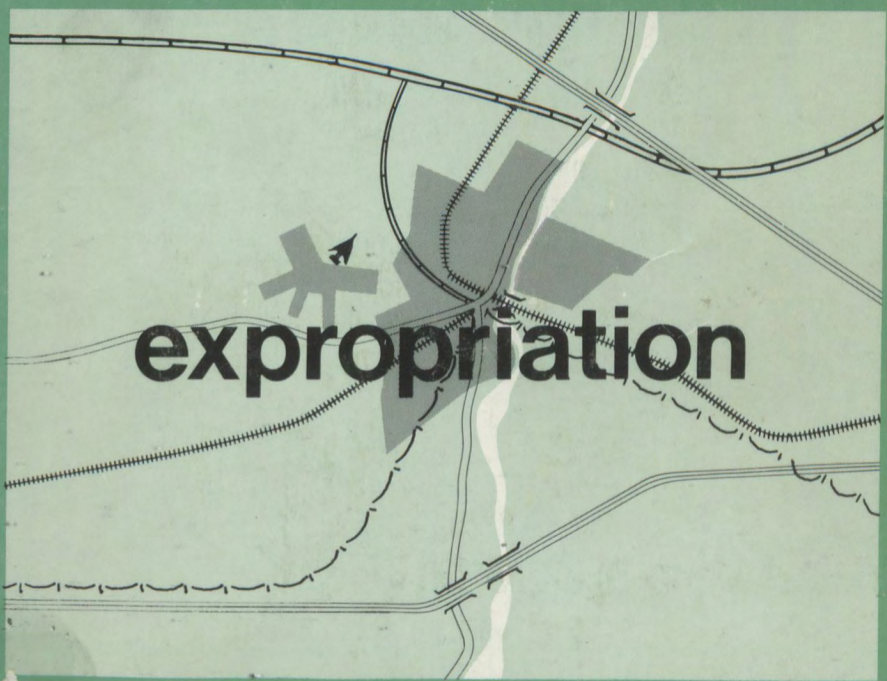
Law Reform Commission of Canada

Commission de réforme du droit du Canada



expropriation

Working Paper 9

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1975

Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing by June 1, 1975 to:

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Contents

PAGE

Preface 1
Introduction 5
Why we are Concerned about Expropriation 7
How this Working Paper is Organized 11
What we Think is Essential to good Expropriation Law 13
A. Equality of Treatment 13
B. Simplicity and Accessibility 14
C. Compensation for all Proven Loss 14
D. Political Responsibility for the Expropriation Decision 14
E. The Right to a Hearing—Public Scrutiny of the Proposed Expropriation Decision 15
F. Who Should be Able to Expropriate 16
G. Summary 17

The Pre-Expropriation Phase 19
I. Source of the Expropriation Power 19
A. The Expropriation Act 19
B. The Railway Act 19
C. The National Energy Board Act 20
D. Authorization by Special Act of Parliament 20
E. Authorization by Letters Patent 21
1. Railway Companies 21
2. Pipeline Companies 22

II. Selection of the Interest to be Expropriated—Conditions on the Power's Use 23
A. The Expropriation Act 23
1. Notice, Hearing and Political Responsibility 23
2. The Pre-Expropriation Hearing 24
3. Procedures for an Effective Pre-Expropriation Hearing 28
B. Strip-Takers: The Railway and National Energy Board Acts 29
1. Approving the General Location 29
(i) Railways 29
(ii) Pipelines 30

PAGE

2. Approving the Right-of-Way ... 32
(i) Railways ... 32
(ii) Pipelines ... 32
3. Political Responsibility for Expropriation by Strip-Takers ... 33
4. Special Expedited Procedures ... 34
(i) Branch Lines ... 34
(ii) Additional Lands ... 35
5. Conclusion ... 35
III. Reforming the Pre-Expropriation Phase for Strip-Takers ... 36
A. Approving the General Location ... 37
B. Approving the Location of the Specific Right-of-Way 39
C. Exceptions to the Two-Step Procedure ... 39
D. Situating Pre-Expropriation Phase Reforms ... 40

The Expropriation Phase ... 43
I. Passing of Title ... 43
II. Securing the Owner's Right to Compensation ... 44
III. Taking Possession ... 45
IV. Offering Compensation and Immediate Funding ... 46
V. Abandoning Expropriated Lands ... 47
VI. Reforming the Expropriation Phase for Strip-Takers ... 48

The Post-Expropriation Phase ... 49
I. Statutory Negotiation ... 49
II. Determining Compensation ... 50
A. Why the Modified Code Approach is Preferable ... 50
B. Compensation Provisions of the Railway and Expropriation Acts Compared ... 52
1. When Should Compensation be Determined ... 52
2. Compensating for Market Value and Disturbance Damages—Prohibiting Double Recovery ... 54
3. Partial Takings ... 55
(i) Under the Expropriation Act ... 55
(ii) A Problem: Injurious Affection ... 56
(iii) Under the Railway Act ... 57
(iv) Reform Suggestions Concerning Compensation for Partial Takings ... 58
4. What to Exclude in Determining Market Value ... 59
5. Special Economic Advantage ... 60
6. Equivalent Reinstatement ... 60

PAGE

7. Home for a Home 62
8. Leases and Tenancies 62
(i) Compensating the Tenant 62
(ii) Does Expropriation End the Lease 64
9. Mortgages and other Security Interests 65
10. Who Should Determine Compensation 67
(i) Under the Expropriation Act 68
(ii) Under the Railway Act 68
(iii) A Uniform System of Adjudicating Federal Expropriation Compensation Claims 70
(iv) Procedure Before Compensation Tribunals 71
(v) Making a Uniform System of Adjudication Work Well—Publishing Significant Decisions 72
11. Interest on Compensation 72
12. Costs—Providing the Means for Owners to Exercise their Rights 73
(i) Under the Railway Act 73
(ii) Under the Expropriation Act 74
(iii) Suggestions 76

Other Federal Expropriation Powers 77
I. Who Has the Power to Expropriate 77
Table I—Government as Expropriator 78
Table II—Private Enterprises as Expropriators 79
Table III—Number of Special Acts Conferring the Power of Expropriation 79
II. How Has the Power to Expropriate Been Conferred 80
A. Clearly Conferring the Power 80
B. Setting Time Limits on the Power's Use 81

III. Rationalizing Expropriation Powers Held By Private Enterprises 83
A. The Unfortunate Legacy of the Special Acts 83
B. Private Enterprises Granted the Power to Expropriate by other Public Acts 84
1. The National Transportation Act and Commodity Pipeline Companies 84
2. The Dominion Water Power Act and Power Companies 85
3. Companies under the Dry Docks Subsidies Act 85
4. Holders of Water Use Licences under the Northern Inland Waters Act 85

PAGE

5. Marine Electric Telegraph Companies and the Telegraphs Act ... 86
6. Summary ... 86

IV. Government as Expropriator ... 86
1. Harbour Commissions ... 87
2. The Fort-Falls Bridge Authority ... 87
3. Under the Atomic Energy Control Act ... 88
4. Under the Radio Act ... 89
5. Under the Telegraphs Act ... 89
6. Under the War Measures Act ... 90
7. Under the National Defence Act ... 91
8. The Canadian National Railway Company ... 91
9. Canadian Government Railways ... 95

Expropriation of Personal Property ... 97
Injurious Affection ... 99
Conclusions ... 103

Preface

Our concern with expropriation began with a suggestion by the Department of Justice in 1972. Would the Law Reform Commission attempt to put some order into the multitude of expropriation powers not covered by the Expropriation Act? When that Act was passed in 1970, further reform had been promised to deal with the expropriation powers of private companies.

We were fortunate in obtaining the assistance of John W. Morden, a Toronto lawyer and now a judge of the Supreme Court of Ontario, who has practised and written extensively in the field. He undertook the major responsibility in preparing a long and detailed study paper analysing and suggesting reforms to federal laws conferring expropriation powers outside the Expropriation Act. The study paper is available on request from the Secretary of the Law Reform Commission. We have relied heavily on its findings, analyses and suggestions for change.

The Commission has also had the benefit of comments from a number of concerned citizens, from government and private enterprises with expropriation powers, and notably from Professor Eric C. E. Todd of the University of British Columbia and R. B. Robinson, Q.C., a Toronto lawyer, both of whom are recognized experts in the field. We particularly appreciate the cooperation and assistance of persons with expropriation experience, both inside and outside government. Our task has also been lightened by the work of other groups who have reported on expropriation in recent years, notably the McRuer Royal Commission, the Ontario Law Reform Commission and the British Columbia Law Reform Commission.[1]

The scope and length of this Working Paper, and Mr. Justice Morden's study paper, reflect the dilemma facing the law reformer asked to do some "patching". It had been thought that a simple extension of the Expropriation Act would serve to introduce fairer procedures for

[1] See Volume 3 of the Report of the Royal Commission Inquiry into Civil Rights (1968) (The McRuer Report); Report of the Ontario Law Reform Commission on The Basis for Compensation on Expropriation (1967); Report on Expropriation of the Law Reform Commission of British Columbia (1971). See also R. B. Robinson, Report on the Expropriation Act/Ontario Ministry of the Attorney General (1974).

the many expropriation powers now outside it. But as often happens, the materials available to bridge the gap need reinforcing if the extra load is to be carried easily.

This Working Paper does not deal with every compulsory taking of property interests that may broadly be defined as expropriation. Thus, governmental actions of a zoning nature that may reduce property values, such as height restriction regulations under the Aeronautics Act, are excluded. So too are statutory rights of entry on private property for surveying or inspection or any sort of relatively unimportant use that may temporarily disrupt an owner's normal enjoyment of property.

Our Working Paper focusses on expropriation procedures. It does not review how government or private enterprises armed with expropriation powers go about purchasing land. But hardship can easily result from these purchasing practices, however equitable expropriation procedures may be.

Rights under the Expropriation Act do not accrue to owners until the expropriator formally reveals an intention to expropriate. Yet if government, or an enterprise with expropriation powers, shows interest in an area as a possible site for a project, the long-term desirability of land in the area for its present use may well be affected, particularly if this use is residential. And this inevitably influences market value. If owners can avoid selling until an intention to expropriate is registered, they will be protected by the Expropriation Act from the depressing effect the project might have on value. But some owners may not be able to wait. Others, eventually, may not want to wait if, for example, the properties around them that have been bought out are allowed to deteriorate. In the end, the bulk of the land necessary for a project could well be acquired, at low prices, without expropriation, and indeed without an official announcement of the project's existence. Keeping the costs of projects down may be in the public interest. But should savings be extracted from owners forced by circumstances to sell their homes and land for less than the price of purchasing equivalent property elsewhere?

The Commission is giving some consideration to an examination of the purchasing practices of expropriators. Owners may need more protection than even the best expropriation laws now give them. We would appreciate comments on this question to assist us in determining the extent of the problem.

Finally, it will be noted that many of the suggestions in this Working Paper affect expropriations by strip-takers—railway and pipeline companies. Since pipeline construction will likely increase over the next few

years and pipeline expropriation procedures are clearly inadequate, we hope to convey our final recommendations on expropriation to the Minister of Justice and Parliament as soon as possible. This, of course, depends in part upon how quickly your comments on the suggestions in this Working Paper reach us.

Introduction

Expropriation is a very unpopular word for a very unpopular action. It happens when property is taken from its owner, without consent. Almost invariably, the owner is irritated, upset and shocked. And understandably so. No one likes to lose what is his; to have to move, to see a long-time home demolished, a community broken up.

Why should expropriation happen? After all, aren't most people willing to give up their property for the right price? That price, however, may be high—higher than what normally is paid for similar property on the open market. Indeed, for some people, compensation cannot possibly cover what they feel has been lost. So expropriation occurs to ensure that the expropriator pays a "fair" price, and gets the property when it is needed, whatever the owner's views may be.

Practicalities justify the use of expropriation. But to expropriate, one must have a legal right to do so. And that can only be granted by our legislators. Indirectly, then, we all bear responsibility for the existence of this power. It is Parliament that originates all federal expropriation powers by express statutory grants. Our legislators, seeing a public need and believing that need may not be met unless the power to expropriate is conferred, treat the power as a necessary instrument of many government policies. In other words, the power is only conferred in the public interest. But in a free enterprise economy, not only government acts in the public interest. Private enterprises traditionally operate what are called public utilities—that all of us prefer not to do without—telephones, trains, power projects and pipelines. Consequently, a varied group of expropriators, public and private—from the Government of Canada to the Restigouche Boom Company—have been granted the power to expropriate.

While we all probably agree with our legislators and accept that expropriation may be unavoidable in some situations, we all still tend to fear it. How can we be sure that it really is necessary? What do we do if we disagree with the value set by the expropriator? And if we challenge this value, are we prevented from looking for another home by lack of money? Should we go to court—and what will this cost? How much time will we have to look for another home? What about

all the out-of-pocket expenses involved in moving—just getting the market value of the property may not be enough! The questions and worries are many. And the law for many years admittedly did not provide much comfort to those expropriated.

Recent reforms at both the federal and provincial levels have helped, however, to cushion the blow. In 1970, the federal Expropriation Act introduced fairer procedures, provided some financial support for the owner who wishes to challenge the expropriator's valuation as well as establishing broader and clearer compensation provisions. These have greatly improved the lot of many expropriated owners. In addition, wise use of many expropriation powers is now promoted by the public hearing of complaints before the expropriation becomes final. And political responsibility for the use of these powers is achieved, at least in theory, by requiring elected officials—a Cabinet Minister, in the case of the Expropriation Act—to approve each expropriation.

Why we are Concerned about Expropriation

Why then, we have been asked many times, is the Commission concerned about federal expropriation laws? Did not the Expropriation Act of 1970 do away with the archaic and unfair features of the earlier law and introduce progressive measures that greatly improve the expropriated person's position? The answer, of course, is yes, but only as far as it went.

For the Expropriation Act, as it was passed four years ago, applies only to some federal expropriations. In fact, by far the greater number of federal expropriation powers—more than one thousand—fall outside the compass of the Expropriation Act.[2] It does not touch several federal expropriation powers, conferred on the Crown, or a particular minister, or the federal Cabinet, that exist as bare grants of power, untempered by any express provisions for fair procedure or compensation. Nor does it affect our major government-subsidized transport undertaking, the Canadian National Railway Company. Expropriations by the C.N.R. continue to be governed by the old Expropriation Act, a statute described by judges and legislators as arbitrary.

Neither does the Expropriation Act impinge upon the many expropriation powers governed by the Railway Act. Most of the federal expropriation powers that lie outside the Expropriation Act's application are governed in one way or another by the Railway Act's rather detailed land acquisition, expropriation and compensation provisions. Dating as they do from the last century, these provisions do not meet the higher standards of the federal Act—the fairer procedures, the broader compensation provisions, and so on. However, the Railway Act provisions were originally designed for expropriations of a kind not considered by the drafters of the newer legislation—for expropriations by "strip-takers". These were not considered by Parliament when it passed the Expropriation Act, hence its limited scope, and this Working Paper.

[2] See Table III at page 79, *infra*.

Railways, and for that matter, pipelines too, usually run on the shortest line between the points to be joined, with certain exceptions owing to grade, terrain and towns. As a result, their requirements are fairly precise—a narrow strip along or under the shortest line. "Strip-takers", as we shall call them, and persons affected by them, thus may have special needs that the Expropriation Act may not fill.

Oddly though, not just the expropriations of railway and pipeline companies—the normal strip-takers—fall under the rather specialized provisions of the Railway Act. (And, as we have seen with the Canadian National Railway, not all railway expropriations are governed in full by the Railway Act.) The practice of our legislators for many years in enacting private statutes setting up a wide range and a large number of companies has been to adopt, or incorporate by reference, some of the Railway Act's expropriation provisions when a grant of the power was considered necessary. Thus, we find many "non-strip-takers" who may use the powers and procedures originally designed for railways—notably bridge, boom, canal, dock, dry dock, harbour, hydraulic, irrigation, power, railway ferry, telephone and telegraph companies. And this seems strange. Why can't expropriations by these companies be governed by the Expropriation Act, the legislation that people quite naturally assume to be applicable to all federal expropriations, and an Act presumably designed to deal with expropriations generally?

