers have often pointed out that compensation for injurious affection where there is no taking is not a matter of expropriation at all. Under Parts I and II of the *Expropriation Procedure Act*, it is true that someone else must have been expropriated, but even this is not required under most statutes, and even where it is required it creates an inconsistency, for it is illogical to make the plaintiff's right depend on the chance circumstance as to whether the authority had to expropriate other land or was able to acquire it by agreement. The various statutes, and the numerous cases construing them, show great diversity in the scope of the provisions. The four rules may not strike a fair balance. They may be too narrow. Ontario has widened them to include business and personal damages. Should they be extended to damage from user as well as construction?

We have not formed a firm opinion on these matters. The various Alberta statutes would require careful examination. Recommendations in connection with the provisions in the *Municipal Government Act* could not be made without a detailed study of the Act and the obtaining of the views both of the municipal authorities and persons who claim to have incurred damage from the exercise of the municipality's statutory powers.

There is another problem that arises in connection with claims against public authorities under statutes of the type we are considering. Does the statutory remedy exclude a common law action for nuisance or negligence, and the right to an injunction? This is a matter of construction of the statute and, notwithstanding the innumerable cases, it is hard to give a confident answer in advance. Sometimes the authority given by the statute is absolute in the sense that it permits the authority to exercise its powers free from risk of action, even though it creates a nuisance, provided the authority is not negligent. Sometimes the statute is held to be conditional or permissive, which means that the authority may carry out its work only if it does not cause a nuisance, and liability in nuisance remains.

The well known case of *Hammersmith Railway* v. *Brand* (1869), L.R. 4 H.L. 171 illustrate the first type of statute. In that case, damage was from vibration caused by the trains. The statutory provisions for compensation for injurious affection did not cover the case because the damage was from user, and yet were sufficient to exclude an ordinary action for nuisance.

The immunity is lost, however, if the authority is negligent. Thus an injunction was granted against the city in *Clarke* v. *Edmonton,* [1933] 1 W.W.R. 113 because the court found that the sewage disposal plant which created the nuisance was operated negligently.

It is hard to tell when a statute will be construed so as to preserve liability in nuisance. The leading case to illustrate this possibility *Metropolitan Asylum* v. *Hill* (1881), 6 A.C. 193. The statutory authority to operate a smallpox hospital was held to be conditional upon it being done without creation of a nuisance, and a nuisance being found, an injunction was granted. The answer often depends on a detailed analysis of intricate provisions.

The following two Supreme Court of Canada cases illustrate the difficulty in determining whether the governing statutes exclude a common law action in nuisance:

In *North Vancouver* v. *McKenzie Barge Ltd.,* [1965] S.C.R. 337 the municipal drainage system caused silting in the barge company's shipyard. The court construed the *Municipal Act* as restricting the company to a claim for compensation under the statute and as excluding an action even where there was negligence or"unnecessary nuisance."

In *Portage la Prairie* v. *B.C. Pea Growers,* .[1966] S.C.R. 150 the damage was from seepage from the defendant's sewage lagoon. The court held that the defendant's charter did not authorize a nuisance and the statutory provision for compensation for injurious affection was inapplicable because the damage was not the necessary result of the exercise of the power to construct the sewage system and the statute did not exclude an ordinary action.

The point that emerges is that there is still great uncertainty as to when a claimant is entitled to statutory compensation or to succeed in an ordinary action. The object must be to balance the interests of the authority against those of the claimant. It is difficult to strike a balance, and we have tried to show that the whole subject cannot adequately be treated by an injurious affection section in an expropriation act, whether or not the four rules are modified.

Although Ontario has included this subject in its new *Expropriation Act*, it is clear from the report of the Ontario Law Reform Commission that the subject did not really belong to expropriation and that the recommendations to include it were merely a temporary solution until an extensive study could be made of the general problem of immunity from liability because of the exercise of statutory powers. The British Columbia Law Reform Commission stated:

> If it were not for our recommendation that the *Lands Clauses Act* repealed, we should 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. (p. 163).

For these reasons we, do not make any recommendation to include in an expropriation act compensation for injurious affection in the absence of a taking of the claimant's land. There is, however, one point that should be attended to. It is in connection with Crown takings. Section 15(1) of the *Expropriation Procedure Act*, cited above, provides for claims for injurious affection in connection with takings by the Crown. We assume that it applies even where there has been no taking of the claimant's land. While we have said that, in our opinion, a provision of this kind does not belong in an expropriation act, we are not recommending its removal. It could properly go in the *Proceedings Against the Crown Act,* and we so recommend in Appendix C. Parenthetically, we observe that its provisions could properly be examined with a view to allowing recovery, e.g., for damage to business as well as to land and from user as well as from construction. This, however, is outside our terms of reference.

I. MISCELLANEOUS

There are a number of incidental matters that do not belong under the heading of Procedures or Principles of Compensation and that should be included in the Act. Some of them now appear at the beginning and others at the end of the *Expropriation Procedure Act*. We group them here for convenience.

1. Amount of Award: Recovery of Excess

The following Recommendation, based on Canada's section 31, provides for deducting from the award the amount paid pursuant to the proffer, and for

permitting the taker to recover the excess where the amount of the award is less than that paid pursuant to the proffer.

RECOMMENDATION No. 59

Where any compensation has been paid to a person in respect of an expropriated interest pursuant to a proffer, the amount so paid shall be deducted from the amount of the compensation awarded by the tribunal, and where the amount so paid exceeds the amount so awarded by the tribunal, the excess constitutes a debt to the expropriating authority and may be recovered by action.

2. Regulations

There should be power in the Lieutenant Governor to make regulations. The present section 49 is adequate for this purpose.

RECOMMENDATION No. 60

The Lieutenant Governor in Council may make such orders, rules and regulations as may be deemed necessary to effect the intent of this Act.

3. Compensation in Place of Land

It is normal in an expropriation act specifically to provide that the compensation shall stand in place of the land and that the taker shall acquire the land free of encumbrances. Section 43(1) and (2) are provisions of this kind and we think they should be brought forward.

RECOMMENDATION No. 61

(1) The right to compensation and the compensation finally awarded for any estate or interest acquired or taken under this Act in Crown or other land by an expropriating authority shall be deemed to stand in the stead of the estate or interest so acquired or taken and a claim to or an encumbrance upon the estate or interest is converted, as against the

expropriating authority, into a claim for the compensation or a portion of the compensation.

(2) When the estate or interest has been expropriated in the manner provided by this act, the estate or interest becomes the property of the expropriating authority free and clear of any and all claims and encumbrances in respect of the previous estate or interest.

4. Unregistered Land

Where land is unregistered, section 50 of the *Expropriation Procedure Act* provides for the deposit in the Land Titles Office of instruments of expropriation, and authorizes the Registrar to make such certificate of title as may be necessary to indicate the vesting in the taker. The following is adapted from section 50:

RECOMMENDATION No. 62

Where a fee simple estate in any land is held by any person and the land is not registered in the Land Titles Office, the land may be expropriated by a deposit in the Land Titles Office. A certificate of approval and such certificates of title may be made in respect thereof by the Registrar of the Land Titles Office as may be necessary to indicate the vesting in the expropriating authority of the land expropriated.

5. Application of Act

The present statute sets out the expropriations to which it applies; the extent of the expropriation, namely a fee simple or lesser interest; exclusion of minerals; and the right of an expropriating authority to acquire by agreement land that he is entitled to expropriate. There should be like provisions in the new Act.

Section 3 provides that all expropriations are within the Act except for those enumerated in the Schedule. Some of the exclusions are probably unnecessary for they are not truly cases of expropriation. However as a

matter of precaution we think it proper to continue to exclude them. At present the *Railway Act* is excluded, but we see no justification for leaving it outside the general Act. The following is the same as section 3 save that it does not refer to future Acts:

RECOMMENDATION No. 63

(1) This act applies to any expropriation authorized by the law of the province and prevails over any contrary provisions that may be found therein, except the statutes or parts of statutes enumerated in the Schedule.

(2) This Act Binds the Crown.

SCHEDULE

	TITLE	EXTENT OF EXCEPTION
1.	*The Agricultural Service Board Act*	Orders of reclamation under section 19
2.	*The Land Titles Act*	Plans of subdivisions and plans of surveys under sections 82 and 91
3.	*The Public Lands Act*	Cancellations or withdrawals under sections 79, 113 and 114
4.	*The Local Authorities Board Act*	Cancellation of plans of subdivision
5.	*The Surface Rights Act*	The whole
6.	*The Rural Mutual Telephone Companies Act*	Confiscation of plant and equipment by Crown
7.	*The Planning Act*	(a) Compulsory subdivisions (b) Replotting schemes

The following Recommendations are carried forward from sections 4, 5 and 6 of the *Expropriation Procedure Act* with minor changes in section 5. section 4 permits expropriation of a lesser estate than the fee simple. Section 5 excludes expropriation of minerals unless the authorizing act includes them. Section 6 preserves the right to acquire by agreement land that may be expropriated.

RECOMMENDATION No. 64

Where an authorizing act permits or authorizes an expropriation of land, the expropriating authority may, unless the authorizing act expressly otherwise provides, acquire any estate required by him in the land and may, unless the authorizing act expressly otherwise provides, acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land.

RECOMMENDATION No. 65

(1) Unless the authorizing act expressly authorizes the expropriation of mines or minerals, the expropriating authority is not entitled to any mines or minerals in any land vested in him under the procedure prescribed by this Act, and, subject to subsection (2), the ownership of mines or minerals is in no way affected by the filing or registration in the Land Titles Office of a certificate of approval under this Act.

(2) Where an authorizing act expressly authorizes the expropriation of mines or minerals, the certificate of approval by which the expropriation is effected shall state the estate or interest acquired in the mines and minerals, and failing such statement no estate or interest in the mines and minerals passes upon the expropriation.

(3) Notwithstanding subsection (1), an expropriating authority may, to the extent necessary for his works, excavate or otherwise disturb any minerals within, upon or under land in which he has acquired an estate or interest by expropriation or by agreement or transfer, without permission from or compensation to any person.

RECOMMENDATION No. 66

Unless an authorizing act expressly otherwise provides, nothing in this Act restricts or affects:

(a) The right of an expropriating authority to acquire, by agreement or transfer, any estate or interest in land that he may acquire by expropriation, or

(b) the right of the Crown or any person to convey to an expropriating authority any estate or interest in any land that the expropriating authority may acquire by expropriation from the Crown or person.

6. Definitions

We have some diffidence about including definitions for they are peculiarly a task for the draftsman. However, we think it convenient to bring forward those definitions in the present Act that will still apply and to add several others. In the definition of owner we have added (iv) “any other person who is known by the expropriating authority to have an interest in the land."

RECOMMENDATION No. 67

In this Act,

(a) "authorizing act" means the act authorizing the expropriation by an expropriating authority;

(b) "board" means the Land Compensation and Surface Rights Board constituted under this Act;

(c) "court" means a judge of the Supreme Court;

(d) “Crown land" means land of the Crown in right of Alberta;

(e) "expropriating authority" means the Crown or any person empowered to acquire land by expropriation;

(f) [see recommendation No. 1];

(g) "land" means land as defined in the authorizing act and if not so defined, as defined in the *Land Titles Act;*

(h) Land Titles Office meas the Land Titles Office of the land registration district in which the land is situated;

(i) "municipality" means a city, town, new town, village, county or municipal district;

(j) "owner" means

> **(i) a person registered in the Land Titles Office as the owner of an estate in fee simple in land,**
> **(ii) a person who is shown by the records of the Land Titles Office as having a particular estate or an interest, mortgage or encumbrance in or upon land,**
> **(iii) any other person who is in possession or occupation of the land,**
> **(iv) any other person who is known by the expropriating authority to have an interest in the land, and**
> **(v) in the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in the land;**

(k) "right of way" means the right of an expropriating authority to carry its pipes, wires, conductor or transmission lines upon, over or under land and that is registrable under the *Land Titles Act*;

(l) "tribunal" means the board or the court, as the case may be;

(m) "work" or "works" means the undertaking and all the works and property that may be acquired, constructed, extended, enlarged, repaired, maintained, improved, formed, excavated, operated, reconstructed, replaced or removed in the exercise of any powers conferred by an authorizing act.

J. RIGHTS OF ENTRY

This term refers to the right of a mineral owner to enter on the surface of the land owned by another for the purpose of getting the minerals. The right of entry is quite distinct from the power of expropriation. Yet the matter of compensation to the surface owner for damage done to the surface and to his right to use the land, has much in common with the right of expropriation, especially for pipelines. Indeed, since 1970 the same Board has dealt with both. For these reasons we decided from the beginning of this study to include rights of entry.

At common law the mineral owner had a right of entry and an implied right to work the minerals. One English case, *Marshall* v. *Borrowdale Mines* (1892), 8 T.L.R. 2 75, holds that the mineral owner may do anything reasonably necessary to extract the minerals, even if he disturbs the surface. However, destruction or permanent disturbance is inconsistent with the rights of the surface owner. On the other hand, *Borys* v. *C.P.R.,* [1953] A.C. 217, from Alberta, held that the owner of the petroleum could recover it even though the surface owner's "free gas" came up with the petroleum.

Where there is a specific right to work the minerals the Supreme Court held in *Fuller* v. *Garneau* (1921), 61 S.C.R. 450, another Alberta case, that the mineral owner has the right to let down the surface. Yet in an English case, *Hext* v. *Gill* (1872), 7 Ch. AP. 699 it was held that the mineral owner could not destroy the surface by quarrying.

It is hard to reconcile the cases or to define precisely the extent to which the mineral owner can go, with or without a specific right to work. The difference of opinion appears from the reason for judgment in *Murphy Oil Co.* v. *Dau* (1970), 7 D.L.R. (3d) 512 in our Appellate Division. Porter J.A. (at p. 518) said that the surface owner could frustrate the operator by demanding a price for the use of the land which would make the recovering of the mineral

economically impossible. McDermid J.A., on the other hand, said (at p. 550): "at one time most mineral owners had the right to enter upon the surface of lands in order to recover their minerals without paying compensation. . . ." On appeal to the Supreme Court, this point was not mentioned (*Dau* v. *Murphy Oil Co.,* [1970] S.C.R. 861).

1. Principles of Compensation

It is unnecessary to further discuss the common law rights of the parties. When the Canadian government transferred Alberta's natural resources to the Province in 1930, a *Provincial Lands Act* was passed. Regulations were made under that Act to provide for right of entry and to fix the compensation.

Four reported decisions of the chairman of the Public Utilities Board show the development of the principles of compensation:

Re Mercury Oils and Hartell, , [1936] 3 W.W.R. 679.

Re Okalta Oils Ltd., [1937] 2 W.W.R. 489.

Re Major Oil Ltd. and King, [1942] 3 W.W.R. 140.

Re Cannar Oils, [1943] 3 W.W.R. 98.

These early cases begin to develop a policy of awarding a single payment for damage to the entered land and for disturbance during drilling, and annual payments to cover use and occupation of the entered land and inconvenience to the owner's farming operations.

In 1947 the Legislature passed the *Right of Entry Arbitration Act*. It established a Board of Arbitration, with power to order "the right of entry, user or taking of the surface of any land" for mining purposes. The Board had power to fix the compensation, and the Act set out the factors that the Board could consider. These factors reflect the previous decisions. It will be noted that the Act provided for the "taking" of the surface as well as entry and user. A right to "take" seems to give a power to expropriate and, indeed, an amendment to the Act said that the Board's order gives the operator "the exclusive right, title and interest in the surface" apart from the right to a certificate of title.

In 1967 an amendment provided for an appeal from orders of the Board to a District Court judge. The appeal was by way of a rehearing. The judgments that have been delivered in District Court are important for they articulate the problems in connection with fixing compensation. The first judgment was that in *Chomany* v. *Rozsa Oils Ltd.* (18 Jan. 1968, unreported). Turcotte D.C.J. held:

> In other cases land is taken for the public good of the area or community, i.e., to provide citizens with a railroad, a street, power, gas or other public utility or service.
>
> In this case one citizen or a company enters upon the land of another citizen for the sole purpose of reaping wealth and profit for himself through the recovery of gas or oil underneath the property owned by the latter citizen.
>
> Throughout the Province, thousands of oil and gas wells have been drilled and, until recently, a considerable portion of the drilling has taken place on property, the surface of which has been owned by farmers of the Province.
>
> No doubt it has been with this thought in mind that the Legislature in its wisdom, has given the Board much wider powers under this Act in determining the amount of compensation to be paid.

In *Twin Oil Ltd.* v. *Schmidt* (1970), 74 W.W.R. 647, Feir C.J.D.C. said that the compensation is not a purchase price or even a rental, but is a recompense for loss or damage. Nevertheless he awarded the value of the land taken for a drill site. In addition, he gave damages for general disturbance and an annual award for loss of use and severance and inconvenience.

In *Murphy Oil Co.* v. *Dau*, already mentioned, the main issue was over the basis of compensation for a well site. The Board had given $1,620 for damage to the surface and general disturbance. The District Court judge valued the well site at a much greater figure, largely because of the potential for commercial or residential purposes. He also gave a large award for injurious affection to the farm. The Appellate Division referred the matter back to the Board, the majority holding that the award should be based on the value of the land at its highest and best use, which was for a well site. (This comes close to value to the taker.) The Supreme Court restored the Board's order (*Dau* v. *Murphy Oil Co.*, [1970] S.C.R. 861).

Since 13 February, 1970, the Board has been required to give reasons. In the typical case (e.g., *Tenneco Oil Ltd.* v. *David* (No. 70-1, 10 April, 1970)) there are two categories of award, with two items in each:

(1) First year (one-time) payments:
(a) damage to surface of site,
(b) disturbance during drilling.

(2) Annual payments:
(a) loss of use of the site,
(b) severance, inconvenience, and the like.

In *Caswell* v. *Alexandra Petroleums,* [1972] 3 W.W.R. 706 the Appellate Division restored nearly every item in the Board's award after the District Court judge had reduced them. It held that the *Surface Reclamation Act* should be ignored, damages may be given for inconvenience and noise though they fall short of nuisance, and the findings of the Board should not be lightly disturbed.