The Expropriation Act's scope of application may be too narrow. What the Act does cover are most expropriations by what could be called federal public authorities. It governs expropriations by the Government of Canada, or "the Crown" or "Her Majesty in Right of Canada", as legal purists would have it. It applies as well to expropriations by several crown corporations, and the government-owned company Telesat Canada. It is applicable wherever a federal statute has referred to the predecessor Act of the new Expropriation Act, as was occasionally done in conferring the expropriation power on a number of public authorities, like the Cape Breton Development Corporation. But many statutes that confer the power to expropriate make no mention of the old Expropriation Act. And many, as we mentioned earlier, refer to the Railway Act.

Our reservations, however, about the Expropriation Act are not limited to its scope. And these reservations are shared by most critics of the Act. Many people are dissatisfied with the public hearing process contemplated by the Act—the newspapers and Parliamentary Debates over the past two years attest to this.

Does it help to ensure—in fact and in appearance—the proper use of the expropriation power in the public interest? Other aspects of the Act have also been publicly criticised. And these criticisms question whether the Act provides for the fair treatment of owners through all stages of land acquisition and expropriation.

One alternative clearly before us is to extend the application of the Expropriation Act to cover all expropriations under federal statutes. But we would be remiss if we did not look closely at the Expropriation Act, and question its adequacy. We have therefore searched for ways to improve the Expropriation Act even though it is relatively recent and generally sound. This, we believe, is a necessary part of any attempt to provide Canadians with good expropriation law; a law that answers our concerns about existing federal expropriation laws and procedures.

How this Working Paper is Organized

If the totality of federal expropriation laws reflects anything, it is the *ad hoc* response of Parliament since Confederation to the demands for the power to expropriate by government and private enterprise. There are, understandably, few discernible patterns lurking within this legislative thicket that could provide us with a satisfactory basis for organizing this Working Paper.

However, most modern expropriation statutes deal with the expropriation process in a way that reflects the concerns of the people involved. What happens when expropriation is still only a possibility or a rumour? Then, what happens when expropriation becomes a reality—how does ownership change—and when is possession lost? And finally, afterwards, how are the effects of expropriation looked after—how, for example, is compensation determined and paid? This Working Paper follows this approach. The bulk of the Paper describes our examination of the most important federal expropriation laws as they now operate through each of these three phases—before, during, and after expropriation. We look at the Railway Act and the National Energy Board Act, the legislation governing expropriations by strip-takers (notably railways and pipelines), and compare these Acts with the Expropriation Act and our notions of what is essential to good expropriation law. Where it appears needed, we make suggestions for change, particularly regarding expropriations by strip-takers, but also concerning expropriations generally.

Then we review the expropriation powers and procedures of many entities, both public and private, that fall outside the ambit of the Expropriation Act. Some of these are governed by the Railway Act, some are not. We ask why some expropriators have special procedures, such as the C.N.R., and whether these could be subjected to more general expropriation laws.

With our review of federal expropriation laws completed, we then deal briefly with several related matters—the expropriation of personal property, and compensating surrounding owners for damages caused by what the expropriator does on the land taken—what lawyers term as compensation for injurious affection.

Finally, we conclude by highlighting our major suggestions for reform. These reflect, of course, what we consider to be essential to good expropriation law. Consequently, it seems wise to state now, at the outset, just what we think it is that can make the laws governing expropriation—an act that without legislative approval is illegal—good laws.

What we Think is Essential to Good Expropriation Law

Obviously, what we believe to be good expropriation law is greatly influenced by what we think is the right way for law to function, for people to be treated, for government to govern. But it is also inspired by the views of law reformers, notably in Ontario and British Columbia, with whom we share several notions about what makes good expropriation law. These essentials can best be described under a number of simple headings.

A. *Equality of Treatment*

First of all, a particular type of activity should be governed by only one set of rules, or laws—no more, no less—no matter who engages in that activity. And this set of rules should apply equally to everyone. These essentials are part of what is called "the rule of law", our basic unwritten constitutional guarantee of fairness and equal treatment.

But sometimes, equality must give way to other needs. Both George and Wilma as drivers are subject to the same law against speeding. Fairness and the safe and free flow of traffic require this. But what if Wilma drives an ambulance? Equality of treatment is a preferred value—but it can be displaced by an overriding public need—in Wilma's case, the immediate preservation of life.

Equality of treatment is lacking in existing federal expropriation laws. One expropriation may fall under one law, while another is subject to yet another law, merely because the identity of the expropriator differs. And the rights of people affected by an expropriation vary according to which law applies, and therefore according to who expropriates. One person may have the opportunity to object to a decision to expropriate, another may not. Perhaps some public interest justifies these differences. But if not, then equality of treatment should be introduced.

B. *Simplicity and Accessibility*

Unequal treatment exists because many different statutes govern federal expropriations. And this lack of uniformity makes the federal law on expropriation difficult to find. The statutory law appears at various points in the updated consolidations of public statutes, and in the annual collection of private statutes incorporating certain kinds of companies, going back for over a hundred years. And the names of statutes, since they usually merely identify the entity given the power, give no indication that expropriation is involved.

Ideally, all legislation on federal expropriations should be in one statute. And not only should it be in one place—easy to find—it should also be written in simple language—understandable by most people, not just by diligent lawyers. Simple language should be used to say exactly what is meant. If "X" is to be given the power to expropriate, then the legislation should read: "X may expropriate . . . ".

Complicated language and laws scattered through various statutes make it frustratingly difficult to discover just what one's rights are, and how those rights can be exercised.

C. *Compensation for all Proven Losses*

Consider now, how people whose property may be expropriated should be treated. Opinions vary here—especially between expropriators and property owners. Why should prices higher than the market value be paid for property needed for a public purpose? On the other hand, fairness demands that the person expropriated be compensated for what has been lost. And recent legislation does, as we indicated earlier, go a long way towards doing just that. Our preference is for as fair a solution as is reasonably possible—for compensating the person expropriated for all proven losses and costs resulting from the expropriation. We recognize that having to move is for a variety of reasons increasingly an incident of modern living. Nevertheless, we believe that expropriation laws should provide compensation for losses that result from expropriation. The community, not the individual, should bear the cost of these, even though some people can cope with the disruptions and burdens that expropriation causes. After all, it is the community that benefits.

D. *Political Responsibility for the Expropriation Decision*

We have mentioned that behind the existence and use of an expropriation power lies some public purpose—and a policy decision that a public need exists and that something should be done to meet it—

a park established, or a railway line built. Ideally, everyone should be involved in making these decisions. But the size of our society has led us to entrust our elected representatives with such decisions. And they, in turn, because of workload, complexity and specialization, have delegated many of these decisions to public officials, to government employees and others.

If the use of the power to expropriate, as well as its existence were authorized by our legislators, we would have fewer concerns here. In fact, where a major public project is involved, authorizing it by statute might be the best approach. Direct political accountability for decisions to expropriate is preferable—if you can get it. But for the bulk of public projects, Parliament is just not available. How then can we be certain that this extreme measure is only used when absolutely necessary? How can we be sure that the person deciding really is aware of all relevant factors? Did the people in the community affected really want the park, or really want their community linked to a railway transit system? Has the best of all alternative locations been selected?

One way of helping to ensure that the decision to expropriate harmonizes with the community's needs is to have an elected official approve all expropriations and give reasons for his decision. This, as we mentioned earlier, is the pattern adopted by recent federal and provincial legislation. Of course, the tendency may be strong for these approvals to become a "rubber-stamping" of the initial decision. Requiring a reasoned decision helps to prevent this.

E. *The Right to a Hearing—Public Scrutiny of the Proposed Expropriation Decision*

An additional check is to expose the proposed expropriation to public scrutiny through a public hearing. Recent reforms have introduced this feature, though in varying forms. Complaints can now be heard, and broader public participation has been achieved. As a result, people probably have a better understanding of the expropriation contemplated and the reasoning behind it. The quality and rationale of the decision can be openly discussed.

The public hearing also gives the person expropriated the opportunity to exercise his right to be heard, an important right the common law normally provides to those affected by similar sorts of decisions. It provides a person with the chance to say why his or her property should not be expropriated. The final decision then rests with the person approving—the elected official to whom the responsibility has been delegated by our legislators. Of course, the right to be

heard can only be exercised if a person has adequate notice of an impending expropriation. So someone should have the duty to tell whoever might be affected just what might happen and when, and what can be done about it.

Political responsibility and what has been learned from the public hearing should also, we think, help to make this final decision one that is acceptable to the community as a whole. These constraints may cause some complication and delay. But that is the price for ensuring that this extreme power, once granted, is wielded wisely and only when absolutely necessary.

F. *Who Should be Able to Expropriate*

This, as we indicated earlier, is a decision made by Parliament. And Parliament has granted the power of expropriation to private companies as well as public authorities. We cannot question Parliament's determination of the need for what the power can do. But should government be the only expropriator, on behalf of itself or other parties?

How appropriate this would be, in our opinion, depends on very practical considerations. We do not consider that "who expropriates" has an impact on whether expropriation law is good law, or not. How an expropriator behaves is more important than who the expropriator is. To justify government being the only expropriator, there must be enough non-governmental expropriations to support the maintaining of a larger government expropriating facility. And, these expropriations must arise often enough to keep such a facility active most of the time.

We believe that a non-governmental expropriator can easily be subjected to the public hearing and approval procedures we consider to be essential to good expropriation law. And our research findings confirm this belief. Furthermore, having the Government expropriate on behalf of, say, a pipeline company, inevitably involves some subsidization. Should the public bear the costs of this? This, perhaps, is a decision best left with Parliament, too. So far it has been the consumer of a public utility's product or service who has been left to pay the costs arising from exercising the expropriation power.

If non-governmental expropriators are to remain, we see no logic in subjecting them to different procedures or compensation provisions than those applicable to expropriations by the Government. They, after all, are also acting in the public interest—which is why Parliament granted them the power to expropriate in the first place.

G. *Summary*

So to summarize, what we consider to be the essentials of good federal expropriation laws are:

(1) Equality of treatment—the same law for all expropriations and expropriators—to the extent that other public interests are also met;

(2) Simple language, the power to expropriate clearly conferred, easy access for everyone to the laws, and one expropriation statute, if at all possible;

(3) Compensation for all proven losses and costs resulting from expropriation;

(4) Political responsibility for the use of the expropriation power through final approval, with reasons, by elected officials for all expropriations;

(5) The right to be heard in a public hearing for those who object to a proposed expropriation coupled with fair notice of proposed expropriations and pre-expropriation public hearings to all persons affected or objecting.

We begin our examination of federal expropriation laws by reviewing the pre-expropriation phase under the Expropriation Act, the Railway Act and the National Energy Board Act. The emphasis here, as in our subsequent consideration of the expropriation and post-expropriation phases under these Acts, is on strip-taking expropriators, on the inadequacies in the statutory provisions governing their land acquisition activities and protecting affected owners, and on the feasibility of subjecting strip-takers to a fairer, uniform expropriation law.

The Pre-Expropriation Phase

I. *Source of the Expropriation Power*

A. *The Expropriation Act*

The federal Act confers the power to expropriate in clear and concise terms:

> Any interest in land... that, in the opinion of the Minister, is required by the Crown for a public work or other public purpose may be expropriated by the Crown...

All that is required is a decision by the Minister of Public Works that a property is needed by the Government "for a public work or other public purpose". And unless the Government questions the Minister, the decision is final. The Government's power to expropriate is certain once this decision is made.

B. *The Railway Act*

The Railway Act is by no means as clear. The words "expropriate" or "expropriation" are not even used in any of its provisions, although "expropriation" does appear in a section heading and in a marginal note. Even the provision that gives a company the power to expropriate says nothing about expropriation. It reads:

> The company may, for the purposes of the undertaking, subject to the provisions of this and the Special Act, take and hold of and from any person, any lands or other property necessary for the construction, maintenance and operation of the railway...

And one only knows that the powers conferred by this provision include the expropriation power because a later provision begins "[T]he lands that may be taken without the consent of the owner..." *The expropriation power should be more clearly granted.*

The Railway Act's use of less than straightforward phrasing continues in its definition of "the company"—the entity that can expropriate.

> "The company"... means "railway company", ... and "railway company" or "company" when it means or includes "railway company", ... includes every such company and any person having authority to construct or operate a railway.

How does a company get the authority to construct and operate railways? From "the Special Act" mentioned in the empowering provision quoted above. And until 1969, the Special Act had to be an Act of Parliament. Since then, the Corporations Act permits the incorporation of railway companies (and pipeline companies too) in the normal way through the issuance of letters patent by the Minister of Consumer and Corporate Affairs. Now therefore, a Special Act may be a railway company's letters patent, as well as a statute. Letters patent, however, must comply with the Railway Act—a requirement not imposed on Special Acts actually passed by Parliament, which have priority over the Railway Act in cases of conflict. One must, therefore, read a railway company's enabling statute very carefully—it may very well alter what the Railway Act requires. Significantly, however, for people who may be affected by a railway company's plans, the Special Act normally describes in a very general way the route the railway will follow.

C. *The National Energy Board Act*

The National Energy Board Act confers the power to expropriate on pipeline companies. Again, the Special Act (meaning an Act of Parliament, or letters patent) provides the essential authority to the company—"to construct or operate a pipeline". And this the Act uses as the basis for granting the expropriation power.

Acquiring the initial authority "to construct and operate . . ." begins then with the Special Act. But pipeline company Special Acts, unlike railway company Special Acts, usually make no mention of routes or the regions where pipelines may be built. They provide no assistance in indicating where land acquisition and expropriation may eventually occur.

D. *Authorization by Special Act of Parliament*

An obvious reason for requiring Parliament to approve the grant of a power is to provide an opportunity for those who might be affected to prevent the grant, or attach conditions to it. When a Special Act of Parliament is sought to authorize the grant of the expropriation power, it is next to impossible to know just whose property will be affected by the use of the power. The promoter of these private bills will know that the railway proposed is to run between two points, or towns or cities, but the exact location of the route must await detailed surveying, planning and regulatory approval. However, the communities affected can be identified, and indeed notice to them of a private bill affecting them is mandatory. Through their elected representatives, these communities have some scope for influencing private legislation.

The House and Senate rules for enacting private bills—as legislation not directly introduced by the Government is called—do result in a significant degree of publicity being given to the project involved. The people who may be affected by expropriation will begin to know about the project. But extensive publicity has a price. It is probably one of the factors that has made obtaining a Special Act of Parliament time-consuming and expensive.

Parliamentary scrutiny and the influence of the communities affected have a wider scope for influencing private bills proposing railways than those concerning pipeline companies. Railway bills always include very general descriptions of the railway lines proposed. But pipeline bills merely give the pipeline company being incorporated a general authority to construct and operate pipelines, perhaps only within a specified region but usually not. Parliament, until 1969, had to authorize each and every railway line (with certain exceptions), but not each and every pipeline. It merely incorporated the pipeline company and left it to the National Energy Board to approve the route of particular pipelines. Parliamentary authorizations of the expropriation power by the passing of Special Acts amounted to some thirty-six Acts over the last two decades, ten for railways and twenty-six for pipeline companies.

E. *Authorization by Letters Patent*

The Special Act of Parliament is no longer the only way of obtaining authority to construct and operate railways and pipelines. The 1969 amendments enacted to save legislative time—and consequently both public and private costs—now provide a quicker and less expensive method. One merely applies to the Minister of Consumer and Corporate Affairs for letters patent. And this is exactly what people have been doing. By mid-1973 six pipeline companies had been issued letters patent, although no railway companies had applied (indicating, perhaps, the slower pace of major railway line construction).

Do new letters patent procedures give communities and persons who might be affected by railway and pipeline land acquisitions and expropriations the same protection through publicity and the chance to have an input on the enacting of a Special Act by Parliament?

1. *Railway Companies*

Before letters patent can be issued incorporating a company that may construct and operate a specified railway line, a certificate of public convenience and necessity must be obtained from the Canadian

Transport Commission—the CTC. In deciding whether to issue such a certificate, the CTC normally assesses the economic feasibility of the proposed railway line, the adequacy of financing and the extent of Canadian participation. But it may also consider any other matter of public interest. Presumably, those affected by the proposed construction can bring public interest issues to the attention of the CTC—and these could be related to land acquisition and expropriation. But how do those affected find out about an application for a certificate? Will they be notified? Perhaps, and only perhaps, because whether notice is given and how it is given is left to the CTC's discretion "as to it appears reasonable in the circumstances". *We believe something as important as public notice of these applications should be mandatory—just as in the House and Senate rules for private bills.*

Oddly, and for no apparent reason, having a new railway line approved is easier for existing railway companies. Letters patent authorizing the company to construct and operate new railway lines are still necessary. But these only require the concurrence of the CTC. This type of application for letters patent is likely to be more frequent than applications concerning the incorporation of new railway companies. And the same sort of policy considerations apply to both. Consequently, *we believe that similar assessment should be made of all proposed railway lines (excepting for the moment branch lines, on which we will have more to say later); that as a minimum, the requirement of a certificate of public convenience and necessity from the CTC should apply to every proposed line.* It makes no sense to treat new companies and existing companies differently.