A subsequent decision of the Board in *Alberta Eastern Gas Ltd.* v. *Eastern Irrigation District* (No. 27-72, 23 June, 1972) is of interest in connection with damage to surface. It was a test case in the Brooks area. The average value of the whole parcel was $25 per acre and the Board awarded $75 per acre for the well site and access road. Noting the seeming incongruity, the Board pointed out that the damage was to a very small area and that no prudent owner would leave it:

> . . . as a weed patch and an eyesore even if he had to spend an amount several times the per acre fee simple value of the damaged area. If he did not take measures to get rid of the eyesore or blight it would depreciate the value of the whole parcel.

The surface owner argued that leases of the surface for oil and gas wells showed a market value of $1,200 for the first year and $350 thereafter. The Board's award was approximately one-half of each of these figures.

The *Surface Rights Act, 1972,* re-enacts and amends the *Right of Entry Arbitration Act*. It brings forward, with some changes, the provision setting out the factors that the Board may consider in awarding compensation. It provides:

> 23.(2) The Board, in determining pursuant to subsection (1) the amount of compensation payable, may consider
>
> (a) the value of the land,

(b) the loss of use by the owner or occupant of the area granted to the operator,

(c) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,

(d) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and

(e) such other factors as the Board considers proper under the circumstances.

Saskatchewan has had considerable experience with rights of entry. In that province a "ready reckoner" was long in use as an aid in fixing compensation. This was a suggested formula contained in the Petroleum and Natural Gas Regulations made in 1953 under the *Mineral Resources Act*. For example: "capital damage for each well site: for the first acre two times the assessed value plus $35.00." The ready reckoner formula is described in a helpful article by Professor Maurice Sychuk, "Compensation for Oil and Gas Surface Rights in Saskatchewan" (Sask. L. Rev. 1971-72, 389 at 393-7).

The Friesen Report in 1966 was followed by the *Surface Rights Acquisition and Compensation Act* 1968, chapter 73. Unlike our statute, it separates compensation for well sites (section 24) from compensation for flow lines (section 39). Both provisions, however, have a resemblance to Alberta's. Professor Sychuk says the Board has tended toward a formula in making awards under each section (at 436). In the only reported case, *Dalgleish* v. *World Wide Energy Ltd* (1970), 75 W.W.R. 516, the main point of interest is that the District Court judge declined to include an item for loss of income from the well site because he had already awarded its capital value.

As we understand the position in Saskatchewan, the Friesen Report recommended that rights of way for pipelines and power lines be treated the same as rights of entry but the Legislature did not implement this recommendation. In other words, it preserved the distinction between expropriation and right of entry.

In British Columbia, the Court of Appeal in *Re Pacific Petroleum Ltd.* (1958), 24 W.W.R. 509 held that it is proper to order annual payments , the case being different from that of expropriation. (See Lucas, "Compensation for

Oil and Gas Surface Rights in British Columbia," 1971-72, Sask. L. Rev. 368 at 376-7.)

Parenthetically, we note that the articles by Professor Sychuk and Professor Lucas, which we have cited, are companions to an article by John Currie, "Compensation for Oil and Gas Surface Rights in Alberta," 1971-72, Sask. L. Rev. 351. All of these articles have been most helpful to us.

Although the legislation in all three provinces distinguishes between compensation for rights of way and rights of entry, the connection between the two is nevertheless close. Alberta's legislation illustrates this in two ways.

(1) Although right of entry is the right of a mineral owner to enter on the surface, an early amendment to the *Right of Entry Arbitration Act* enabled the Board to grant right of entry on other land for a pipe line, power line, road, tanks and the like; and a later amendment enabled an oil sands operator to enter on other land for access roads, disposal of overburden and tailings. This is clearly expropriation, for the company asking for right of entry does not own the underlying minerals. We understand that orders under this provision are rare. However, the power exists (*Surface Rights Act*, section 12). Another extension of the common law right of entry has to do with the carrying out of conservation measures. Right of entry can be granted to drill wells for repressuring, storage of natural gas, storage of water and the like (section 13).

(2) There is an "overlap" between right of entry and power to expropriate in connection with pipelines. In general, right of entry has to do with production whereas the power of expropriation is given in connection with transportation. In the case of gas, transportation begins at the wellhead but in the case of oil, the flow line from the well to the tank battery and the battery itself are included in production. There were cases in which doubt existed as, to whether the operator's proper course was to proceed by way of right of entry or by acquiring a right of way for a proposed pipeline, e.g., a flow line. To relieve the operator of the risk of making the wrong application, the Legislature provided in section 41 of the *Pipe Line Act* that he could proceed under the *Expropriation Procedure Act* or "by an order under the *Surface Rights Act* if the operator is entitled to apply under that Act." We understand that there are two situations in which the operator has an option:

(1) the construction of flow lines and tank batteries; and, (2) the construction of pipelines in connection with wells for conservation under section 13 of the *Surface Rights Act*. We understand further that the Surface Rights Board treats the portion of the line outside the property containing the well as a matter of expropriation and the portion inside that property as a matter of right of entry.

Both the right of entry on other land and the overlap seem anomalous. Each, however, came into being to meet a practical problem. We have tried to determine whether either works an injustice on the landowner, and are unable to say that it does. If the mineral owner were able to manipulate his right of entry and expropriation in a way that worked unfairly against the surface owner in terms of compensation then there would be a case for doing away with both right of entry on other land and the overlap. We understand, however, that this is not the case and, on the other hand, the present provisions have the virtue of convenience.

Our discussion of rights of entry has had to do with production of oil and natural gas. The other principal mineral in Alberta is coal, and in the case of strip mining the mineral owner obviously needs access to the surface. We have considered whether in fairness to the surface owner, the mineral owner should be required to expropriate. However such opinion as we have been able to obtain is that the surface owner would have little to gain.

The question now comes: Should there be changes in the principles of compensation respecting rights of entry? We have already discussed this in connection with compensation for rights of way. The comments on the Working Paper reflect differing views. One opinion was that the basis of compensation should be the same for rights of way as for rights of entry and that, specifically, there should be provision for annual payments for the former. Another brief expressed the opinion that the present basis for compensation for right of entry permits double damage, especially in the case of the well head, because the owner receives the value of the land for "permanent damage" and an additional annual sum for loss of use of the same land. There was an opinion each way on the question of enabling the Board to assess incidental damages off the area of right of entry.

We do not recommend any changes in the principles of compensation for rights of entry. The factors to be considered are set out in section 23(2) quoted above. There is now a body of case law in the orders of the Board and in the judgments of the courts on appeal. We are aware of criticisms from both sides. One of our members would add a provision against double damages, especially in connection with damages to a well site coupled with loss of use of the well site. There is, too, the question of residual value in connection with flow lines, as there is respecting rights of way. On balance, we think that the principles worked out over the years and as applied operate fairly.

One important new provision is section 36 which permits either party to apply to the Board for a review of the amount of the annual payments after five years. This is a good provision and we do not suggest any change.

2. Procedure

The Board of Arbitration became the Surface Rights Board on passage of the 1972 Act. We have previously noted that since 1970 it has had jurisdiction over expropriations by most, if not all, companies that have power to expropriate. We have also noted that most of the takings are of rights of way in the nature of easements rather than of the fee simple.

It will be recalled, too, that in our recommendations for the establishment of a tribunal we favour the inclusion of the present Board in the tribunal that will deal with expropriations. Otherwise, we think that the present structure and procedures of the Board, as provided in the *Surface Rights Act*, are satisfactory, subject to the following comments:

(1) General powers and duties of the Board--While the provisions in the *Surface Rights Act* as to proceedings before the Board are not greatly different from those we propose for the new Board, we think the former will be superseded.

(2) Appeals--In connection with expropriations, we recommend abolition of the trial de novo before a District Court judge. If our recommendation for a single tribunal is accepted then the appeal provisions in the *Surface Rights Act* will be replaced by the new ones.

(3) Damages off the area covered by right of entry--Until passage of the *Surface Rights Act*, the Board of Arbitration had taken the view that it did not have jurisdiction to deal with damages caused by the mineral owner, e.g., to the parcel of land outside the area of entry, or for loss of or damage to livestock, or to expenses incurred by the owner in recovering livestock. On the other hand, *Ratz* v. *Strawberry Creek Coal Co.* 1952), 6 W.W.R. (N.S.) 145 points in the opposite direction. The surface owner brought action against the mineral owner for dumping overburden in his stream. The Appellate Division dismissed the action, holding this type of damage to be within the Board's jurisdiction. Section 23(3) specifically gives the Board power to determine the compensation, but in the case of damage to land, consent of both parties is required. In dealing with a similar provision in connection with rights of way, we recommended the omission of this provision and we so recommend in connection with section 23(3). We note that, in the case of a surface lease as distinct from a compensation order on right of entry, section 38 gives to the Board the same powers that section 23(3) gives. However, in section 38 the consent of the parties is necessary in all cases and not merely in the case of damage to land. This, of course, is outside the scope of the present report.

We set out in Appendix C our recommendations for amendments to the *Surface Rights Act* in connection with the three points just described.

26 March, 1973

W. F. Bowker
R. P. Fraser
G. H. L. Fridman
Wm. Henkel
W. H. Hurlburt
H. Kreisel
Frederick Laux
W. A. Stevenson

by "W.H. Hurlburt"
CHAIRMAN

" W. F. Bowker"
DIRECTOR

NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this report.

APPENDIX A

LEGISLATION GRANTING THE POWER TO EXPROPRIATE[1]

**(Hard copy of charts outlining legislation granting the power to expropriate are available for viewing from the Alberta Law Reform Institute Office.)