2. *Pipeline Companies*

The 1969 letters patent procedures for pipeline companies provide little scope for public comment. However, the scope here was never extensive. Even incorporation by Special Act of Parliament did not require a pipeline company to specify where it would construct a pipeline. And this obviously limits public reaction.

All that is needed for incorporation now is that two other concerned Cabinet Ministers concur with a decision of the Minister of Consumer and Corporate Affairs to issue letters patent. There is no statutory requirement that notice be given either of the application for letters patent, or of an impending ministerial concurrence. Of course, as we shall be mentioning, pipeline companies still must acquire a certificate of public convenience and necessity from the National Energy Board before construction can begin. And similar considerations to those assessed during the letters patent procedure for railway com-

panies do prevail then. However, there is, in our opinion, some value to consistency in dealing with matters where similar public interests are involved. Why railways and pipelines should be subjected to these differing approval procedures escapes us.

II. *Selection of the Interest to be Expropriated—Conditions on the Power's Use*

Having described how strip-takers get the expropriation power, we now consider how they can use it. Again—it isn't that simple—or immediate. Several conditions must be met before use of the expropriation power becomes possible under any of the three Acts. And it is in the meeting of these conditions that the land to be expropriated is identified.

A. *The Expropriation Act*

What can be expropriated under the Expropriation Act is certain —whatever the Minister says is required. But the conditions that must be met before that interest can be expropriated are extensive and clearly aimed at encouraging good decisions.

1. *Notice, Hearing and Political Responsibility*

The pre-expropriation hearing procedure commences with notice being given of the intention to expropriate. The general public, the community affected and individuals whose property may be expropriated are made aware of what might happen and what they can do about it. "Any person" may object to a proposed expropriation by writing to the Minister of Public Works. And if someone has objected, a public hearing is held at which the objection is heard. The hearing officer, appointed by the Attorney-General of Canada—not the Minister seeking the expropriation—reports to the Minister of Public Works "on the nature and grounds of the objections made". Once the Minister has the report, he may either confirm or abandon the intention to expropriate. When an objection to an expropriation is rejected by the Minister, the person objecting has the right to receive on request "a statement of reasons" from the Minister.

While the essentials of what we consider to be good expropriation law appear at first sight to be guaranteed by the Expropriation Act, a closer analysis reveals that appearances are deceptive. Our analysis found the public hearing envisaged by the Expropriation Act to be

deficient in conception and in practice. At a very minimum, it does not accomplish its intended or presumed purposes. It doesn't assure the people affected that the best decision about expropriation will be made. And we doubt whether the hearing officer's reports that have been submitted so far really help the Minister make a better decision.

2. *The Pre-Expropriation Hearing*

The major purpose of the Expropriation Act's public hearing seems fairly clear—to inform the Minister of Public Works of objections to a proposed expropriation—and the nature and grounds of those objections. It would appear to be a way of improving the quality of the decision of the elected official who places the final stamp of approval on an expropriation. Presumably it should make the Minister particularly alert to objections because they would be made publicly. If no objections are made, then there is no hearing, and the Minister may approve the expropriation unencumbered by negative reaction.

Experience so far has shown that people expect the pre-expropriation hearing to be more than a conduit for their complaints to the Minister. People feel frustrated because the advantages and disadvantages of the issues they considered important enough to raise are all left hanging, both at the hearing and in the report of the hearing officer.

Hearing officers have been frustrated because they lack the power to "arrive at a balanced judgment" of objections, as one hearing officer put it, to determine that some objections were indeed answerable and to conclude that others may well have merit. Presumably their frustrations are shared by the Minister—for the Minister cannot make anything more out of the hearing officer's report than what it contains —a list of objections—a mixture of facts and opinions, unranked in merit, neither verified or substantiated.

Expectations about what the pre-expropriation hearing should be have not been helped by the lack of an opportunity for prior public participation in the planning of public facilities. There are, after all, two general questions that may be reviewed at pre-expropriation hearings. First, what is the necessity of the public work or public purpose? And second, how desirable is the proposed location of the public facility? Or, to put it in another way, is the proposed location the best of all possible alternatives? Without prior participation in planning, the pre-expropriation hearing inevitably becomes the hearing for all objections, broad and narrow, general or specific, that relate to necessity and location.

Experience under the federal Expropriation Act and in England (the source of inspiration for expropriation procedures adopted in Ontario and, to a lesser extent, in the Expropriation Act) demonstrates an acceptance of both necessity and location as relevant questions at pre-expropriation hearings, and logically, of course, they are. They are very hard, if not impossible, to separate. Legislation in both countries is similar in the guidance given on the purpose of a hearing and the nature of objections that may be heard—very little guidance, indeed. And without guidance, if necessity is to be considered, people will inevitably raise issues of policy and government decision-making very much broader in nature than questions concerning the acquisition and expropriation of certain plots of land. Is a pre-expropriation hearing a proper forum for considering objections about such broad matters as, say, government environmental policies? Should the hearing be used to help determine the environmental impact of public works or projects requiring land acquisition?

We find it difficult to answer these questions. Why should the only initiating event for a public hearing on the environmental and other effects of a proposed public facility be the refusal of one person within a project area to sell his or her land voluntarily to the expropriator?

Acquiring land—and thus expropriation—is normally the last step in project planning. For some projects, the land needed may already be available through long-standing ownership. Or it may be easily acquired through private negotiation and normal purchase. Expropriation would not then be needed. There could not then be any objections of the sort that, under the Expropriation Act, lead to a pre-expropriation hearing. But there could very well be objections about the project, or about how the land for it had been assembled. If all the 17,000 acres for the proposed airport at Pickering, Ontario had been acquired through private negotiation by the government, there could have been no hearing of any kind at all.

If thoughtful public participation in project planning is desired before final decisions are made about land acquisition or use—and we think it should be, particularly for major projects—*then there ought to be public participation regardless of how land is acquired—by private sale or expropriation.*

Earlier participation would, in our view, limit the pre-expropriation hearing to issues more closely related to the proposed expropriation. And this would result in fewer, more focussed objections.

People have also assumed that location—the second question that can logically be raised about a proposed expropriation—is an issue for

debate at the pre-expropriation hearing. The Expropriation Act, as interpreted by government, provides no basis for this assumption. There has been no opportunity at the hearing stage for choice among alternative sites. It is the site proposed—or part of it—or nothing at all. And this does tend to limit the impact of objections that argue that other sites may be better. The government is seen as committed to the site it proposes—even before the pre-expropriation hearing. And impressions that the Minister merely "rubber-stamps" an earlier decision are reinforced.

If location cannot be raised in the pre-expropriation hearing, and necessity is best raised at an earlier stage in planning public projects, just what purpose does the hearing serve? Surely it was intended by our legislators to be more than an extra set of political antennae for the responsible Minister.

We think there should be scope for public participation in the selection of the site from among all possible alternatives.

This could, we realize, create problems that may not be anticipated by the Expropriation Act. Considering several sites for a project at the same time can subject more people to uncertainties than considering one site alone. But uncertainty can be minimized by expedited proceedings. Furthermore, those suffering actual loss through temporary blighting—where land has been considered and then rejected —could be compensated.

The major argument against considering several sites simultaneously has that much feared demon—speculation—driving up the price for the land that would eventually be acquired or expropriated. It is possible that the Expropriation Act already scotches this argument. In determining the value of an expropriated interest, the Act directs that

> no account shall be taken of . . . any increase or decrease in the value . . . resulting from the anticipation of expropriation . . . or from any knowledge or expectation, prior to the expropriation, of the public work or purpose for which the interest was expropriated.

But just to make things certain, *the Expropriation Act could be amended to make it clear that anticipation of expropriation need not be confined to the period when the expropriated land alone was being considered. It could also cover an earlier time when the land was one of several parcels under consideration.* We believe this would make location a feasible question for consideration at a pre-expropriation hearing.

Much of the dissatisfaction with the existing hearing and decision process under the Expropriation Act can be traced to the way in which

the hearing is held, and the roles played by the hearing officer, the Government and the Minister of Public Works. The hearing is not what most people would consider to be an adequate inquiry. As we mentioned earlier, the hearing officer's only function is to hear objections—and to report on the nature and grounds of objections to the Minister. The officer cannot compel evidence to be given. And the expropriator—the Government—need not attend the proceedings or participate in them in any way. The expropriator, of course, must indicate "the public interest or other public purpose" underlying the proposed expropriation to the persons whose properties may be expropriated. But this obligation can be and is met tersely. As well, the Minister, when requested, must make available "to the extent that it appears to him to be practicable and in the public interest to do so any additional information that is available to the Minister as to the public work or other public purpose for which the interest . . . is required . . .", And extensive information has in fact been furnished to objectors.

But the information on which objectors must base their arguments cannot be assessed by them using normal methods of determining truth or opinion in areas of dispute. No one at the pre-expropriation public hearing has a right to cross-examine anyone else. Add the limited powers and role of the hearing officer, the probable absence of the principal character, and one has a scenario that could well have been created by Fellini—many people involved in a process with varying notions of its purposes and no one with a capacity to provide coherence or order.

We find this unacceptable. The present public hearing procedures do not make for better expropriation decisions—because they do not really give the Minister very much help in making his final decision. And in addition, they cause frustration among objectors. They do not allow objections to be tailored to fit or to be measured against the expropriator's rationale.

We recognize that the pre-expropriations hearing was not intended to be a judicial inquiry, or an adversary procedure pitting the Minister against the expropriated owners or other objectors. But neither was it intended to be an ineffective method of improving expropriated decisions. Its effectiveness could be improved without the hearing becoming a "trial of the issues".

We cannot see why it should be difficult for an expropriator to appear at a hearing, present the reasoning behind the proposed expropriation, raise alternative sites and be cross-examined by objectors on this presentation.

Lest we be criticized for suggesting a lawyer's solution, consider the experience elsewhere. The English have survived an adversarial-type pre-expropriation hearing procedure (and there the inquiry officer makes findings of fact, and expresses an opinion) for more than a decade. Admittedly, the context is different. However, the underlying considerations are similar, and in England have best been expressed in the report of the Franks' Committee reviewing the procedures used by tribunals and inquiries in 1957:

> Although the statutory requirements are merely to hear and consider objections, it must surely be true that an objection cannot reasonably be considered as a thing in itself in isolation from what is objected to. The consideration of objections thus involves the testing of an issue, though it must be remembered that it may be only a part of the issue which the Minister will ultimately have to determine. If so, then the case against which objections are raised should be presented and developed with sufficient detail and argument to permit the proper weighing of the one against the other. . . . [W]e regard the various procedures concerning land as involving the testing of an issue and . . . the right of individuals to state their case cannot be effective unless the case of the authority with which they are in dispute is adequately presented. In other words, an objection cannot properly be considered or developed in isolation from the proposal or decision objected to. . . . It follows that the scope of the inquiry should include some examination of the case of the initiating or planning authority . . .

3. *Procedures for an Effective Pre-Expropriation Hearing*

We conclude that an effective pre-expropriation public hearing should include

(1) the expropriator presenting the reasoning behind the proposed expropriation; necessity and location, as not already publicly debated being proper issues for objections;

(2) all persons participating at the hearing, the expropriator and all objectors, having the right to cross-examine;

(3) a discretion in the hearing officer to limit cross-examinations where repetitions and irrelevant;

(4) responsibility in the hearing officer to consolidate similar objections through pre-hearing conferences;

(5) a responsibility in the hearing officer to make findings of fact and to express an opinion on the issues involved.

We think our conclusions about the Expropriation Act are also applicable to pre-expropriation hearings presently held under other legislation.

B. *Strip-Takers: The Railway and National Energy Board Acts*

Railway and pipeline companies are subject to a number of requirements and regulatory controls before using their expropriation powers. These are met in two stages, or steps. First, they must submit maps of the general location of the proposed line. Once the general location has been approved, more detailed plans, profiles and books of reference must be submitted for approval. Only then does expropriation become possible. However, the details and scope of these requirements controls vary.

Not all railway companies must follow the two-step procedure for every railway line proposal. The Canadian National Railway follows the special procedures laid down in the Canadian National Railways Act. Branch lines of any length built by the Canadian Pacific Railway from any point on its main line are also excepted from the two-step procedure.

Many railway lines are excepted merely because they are branch lines less than twenty miles in length. Expropriating land for these lines requires no special authorization (neither special Act or letters patent) or approval of general location. Similarly, expropriation of land required for additional purposes connected with building, operating and maintaining a railway line needs only regulatory approval to be carried out.

We now review in some detail the two-step procedure affecting strip-takers.

1. *Approving the General Location*

(i) Railways

For railway companies, the first step is to file with the Canadian Transport Commission (the CTC) a general location map, showing in a general way the proposed route, the terrain it will encounter, its proximity to habitation and to other railways. Here, the CTC is concerned with the overall implications of the proposed route. Given the scale of the maps, it is difficult to know exactly what lands will be required for the right-of-way.

The CTC will, of course, wish to confirm that the line is actually needed. Yet its power to reject a line authorized by Parliament in a Special Act is doubtful. Lines approved by letters patent have already been subjected to some assessment by the CTC.

Normally, persons who may be affected by land acquisition and expropriation cannot be identified with any accuracy at this stage. But this does not detract from its importance. Approval of the general location of a proposed line helps to ensure that the expensive survey and engineering work that allows a line to be more precisely located may be kept to a minimum.

One could possibly identify, in some instances, "persons in adverse interest" to an application for approval of a general location. These people, according to the CTC Rules of Procedure, should be given notice of applications. This does not appear to be done in any uniform way. We think it should be. Municipalities and other railway companies that are clearly affected are notified by the applicant and do make submissions to the CTC. But other persons usually aren't. If they do object and they have, their submissions will be considered, perhaps at a hearing. We lack knowledge of the frequency of objections but note that hearings of this sort are rare.

How seriously these objections will be considered is another matter. Like many regulatory agencies with broad mandates, the CTC believes that it must be more concerned with the interests of the public at large than with those of private individuals. Thus engineering considerations (which are closely linked to matters of public safety) "must govern irrespective of private rights", although injuries to private owners ought to be kept to a minimum. As a result, approval of the general route map is merely a method the CTC uses to reduce errors and problems in the next step in the pre-expropriation phase—the approval or sanctioning of the plan, profile and book of reference that describes in detail the location of the right-of-way. When seen in this light, there is little scope for considering the views of individuals who may be affected.

(ii) Pipelines

The procedure for approving general routes of pipelines is rather different. It begins with an application for a certificate of public convenience and necessity from the National Energy Board (the NEB).

Submitted with the application is a general location map, showing the major features touched by the proposed route. The map's scale is set at one inch to the mile, but this is not uniformly enforced and maps of much larger scale have been accepted. Again, the generalities are more important at this stage than knowing exactly what land will be affected.

In deciding whether to issue a certificate, the NEB must consider a number of factors very similar to those reviewed by the CTC in

granting a certificate of the same name to applicants for railway company letters patent. The Board's notion of the public interest looms large, as do supply, markets, economic feasibility, financing and Canadian participation. So too does the route which the Board indicates is a factor in its deliberations.

The NEB has shown interest in the land acquisition methods of applicants. Companies often indicate in their applications how much of the proposed right-of-way has been acquired by option. And Board decisions on applications make specific reference to this in a section entitled "Right-of-Way". Apparently, the Board could refuse to issue a certificate if too many expropriations were foreseen. Its reasoning here though might be more influenced by cost and delay than by excessive use of the expropriation power.

The Board need not hold hearings on applications for certificates of public convenience and necessity. But if it does, these hearings must be "public". Nor does the Act confer any specific right to a hearing. While the Board is obliged by the Act to hear the objection of any "interested person", it is left to the Board to decide just who is an "interested person". Usually objections are heard unless the NEB thinks them irrelevant.

How do interested persons know when to object? How does one find out about an application? Persons affected by a proposed pipeline can't be identified at this stage. But applicants are asked by the Board to give notice of their application in newspapers "or otherwise", as the Board deems necessary. The Attorney-General of every province affected by an application must also be notified. So, in fact, a fair amount of publicity usually results.

If a hearing is held, the applicant is asked to notify other persons (including, presumably, those likely to be affected by construction and land acquisition) and told the means of notification to be used.

We note that the issuance of a certificate must be approved by Cabinet. While the Cabinet, understandably, does not hear affected persons, its approval provides not only political responsibility for the decision to build a pipeline but also stimulates publicity that may make people who might be affected more aware. This then sets the stage for the approval of the actual location of the route. Some of the persons who will be affected by land acquisition and expropriation probably are already aware at this stage of what is about to happen.

A minor concern that we have with the general route approval process for pipelines is that the general location map is not attached

to this certificate of public convenience and necessity as issued. Without it, the certificate gives inadequate guidance on where the pipeline will be located.

2. *Approving the Right-of-Way*

The decision that finally identifies the land to be expropriated is the approval by the CTC or NEB of documents known as the plan, profile and book of reference. Once the general location is approved, surveying and engineering work follow. Eventually, these more detailed documents are prepared and submitted. Strangely there is no legal requirement that the right-of-way as located on the plan be within the general location previously approved. There should be. Otherwise, approval of the general location is only as effective a control as the cost to the applicant of deviating from it.

(i) Railways

Again, the CTC's concerns at this stage are predominantly of an engineering nature. Checking of grades, crossings and curves ensures that the line as built will be safe. But the CTC also confirms that local governments approve of the location of the proposed railway line.

Again, persons affected have no legal right to be notified or heard before the CTC decides to approve (or sanction as the Act puts it) the actual right-of-way location. But now all these people can be identified, since the plan shows how the proposed right-of-way bisects existing land holdings.

Again, we note the CTC Rules of Procedure which speak of notifying persons "in adverse interest". If people do hear of what is going on, and do object or file a complaint, they will be heard. But is this enough? Shouldn't the CTC actively attempt to notify persons who may be affected? Good pre-expropriation procedures, in our view, require both notice to, and hearing of affected persons.

Those affected by the CTC's decision to approve a particular right-of-way should have the right to notice and to a hearing before the decision is final. And these rights should be legislatively confirmed. Otherwise, they may be expropriated without any opportunity to be heard. In this, the Railway Act is deficient.

(ii) Pipelines

The NEB's role in approving plans, profiles and books of reference parallels that of the CTC. However, the NEB Act gives no indication of the function of the plan and the profile. These functions should be stated, while continuing to leave the NEB the power to define the

details to be submitted. Also, the power of the NEB to approve these documents is not explicit. This too should be remedied.

We have learned that the Board's investigations at this stage are rigorous. The accuracy of the documents submitted is checked carefully. And the Board reviews the extent of land acquisition to get some idea of the need for expropriation.

There is, though, no requirement that affected persons be given notice of applications for approval of the location of a pipeline's right-of-way. Just as with railway companies, these persons can be identified now—after all, the right-of-way for a pipeline is only sixty feet wide. Notices of such applications are placed in relevant newspapers. And hearings have been held where complaints were made to the Board about proposed pipeline locations. One such hearing resulted in three substantial relocations of a pipeline. But such hearings have not been frequent.

As with railway company applications, there are the same arguments supporting the right of affected persons to have notice and to be heard during the NEB's consideration of these applications. Again, the only satisfactory way of ensuring that these rights are available is to have them legislatively guaranteed.

3. *Political Responsibility for Expropriation by Strip-Takers*

The CTC and NEB decisions described above locate the land that can be expropriated by strip-takers. Once the final decision has been made, the initiative is then in the hands of the strip-taker. We have indicated already that we believe all expropriations should be approved by a politically responsible official. The question then arises: are the CTC and NEB—independent regulatory agencies—politically responsible? The answer is "no".

Neither agency can accept political responsibility for their decisions; nor can the Government of the day. Members of these agencies are relatively immune, at least in theory, from political pressure. They have significant tenure in their appointments—ten years in the CTC, and seven in the NEB. Indeed, independence of political influences was a motivating concern of Parliament when these agencies were established.

But this is not to say that these agencies are immune from political review. The National Transportation Act gives the Cabinet the power to vary or rescind any CTC decision. And the issuance by the NEB of a certificate of public convenience and necessity must be approved by Cabinet. However, these are not significant injections of political

responsibility into the decision on what land can be expropriated by strip-takers.

There have been no Cabinet considerations of CTC general location or right-of-way approval decisions during the past twenty years. And the Cabinet's veto power over the NEB's decision to allow a pipeline to be constructed (the first step toward expropriation that merely identifies the general location) has little relationship to whether or not certain lands should be expropriated since these are not usually identifiable at this stage.

We must conclude that political responsibility rarely attaches to the decisions that allow expropriation by strip-takers.

4. *Special Expedited Procedures*

This conclusion also applies to expropriations by strip-takers outside the normal two-step approval procedures. Both the Railway Act and National Energy Board Act provide for expedited pre-expropriation procedures where companies require additional lands and wish to construct short lines. Oddly enough, people affected by some of these procedures have more rights than those affected by the normal procedure.

(i) Branch Lines

For railway companies, the most significant of the shortened pre-expropriation procedures apply to branch lines—lines less than twenty miles in length (but before a 1967 amendment, only six miles in length) connected to a main line or an existing branch line that does not extend the railway beyond the termini authorized in the Special Act. Many branch lines have been constructed in the last twenty years. Accurate statistics are difficult to acquire but the CTC believes that there have been between three and six each year.

All a railway company requires to build a branch line is the authorization of the CTC. The normal requirements of a Special Act and general location approval are by-passed. Still mandatory, however, is the approval of a plan, profile and book of reference precisely locating the right-of-way.

There is some opportunity for persons affected to become aware of branch line applications. Public notice of the application must be givien in local newspapers. But as with main lines, the persons owning the land across which the branch line would run are not given anay direct notice. *We believe the Railway Act is deficient in not expressly*

requiring that notice be given to persons affected by the application for authorization of a branch line.

The Railway Act, however, does identify the policy considerations to be reviewed by the CTC on a branch line application. The branch line must be in the public interest or give "increased facilities to business". The latter has a decidedly nineteenth-century ring. It may have been thought acceptable in 1879, when it was introduced, but it is out-of-place today. *No one should suffer expropriation solely for someone else's business advantage.*

The National Energy Board Act also allows expedited procedures for the construction of shorter lines. Pipelines not exceeding twenty-five miles in length may by order of the Board be exempted from the requirement of a certificate of public convenience and necessity or an approved plan, profile and book of reference. There have been several hundred exemptions ordered during the last two decades, although not all of these concerned short pipelines. The exemption order may also apply to such structures as "tanks, reservoirs, pumps, . . . as the Board considers proper". Apparently, no exemptions have ever resulted in expropriations. But this is a possibility. We think that the protections offered by the normal two-step approval procedure should apply to all applications that could result in expropriations.

Of course, it can be argued that an exemption order prevents expropriation since the first step in expropriating may occur only ten days after the deposit of the plan, profile and book of reference in the appropriate registry offices. Nevertheless, the law should be clear—*those exempted from the normal procedures should not be able to expropriate.*

(ii) Additional Lands

The expedited procedures for the acquisition of additional lands provide better protection to affected persons. Both the Railway Act and the National Energy Board Act provide for the expropriation of additional lands above and beyond the strip approved by the normal procedures. For railways, we find the procedures here preferable to the normal ones. Additional lands may be expropriated for specified purposes such as better public facilities and road diversions, if the CTC agrees. Notice of an application for CTC authorization of such expropriations must be given to the "owner or possessor of such lands". And that authorization can only be given after "the hearing of such parties interested as might appear". In addition, an executive officer of the company applying must submit a sworn statement indicating the

proposed use and need for the particular land. The officer must also demonstrate that no other suitable lands can be acquired on reasonable terms and with less injury to private rights. So the people affected can find out the case they have to meet and have an opportunity to answer it.

The provisions of the NEB Act for the expropriation of additional land follow those in the Railway Act. The only significant variation is the lack of the requirement for a statement from an executive officer of the applying company stating what is needed and why. We think this requirement would be a useful addition here. Why should there be any difference between procedures that have the same objectives?

These constraints on strip-takers applying for permission to expropriate additional lands may provide some explanation for the relatively rare use of this exceptional procedure. Only six applications have been made by railway companies in twenty years. Only two have been made by pipeline companies since 1949, and people affected opposed the application.

5. *Conclusion*

This completes our review of how land is selected for expropriation by strip-takers. *We conclude that the conditions on the use of the expropriation power by strip-takers fall short of what we consider to be essential to good expropriation law.* It is hard for persons affected by land acquisition and expropriation activities of strip-takers to know what is happening. As a result, they have little opportunity to voice their complaints. In addition, the decision that earmarks what land can be expropriated need not be approved by an elected official, who is usually more sensitive to public opinion than an appointed member of a regulatory agency.

The need is clear for reform of the pre-expropriation procedures that govern strip-takers. Would the federal Act provide a better framework for the pre-expropriation phase? Earlier, we suggested that while the Expropriation Act has a number of good provisions, it also has some shortcomings. A further question is whether an improved Expropriation Act would meet the rather special needs of strip-takers and people affected by their land acquisition activities.

III. *Reforming the Pre-Expropriation Phase for Strip-Takers*

Our first question here is, what are the special needs of strip-takers? And our second, can they be met by an amended Expropriation Act?

The essential requirement of the strip-taker is the right-of-way—a narrow strip of land usually not more than one hundred feet wide, running between points normally a number of miles apart. And for strip-takers that strip—should be on the shortest line possible between the points being connected, since the cost per foot of a railway or pipeline is very high. Add geography, safety and engineering factors and the strip-taker's range of choices in locating the right-of-way are limited. A strip-taker's plans can be frustrated if any portion of land, however small, cannot be acquired.

Pre-expropriation procedures for strip-takers must recognize these realities. Undoubtedly, expertise is required to assess the factors that determine the most viable route for the strip-taker as well as to balance the strip-taker's needs with the public and private interests affected. Could the public hearing and decision procedure under the Expropriation Act, amended as we have suggested, bring such expertise to bear consistently on projects proposed by strip-takers?

We think not. It would be too much to ask of the hearing officer, appointed *ad hoc*, and without staff. We feel the two-step approach—approving first a general location and then a specific right-of-way—now used in the Railway Act and National Energy Board Act should be retained. Given the existing expertise and resources of the CTC and the NEB, it would be foolhardy not to use these agencies. However, there are inadequacies in the existing procedures for strip-takers. As we have already suggested, many of the essentials of good expropriation law are lacking.

Would the inadequacies in the approval procedures under the Railway Act and National Energy Board Act be met by tacking on the amended pre-expropriation procedure we have suggested for the Expropriation Act? Or would this create even more problems? Duplication and delay would be an obvious result. And with the hearing officer second-guessing the CTC or NEB, a great deal of careful and expert work might well be undone. Still we are left with the task of improving the Railway and National Energy Board Act procedures so that they meet the same standards we have set for the Expropriation Act.

A. *Approving the General Location*

The two-step procedure under the Railway and National Energy Board Act should logically begin with an assessment and decision by the CTC or NEB that provide the strip-taker and persons affected by a project with a confirmed basis for further work or action. The procedures for railways and pipelines could be similar. Why does project approval

for railways now occur through the issuance of letters patent, when for pipelines it occurs when the NEB approves the general location? Why for some railway lines is the CTC's certificate of public convenience and necessity a prerequisite to obtaining letters patent when it is not for others, while, on the other hand, for pipelines an NEB certificate of the same name is a prerequisite to applying for approval of specific right-of-way location? In fact, as we have mentioned, the factors for issuing a certificate of public convenience and necessity are similar for both railways and pipelines.

We think the most logical time for issuing a certificate of public convenience and necessity is when the general location is approved, either by the CTC or the NEB. At this time, the merits of the project as well as its probable location may be assessed.

However, we would add to the general location approval process the following elements, which would make the process parallel the improved pre-expropriation procedures under an amended Expropriation Act:

1. Notice of an application for a certificate of public convenience and necessity and general location approval should be given in local newspapers.
2. More direct notice should be given where convenient and possible, at the discretion of the CTC or NEB.
3. Any person should be permitted to object to the application.
4. Objections should be heard at a public hearing subject to the CTC's or NEB's discretion not to hold a hearing if relevant objections are not received, and a responsibility to consolidate similar objections.
5. Both the necessity for and the location of the proposed project should be relevant issues, and consideration should be given to possible alternative sites.
6. At the public hearing, the company proposing the project should begin by presenting the reasons for the project. The company would then have an opportunity to reply to objections. Cross-examination should be permitted.
7. For the purposes of the hearing, the CTC and NEB should have power to make findings of fact and express an opinion on all relevant issues.
8. These conclusions should be reported to the Cabinet, or an individual Minister, for approval. The Cabinet or the in-

dividual Minister should be free to accept or reject any or all of the CTC's or NEB's conclusions on necessity and location. Cabinet or ministerial approval of both necessity and general location would be a prerequisite for subsequent approval of a specific right-of-way.

B. *Approving the Location of the Specific Right-of-Way*

Following the issuance of a certificate of public convenience and necessity and the approval of the general location, a company would then carry out the work necessary to locate an appropriate right-of-way. Once this was completed, it would then apply to the CTC or NEB for approval of the right-of-way by submitting a plan, profile and book of reference. Once again, we would introduce the following elements:

1. All affected persons should be notified of the company's application. So too should other persons, in the discretion of the CTC or NEB, where their participation in this stage would be beneficial.
2. All such persons should be given the opportunity to participate in a public hearing, held primarily to determine the best possible location of the right-of-way, for all interests concerned. While location would be the major issue under consideration, questions of necessity not reasonably foreseeable at the previous hearing would also be relevant.
3. The CTC or NEB would submit a report of findings and opinions arising from the hearing to Cabinet, or an individual Minister, for approval or rejection.
4. Following the Cabinet's approval, the plan, profile and book of reference when registered in an appropriate land registry office would effect expropriation. (We discuss this step during our consideration of the expropriation phase.)

C. *Exceptions to the Two-Step Procedure*

Our proposals so far may be seen as unduly burdening existing procedures. Why, for example, have two public hearings? As we indicated earlier, it is likely to be easier to consider issues of necessity before issues of location. Of course, this could be done in one hearing, particularly if opinion is not divided, or where there is very little opposition to the proposed right-of-way location. One hearing, however, would compress the approval of general and specific locations into one decision and this might not be seen as wise by companies, except in the case of short lines.

For these reasons, we think that companies should have the option to ask the CTC or the NEB to consider both general and specific locations in the same application.

There may also be situations when the public interest may not be served by rigid adherence to the two-step procedure. The Expropriation Act recognizes this and exempts certain expropriations from the pre-expropriation requirements where the Cabinet believes

> ... that the physical possession for use by the Crown of the land to the extent of the interest intended to be expropriated is, by reason of special circumstances, urgently required and that to order a public hearing to be conducted with respect thereto would occasion a delay prejudicial to the public interest...

Since the projects constructed by strip-takers must serve a public purpose, a similar exemption should be available to them. Companies could apply to the CTC or NEB for such an exemption, and they would then report to the Cabinet, or an individual Minister, where the final decision on the exemption would be made. So political responsibility would exist for decisions involving departures from normal procedures.

Having outlined the pre-expropriation procedures we believe are required, the next question is—where should they appear? What statutes should be amended?

D. *Situating Pre-Expropriation Phase Reforms*

We have indicated earlier our strong preference for having the law in one place. Why strip-takers need special pre-expropriation procedures we have already explained. And we see no obstacles to having uniform procedures for all strip-takers.

It must be remembered that these procedures also serve larger objectives—railway and pipeline regulation—the task of controlling the construction, operation and maintenance of railways and pipelines assigned by Parliament to the CTC and NEB, respectively. The pre-expropriation procedures we have reviewed are also the procedures for carrying out these tasks. Obviously, these procedures must be set out in the statutes that define the roles, responsibilities and powers of the CTC and NEB. But there is also the need of people affected by the land acquisition and expropriations of strip-takers to know what their rights are. And the obvious place for spelling these out is in the Expropriation Act. This is, after all, the Act that comes to mind when the possibility of expropriation is raised.

Accordingly, we think the Expropriation Act, the Railway Act and the National Energy Board Act should be amended in a coordinated

fashion so that the rights of people during the pre-expropriation phase are stated in the Expropriation Act, and the corresponding responsibilities and powers of the CTC and NEB are stated in the Railway Act and the National Energy Board Act. Simple explanations of how the procedures operate and what they should accomplish, supplemented by cross-references where necessary, should be included in the Expropriation Act.