[1] Key: PROVISIONS GRANTING THE POWER *AND QUOTATIONS*
Provisions approaching the power *and quotations*

APPENDIX B

ACKNOWLEDGEMENTS

The Institute is grateful for assistance received from the many persons mentioned below.

Advisory Committees and Former Members of Institute

The Honourable M. M. Porter of Calgary, now retired from the Appellate Division of the Supreme Court of Alberta, has been an advisory committee from the Judiciary ever since the Institute was established. He has taken a special interest in the Expropriation study, has attended a number of our meetings on the subject, and given to the Institute valuable counsel.

Mr. H. G. Field, Q.C., of Edmonton, was the first Chairman of the Board of the Institute. Since he retired from the chairmanship and the Board early in 1971, he has acted as an advisory committee and has participated fully in the deliberations and decisions of the Board on Expropriation to the completion of this Report.

Professor D. T. Anderson, formerly a member of the Board of the Institute, resigned in July 1971 when he took an appointment in the Faculty of Law at the University of Manitoba. Until his departure, Professor Anderson devoted much time and work to this study.

Research Assistance

Mr. D. Barry Kirkham, Barrister and Solicitor, now of Vancouver, completed an intensive research study of expropriation early in 1971. It served as an invaluable reference throughout our deliberations. Mr. Kirkham also rendered assistance of an on-going nature.

Messrs. Kenneth Swan (1969) and Robert Curtis, Harry S. Campbell, and Stephen D. Hillier (1972) contributed useful research while engaged as summer students.

Submissions

The following persons submitted thoughtful suggestions and criticisms in response to our Working Papers on Principles of Compensation and Procedure:

American Right of Way Association
Prairie Chapter No. 48
(S. C. Johnson, Esq., President)

D. G. Blair, Esq.
Post-Doctoral Fellow
Department of Physics
University of Alberta

Canadian Petroleum Association
Calgary
(John W. Proctor, Esq., Manager)

J. W. Dodds, Esq., General Manager
Alberta Government Telephones
Edmonton

Edmonton Chamber of Commerce
Special Committee Report
(D. F. Marlett, Esq., General Manager)

R. G. Hurlburt, Esq.
Real Estate Appraiser
Edmonton

W. F. McLean, Esq., Q.C.
Director of Civil Law
Department of the Attorney General
Edmonton

Professor Howard M. Mills
St. Stephen's College
University of Alberta

D. O. Sabey, Esq.
Barrister and Solicitor
Calgary

P. M. Troop, Esq., Q.C.
Director
Property and Commercial Law Section
Department of Justice
Ottawa

UNIFARM
Edmonton

P. S. Winfield, Esq.
Solicitor
London, England

Interviews and Correspondence

We were fortunate to have the repeated help of many persons with knowledge and experience in respect of expropriation:

Alberta Government Telephones
J. W. Dodds, Esq., General Manager, and E. L. Harrison, Esq., Director of Engineering and Construction

Board of Arbitration
(formerly Right of Entry Arbitration Board and now Surface Rights Board)
P. J. Skrypnyk, Esq., Chairman (now retired); N. A. Mowat, Esq. (deceased), and K. J. Spread, Esq., Members; and B. E. Langridge, Esq., Barrister and Solicitor

David Bernstein, Esq., Chief Inquiry Officer, Ministry of the Attorney General, Toronto

F. S. Currie, Esq., Assistant Director, Property Services Branch, Department of Public Works, Ottawa

J. W. de Zeeuw, Esq., Director; and J. A. Good, Esq., former Director, Land Acquisition Branch, Department of the Attorney General, Province of Manitoba

Energy Resources Conservation Board (formerly Oil and Gas Conservation Board) Dr. George Govier, Esq., Chairman; and Norman McLeod, Esq., Barrister and Solicitor

Richard Gosse, Esq., Q.C., Professor of Law, University of British Columbia, (formerly Commissioner, Law Reform Commission of British Columbia)

Department of Highways
L. H. McManus, Esq., Deputy Minister; G. S. Syska, Esq., Barrister and Solicitor; and C. W. Youngs, Director of Surveys

J. R. Klinck, Esq., Mortgage Manager, North American Life Assurance Company, Edmonton

W. Lang, Esq., Chairman, Ontario Board of Negotiation, Toronto

H. Allan Leal, Esq., Q.C., Chairman, Ontario Law Reform Commission

Manawan Drainage District
Leon Riopel, Esq., Trustee; and Mrs. Charlotte Riopel, Secretary Treasurer, Board of Trustees

W. A. Meneley, Esq., Associate Research Officer, Geology Division, Saskatchewan Research Council 197

Department of Mines and Minerals H. H. Somerville, Esq., Deputy Minister; and Miss E. K. Spady, Barrister and Solicitor

John W. Morden, Esq., Barrister and Solicitor, Toronto

A. W. Morrison, Esq., Deputy Minister, Department of Municipal Affairs, Edmonton

R. A. L. Nugent, Esq., Q.C., Barrister and Solicitor, Winnipeg

Public Utilities Board, Edmonton
W. Nobbs, Esq., Chairman; and William Abercrombie, Esq., Barrister and Solicitor, Member

Maurice J. Sychuk, Esq., Associate Professor of Law, Edmonton

Eric C. E. Todd, Esq., Professor of Law, University of British Columbia

Dr. J. A. Toogood, P.Ag., Chairman, Department of Soil Science

E. E. Wilson, Esq., Administrator of Properties, Department of Public Works

J. S. Yoerger, Esq., Chairman, Ontario Land Compensation Board, Toronto

Field Trips

Messrs. J. O'Hare and J. Gray of Ponderay Exploration Co. Ltd., Edmonton, gave valuable technical guidance, highlighted by a visit to a producing oil field and gathering system northeast of the city.

Earlier Assistance

In 1968 when we began a preliminary study of Expropriation, and before formally undertaking this project, we wrote to a number of persons to obtain their views on the working of the existing statutes and legal doctrines. The following made helpful comments:

James R. McFall, Alberta Federation of Agriculture, Edmonton

D. Lindsay Hay, Interprovincial Pipe Line Company, Edmonton

D. O. Sabey, Esq., Barrister & Solicitor, Calgary

Donald Florry, Canadian Utilities Limited, Edmonton

R. N. Craven, The Appraisal Institute of Canada, Edmonton

A. F. Wilson, Assistant City Solicitor, Edmonton

B. St. L. Robison, Alberta Institute of Professional Appraisers, Calgary

APPENDIX C

ANCILLARY RECOMMENDATIONS AND OBSERVATIONS

The Administrative Procedures Act

We recommend (page 44) an order in council making the *Administrative Procedures Act* apply to the new Land Compensation and Surface Rights Board.

We also point out (page 28) that Recommendation No. 12(8)(c) in respect of proceedings before the inquiry officer has the same purpose as sections 5 and 6 of the *Administrative Procedures Act*. If those two sections were to be made applicable to inquiry officers, this Recommendation would not be required.

The Alberta Government Telephones Act

We recommend (page 26) a provision for notice and compensation for damage in section 25 as we have done in connection with section 22 of the *Public Works Act* (below).

Certificate of Approval

We point out (page 35) that the content of the Certificate of Approval should be framed with the requirements of the *Land Titles Act* in mind including provision for a plan where necessary.

The City Transportation Act

We recommend (page 83) that consideration be given to eliminating the period of "three years or longer" in section 20(3) of this Act.

The Mechanical Recording of Evidence Act

We assume (page 44) that the *Mechanical Recording of Evidence Act* will apply in connection with the recording of evidence before the Land Compensation and Surface Rights Board.

The Proceedings Against the Crown Act

We recommend (page 137) that section 15(1) of the *Expropriation Procedure Act* go in the *Proceedings Against the Crown Act*.

The Public Works Act

We recommend (page 25) that section 22 be amended, along the lines of Canada's sections 39(2) and 40:

(a) to provide for notice to the owner, or to any other person who may be affected, before exercise of the power of entry, and
(b) specifically to provide compensation for loss or damage resulting from the exercise of the power.

The Surface Rights Act

(1) We think (page 57) that the provisions in this Act as to proceedings before the Surface Rights Board will be superseded by those we propose for the new Land Compensation and Surface Rights Board.

(2) We recommend (page 157) that the appeal provisions in the *Surface Rights Act* be replaced by those in the new *Expropriation Act*.

(3) We recommend (pages 157-58) that the new Board have jurisdiction over damages off the area covered by right of entry and that the words "if the operator and the owner or occupant concerned consent to the Board's jurisdiction in that matter" be omitted from section 23(3)(a) of the *Surface Rights Act*.

APPENDIX D

THE EXPROPRIATION ACT

1. In this Act,

   (a) "authorizing Act" means the Act authorizing the expropriation by an expropriating authority;

   (b) "Board" means the Land Compensation and Surface Rights Board constituted under this Act;

   (c) "court" means a judge of the Supreme Court;

   (d) "Crown land" means land of the Crown in right of Alberta;

   (e) "expropriating authority" means the Crown or any person empowered to acquire land by expropriation;

   (f) "expropriation" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers;

   (g) "land" means land as defined in the authorizing Act and if not so defined, as defined in the *Land Titles Act;*

   (h) "Land Titles Office" means the Land Titles Office of the land registration district in which the land is situated;

   (i) "municipality" means a city, town, new town, village, county or municipal district;

   (j) "owner" means

      (i) a person registered in the Land Titles Office as the owner of an estate in fee simple in land,
      (ii) a person who is shown by the records of the Land Titles Office as having a particular estate or an interest, mortgage or encumbrance in or upon land,
      (iii) any other person who is in possession or occupation of the land,
      (iv) any other person who is known by the expropriating authority to have an interest in the land, and

(v) in the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in the land;

(k) "right of way" means the right of an expropriating authority to carry its pipes, wires, conductors or transmission lines upon, over or under land and that is registrable under the *Land Titles Act*;

(l) "tribunal" means the board or the court, as the case may be;

(m) "work" or "works" means the undertaking and all the works and property that may be acquired, constructed, extended, enlarged, repaired, maintained, improved, formed, excavated, operated, reconstructed, replaced or removed in the exercise of any powers conferred by an authorizing Act.

[Rec. No. 67; sub-paragraph (f) is Rec. No. 1]

Application of Act

2. (1) This Act applies to any expropriation authorized by the law of the Province and prevails over any contrary provisions that may be found therein, except the statutes or parts of statutes enumerated in the Schedule.

(2) This Act binds the Crown

[Rec. No. 63]

3. Where an authorizing Act permits or authorizes an expropriation of land, the expropriating authority may, unless the authorizing Act expressly otherwise provides, acquire any estate required by him in the land and may, unless the authorizing Act expressly otherwise provides, acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land.

[Rec. No. 64]

4. (1) Unless the authorizing Act expressly authorizes the expropriation of mines or minerals, the expropriating authority is not entitled to any mines or minerals in any land vested in him under the procedure prescribed by this Act, and, subject to subsection (2), the ownership of mines or minerals is in no way affected by the filing or registration in the Land Titles Office of a certificate of approval under this Act.

(2) Where an authorizing Act expressly authorizes the expropriation of mines or minerals, the certificate of approval by which the

expropriation is effected shall state the estate or interest acquired in the mines and minerals, and failing such statement no estate or interest in the mines and minerals passes upon the expropriation.

(3) Notwithstanding subsection (1), an expropriating authority may, to the extent necessary for his works, excavate or otherwise disturb any minerals within, upon or under land in which he has acquired an estate or interest by expropriation or by agreement or transfer, without permission from or compensation to any person.

[Rec. No. 65]

5. Unless an authorizing Act expressly otherwise provides, nothing in this Act restricts or affects

(a) the right of an expropriating authority to acquire, by agreement or transfer, any estate or interest in land that he may acquire by expropriation, or

(b) the right of the Crown or any person to convey to an expropriating authority any estate or interest in any land that the expropriating authority may acquire by expropriation from the Crown or person.

[Rec. No. 66]

Procedure for Expropriation

6. (1) No person may in any proceedings under this Act dispute the right of an expropriating authority to have recourse to expropriation.

(2) Notwithstanding subsection (1), where the expropriating authority is a municipality, but not otherwise, the owner may question the objectives of the expropriating authority.

(3) In an expropriation by any expropriating authority, the owner may question whether the taking of the land, or estate or interest therein is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

[Rec. No. 2]

7. (1) An expropriating authority shall not expropriate land without the approval of the approving authority.

(2) The approving authority in respect of an expropriation shall be the Minister responsible for the administration of the Act in which the power to expropriate is granted except that where a municipality expropriates land for municipal purposes, the approving authority shall be the Council of the municipality.

(3) The approving authority in any case not provided for in this section shall be the Attorney General.

[Rec. No. 3]

8. (1) The expropriating authority shall file a notice of intention to expropriate in the proper Land Titles Office.

(2) The expropriating authority shall forthwith serve the notice of intention on the approving authority and on every person shown on the title to have an interest in the land and also on every person whose interest is not shown on the title but who is known to the expropriating authority to have an interest in the land.

(3) The notice of intention shall be published in at least two issues, not less than seven nor more than fourteen days apart, of a newspaper in general circulation in the locality in which the land is situate.

(4) A notice of intention shall contain
(a) the name of the expropriating authority,
(b) the description of the land,
(c) the nature of the interest intended to be expropriated,
(d) an indication of the work or purpose for which the interest is required,
(e) a statement of the provisions of section 6 and section 9,
(f) the name and address of the approving authority.

[Rec. No. 4]

9. (1) The owner who desires a hearing shall send to the approving authority a notice of objection in writing
(a) in the case of an owner served in accordance with section 8(2), within twenty-one days of service upon him of notice of intention; and
(b) in any other case, within twenty-one days after the first publication of notice of intention.

(2) The notice of objection shall state the name and address of the person objecting, the nature of the objection and the grounds upon which it is based and the nature of the interest of the person objecting in the matter of the intended expropriation.

[Rec. No. 5]

10. (1) Upon the expiration of the period of twenty-one days and upon proof of service in accordance with section 8(2) and (3), the approving authority shall approve or not approve the proposed expropriation where it has not been served with a notice of objection.

(2) The approving authority may approve the expropriation of a lesser interest than that described in the notice of intention.

[Rec. No. 6]

11. Where a person having served a notice of objection withdraws it, the approving authority may proceed as though the objection had never been made.

[Rec. No. 7]

12. (1) The Lieutenant Governor in Council, at any time before service of notice of intention, where satisfied that the expropriating authority urgently requires the land immediately and that delay would be prejudicial to the public interest, may by order in council direct that an intended expropriation shall proceed without inquiry.

(2) Where an order is made under subsection (l) the expropriating authority shall serve the notice of intention but omitting the requirements of section 8(4)(e) and (f) and instead including a copy of the order in council.

(3) Where an order is made under subsection (1) the expropriating authority may apply immediately to the approving authority for certificate of approval, and the approving authority shall issue the certificate.

[Rec. No. 8]

13. (1) Where in the opinion of the approving authority, the owner pursuant to the provisions of the *Energy Resources Conservation Act* or the *Housing Act* or the *City Transportation Act* or any other Act has had substantially the same opportunity to object to the expropriation as he would have had on an inquiry under this Act, the approving authority by direction in writing may dispense with the hearing before the inquiry officer.

(2) Where the inquiry is dispensed with under subsection (1), the expropriating authority shall serve the notice of intention but omitting the requirements of section 8(4)(e) and (f) and instead including a copy of the direction in writing of the approving authority.

(3) Where the inquiry is dispensed with under subsection (1), the expropriating authority may apply immediately to the approving authority for certificate of approval.

[Rec. No. 9]

14. Subject to Section 21, if within 120 days from the date when the notice of intention was registered the certificate of approval has not

been registered, it shall be conclusively deemed that the expropriation has been abandoned.

[Rec. No. 10]

15. (1) Where the approving authority has received an objection it shall forthwith notify the Attorney General.

(2) Within five days of receiving notice that the approving authority has received an objection, the Attorney General shall appoint an inquiry officer, who is not a person employed in the public service of the Province, to conduct an inquiry in respect of the intended expropriation.

(3) The Attorney General may appoint a chief inquiry officer who shall exercise the power of the Attorney General under subsection (2) and who shall have general supervision and direction over inquiry officers.

(4) The inquiry officer shall fix a time and place for the hearing and shall cause notice of the hearing to be served on the expropriating authority and on each person who has made an objection to the expropriation.

(5) The expropriating authority and each person who has served a notice of objection shall be parties to the inquiry.

(6) The hearing before the inquiry officer shall be public.

(7) The inquiry officer shall inquire into whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority, and in the case of a municipality shall inquire into any objection to the objectives themselves.

(8) For the purpose of subsection (7) the inquiry officer

(a) shall require the expropriating authority to attend at the hearing and to produce such maps, plans, studies and documents as the inquiry officer deems necessary for his inquiry;

(b) may add as a party to the inquiry any owner whose land would be affected by the expropriation of the lands concerned in the inquiry and any person who appears to have a material interest in the outcome of the expropriation;

(c) shall give each party to the inquiry a reasonable opportunity to present evidence and argument and may permit examination and cross-examination, either personally or by counsel or agent;

(d) may inspect the lands intended to be expropriated or the lands of an owner referred to in paragraph (b), either with or without the presence of the parties;

(e) has general control over the procedure at the hearing, including power to adjourn the hearing and change the venue;

(f) may combine two or more related inquiries and conduct them as one inquiry;

(g) may provide for a transcript of the evidence; and

(h) is not bound by the rules of law concerning evidence.

[Rec. No. 12]

16. (1) The inquiry officer shall within thirty days of his appointment make a report in writing to the approving authority and the report shall contain a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact, and his opinion on the merits of the expropriation with his reasons therefor.

(2) The inquiry officer shall forthwith send his report to the parties to the hearing and shall make it available on request to any person at reasonable cost.

[Rec. No. 13]

17. No proceedings by or before an inquiry officer shall be restrained by injunction, prohibition or other process or proceedings in any court or are removable by *certiorari* or otherwise into court nor shall any report or recommendation by the inquiry officer be subject to review in any court.

[Rec. No. 14]

18. (1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a person who was not a party to the hearing.

(2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served

upon all the parties within thirty days after the date upon which the report of the inquiry officer is received by the approving authority.

(3) Where the approving authority approves the expropriation, when giving the written reasons referred to in subsection (2), it shall also provide the expropriating authority with a certificate of approval in prescribed form.