The amendments to all three Acts that we have proposed for this phase reflect our attempt to introduce what we believe to be essential to good expropriation law. The procedures we consider suitable for an effective pre-expropriation hearing are similar, whether that hearing be held by a hearing officer under the Expropriation Act, or by regulatory agencies like the CTC or the NEB, under the Railway Act or the National Energy Board Act.

The Expropriation Phase

Once the expropriator meets the various requirements and obtains the necessary approvals in the pre-expropriation phase, the property needed can be expropriated. The expropriator can become the owner of the property, and take possession of it—that is, enter it, occupy and use it. We now consider just how this happens under the Expropriation and Railway Acts. The latter Act governs purchase, conveyance and expropriation by both railway and pipeline companies since the National Energy Board Act incorporates these Railway Act provisions by specific reference.

I. *Passing of Title*

When does expropriation occur? When does ownership actually change?

Under the Expropriation Act, the Government becomes the legal owner of the property by simply registering a notice of the Minister's approval—the confirmation of the intention to expropriate—in the appropriate land registry office.

Acquiring title is more complicated under the Railway Act. If the property is not voluntarily conveyed, title does not pass until the expropriator pays the compensation into court fixed by an arbitrator (we shall have more to say about how this is done), as perhaps modified by appeal to the courts, and a copy of the final decision in the proper amount of compensation to be paid is registered with the court clerk. The award, as this decision is called, is then considered to be the title of the expropriator to the land. In contrast to the Expropriation Act's procedures, the prior depositing of the plan, profile and book of reference in the land registry office, and the serving of what in practice is called the notice of expropriation are only prerequisites to the eventual passing of title. They have no final legal effect.

Implicit in this rather convoluted procedure is the hope that it will encourage the owner to convey the land voluntarily. But there is really little in it that would encourage agreement on compensation more quickly than under the Expropriation Act's procedures. Who has title would seem to have little bearing on an owner's propensity to settle.

After all, at this stage it is certain that ownership will eventually change if it hasn't already. What encourages settlement before arbitration is the amount of compensation being offered, and this is more closely linked to the date possession is required. Unless the company uses the special procedures in the Railway Act for obtaining immediate possession, an owner who refuses to settle can stay in possession until an award is made. So the right to remain in possession continues until about the time title passes. However, we doubt that remaining in possession as long as possible gives the owner any real benefit or bargaining advantage that could not be achieved in other less disruptive and more certain ways.

We believe the Expropriation Act's procedures here are the simplest and clearest way of passing title. Although these procedures for acquiring title may seem somewhat heavy-handed, they are in practice tempered by the Act's pre-expropriation procedures. If the pre-expropriation procedures we favour are introduced for all federal expropriations, we think *all expropriators should be able to acquire title by depositing the relevant documents (for strip-takers, the approved plan, profile and book of reference) in the appropriate land registry office.*

II. *Securing the Owner's Right to Compensation*

What happens if the expropriator doesn't pay for the property acquired? When government is acquiring land, its ability to pay is presumed. But what about non-governmental bodies with expropriating powers, like railway and pipeline companies?

Under the Railway Act, the only remedy appears to be the vendor's lien, which is enforced by a court order for sale of the land. This remedy is not only cumbersome but most likely worthless. Is there any real market for strips of railway or pipeline rights-of-way? If non-governmental bodies are to have expropriation powers, then the people affected by them need a better remedy than the vendor's lien. They need some form of guarantee to cover the possibility of non-payment. This seems necessary if, as we propose, title passes by registration of documents before any compensation is paid.

The most appropriate guarantor would be the Government of Canada. It should be liable for all unpaid compensation monies owed by non-governmental bodies that have been conferred expropriation powers. Such a guarantee should become operable soon after an obligation to compensate has been incurred. Furthermore, it should be enforceable through a quick, inexpensive procedure.

Of course, before a non-governmental body exercises the expropriation power, its financial ability to meet *all* obligations anticipated

should be confirmed. And this, in our scheme, ought to be done during the pre-expropriation phases; for example, by the CTC for railway companies. We understand the NEB already does this for pipeline companies.

III. *Taking Possession*

The Expropriation Act provides a reasonably clear and fair approach to the taking of possession that meets the needs of both the expropriator and the expropriated parties.

In brief, the Government may take possession:

1. if the owner isn't occupying the land at the time of expropriation; or
2. if the owner agrees at any time after expropriation; or
3. after 90 days' notice of the need for possession, and the making of an offer for compensation; or
4. whenever the Cabinet decides that because of special circumstances, the land is urgently needed.

Early possession, however, does have a price. If possession or use occurs before the notice period of 90 days has expired, the owner receives an additional ten percent of the value of the expropriated interest.

The Railway Act is less flexible. Possession is generally not possible until the full amount of compensation has been settled by award or agreement. A special procedure does exist under the Act for obtaining possession sooner, but it requires a judge's warrant that possession is indeed necessary, and the payment of an amount as security that will cover the probable costs of arbitration and compensation.

Strip-takers are understandably unhappy with the delays inherent in these provisions. Because of the short season for construction, pipeline companies in particular want possession of the right-of-way as soon as possible. Indeed, from their perspective the Railway Act's approach is rather rigid. We believe it can be made more flexible without harming affected owners.

In many railway or pipeline acquisitions, the owner does not lose total possession. Pipeline acquisitions, for example, usually cause only a temporary interference with the owner's surface rights during construction. There is, though, a permanent building prohibition over the right-of-way. Taking possession normally causes no great hardship. This

could be contrasted with the Government's acquisition of land for public projects, such as an airport, where for the most part, total holdings are taken. Why should obtaining possession be more difficult for railway and pipeline companies, when less disruption is normally involved, than for government?

We see no real obstacles to extending the Expropriation Act's provisions on taking possession to all federal expropriations. However, because of the special needs of strip-takers, the notice of possession should be less than 90 days—say 30 days—when the owner of the land involved need not relocate as a result of the expropriation. *If the owner must move, then the strip-taker should have to apply to a local judge for permission to shorten the 90 day period, and be able to demonstrate that no significant inconvenience or hardship will result from shorter notice.*

IV. *Offering Compensation and Immediate Funding*

The Expropriation Act requires that the Government, within 90 days of the expropriation,

> ... make to each person who is entitled to compensation ... an offer in writing of compensation, in an amount estimated by the Minister to be equal to the compensation to which that person is then entitled ... not conditional upon the provision by that person of any release or releases and without prejudice to the right of that person, if he accepts the offer, to claim additional compensation ...

This offer is unconditional. And acceptance of it does not prevent the owner from later claiming additional compensation. Making this offer, as we mentioned earlier, is a prerequisite to obtaining possession without the consent of an owner in occupation.

The opportunity to have immediate funding without prejudice to any final determination of full compensation is not possible under the Railway Act. All that owners affected by the Railway Act acquisitions get is a notice indicating the company's readiness to pay a specified sum as compensation. And accepting that sum ends the owner's claim.

We find the Expropriation Act's approach here to be preferable, and see no reason why it could not be used for strip-takers. People without savings or extensive financial reserves whose property is expropriated should not be any worse off than those who have the funds to weather the inevitable shocks and disruptions that expropriation brings. Of course, the usefulness of immediate funding which is based only on an assessment of value of the property interest may be minimal. It

might provide only enough to pay for disturbance costs. Consequently, *the Expropriation Act's approach could be improved by requiring that a sum for damages be included in the initial offer, as Ontario legislation does.*

We also prefer the Expropriation Act's requirement that the offer of compensation be based on "a written appraisal of value". The Railway Act, in contrast, requires appraisals by surveyors or engineers as support for the compensation offered. Today, they may lack the experience and knowledge of the professional appraiser.

V. *Abandoning Expropriated Lands*

Occasionally, land that has been expropriated may no longer be needed by the expropriator. Plans change and projects often evolve in ways not contemplated by planners. The Expropriation Act recognizes this possibility as well as the adverse effects abandonment can have on the expropriated owner. While allowing abandonment, the Act protects those harmed by it.

The intention to expropriate can be abandoned at any time up to actual expropriation. But notice of this change of plans must be sent to the registered owner and to people who have objected to the planned expropriation. Owners can be compensated for actual losses sustained from the time the notice of intention to expropriate was registered until it was abandoned.

Once, however, the confirmation of intention to expropriate is registered—and ownership changes—so too do the rules of the game. Abandonment is only possible now if no compensation has been paid and all persons with an interest in the land agree to the abandonment. The fact of abandonment or revesting then becomes an element to be taken into account in fixing the amount to be paid as compensation for the expropriation.

The Railway Act is silent on abandonment before the giving of what the Act's marginal notes describe as the notice of expropriation. This notice does not effect expropriation but rather by indicating what the expropriator is willing to pay begins the process of determining the compensation payable. A company can abandon its intention to acquire or expropriate at any point until the giving of this notice without incurring any responsibility for losses suffered by affected owners.

Once the notice of expropriation has been given, a company is liable under the Act for all damages and costs incurred by an owner "in consequence of" the notice of expropriation and abandonment. How-

ever, it is not certain when the company's right to abandon ends. Judicial consideration of this question, even in the Supreme Court of Canada, has not resolved whether the taking of possession, or the passing of title, is the event terminating the right of abandonment.

The Expropriation Act's approach is much clearer. In fact, *there appears to be no good reason why this Act's provisions on abandonment should not apply to strip-takers, or indeed to all expropriators.* We believe an owner should be compensated for all losses resulting from expropriation proceedings. And this should include actual losses suffered from the time of application for approval of the plan, profile and book of reference to the registration of an abandonment of the application.

The Expropriation Act's provisions regarding abandonment after expropriation, however, could be improved in two ways. First, we note that if an owner has accepted immediate compensation, then the power to abandon under the Expropriation Act is lost. So too is the owner's alternative of taking the land back and claiming compensation for consequential damages. *We think that abandonment should be possible until compensation is paid in full,* as Ontario legislation provides. Admittedly, expropriators dislike the sometimes difficult task of recovering compensation that has already been paid. So it is possible that abandonment will be rare when non-prejudicial immediate compensation has been paid. However, since abandonment can benefit both the expropriator and the owner, we believe it should be an available option for as long as possible.

Second, requiring that each and every person with an interest in the land in question agree to the abandonment is excessive. Some interests are too minisçule to merit this protection—take an execution creditor owed one hundred dollars! And abandonment really does no more than place all interests in the same position as they were before expropriation, or the possibility of expropriation, arose. *We think that statutory abandonment should be available to expropriators when the owner of the land elects to take it back.*

VI. *Reforming the Expropriation Phase for Strip-Takers*

We have found the Expropriation Act's provisions governing this phase, to be suitable with minor modifications to expropriations by strip-takers. Indeed, it should be possible to establish the Expropriation Act as the law governing all federal expropriators, whether governmental and private enterprises, during this phase.

The Post-Expropriation Phase

As we have mentioned earlier the point at which expropriation occurs depends upon what Act applies—the Expropriation Act or the Railway Act. We have said too that we prefer the former Act's approach, title passing when the expropriator wishes once the decision to expropriate has been approved, either by the Minister, or by the CTC or NEB and the Cabinet. Once title has passed, the post-expropriation phase begins—a phase which is concerned mainly with arriving at the compensation to be paid to the owner by the expropriator.

The amount of compensation can of course be settled at any time throughout this phase by agreement between the parties. But agreement is often hard to reach. Since, too, it is difficult for compensation to be determined by a third party through arbitration or adjudication, one normally finds statutory schemes in most expropriation legislation that attempt to promote voluntary agreement. The Expropriation Act is no exception.

I. *Statutory Negotiation*

Under the Expropriation Act, either the owner or the Minister (the expropriator) can activate this process. Once activated, a negotiator is appointed by Cabinet on the recommendation of the Attorney-General. The negotiator meets with the parties, possibly looks at the land, receives and considers information about its value, and generally tries to get the parties to agree on the compensation payable. Neither party can be prejudiced by participating in the attempt to reach agreement on compensation. The Act explicitly precludes admitting evidence collected during negotiation in any subsequent judicial determination of compensation.

Experience with statutory negotiation and similar schemes at the federal and provincial levels demonstrates its usefulness. It gets the parties together and talking, particularly when inertia has set in. It exposes them to the informed view of an independent third party—the negotiator. It is in effect a "dry run" of what might be expected in the more complicated, time-consuming and expensive setting of a trial.

Nothing similar is envisaged by the Railway Act, which governs the determination of compensation for railway and pipeline expropriations. Yet just this sort of formal negotiation process should be useful in strip-taking where a number of relatively minor interests in land are involved. In fact, *we think the Expropriation Act's approach here is suitable for all federal expropriations.*

Before extending the ambit of the Act, though, a related question must be answered. Who should act as negotiator? There are good arguments supporting the use of *ad hoc* appointees. There are good arguments, too, for relying on relatively permanent negotiators. Being a negotiator regularly increases expertise, although this sort of expertise can be gained in other ways. Familiarity with the local setting may favour appointing *ad hoc* negotiators, although information about local peculiarities can be obtained in other ways. We think expertise is most important and favour appointing experienced persons or negotiators in each province, on a relatively permanent basis.

If negotiation is attempted but agreement is not reached, then compensation must be determined by a third party. How this is, and should be done is our next concern.

II. *Determining Compensation*

A. *Why the Modified Code Approach is Preferable*

Experience has shown that determining compensation is greatly assisted by the existence of what could be called a modified code of compensation rules—a list of the items that constitute an award of compensation. This experience no doubt encouraged Parliament to adopt this approach for the Expropriation Act of 1970. The Act does not lay down *all* the rules that might be used in determining compensation. Nor does it preclude reliance on previous judicial decisions. But it does set forth and define the elements, such as market value and disturbance damages, to be included in a compensation award. In addition, the Act specifically provides for such matters as the claims of mortgagees, tenants and the owners of buildings specially designed for them. It also establishes the "home for a home" principle for owners of residences. The Expropriation Act's approach to determining compensation has definitely improved what was previously a difficult situation. Little legislative guidance and conflicting judicial decisions made it virtually impossible to predict accurately the final outcome of any contested compensation determination.

Prior to the Expropriation Act, one had to seek guidance from what could be called the common law of compensation to determine

compensation for expropriation under any federal Act—the old Expropriation Act and the Railway Act included. This common law also applied until very recently to most provincial jurisdictions. And one must still turn to it in order to decide what compensation is payable in Railway Act expropriations.

The Railway Act gives little help in determining what can be included as part of a compensation award. It does, however, provide that the company shall make full compensation to all affected persons for damage sustained by them because of the exercise of expropriation and other related powers.

Because of legislative reticence in this and other federal statutes concerned with expropriation, the courts have had to fashion both the basic principles applicable in arriving at the quantum of an owner's entitlement to compensation as well as rules for implementing these principles. It is only by combing through the courts' decisions—the common law of compensation mentioned above—that one can discover these principles and rules. Understandably, the fabric of the common law of compensation, woven as it has been in fits and starts as the courts responded to the claims before them, is not without gaps and patches. Even its basic principles have caused difficulties.

The basic entitlement under this common law is "value to the owner" rather than bare market value (although this may well be the full measure of value to the owner).

The classic statement of how the "value to the owner" approach should be applied was made by Mr. Justice Rand of the Supreme Court of Canada in 1949:

> The owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.[3]

In cases when the courts have had to use this approach, judges have said very little about how they arrived at the amount awarded. Although the required outlook of the "prudent man" does attempt to introduce objectivity into the approach, its obvious subjective nature may explain this judicial silence. Application of the approach consequently does not result in an easily predicted outcome.

A more recent decision of the Supreme Court of Canada, *National Capital Commission* v. *Hobbs*, has provided some needed guidance.[4] Concrete evidence must now be introduced to support claims of real economic loss. In fact, as this decision demonstrates, the result of

[3] *Diggon-Hibben Ltd.* v. *The King*, [1949] S.C.R. 712, 715.
[4] [1970] S.C.R. 337.

"value to the owner" approach sensibly applied may not differ from the "market value" approach of the Expropriation Act.

But even with clarification of its basic principles, the common law of compensation remains difficult and time-consuming to apply. We agree with the view of the Ontario Law Reform Commission, expressed prior to the *Hobbs* decision:

> The rationalization of the cases consumes both time and effort. The average competent solicitor without a good deal of time, confused by conflicting statements and decisions, and confounded by subsequent applications of the *Diggon-Hibben* test, appears to believe that the test is a purely subjective one, superimposed on various objective factors. Some fresh statement of the meaning of compensation is necessary to clarify the situation.[5]

Consideration of this sort have led to the modified compensation code approaches being used in legislation enacted in recent years in Ontario, Manitoba, Nova Scotia and New Brunswick as well as in the federal Expropriation Act. The approach has also been recommended in Alberta and British Columbia.