(4) Where the approving authority and expropriating authority are one and the same the requirements of subsections (2) and (3) shall be modified accordingly.

(5) After the approving authority has given approval and notwithstanding registration of the certificate of approval it may vary the size or location or boundary of the expropriated land, but within the boundaries of the parcel from which the land was expropriated, where in the opinion of the approving authority the variation is minor and can be made without prejudice to the owner.

(6) Where the approving authority varies the expropriation under subsection (5), it shall provide the expropriating authority with an amended certificate of approval.

(7) The expropriating authority may register the amended certificate of approval in the Land Titles Office.

(8) Where the amended certificate of approval is registered,

(a) it takes the place of the certificate of approval registered under section 19;

(b) the expropriating authority shall not be delayed in taking possession on account of the amendment;

(c) the owner is entitled to compensation for his interest in the lands described in the amended certificate of approval or to compensation for his interest in the lands described in the certificate of approval, whichever is the greater; and

(d) the provisions of this Act for determining compensation, including the provisions for the proffer, apply.

[Rec. No. 151

19. The expropriating authority may register the certificate of approval in the Land Titles Office, and registration vests in the expropriating authority the title to the lands described as to the interest described.

[Rec. No. 16]

20. Registration of the certificate of approval is conclusive proof that all the requirements of this Act in respect of registration and of matters precedent and incidental to registration have been complied with.

[Rec. No. 17]

21. (1) The Attorney General may prior to the expiration of the 120 days referred to in section 14

(a) extend the time for appointing the inquiry officer for another five days;

(b) extend the time for the inquiry officer to report for another thirty days;

(c) extend the time for the approving authority to make his decision for another thirty days.

(2) Where any extension is granted under subsection (1), the Attorney General shall execute a notice of extension extending the time for registration of the certificate of approval for an equivalent number of days.

(3) Notwithstanding that no extension has been granted under subsection (1), the Attorney General may, prior to the expiration of the 120 days referred to in section 14, execute a notice of extension extending the time for registration of the certificate of approval beyond the 120 days.

(4) The notice of extension executed under subsection (2) or (3) shall be registered in the Land Titles Office prior to the expiration of the 120 days and shall be served forthwith upon the persons who were served with the notice of intention and upon any other person who has given notice of objection or become a party to the inquiry.

[Rec. No. 18]

22. (1) An expropriating authority may abandon its intention to expropriate, either wholly or partially, at any time before registration of the certificate of approval in the Land Titles Office.

(2) The expropriating authority shall 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 shall deposit the notice in the appropriate Land Titles Office.

(3) Where an expropriation has been abandoned the expropriating authority shall pay to the owner any actual loss sustained by him and the reasonable legal, appraisal, and other costs incurred by him up to the time of abandonment, as a consequence of the initiation of the expropriation proceedings.

(4) Compensation payable under this section including costs, shall be fixed by the tribunal.

[Rec. No. 19]

Procedure for Compensation

23. (1) There is hereby established a Board called the Land Compensation and Surface Rights Board.

(2) The Board shall consist of a chairman and a vice-chairman and such other members as the Lieutenant Governor in Council considers advisable, provided that the persons who are members of the Surface Rights Board under the *Surface Rights Act* immediately prior to the commencement of this Act shall become members of the Land Compensation and Surface Rights Board without the necessity of an order in council appointing them.

(3) The chairman shall be a member in good standing of the Law Society of Alberta.

(4) The first vice-chairman shall be the then chairman of the Surface Rights Board and thereafter the vice-chairman shall be selected for his experience in connection with compensation for agricultural land.

(5) The chairman and each member of the Board shall receive such remuneration as may be fixed by the Lieutenant Governor in Council.

(6) In accordance with the *Public Service Act* there may be appointed a secretary, and assistant secretary, inspectors, land examiners and such other employees as are required to carry on the business of the Board.

(7) Each member of the Board holds office during good behaviour for a term of ten years from the date of his appointment and at the expiration of his term of office is eligible for re-appointment.

(8) Subject to subsection (10), the chairman may select a member or any odd number of members to deal with a particular case or class or group of cases.

(9) The member or members selected pursuant to subsection (8) may perform the functions of the Board and when performing any such function shall have all the powers and jurisdiction of the Board.

(10) Where the expropriated land is agricultural the vice-chairman or his nominee shall be the single member or presiding member, as the case may be, for the purposes of subsection (8).

[Rec. No. 20]

24. (1) The Board may make rules of procedure and practice governing the hearings and proceedings before it and in particular for the hearing of two or more claims together, notice to admit facts, production of documents and discovery.

(2) The Board may hold its sittings at such place or places in Alberta as it from time to time considers expedient.

(3) The Board shall cause all oral evidence submitted before it at a formal sitting to be recorded, and this evidence together with such documentary evidence and things as are received in evidence by the Board, shall form the record before the Board.

(4) The Board has

(a) all the powers of a commissioner appointed under the *Public Inquiries Act*, and

(b) such further powers and duties as may be determined by the Lieutenant Governor in Council.

(5) The Board may enter upon and inspect or authorize any person to enter upon and inspect, any land, building, works or other property.

(6) The Board

(a) in conducting any hearing shall proceed in accordance with its rules of procedure and practice;

(b) is not bound by the rules of law concerning evidence;

(c) may adjourn any hearing of a proceeding from time to time for such length of time as the Board in its discretion considers expedient or advisable.

(7) If any person, other than a party, without just cause

(a) on being duly summoned as a witness before the Board makes default in attending; or

(b) being in attendance as a witness refuses to take an oath legally required by the Board to be taken, or to produce any document or thing in his power or control legally required by the Board to be produced by him, or to answer any question to which the Board may legally require an answer; a member of the Board may certify as to the facts of the default or refusal of that person under his hand to the Supreme Court, and the court may thereupon inquire into the alleged offence and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence and after hearing any statement that may be offered in defence, may punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

[Rec. No. 21]

25. (1) Where the expropriating authority and the owner have not agreed upon the compensation payable under this Act, the Board shall determine such compensation.

(2) The Board shall also determine any other matter required by this or any other Act to be determined by the Board.

(3) Notwithstanding sub-section (1), where the expropriation is by the Crown, the owner may elect to have the compensation fixed by the court.

[Rec. No. 22]

26. (1) Where a certificate of approval has been registered the expropriating authority shall forthwith serve the owner with a notice of expropriation in form A.

(2) The owner is entitled to an immediate payment in the amount which the expropriating authority estimates to be equal to the compensation to which the owner is then entitled in respect of his interest in the land.

(3) Within ninety days of registration of the certificate of approval, the expropriating authority shall give to the owner a written notification, hereinafter called "the proffer", setting out the amount estimated pursuant to subsection (2) or (4).

(4) Where the expropriated land is part of a larger parcel,

(a) the proffer shall be for the estimated value of the expropriated land, and excepting co-owners of the same interest, where there is more than one owner they may agree as to the disposition among themselves of the amount proffered, and in the event of dispute the expropriating authority may apply to the Board for an order for payment in the amount set out in the proffer and the Board may make directions as to the disposition of that amount; and

(b) the proffer shall include the expropriating authority's estimate of severance damage.

(5) Acceptance by the owner of the amount proffered is without prejudice to his right to claim additional compensation in respect thereof.

(6) The amount of the proffer is irrevocable by the expropriating authority until the hearing but nothing in this section shall prevent the tribunal from awarding an amount less than that of the proffer.

(7) The expropriating authority may, within the period mentioned in subsection (3) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to the court for an order extending the time referred to in subsection (3).

[Rec. No. 23]

27. The proffer made to an owner shall be based on a written appraisal, and a copy of the appraisal shall be sent to the owner at the time of the making of the proffer.

[Rec. No. 24]

28. (1) To assist the expropriating authority in making its appraisal, the owner shall furnish on request to the expropriating authority any information relevant to the valuation of his interest.

(2) Any owner who withholds any relevant information may be penalized in

(a) costs; and

(b) interest that he would otherwise be entitled to.

[Rec. No. 25]

29. Where the expropriating authority is unable to obtain the information necessary to make a proffer, the expropriating authority may apply to the Board for directions and the Board may determine the amount of the proffer.

[Rec. No. 26]

30. (1) The owner may obtain an appraisal of his interest that has been expropriated and the expropriating authority shall pay the reasonable cost of the appraisal.

(2) The owner may obtain legal advice as to whether to accept the proffer in full settlement of compensation, and the expropriating authority shall pay the owner's reasonable legal costs.

[Rec. No. 27]

31. (1) Where the expropriating authority and the owner have not agreed upon the compensation payable under this Act

(a) the expropriating authority may institute proceedings to determine compensation after making the proffer;

(b) the owner may institute proceedings after the making of the proffer or expiration of the time for making the proffer, whichever shall first occur.

(2) Where no proceedings have been commenced by either party within one year of the date of making the proffer, the amount of the proffer shall be conclusively deemed to be the full compensation to which the owner is entitled.

[Rec. No. 28]

32. (1) An appeal lies to the Appellate Division from any determination or order of the tribunal.

(2) An appeal under subsection (1) may be made on questions of law or fact or both and the Appellate Division

(a) may refer any matter back to the tribunal; or

(b) may make any decision or order that the tribunal has power to make, and may exercise the same powers that it exercises on an appeal from a judge of the Trial Division sitting without a jury, and the rules and practice applicable to appeals to the Appellate Division apply.

[Rec. No. 29]

33. (1) Where the jurisdiction of the tribunal or the validity of any decision, order, direction or other act of the tribunal is called into question by any person affected, the tribunal upon the request of such person, shall state a case in writing to the Appellate Division

setting forth the material facts and the decision of the court thereon is final and binding.

(2) If the tribunal refuses to state a case, any person affected may apply to the Appellate Division for an order directing the tribunal to state a case.

(3) Pending the decision of the stated case, no further proceedings in respect of the application shall be taken by the tribunal save with leave of a judge of the Appellate Division.

[Rec. No. 30]

34. (1) The reasonable legal, appraisal and other costs actually incurred by the Owner for the purpose of determining the compensation payable, shall be paid by the expropriating authority, unless the tribunal finds special circumstances to justify the reduction or denial of costs.

(2) The tribunal may order by whom the costs are to be taxed and allowed.

(3) Where settlement has been made without a hearing the tribunal may determine the costs payable to the owner and subsections (1) and (2) shall apply.

(4) On appeal by the expropriating authority costs of the appeal shall be paid on the same basis as they are payable under subsection (1) and on appeal by the owner, the owner is entitled to his costs where the appeal is successful and where unsuccessful, the costs are in the discretion of the court.

[Rec. No. 33]

35. Where the persons interested, or appearing to be interested, in the compensation, fail to agree as to the disposition thereof among themselves, then the tribunal shall determine the claimant or claimants to whom the compensation, or any portion or portions thereof, is payable and shall order and direct the payment thereof in accordance with such determination.

[Rec. No. 38]

Principles of Compensation

36. The market value of land expropriated is the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

[Rec. No. 40]

37. (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.

(2) Where land is expropriated, the compensation payable to the owner shall be based upon

(a) the market value of the land,

(b) the damages attributable to disturbance,

(c) the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion,

(d) damages for injurious affection.

[Rec. No. 41]

38. Where the owner of the expropriated land is in occupation and, as a result of the expropriation, it is necessary for him to give up occupation of the land, the value of the land is the greater of

(a) the market value thereof determined as set forth in section 36; or

(b) the aggregate of

(i) the market value thereof determined on the basis that the use to which the expropriated land was being put at the time of its taking was its highest and best use, and

(ii) damages for disturbance.

[Rec. No. 42]

39. No allowance shall be made on account of the acquisition being compulsory.

[Rec. No. 43]

40. In determining the value of the land, no account shall be taken of

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

(b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the land, where such transaction

or agreement was entered into after the commencement of expropriation proceedings;

(c) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation;

(d) any increase or decrease in the value of the land due to development of other land that forms part of the development for which the expropriated land is taken;

(e) any increase in the value of the land resulting from its having been put to a use that was contrary to law;

(f) any increase or decrease in value which results from the imposition or amendment of a zoning by-law, land use classification, or analogous enactment made with a view to the development under which the land is expropriated.

[Rec. No. 44]

41. (1) Where any land had any building or other structure erected thereon that was specially designed for use for the purpose of a school, hospital, municipal institution, or religious or charitable institution, or for any similar purpose, the use of which building or other structure for that purpose by the owner has been rendered impracticable as a result of the expropriation, the value of the expropriated interest is, if the expropriated interest was and, but for the expropriation, would have continued to be used for that purpose and at the time of its taking there was no general demand or market therefor for that purpose, the greater of

(a) the market value of the expropriated interest determined as set forth in section 36; or

(b) the aggregate of

(i) the cost of any reasonably alternative interest in land for that purpose, and

(ii) the cost, expenses and losses arising out of or incidental to moving to and re-establishment on other premises, minus the amount by which the owner has improved, or may reasonably be expected to improve, his position through re-establishment on other premises.

(2) For the purposes of subsection (1)(b) the cost of any reasonably alternative interest in land shall be computed as of the date at which construction of the new building or the structure could reasonably be begun.

[Rec. No. 45]

42. (1) Upon application therefor, the tribunal shall, after fixing the market value of lands used for the principal residence of the owner, award such additional amount of compensation as, in the opinion of the tribunal, is necessary to enable the owner to relocate his residence in accommodation that is at least equivalent to the accommodation expropriated, and in fixing the additional amount of compensation the tribunal shall include the increase in cost between the time of expropriation and the time when the new accommodation could reasonably be obtained.

(2) In this section "owner" means a registered owner or purchaser and does not include a tenant.

[Rec. No. 46]

43. Where there are more separate interests than one in land, the market value of each such separate interest shall be valued separately.

[Rec. No. 47]

44. (1) Where the expropriated land is subject to a security interest, the market value of each person having an interest in the land shall be established separately.

(2) Where the amount owing to the security holder is greater than the market value of his interest and there is no collateral security other than the purchaser's (or borrower's) covenant to pay the amount of the debt, the security interest shall be deemed to be fully paid, discharged, and satisfied on payment to the security holder of the market value of the security.

(3) Where the amount owing to the security holder is greater than the market value of his interest and there is collateral security other than the purchaser's (or borrower's) covenant to pay the amount of the debt, and whether such collateral is by way of security on other property or a guarantee of a third party or otherwise, the compensation shall not fully discharge the debt, and the tribunal shall determine the balance remaining and the manner in which it is to be repaid.

(4) Where the expropriation is of a part of land that is subject to a security interest, the tribunal shall determine the market value of

the expropriated part and shall distribute the compensation between the parties as seems just.

[Rec. No. 49]

45. The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,

(a) where the premises taken include the owner's residence

(i) an allowance to compensate for inconvenience and the costs of finding another residence of five per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, or the actual amount proved with respect to those items, whichever is the greater, provided that such part was not being offered for sale on the date of the expropriation, and

(ii) a reasonable allowance for improvements, the value of which is not reflected in the market value of the land;

(b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and

(c) relocation costs, to the extent that they are not covered in (a) or (b), including,

(i) the moving costs, and

(ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.

[Rec. No. 50]

46. (1) The expropriating authority shall pay to a tenant occupying expropriated land in respect of disturbance so much of the cost referred to in section 45 as is appropriate having regard 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 land.

(2) The tenant's right to compensation under this section is not affected by the premature determination of the lease as a result of the expropriation.

[Rec. No. 51]

47. Where the expropriated land is subject to a security interest, the expropriating authority shall pay to the security holder three months' interest at the current rate, on the amount of the outstanding principal together with the security holder's reasonable costs of re-investment.

[Rec. No. 52]

48. (1) Where a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and the tribunal may defer determination of the business losses until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first.

(2) The tribunal may, in determining compensation on the application of the expropriating authority, or an owner, include an amount not exceeding the value of the good will of a business where the land is valued on the basis of its existing use and, in the opinion of the tribunal, it is not feasible for the owner to relocate.

[Rec. No. 53]

49. Where only part of an owner's land is expropriated and as a result the value of the remaining land is increased the owner shall nevertheless be entitled to the market value of the land expropriated.

[Rec. No. 54]

50. Where only part of the land of an owner is taken, and such part is valued on the basis of a use other than the existing use, then the owner shall not be entitled to claim for injurious affection to the balance of the land.

[Rec. No. 55]

51. Where part of an owner's land is taken, compensation shall be given for injurious affection, including severance damage and any reduction in market value to the remaining land, and also for incidental damages, provided the injurious affection or incidental

damages result from or are likely to result from the taking or from the construction or user of the works for which the land is acquired.

[Rec. No. 56]

52. On the expropriation of an easement or right of way, the tribunal, in making its award for the value of the interest taken, may ignore the residual value to the owner of the right of way.

[Rec. No. 57]

53. Where the expropriation is of an easement or right of way, the tribunal may determine the amount of compensation payable by the taker

(a) for damage caused by or arising out of the operation of the taker to any land of the owner or occupant other than the area granted to the taker;

(b) for the loss of or damage to livestock or other personal property of the owner or occupant caused by or arising out of the operations of the taker; and

(c) for time spent or expense incurred by the owner or occupant in repairing or recovering any of his personal property, or in recovering any of his livestock that have strayed, due to the act or omission of the taker; and shall direct the person to whom the compensation is payable.

[Rec. No. 58]

General

54. Where any compensation has been paid to a person in respect of an expropriated interest pursuant to a proffer, the amount so paid shall be deducted from the amount of the compensation awarded by the tribunal, and where the amount so paid exceeds the amount so awarded by the tribunal, the excess constitutes a debt to the expropriating authority and may be recovered by action.

[Rec. No. 59]

55. The Lieutenant Governor in Council may make such orders, rules and regulations as may be deemed necessary to effect the intent of this Act.

[Rec. No. 60]

56. (1) The right to compensation and the compensation finally awarded for any estate or interest acquired or taken under this Act in Crown or other land by an expropriating authority shall be deemed to stand in the stead of the estate or interest so acquired or taken and

a claim to or an encumbrance upon the estate or interest is converted, as against the expropriating authority, into a claim for the compensation or a portion of the compensation.

(2) When the estate or interest has been expropriated in the manner provided by this Act, the estate or interest becomes the property of the expropriating authority free and clear of any and all claims and encumbrances in respect of the previous estate or interest.

[Rec. No. 61]

57. Where a fee simple estate in any land is held by any person and the land is not registered in the Land Titles Office, the land may be expropriated by a deposit in the Land Titles Office of a certificate of approval and such certificates of title may be made in respect thereof by the Registrar of the Land Titles Office as may be necessary to indicate the vesting in the expropriating authority of the land expropriated.