We firmly believe that the modified code approach is suitable for expropriations under the Railway Act. The compensation provisions of the Expropriation Act, with minor changes, should apply to expropriations by railway and pipeline companies, and other bodies acting under federal legislation. The arguments for introducing the modified code approach in the Expropriation Act apply equally to extending the approach beyond the Act's present coverage. Indeed, the Railway Act, the common law of compensation and the Expropriation Act all share the objective of indemnifying a person fully for all proven losses resulting from an expropriation. The additional advantage of uniformity—one law of compensation for all federal expropriations—confirms, in our view, the wisdom of this proposed reform. However, our analysis of the feasibility of such an extension reveals the need for minor changes in the Expropriation Act. What follows is a comparison of some of the compensation provisions in the Expropriation and Railway Acts and our suggestions for improvements.

B. *Compensation Provisions of the Railway and Expropriation Acts Compared*

1. *When Should Compensation be Determined*

In times of volatile real estate prices, the date selected as the appropriate point in time at which compensation is to be determined

[5] Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation (1967), 15.

is extremely important. The general approach in most expropriation statutes in Canadian jurisdictions has been to select the date of expropriation for this purpose—the date when title passes to the expropriator. This is the Expropriation Act's position, although, when the notice of confirmation is delayed, the owner may elect to have the day when the notice actually arrived as the date for determining compensation.

The Railway Act is less clear. In general, "the date with reference to which compensation or damages shall be ascertained" is the day when the plan, profile and books of reference are filed in the registry office. But if the company does not acquire title within one year from the date of filing, the relevant date becomes the day when ownership finally changes. This can cause problems. To understand why, one must remember just how title can be acquired. The first and easiest way is by ordinary conveyance in return for the compensation agreed upon or determined through arbitration. If for some reason a conveyance is not obtainable, then the company can pay into court the compensation considered appropriate by the arbitrator and deliver a copy of the arbitrator's decision—the award—to the court clerk. As we mentioned earlier this award then is "deemed to be the title of the company to the land mentioned therein". Now, in cases where a year from filing has passed, the relevant date for determining compensation cannot be selected until title has been acquired. But title cannot be acquired, in some instances until compensation has been determined. One can only conclude, to escape from this quandary, that it may well be impossible in some cases to know what the relevant date for determining compensation is.

Fortunately, this possibility for confusion seems not to have caused any practical difficulties. For this we should perhaps thank the Privy Council which decided in 1928, without a close analysis of the Railway Act, that the date of acquisition was the date of the "notice of expropriation".[6] As we have indicated earlier this notice does not in itself transfer ownership.

We think these provisions of the Railway Act require clarification. We have already suggested that a company acquire title by registration of the plan, profile and book of reference. *Following the approach of the Expropriation Act, the date of registration seems to be the most appropriate point in time at which compensation should be determined.* We also favour the Act's 90 day period from the date of expropriation

[6] *LaCoste* v. *Cedar Rapids Manufacturing and Paving Company*, [1928] 2 D.L.R. 1, 10-11.

for sending the notice of confirmation. The one year equivalent period in the Railway Act excessively delays concluding the expropriation.

Something not covered by the Expropriation Act is the situation where a notice of confirmation is never sent. The McRuer Report recognized this problem and recommended that the owner be able to elect to have compensation determined at the date when possession is relinquished. However, the owner may remain in possession throughout arbitration, thus rendering the McRuer Report's approach unworkable.

In order to have certainty for cases where no notice of confirmation is sent, we think that *the Expropriation Act should provide that the owner may elect to have compensation determined at the date when court proceedings begin.*

2. *Compensating for Market Value and Disturbance Damages—Prohibiting Double Recovery*

The major element in determining compensation payable under the Expropriation Act is the market value of the expropriated interest—

> ... the amount that would have been paid for the interest if, at the time of its taking, it had been sold on the open market by a willing seller to a willing buyer.

However, disturbance damages are also payable when the owner was in occupation at the time the notice of confirmation was registered and had to move because of the expropriation. Disturbance damages are those costs, expenses and losses caused by the owner's disturbance, and include the costs of moving.

The possibility of double recovery arises because some land has a potential—as well as an existing use. It may be used as a farm, for example, but could also be suitable for a residential development area. The value of the land for its potential use may be higher than for its existing use. In determining compensation on expropriation, market value might well be based on the highest and best use. However, to avoid excessive compensation awards—or double recovery, as it has come to be called—the Expropriation Act provides that compensation should not exceed the larger of either the value based on the highest and best use, or the sum of the existing use value and disturbance damages.

This approach has its origins in the common law of compensation, although judges have not been uniformly opposed to double recovery. A number of studies of expropriation law have recommended that double recovery be legislatively prohibited. The Expropriation Act in operation does this—but without stating what is being done or why. *We think that the rule against allowing double recovery should be clearly*

stated in the Expropriation Act and that it should apply to compensation determination in all expropriations under federal legislation.

3. *Partial Takings*

At first glance, calculating the compensation payable when only part of a person's land is expropriated would appear to be an easy task. Unfortunately, this is not so. Complications are numerous. Presumably, the owner should receive the value of the part expropriated. But how should the value be determined when there is no market for property of the sort involved? And should the owner also receive a sum to compensate for damages caused to the land retained for what lawyers call "injurious affection"? And what if the land retained by the owner benefits from the project initiating the expropriation? Should the benefit —in the form of increased value—be deducted from the compensation for the part of the land taken? A review of the ways in which these questions can be answered cannot be avoided here, because most acquisitions by strip-takers are partial takings. Pipeline and railway companies normally need only an underground easement or a narrow strip of land. Would the Expropriation Act's formula for determining compensation in partial takings be suitable for partial takings by strip-takers?

(i) Under the Expropriation Act

The Act's provisions on partial takings could be described as the most ambitious and elaborate in Canada. Briefly, owners subjected to a partial taking are to receive an amount made up of the value of the land expropriated at the time of taking plus any decrease of value of the remaining property—land that lawyers say has been injuriously affected. Any increase in value of the land retained because of the project causing the expropriation is not set off against the owner's basic entitlement—the market value of the land taken. This market value, of course, excludes any changes in value induced by the anticipated or actual use of the land by the expropriator.

The Act specifies how to calculate any decrease in value of the remaining property. One subtracts from the value of the entire property, prior to the taking of part of it, the sum of the value of the land expropriated and the value of the remainder after the expropriation. However, in calculating the value of the remainder, the Act does say that "account shall be taken" of any change in value resulting from the project.

The Expropriation Act's dependency on market value as the basic element of compensation is only operable, presumably, when a market exists for the land expropriated. But there are interests in property for

which there are no willing buyers—like a two-foot strip between the front lawn of a residence and a street, or a pipeline or railway right-of-way angling through a large tract of land. What is to be done about these?

When such interests are expropriated, an appraiser will probably use a "before and after" comparison to arrive at the value of the portion of land taken. And this may lead to higher evaluations. A "before and after" comparison inevitably transfers some of the value attached to the surrounding lands to the land expropriated. And this transfer of value is artificial. How can a strip of land at the edge of a residential property, which has been expropriated to widen a street, have the same market value per square foot as the total property? It can, only if the concept of market value is distorted beyond its ordinary meaning and the limits of the Expropriation Act's definition. *The best way to use market value as a basis for determining compensation on a partial taking is to compare the value of interests for which there is likely to be a market—that is, the entire plot of land before expropriation, and after.*

(ii) A Problem: Injurious Affection

We must also point out a further shortcoming of the Expropriation Act. Included in its formula for determining compensation for a partial taking is compensation for injurious affection

> . . . resulting from the construction or use or anticipated construction or use of any public work *on the land to which the notice relates* or from the use or anticipated use of that land for any public purpose.

"The land to which the notice relates" is, of course, the expropriated land and not all of the land that is covered by the public work or public purpose. The Act's approach here follows the common law of compensation.

The problem is that a land owner who has had a small part of a property expropriated may suffer property damages arising from the project which occupies or uses other land as well as the land taken from this land owner. However, this person can only claim compensation for injurious affection for those damages caused by the use of the part of his or her land that was taken.

To us this seems narrow and unfairly restrictive. It is a restriction that has been recently done away with in the United Kingdom. There, it is now provided that

> . . . compensation for injurious affection of land retained . . . shall be assessed with reference to the whole of the works and not only the part situated on the land acquired . . .

The provision would be a desirable reform in Canada too, but it does not go far enough for Canadian needs. Left untouched are cases

of injurious affection where no land is taken. Strictly speaking, this falls outside our present concern with the law of expropriation. However, we will have more to say later in this Working Paper about the need for reform of the law of injurious affection generally. For now, it suffices to observe that following the United Kingdom reform would result in an anomalous situation. A land owner, who has lost a small portion of his or her land for a public work or purposes, would be entitled to compensation for all damages resulting to his or her land from the use of the whole public work whether or not that use occurred on the land taken. However, other land owners in the area who had no land taken, but who suffered similarly, would have no right to compensation if the damage resulted from the use rather than the construction of the public work, or if the activity involved was not in itself actionable at common law.

Our review of the Expropriation Act indicates that it may not provide a suitable approach for determining compensation for partial takings, particularly by strip-takers. But does the Railway Act provide a better alternative?

(iii) Under the Railway Act

Determining compensation for partial takings under the Act is achieved by using the traditional "before and after" rule, an approach that has evolved in the common law of compensation, and an approach that doesn't torture the concept of market value as the basic element in determining compensation.

In relying on the "before and after" rule, evaluations are made of the owner's land prior to and then after part of it has been expropriated. The compensation payable is the difference between the "before" and "after" evaluations, a difference that reflects many benefits flowing from the project that may have increased the value of the remaining land. In contrast, under the Expropriation Act, compensation for the land taken may not be reduced by the setting off of these benefits beyond the market value of the land taken. After all, as law reformers elsewhere have pointed out, why should the person who loses some land pay for benefits that his or her neighbours, who lost no land, got for nothing?

The "before and after" test as prescribed by the Railway Act, reflects an awareness of this problem. The Act instructs arbitrators determining compensation in such cases to set off "the increased value beyond the increased value common to all lands in their locality" against "the inconvenience, loss or damage that might be suffered or sustained

by reason of the company taking possession of or using the said lands". But strangely, the courts have not heeded this fair and reasonable instruction and so a straightforward "before and after" approach is the rule for determining compensation for partial takings under the Railway Act.

Our preference for the "before and after" test is strengthened by adding to it a set-off of special benefits. And this approach is supported by several decisions of the courts that have set off special benefits flowing from the project or scheme against the value of the land taken and damages for injurious affection.

We also favour giving the owner as a minimum entitlement the value of the land taken, as the Expropriation Act does.

(iv) Reform Suggestions Concerning Compensation for Partial Takings

We believe that the "before and after" test is the best approach to determining compensation for partial takings, with the following refinements:

1. The basic entitlement of any owner losing a portion of his or her land should be the market value of the land taken. To facilitate the evaluation of part of a tract of land, we suggest that a formula be used which would begin with ascertaining the value of the total land holding, and then allocate this amount between the part taken and the part remaining. One possible basis of allocation could be the ratio of the acreage of the part taken to the acreage of the whole.

2. Only increases in the value of the remaining land flowing from the construction or use or anticipated construction or use of the work in question which, in the language of the Railway Act are "beyond the increased value common to all lands in the locality", should be set off against the total compensation payable.

It is difficult to predict whether a better result for all parties is achieved by using the approach to determining compensation for partial taking we have suggested, rather than that in the Expropriation Act. We believe, though, that our approach is conceptually clearer and more easily understandable in its working. Moreover, we think it would cope much better with the increased number of partial takings that would fall under the compensation provisions of the Expropriation Act if these were extended to apply to strip-takers.

4. *What to Exclude in Determining Market Value*

In providing guidance on what should be included in a compensation award, the Expropriation Act has to some extent defined "market value" negatively—saying more about what it is by saying what it isn't. "What the property would fetch on the open market at the relevant date" is the clear meaning of the Act's definition of market value. But the market is not a pure mechanism reacting only to supply and demand. A number of other factors have the potential to alter market value. Some of these have been nullified for policy reasons by the Expropriation Act.

One of these factors is the value of the land to the taker. Another is the effect of the expropriation, or the public work or purpose involved, on the value of the land. Both of these may enhance the value of the land—giving an undeserved windfall to the owner. But the effect of the project or scheme—of which expropriation is but one vehicle of implementation—may be to depress the value of the land. Disallowing this in determining market value protects the owner from a possible double loss—of both his or her land, and the funds needed to purchase an equivalent property.

With some exceptions,[7] the position of the Expropriation Act on value to the taker and the effect of the project reflects the common law of compensation. But even with the common law as a possible origin, what to do with these factors is a matter of policy that the Act has dealt with wisely, in our opinion.

We would also agree, although with some reluctance, with the Expropriation Act's position on transactions or agreements made after the registration of the notice of intention to expropriate. The Act prohibits their use in determining market value. Admittedly, such agreements may be "manufactured". On the other hand, there are agreements that may have been made in good faith and in complete ignorance of the notice of intention to expropriate, the event that activates prohibition. However, would anyone determining market value attach much weight to such agreements? We think not, and in the interest of not delaying the post-expropriation phase, support the position of the Expropriation Act on these agreements.

We have some difficulty, however, in extending this prohibition to the procedures applying to railway and pipeline companies. Here, there is no document equivalent to the notice of intention to expropriate. One method would be to make the registration of the notice of a

[7] See *Fraser* v. *The Queen*, [1963] S.C.R. 445.

company's application for approval of the specific right-of-way location (submission to the CTC or NEB of a plan, profile and book of reference) in the local registry office the cut-off point for determining whether transactions or agreements may be used as evidence of market value.

Finally, the Expropriation Act disallows any increase in value resulting from an illegal use. The position of the common law of compensation affecting Railway Act expropriations is similar.[8]

5. *Special Economic Advantage*

The Expropriation Act provides the owner with additional certainty that he or she will receive full indemnification for all economic loss arising from an expropriation. As well as market value and disturbance damages, an owner may claim

> ... the value ... of any element of special economic advantage to him arising out of or incidental to his occupation of the land ...

This element of compensation is similar to "special value", which has been used in a number of cases decided under the common law of compensation, using the "value to the owner" approach.

Of course, losses attributable to special value or special economic advantage to the owner might in some instances be recovered as disturbance damages. Take, for example, the structural alterations necessary in the residence of a handicapped person. Recognizing this overlap the Expropriation Act only allows special economic advantage as a basis for compensation if adequate recovery cannot be achieved through claims for disturbance damages or market value.

It should be noted that the rule against double recovery is only applicable to disturbance damages and not to awards based on special economic advantage. The theoretical possibility exists (though is probably rare) for an owner to receive a market value for his property based on its possible use rather than the existing use, as well as compensation for loss of any special economic advantage to the owner arising from his occupying the property as it is presently used. Whatever the logic of this result, we presume it flows from a conscious policy choice. *That the element of special economic advantage provides additional protection to the owner in our view justifies its existence and extension to all expropriations under federal legislation.*

6. *Equivalent Reinstatement*

How is compensation determined for properties that are difficult to evaluate because the particular purpose they are used for, and often

[8] *Re Matell and City of Halifax* (1970), 9 D.L.R. 3d 163.

structurally adapted for, takes them off the market? Who, for example, would buy a church? The courts developed the notion of equivalent reinstatement to assure that owners of such properties are treated fairly by placing them in a substantially equivalent position in an alternative property. This aspect of the common law of compensation continues to apply to expropriations under the Railway Act.

The Expropriation Act accepts the idea of equivalent reinstatement but limits its application to lands having

> . . . 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 . . .

Legislative provisions of this nature elsewhere, notably in Ontario and the United Kingdom, follow the common law and apply more generally to "land . . . devoted to a purpose of such a nature that there is no general demand or market for land for that purpose".