[Rec. No. 62]

58. (1) Whether or not expropriation proceedings have been commenced by registration of notice of intention to expropriate, the expropriating authority may, after making reasonable effort to give notice thereof to the person in possession of the land, enter by himself or by his servants or agents, on any Crown or other land for the purpose of making

(a) surveys, examinations, soil tests, or other necessary arrangements to determine the location of any proposed works or the description of the land that he may require in connection therewith, and

(b) an appraisal of the value of the land or any interest therein.

(2) Subject to subsection (3) where it is necessary to effect a survey, an expropriating authority may, by himself or by his servants or agents, cut down any trees or brush that obstruct the running of survey lines.

(3) An expropriating authority who exercises a power given by this section shall compensate the registered owner or person in possession of the land, as the case may be, for all damage caused by him or his servants or agents in or by the exercise of all or any of the powers given by this section.

(4) Where the land entered upon is not expropriated, no action lies against the expropriating authority for damage occasioned by him in the exercise of a power given by this section unless notice in

writing signed by the claimant is given to the expropriating authority who exercised the power within six months after notice was given to the claimant pursuant to subsection (1) .

(5) The provisions of this section for notice and compensation apply notwithstanding that the authorizing Act makes express provision with respect to the subject matter of this section.

[Rec. No. 11]

59. (1) After notice of expropriation has been served, the expropriating authority may, subject to any agreement to the contrary, serve on the person in possession a notice that it requires the land on the date specified therein.

(2) The date specified shall be at least ninety days from the date of serving the notice, but in the case of the taking of a right of way the period shall be seven days.

(3) After service of the notice either party may apply to the court for an adjustment of the date for possession specified in the notice, and the court may order an adjustment in the date.

(4) Notwithstanding anything in this section, the expropriating authority shall not be entitled to take possession unless with leave of the court

(a) except in the case of the taking of a right of way, until thirty days after payment of the amount of the proffer; and

(b) in the case of a right of way, until after payment of the amount of the proffer.

[Rec. No. 31]

60. (1) If any resistance or opposition is made or is threatened to be made by any person to the expropriating authority, or to any authorized person acting for him, desiring to exercise his rights in or over, or to enter upon and take possession of, the land, the court may upon application by originating notice of motion issue a writ of possession or such other order as may be necessary to enable the expropriating authority to exercise such rights.

(2) A writ or other order under this section has the effect of a writ of assistance.

[Rec. No. 32]

61. (1) An expropriating authority shall pay interest at the rate fixed by the tribunal in its regulations or at such rate as the tribunal

determines from the date of acquisition of title on the amount outstanding from time to time until payment with respect to compensation for the land and for severance damage on a partial taking, and on damages for disturbance from the date of the award therefor until payment.

(2) Notwithstanding subsection (1) where the owner is in possession when the expropriating authority acquires title, he is not entitled to interest until he has given up possession.

(3) Where the expropriating authority has delayed in making the proffer beyond the prescribed time, the tribunal shall order the expropriating authority to pay additional interest on the value of the land and severance damage, if any, from the beginning of the delay until the proffer is made, at the same rate as that prescribed in subsection (1).

(4) Where the amount of the proffer is less than 80% of the amount awarded for the interest taken and severance damage, if any, the tribunal shall order the expropriating authority to pay additional interest at the same rate as that prescribed in subsection (1), from the date of notifying the owner of the amount of the proffer until payment, on the amount by which the compensation exceeds the amount set out in the proffer.

(5) Notwithstanding subsection (3) and (4), where the tribunal is of opinion that a proffer of less than 80% of the amount awarded for the interest taken and severance damage, if any, or any delay in making the proffer is not the fault of the expropriating authority, the tribunal may refuse to allow the owner additional interest for the whole or any part of any period for which he would otherwise be entitled to interest.

[Rec. No. 34]

62. Where a document is required by this Act to be served on any person and no method of service is prescribed, the document may be served personally or by registered mail addressed to the person to be served at his last known address, or if that person or his address is unknown, by publication once in a newspaper having general circulation in the locality in which the land concerned is situate, and service shall be deemed to be made

(a) in the case of service by registered mail, in ordinary course of mail;

(b) in the case of service by publication on the date of publication.

[Rec. No. 35]

63. (1) If the owner of land which is the subject of expropriation is under disability, or not known, or his residence is not known, or he cannot be found, the court may appoint a person to act in his behalf for any purpose under this Act.

(2) Where there is no guardian, committee or other person to represent an owner under disability, or the owner is unknown, or his residence is unknown, or he cannot be found, the expropriating authority shall apply to the court for an order for payment in the amount set out in the proffer and the court may make directions as to the disposition of that amount.

[Rec. No. 36]

64. (1) After the expropriating authority has acquired title, where the expropriating authority or the tribunal is in doubt as to the persons who had any interest in the land or the nature or extent thereof, the expropriating authority may apply or the tribunal may direct the expropriating authority to apply to the court to make a determination respecting the state of the title of the land immediately before the expropriation, and the court shall determine that issue.

(2) Where any application is made under subsection (1),

(a) notwithstanding section 26(3), the expropriating authority has ninety days from determination of the issue by the court to make its proffer; and

(b) the expropriating authority may apply for leave of the court to take possession of the land as soon as it requires the land.

[Rec. No. 37]

65. (1) If within two years of completion of the expropriation, the expropriating authority finds that the lands are no longer required for its purposes, and the expropriating authority desires to dispose of them, it shall first offer to sell them to the former owner of the fee simple and if the former owner does not accept, the expropriating authority may sell the lands to any other person on terms that are at least as favourable to the expropriating authority.

(2) Where the expropriation is of part of a parcel of land, the offer pursuant to subsection (1) shall be to the former owner or his successor in title, and if there is more than one successor, to such of them as to the expropriating authority seems fair.

(3) In the case of the taking of a right of way where at any time the expropriating authority or its successor has discontinued the use

for which the land was expropriated, the expropriating authority or the former owner of the expropriated lands or his successor in title may apply to the court for an order terminating the estate or interest of the expropriating authority and the court may

(a) terminate the estate or interest acquired by the expropriating authority; and

(b) grant the estate or interest so terminated to the person from whom it was expropriated or to such other person as the court may order.

(4) Where the expropriated estate or interest is one to which the *Surface Reclamation Act* applies, the court shall not make an order under subsection (3) unless a certificate under that Act has been furnished.

(5) An order of the court made pursuant to subsection (3), or a certified copy thereof,

(a) may be registered in the Land Titles Office; or

(b) if the land is not registered in the Land Titles Office, may be filed with the Deputy Minister of the Department charged with the administration of the land affected;

and upon registration or filing the estate or interest so terminated is revested in the person from whom it was expropriated or is vested in the other person named in the order, as the case may be.

[Rec. No. 39]

66. (1) Subject to subsection (2), where only part of the interest of a lessee is expropriated, the lessee's obligation to pay rent under the lease shall be abated *pro tanto*, as the parties agree or, failing agreement, as determined by the tribunal.

(2) Where all the interest of a lessee in land is expropriated or where part of the lessee's interest is expropriated and the expropriation renders the remaining part of the lessee's interest unfit for the purposes of the lease, as determined by the tribunal, the lease shall be deemed to be frustrated from the date of the expropriation.

[Rec. No. 48]

SCHEDULE
(Section 2)

TITLE	EXTENT OF EXCEPTION

1.	*The Agricultural Service Board Act*	Orders of reclamation under section 19
2.	*The Land Titles Act*	Plans of subdivisions and plans of surveys under sections 82 and 91
3.	*The Public Lands Act*	Cancellations or withdrawals under sections 79, 113 and 114
4.	*The Local Authorities Board Act*	Cancellation of plans of subdivision
5.	*The Surface Rights Act*	The whole
6.	*The Rural Mutual Telephone Companies Act*	Confiscation of plant and equipment by Crown
7.	*The Planning Act*	(a) compulsory subdivisions (b) replotting schemes

FORM A
(Section 26)

NOTICE OF EXPROPRIATION

To . . . . . .
(name of the owner)

. . . . . .
(address)

TAKE NOTICE THAT;

1. The following lands
. . . . . .
(set out description)

have been expropriated on the . . . . day of . . . . . 19 . . and are now vested in the expropriating authority.

(Where the expropriated estate or interest is less than a fee simple, the interest will be stated, e.g., right of way for a pipeline.)

2. The name and address of the expropriating authority for service and further communication is:

. . . . . .
(name)

. . . . . .
(address)

3. For your information and convenience we will set out the provisions dealing with your right to immediate payment of compensation based on an appraisal report; dealing with the expropriating authority's right to take possession; and dealing with your right to costs.

(The relevant sections will be attached; they are section 25, section 26, section 27, section 28, section 32, and section 59.)

4. If you are not satisfied with the amount the expropriating authority is willing to pay, you may take the matter to the Land Compensation and Surface Rights Board at . . . . . .

(Where the expropriating authority is the Crown, add: or if you prefer you may commence proceedings in the Supreme Court of Alberta.)

DATED at . . . . . this . . . . day of . . . . . 19 . .

. . . . . .
(name of expropriating authority)

. . . . . .
(signature of officer or agent of expropriating authority)