We think the Expropriation Act's approach here should be similar. There are properties, such as theatres and golf clubs, that fall outside the Act's equivalent reinstatement approach, for which full compensation under other elements may be difficult to achieve. Furthermore, it would excessively stretch such an element as special economic advantage if it were to be used as a basis for recovering the total cost of establishing elsewhere when the market value of a special purpose property is minimal. However, if the right to compensation on the basis of equivalent reinstatement is extended, we think the right should be available at the option of the owner, following the examples of New Brunswick and the United Kingdom. This would leave it up to the owner to determine whether or not there was in fact a market value for his or her property.

Equivalent reinstatement, we believe, is a proper element to be included in a modified code of compensation rules applicable to expropriation under federal legislation, such as the compensation provisions in the Expropriation Act. But the element should not just be available to owners of land on which certain defined special purpose buildings are situated. *The right to compensation on the basis of equivalent reinstatement should be available to owners of land "devoted to a purpose of such a nature that there is no general demand or market for land for that purpose".*

We support the Expropriation Act's provisions on the amount of compensation payable under the element of equivalent reinstatement.

The owner receives

> ... the cost of any reasonably alternative interest in land for that purpose and ... the cost, expenses and losses arising out of or incidental to moving to and re-establishment on other premises ...

This is preferable to the more general approach found in Ontario's expropriation legislation where entitlement is to "the reasonable cost of equivalent reinstatement". This formula leaves the possibility open that the courts may follow the decision in *The Queen* v. *Sisters of Charity of Providence*,[9] which awarded as equivalent reinstatement the sum of the market value of the land and the depreciated reproduction cost of the building. Conceivably, depreciation could so reduce compensation that an owner would not have enough to finance reinstatement. We believe the Expropriation Act would prevent this from happening while also limiting the possibility of enrichment. The Act does reduce the reinstatement amount by "the amount by which the owner has improved, or may reasonably be expected to improve, his position through re-establishment on other premises". However, this reduction should not prevent an owner from reinstating himself or herself in reasonably similar premises.

7. *Home for a Home*

Clearly superior to the common law, and consequently the Railway Act which it supplements, is the Expropriation Act's provision establishing the "home for a home" principle. This enables an owner of residential property, the value of which "is less than the minimum amount sufficient to enable the owner . . . to re-locate his residence in or on premises reasonably equivalent to the premises expropriated", to receive this minimum amount. Without this provision, hardships can arise if owners have to find additional money to buy a comparable house. Sometimes, compensation made up of the market value of an expropriated residence plus the costs of moving is just not enough. This happens more often in "blighted" or run-down urban areas when housing of equivalent size and interior quality is much more expensive elsewhere. The *"home for a home" principle should apply to all expropriations under federal legislation.*

8. *Leases and Tenancies*

(i) Compensating the Tenant

What can or should a person renting a house or apartment, or other sort of leasehold interest, expect to recover when the interest is expropriated? Under the common law, and once again because of the Railway Act's silence, under this Act as well, all the tenant can get is

[9] [1952] Ex. C.R. 113.

compensation for loss of the existing lease. The tenant is not considered to have lost more than can be legally enforced, notwithstanding that the likelihood of renewing the lease may be strong.

The value of a leasehold interest under the common law is assessed as the present value of the difference between the rental paid by the tenant, and the rental the property is worth on the unexpired portion of the lease. In other words, if the contract rent matches or is greater than the economic rent, no compensation is payable for the leasehold interest. The tenant as owner of the interest held no special advantage in market terms over other tenants in similar premises.

The Expropriation Act adopted this approach to determining the market value of a lease. However, the Act has improved the tenant's position by giving the owners of leasehold interests a right to special disturbance damages. These, for tenants, are to be calculated "having regard to" the term of the lease and how much longer it has to run, any right or "reasonable prospect of renewal", the investment in the land and the nature of any business carried on by the tenant on the land. *This improvement should be available to tenants affected by expropriation under federal statutes generally.*

The scope of a tenant's entitlement to disturbance damages remains a matter to be determined in each case. However, we note the approach taken in *Re Frankel Steel Construction Limited* v. *Metropolitan Toronto*, which was approved by the Supreme Court of Canada.[10]

In this case, the compensation awarded to a tenant who was forced to move because of expropriation included an element as disturbance damage based on moving expenses. The court considered these expenses to be costs that a tenant would eventually have to pay at the expiration of the lease. Consequently, compensation was based on "the acceleration of the expense rather than . . . the expense itself". Having lost the use of "the fair cost of moving" earlier than at the end of the lease, the tenant received what it would cost to borrow "the fair cost of moving" for the unexpired portion of the lease.

If this case had involved determining compensation under the Expropriation Act, then obviously the longer the period of time the tenant could reasonably show he would have stayed, whatever the term of the lease, the higher the disturbance damages that would probably have been awarded. And the more realistic these might be.

Although a tenant may receive some compensation as disturbance damages for loss of a reasonable prospect of renewing a lease, is not

[10] (1966), 58 D.L.R. (2d) 578; [1970] S.C.R. 726.

the real impact of such a prospect on the market value of the leasehold interest? Surely, a lease may itself be more valuable to the prospective tenant, if renewal is a strong possibility, and to a landlord in order to keep a good tenant. We cannot, of course, deny that the possibility of renewal is a speculative matter. But is it so speculative that its impact on market value, even though demonstrable, should be ignored, as the Expropriation Act and legislation in Ontario do?

If a reasonable prospect of renewal can be satisfactorily proved, we think it should be taken into account in determining the market value of leasehold interests expropriated under federal legislation. Merely because the majority of claims based on such prospects probably cannot be proven is not an adequate reason for barring all claims. Nor are difficulties in determining the terms on which the premises would be leased for the renewal period. Since there may be exceptions and because of the large numbers of residential leases, the prospect of renewal should not be ignored as an element of market value.

(ii) Does Expropriation End the Lease?

Neither the Expropriation Act nor the Railway Act indicates whether an expropriation frustrates or ends existing leases. Does the tenant continue to have an obligation to pay rent, and the landlord a right to receive it, even though the premises can't be used in whole or in part because of the expropriation? The common law is uncertain here although a recent decision of the courts provides additional support for the position that expropriation does frustrate leases.[11] *To remove any doubts, we believe that what happens here should be clearly stated in the Expropriation Act.* Legislation in Ontario provides an appropriate model:

> Where all the interests of a lessee in land is expropriated or where a 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 . . . the lease shall be deemed to be frustrated from the date of the expropriation.

For partial expropriations of leasehold premises when a tenant can continue in possession, "the lessee's obligation to pay rent under the lease shall be abated *pro tanto* . . .". Without a provision of this sort, the tenant probably must pay rent until the end of the lease. As a result, calculating compensation on expropriation is unnecessarily complicated.

We find the Ontario model here suitable and feasible for federal expropriations.

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[11] *Rosenblood* v. *Plastic & Allied Building Products Limited*, (1970) 9 D.L.R. (3d) 123, 127-28.

9. *Mortgages and other Security Interests*

Little guidance exists in the common law on how to value mortgages and other security interests in land on an expropriation. Traditionally, the balance of the principal and interest outstanding against the land at the time of expropriation has been recognized as the proper entitlement. The Expropriation Act has maintained the "outstanding balance" method of compensating the mortgagee, the person who lent money against land.

The alternative to this method is the market value approach. And indeed, this approach has a definite inherent logic and apparent practicality to it. After all, mortgages do have a market value since they are bought and sold almost daily, in large urban centres in particular. Since the owner's compensation is based on the market value of the land, why shouldn't the mortgagee's be based on the market value of the mortgage?

The Ontario Law Reform Commission preferred the traditional approach, believing that there were practical difficulties in determining the market value of mortgages because of the state of development of the mortgage market. Furthermore, the Ontario Commission was influenced by the fact that a mortgagee's interest is not confined to an interest in land—an owner owing money on a mortgage has a contractual obligation to pay the mortgagee the outstanding principal and interest. Surely, argued the Ontario Commission, if expropriation interferes with that contract, the lender (the mortgagee) should receive at least the principal outstanding. Adopting the market value approach might result in a mortgagee receiving less than the amount loaned—a consequence the Ontario Law Reform Commission considered to be unacceptable.

But there is another side to this coin, which reveals equally disturbing consequence of the outstanding balance method. Since the compensation on expropriation payable to an owner depends on the whims of the market for land, an owner in times of falling land prices may end up with less compensation than the amount of principal outstanding and owed on an existing mortgage. Admittedly, the legislative reform resulting from the Ontario Law Reform Commission's study of expropriation law helped to reduce the squeeze felt by owners in situations such as this. But why prop up an approach that may lead to such unacceptable situations, particularly when there may be an alternative that can stand alone?

The Law Reform Commission of British Columbia examined the alternative approach in its 1971 Report on Expropriation and recom-

mended the market value method. The British Columbia Commission noted that the outstanding balance method had the advantage of being easily understood and simple to use. However, "there has been a kind of hypnotic fascination with the sum owed under the mortgage, even though the sum is payable by deferred payments." In other words, the mortgage has been considered as "an isolated contract rather than an investment."

The various ways in which the shortcomings of the outstanding balance method have been met legislatively, in the British Columbia Commission's view tend to penalize the expropriator. If, for example, higher interest rates prevail than the rate set in the mortgage, the mortgagee will be very pleased to receive and reinvest the outstanding principal. "Expropriation will have resulted in the substitution of a more valuable investment" for the mortgagee. And the expropriator as well as subsidizing this windfall for the mortgagee will also have to pay disturbance damages to compensate the mortgagor (the owner) for having to pay higher interest.

The British Columbia Commission concluded that "using the market value principle would avoid all the difficulties of trying to make the outstanding-balance method fair by creating a number of complicated exceptions". And the Alberta Institute of Law Research and Reform in its recent Report on Expropriation in 1973 has agreed with this conclusion.

There may, however, be some practical costs and limitations to the market value method that have been overlooked by its proponents. How even are mortgage market values across the country? Since most expropriation claims are settled voluntarily, would using the market value approach slow down settlement? Would it increase the cost of settlement because of additional fees payable to appraisers and solicitors?

The Expropriation Act attempts in a number of ways to counter the possible harsh effects of the outstanding balance method of compensating mortgagees. For example, the owner-mortgagor receives "the amount of any loss or anticipated loss . . . resulting from a difference in the rates of interest during the remainder of the period for which any principal amount payable under the terms of the security was advanced . . ." As might be expected, under the outstanding balance approach the mortgage receives the principal amount outstanding and the accrued interest. But also due to the mortgagee from the expropriator is an amount equal to three months' interest at the mortgage rate as disturbance damages for the cost and inconvenience of having to reinvest the capital involved.

Some harsh effects have not been remedied. The Expropriation Act gives no compensation to mortgagees, as it does to mortgagors, for loss that results when at the date of expropriation interest rates are lower than the rate in the mortgage. Legislation in Ontario treats mortgagors and mortgagees more equally in this respect. And so should the Expropriation Act if the outstanding balance approach is retained.

Nor does the Expropriation Act relieve the mortgagor from the squeeze mentioned earlier—contractual liability for deficiencies to the mortgagee should the balance owing exceed the value of the land. This can happen when expropriation occurs in a time of falling land values, particularly if it follows a period when land transactions have been financed by very small down payments and high mortgages. The owner may receive as compensation on expropriation an amount for the market value of the land that is less than the principal owing on the mortgage. Ontario has attempted to protect owners in situations like this by relieving them from having to make up deficiencies in the case of purchase-money and bonus mortgages. Relief was limited to these types of mortgages because land prices are often inflated when small down payments are involved. In most cases, the vendor-mortgagee would probably have accepted a lesser amount in cash. In other types of mortgages, so the reasoning in Ontario went, "it seems appropriate the mortgagor should be liable for the full amount since mortgage monies have actually been advanced."

We believe the Expropriation Act's reliance on the outstanding balance method requires protection to the owner-mortgagor similar to that provided in Ontario's expropriation legislation, at the very least. But rather than engage in suggesting legislative reform that raises constitutional questions, *the easiest and best solution may be to adopt the market value approach to compensating mortgagees on expropriation.* Getting rid of the complicated exceptions and props supporting the outstanding balance method seems to outweigh any disadvantages of the market value approach.

10. *Who Should Determine Compensation*

We have already covered in some detail the question of how compensation should be determined. But who should apply the various rules and principles of compensation? What is the appropriate institution or tribunal or individual for doing this?

Obviously, whoever fixes compensation should be independent and have no relationship of any sort with parties who may have compensation claims to be determined. Furthermore, whoever assesses the

compensation payable on an expropriation should be competent and experienced, know the relevant law and how to apply it to the sort of facts and opinions likely to be introduced as evidence supporting claims. We would agree with the McRuer Report that "a properly established tribunal to hear compensation claims should have the same independence as a court of justice". In addition, we believe that such a tribunal should be accessible to claimants.

We shall now review the provisions in the Expropriation Act and the Railway Act that dictate who shall determine compensation, initially and finally. This review includes a consideration of appeals open to parties dissatisfied with the compensation awarded.

(i) Under the Expropriation Act

The Expropriation Act meets the requirements of independence and competence. The Trial Division of the Federal Court is the tribunal named to determine compensation under the Act. Its decisions can be appealed to the Federal Court of Appeal, and thence to the Supreme Court of Canada, either by leave, or automatically if there is more than a question of fact involved and the amount in controversy exceeds $10,000.

Both the Trial Division and the Federal Court of Appeal sit across the country and are in no way limited by statute to sit only in Ottawa and the provincial capitals. In fact, the Federal Court Act gives the Chief Justice of the Court discretionary authority to arrange the sitting of that court "to suit, as nearly as may be, the convenience of the parties".

(ii) Under the Railway Act

Compensation under the Railway Act is fixed at first instance by tribunals composed of a judge of the county or district court for the county or district where the lands lie, or in Quebec, by a superior court judge for the district or place in which the lands are located.

When the award exceeds $600, or when a party claims more than $600 in its notice of appeal, the award of this tribunal may be appealed

> upon any question of law or fact, or upon any other ground of objection, to a superior court, or the court of last resort of the province in which the lands lie, if the judge of the superior court has been constituted arbitrator.

This provision clearly does not place any limit on appeals from very small awards by claimants who may always claim more in the notice of appeal. There is, however, a limit on appeals by the expropriator—

the railway, pipeline and other companies or bodies that may expropriate using the Railway Act's powers and procedures. For awards of less than $600, an appeal is possible "upon any question of law or . . . mistake appearing on the face of the proceedings, to a superior court or to the court of last resort as the case may be . . .".

Just what is the proper court in which one may appeal an arbitrator's award, as the decision of the initial tribunal determining compensation is called? A "superior court", according to the Interpretation Act (no definition appears in the Railway Act) is the supreme court of the province, and in Quebec, the Court of Queen's Bench and the Superior Court. But in some provinces, notably Ontario, the Supreme Court consists of two branches, the Court of Appeal and the High Court of Justice. Which one should the prospective appellant choose? Judicial interpretation of similar legislative definitions indicates that one appears to have a choice. However, if the High Court is selected, then there is no further appeal to the Court of Appeal.

We should note that further appeals are expressly prohibited by the Railway Act where less than $5,000 is involved although the prohibition can be avoided. One may not appeal a "superior court's" decision, "except where the amount awarded by or *claimed in the appeal* from such decision exceeds $5,000 . . ." (our italics). There appears to be nothing to prevent a claimant from increasing the amount claimed if an appeal is desired.

In addition, there may be the possibility of an appeal to the Supreme Court of Canada.

However, if one has opted in the previous appeal to use the trial division of a provincial superior or supreme court, further appeal to the Supreme Court of Canada is foreclosed. After all, as we previously noted, one cannot appeal from the trial division to the appellate division of a provincial superior or supreme court. And a judgment of a trial division is not a judgment "of the highest court of final resort" in a province—an essential prerequisite for appealing to the Supreme Court of Canada. Appeals to this court by leave and *per saltum* have similar requirements. So a party, who could be the expropriator, can prevent any possible second appeal by appealing the arbitrator's initial decision on compensation to a provincial superior court trial judge.

We see obvious scope for improvement in the Railway Act's provisions that state who determines compensations initially, and set up a system of appealing that decision. But understandably, our concerns go further than merely improving the Railway Act. Is it possible to

devise a simple uniform adjudication system for compensation determination that could apply to all expropriations under federal legislation? What attributes should such a system have?

(iii) A Uniform System of Adjudicating Federal Expropriation Compensation Claims

Previously, we have mentioned that the tribunal determining compensation should be independent and competent—two rather obvious attributes for all decision-makers to have if their decisions are to be accepted. At present, only judges fix compensation in federal expropriation cases beginning either in the Federal Court's Trial Division under the Expropriation Act, or as arbitrators under the Railway Act, and later in the courts during the various stages of appeal. So our concern about independence has already been met in the traditional fashion.

Competence—the ability to do one's job well—is a more elusive attribute. Normally, it comes from having to do the same sort of job fairly often. By assessing the frequency with which our judges decide compensation claims arising from expropriations under federal legislation, some measure of competence may be made.

One approach is to look at the index to the 1973 Federal Court Reports, which includes unreported decisions. This index lists some 18 cases involving compensation for expropriation. Since there were nine Trial Division judges, and three deputy judges during 1973, we conclude, albeit superficially, that a reasonable opportunity for exposure to compensation cases exists in that Court.

On the other hand, claims arising from expropriation under the Railway Act have been infrequent in recent years. The number of judges who may act as arbitrators totalled 274 in 1973—182 county and district judges, and 92 superior court judges in Quebec. Thus, competence in federal expropriation matters acquired through experience is probably rare among these judges. Nor, is equivalent experience gained by these judges, with the exception of those in Saskatchewan, through exposure to provincial expropriation claims.

Balanced against this probable lack of experience, however, are the attributes of familiarity with local conditions and accessibility. The latter we think is extremely important, particularly when small claims are involved. On these grounds, even twelve full-time Federal Court Trial Division judges sitting across the country could not compete with 275 county, district and Quebec superior court judges.

Given the advantages and disadvantages of the existing compensation systems, what are the best available options for adjudicating

compensation claims arising under federal expropriation legislation? We think there are three.

1. All cases could be heard in the first instance in the Trial Division of the Federal Court, following the Expropriation Act. This tribunal sits across the country and has competence based on experience. However, its procedures may be expensive and burdensome for parties claiming small amounts. Delay could result because of excessive case-loads. Appeals from the Trial Division would be possible in the ordinary way.

2. All cases could be heard at first instance by county, district, and Quebec superior court judges, acting as arbitrators, following the Railway Act. Here, accessibility is increased and the financial costs are probably reduced but at a probable cost in competence. For the sake of uniform interpretation, appeals from these first instance decisions would go to the Federal Court of Appeal.

3. This option combines options 1 and 2. The claimant could have the right to commence in either way, although if the claim is for more than $5,000, the expropriator would have the right to have the claim transferred to the Trial Division of the Federal Court. Only awards at first instance when the amount in controversy exceeds $2,000 could be appealed to the Federal Court of Appeal. This option combines the best features of options 1 and 2, although the suggested minimal amounts in controversy that could bring the claim into the Federal Court of Appeal or Trial Division may be low.

One common feature of all these options concerns appeals to the Supreme Court of Canada. Here, we know of no reason for treating expropriation compensation cases differently. The legislation which determines the jurisdiction of the Federal Court and Supreme Court of Canada should govern.

As is apparent, we favour option 3 because it seems to be the most practical approach at this time. This reflects our realization that no one option is clearly and obviously better than any other. We believe option 3 would provide a workable uniform system for adjudicating compensation claims arising from expropriation under federal legislation.

(iv) Procedure Before Compensation Tribunals

At present, arbitrators determining compensation under the Railway Act are given virtually no procedural guidance on orderly conduct of hearings or pre-hearing proceedings. Because of this, procedures vary greatly and parties are very much subject to the whims

and preferences of individual arbitrators. Admittedly, the basic procedural "decencies" can be met in a variety of ways. However, parties have a right to know what to expect in an arbitration, if this is at all possible.

We think that uniform procedures, if they are simple and fair, if they avoid delay and excessive formality, are possible and advisable for compensation tribunals of first instance either under the Railway Act or our options 2 and 3.

(v) Making a Uniform System of Adjudication Work Well—Publishing Significant Decisions

Any specialized tribunal of first instance gains expertise and confidence more quickly if an adequate system of reporting all significant cases exists. The Land Compensation Reports can fulfill this need for the uniform adjudication system we suggest. Furthermore, uniformity of substantive law, such as the introduction of a single modified code of compensation rules for all federal expropriations, increases the usefulness of case reports. More and more cases will provide relevant precedents. A body of jurisprudence will be built up that will not only aid compensation tribunals, but also expropriators and claimants in settling their claims.

11. *Interest on Compensation*

An owner may have neither compensation or land for a period of time during the post-expropriation phase. Title may have been lost, perhaps possession too, but compensation may still not be finally determined. As a result, both the Expropriation and Railway Acts provide for interest on compensation. However, their approaches differ.

The Expropriation Act states that interest is payable at

> . . . a rate [known as the basic rate] determined in the manner prescribed by any order made from time to time by the Governor in Council . . . being not less than the average yield, determined in the manner prescribed by such order, from Government of Canada Treasury Bills . . . on the compensation from the date the Crown becomes entitled to take possession or make use of the land to which a notice of confirmation relates.

Indexing the interest rate to the yield of government treasury bills maintains the rate at a level more in keeping with the current cost of money. The Basic Rate Order presently in force sets a minimum rate of six per cent per annum and a possible maximum arrived at by calculating the average yield of treasury bills over certain four-week periods.

In addition, the Expropriation Act uses interest as a penalty or reward in order to improve the operation of other aspects of the Act. For example, interest is payable for additional periods if the compensation awarded exceeds the amount offered. This increases the pressure on the expropriator to make a reasonable offer. In a similar fashion, owners are encouraged not to delay unreasonably the giving up of possession.

The Railway Act says nothing about how much interest should be paid. As a result, the Interest Act's unrealistic rate of five per cent per annum applies. On the face of it, the Railway Act's provision on interest merely confers a discretion on the arbitrator who

> ... may include in the award an allowance for interest on the compensation or damages from the date of deposit of the plan, profile and book of reference with the registrar of deeds or for such shorter time as he deems proper.

In practice, however, and following the common law of compensation, interest is normally awarded from the date the expropriator takes possession. If the land is vacant and unproductive, or when continued possession following expropriation confers no benefit on the owner, then interest may run from the date of the taking. However, because cases have been few, it is difficult to predict what the courts will do here. Legislative clarification would obviously help.

We find the Expropriation Act's approach to interest on compensation more realistic, predictable and workable than that of the Railway Act. It is, we believe, quite suitable for wider application.

12. *Costs—Providing the Means for Owners to Exercise Their Rights*

An owner who has been expropriated, or who faces expropriation if he doesn't sell, should be able to seek advice and assistance (legal, appraisal or otherwise) that is reasonably needed to discover and assert his rights and remedies. The owner should not be barred from having compensation determined by the courts because of the costs of the proceedings. Ideally, we would like to see the owner receiving full indemnity for all such costs. After all, compensation for all proven losses flowing from an expropriation is for us an essential of good expropriation law. But owners, it must be said, should not be encouraged to pursue unreasonable claims for compensation by being reimbursed their costs in all cases.

(i) Under the Railway Act

An owner facing expropriation under the Railway Act cannot expect to recover the full costs of legal, appraisal or other expert advice and representation, even though reasonably incurred in determining the

amount of compensation through voluntary negotiation, arbitration or in the courts. All that the Railway Act says about costs is that

> The costs of the arbitration are in the discretion of the arbitrator and shall be paid by the party against whom he allows the costs and it is the duty of the arbitrator to state in his award whether the whole or any part of the costs are allowed and by whom they are to be paid.

The "costs of the arbitration" are the most that the party can hope to recover. And even being awarded these will not pay for the *real* costs of the arbitration. By a quirk in the law, the word "costs" in the Railway Act, as in many other acts, does not mean exactly what it says. It does not mean "full costs". It means that costs are paid on what lawyers describe as a "party and party" basis which only amounts to a partial indemnity.[12] Furthermore, the Railway Act does not expressly include appraisal, engineering or other relevant expert fees in its definition of costs. So the owner will have to reach into his own pocket to pay these.

There may also be costs that have been incurred before arbitration that are probably not recoverable at all. There is nothing in the Railway Act to entitle an owner to recover costs incurred in attempts to negotiate a settlement of the purchase price, or during applications for approval of the line's general location, or plan, profile and book of reference. And although the General Rules of the CTC provide that "the costs of and incidental to any proceedings before the Commission... are in the discretion of the Commission...", the CTC has never awarded such costs.

How the arbitrator will exercise his discretion to award the owner the costs of the arbitration is not entirely predictable. But the practice apparently is to give costs to the owner if the award exceeds the company's offer, and to the company if it is less.

We find the owner's position here to be untenable. Not only is the owner not compensated for all proven losses, but he may well be deterred from challenging a less-than-fair offer of compensation because the costs of doing so are too high and not entirely recoverable. And if the award is slightly less than the amount offered, the owner might be liable to pay not just his own costs but also a portion of the expropriator's too, even though the owner was quite reasonable in proceeding to arbitration.

(ii) Under the Expropriation Act

The Railway Act's shortcomings are remedied to some extent by the Expropriation Act. But this Act still falls short of the position

[12] *Re Ewart and Toronto Terminals Rwy.*, [1932] 1 D.L.R. 582.

we prefer—full indemnity to an owner for all costs, legal and otherwise, if reasonably incurred.

The Act provides some compensation for the costs of making an objection in the pre-expropriation hearing proceedings. A tariff prescribed by order-in-council sets limits to the costs that can be recovered—limits which may be and have been unrealistically low. But these can be easily changed without legislative reform.

The Act does give full indemnity to the owner for the costs incurred during voluntary negotiation. The owner receives "an amount equal to the legal, appraisal and other costs reasonably incurred... in asserting a claim for compensation" prior to the institution of court proceedings to determine compensation.

Whether an owner recovers the costs of court proceedings depends, under the Expropriation Act, on the amount of compensation the Federal Court awards. To limit unnecessary actions, the owner receives no indemnity for these costs if the Court considers the amount claimed to be unreasonable. However, if the Court finds the amount claimed to be reasonable, although the amount awarded is less than the amount offered by the expropriator, then the owner will receive his costs. But again, as under the Railway Act, these are calculated on a "party to party" scale which gives the owner less than the real costs incurred. Since the reasonableness of an owner's claim can be assessed using several criteria, such as the timing of the offer, the extent of the difference between the offer and the award, and the possibility of the owner's evidence and submissions, it is difficult for an owner to be able to predict whether or not costs will be recovered. And this could unfairly deter some claimants from having their claims settled by the Court. Admittedly, the Federal Court Rules do enable the amounts awarded for costs to be raised in special circumstances. However, it might be wise to spell out for expropriation cases what these circumstances are.

If the amount awarded the owner exceeds the expropriator's offer, then the Expropriation Act gives the owner his costs "determined by the court on a solicitor and client basis". This is traditional lawyer's language for the next scale of costs—higher than "party and party" but not as high as "solicitor and own client". We see no reason why these terms should be used in the Expropriation Act, or indeed in any public statute. They confuse the non-lawyer, who must consult a lawyer to find out what they mean, only perhaps to discover that he cannot recover fully the cost of that consultation!

We have also searched unsuccessfully for the reasons why an owner should receive the full costs incurred during negotiation, but not

during the court stage of the proceedings where the court accepts the owner's contention that the expropriator's offer was too low. Giving full indemnity for costs in both stages should promote voluntary settlement by encouraging the owner to negotiate and the expropriator to offer a more acceptable amount.

(iii) Suggestions

While the costs provisions of the Expropriation Act are superior to the Railway Act's single section on arbitration costs, some improvements are needed. *Owners should be fully indemnified for reasonably incurred costs from the time of expropriation to the date of the award or to the termination of related proceedings.* These costs, after all, are part of the losses caused by expropriation or the possibility of expropriation. *The Court should be able to award full indemnity for costs to the owner when the award does not exceed the offer, when the Court considers it just and equitable to do so.* This should allow owners who are thinking about having their claims adjudicated base their decision on whether to proceed on the merits of their claims, rather than on the prospect of having to pay part of the costs involved.

Our suggestion here reflects experience in Ontario where the owner receives full indemnity for costs if the amount awarded is 85 per cent or more of the amount offered. There, since the offer is made three months from expropriation and long before the claim gets to Court, it is almost impossible for an owner not to fall within the rule and receive a full award of costs. We prefer to give the discretion to the Court to assess whether it would be fair or just and equitable not to indemnify owners for their costs.

This concludes our detailed examination of the laws affecting the three phases of most expropriations by government, and virtually all expropriations by strip-takers. There are, as we have pointed out, a significant number of inadequacies that call for legislative action. Most important, however, is our finding that a uniform expropriation statute (that includes what we believe are the essentials of good expropriation law) is feasible and can correct these inadequacies. However, because of the special problems arising from land acquisitions by railway and pipeline companies, and the regulatory control over their operations by specialized agencies, special procedures for strip-takers are necessary during the pre-expropriation phase. These procedures, nevertheless, should give affected owners the same rights and protections they would have if they faced an expropriation by a non-strip-taker.

Other Federal Expropriation Powers

I. *Who Has the Power to Expropriate*

So far, we have examined the statutes—the Expropriation Act, the Railway Act, the National Energy Board Act—that govern most federal expropriations. But as we mentioned earlier, these Acts are not the only general enabling statutes conferring the power to expropriate on government and private enterprise. Some eleven other statutes also allow government—a Minister, the Cabinet, or a public authority—and certain private enterprises to resort to expropriation. These Acts are listed in the accompanying Tables I and II. We shall have more to say about them shortly.

In addition, many private or Special Acts grant the power to private enterprises. Most of these enterprises are railway or pipeline companies that have been given the power by the Railway Act and the National Energy Board Act. However, many other "public utility" types of private enterprises have also received the power by specific legislative grants as the accompanying Table III indicates.[18]

[18] A two-volume collection and analysis of Special Acts conferring the expropriation power is filed in the Ottawa office of the Law Reform Commission.

TABLE 1

Government as Expropriator

EXPROPRIATOR:	ENABLING LEGISLATION:
Minister of Public Works (MPW)	Expropriation Act
MPW (Canadian Broadcasting Corporation)	Broadcasting Act*
MPW (Canadian Overseas Telecommunications Corporation)	Canadian Overseas Telecommunications Corporation Act*
MPW (National Capital Commission)	National Capital Act*
MPW (National Harbours Board)	National Harbours Board Act*
MPW (Northern Canada Power Commission)	Northern Canada Power Commission Act†
MPW (St. Lawrence Seaway Authority)	St. Lawrence Seaway Authority Act†
MPW (Telesat Canada)	Telesat Canada Act†
Cape Breton Development Corporation	Cape Breton Development Corporation Act†
Minister of Agriculture	Experimental Farm Stations Act*
Minister of Transport	Government Railways Act*
Minister of Indian Affairs and Northern Development	National Parks Act*
	Dominion Water Power Act*
National Battlefields Commission	National Battlefields at Quebec Act*
Harbour Commissions	Harbour Commissions Act†
Fort-Falls Bridge Authority	Fort-Falls Bridge Authority Act†
Minister of Energy, Mines and Resources, and Government-sponsored Companies (as defined by the Act)	Atomic Energy Control Act
Government (Her Majesty)	Radio Act
Government (Her Majesty)	Telegraphs Act
Cabinet (Governor-in-Council)	War Measures Act

* And the Expropriation Act.
† And the Railway Act.

TABLE II

Private Enterprises as Expropriators

EXPROPRIATOR:	GENERAL ENABLING LEGISLATION:
Railway and Other Companies	Railway Act
Oil and Gas Pipeline Companies	National Energy Board Act*
Commodity Pipeline Companies	National Transportation Act (and National Energy Board Act)*
Power Companies	Dominion Water Power Act
Dry Dock Companies (as defined by the Act)	Dry Docks Subsidies Act
Water Use Licencees	Northern Inland Waters Act
Marine Electric Telegraph Companies	Telegraphs Act

*And a special Act or Letters Patent

TABLE III

Number of Special Acts Conferring the Power of Expropriation (Directly or by Reference)

ACTS ESTABLISHING COMPANY AS EXPROPRIATOR	PASSED BEFORE 1953	AFTER 1953
Railway (1867-1952)	about 1100	10
Pipeline	12	26
Bridges and Tunnels	at least 60	4
Booms (prior to 1913)	at least 12	0
Canal (1870-1911)	at least 9	0
Docks and Harbours (1847-1893)	at least 6	0
Hydraulic (prior to 1900)	at least 4	0
Irrigation	at least 6	0
Power (1873-1927)	about 20	0
Railway Ferry (1877-1910)	at least 3	0
Telegraph and Telephone (1905-1906)	at least 2	0
Total	at least 1234	40

II. *How Has the Power to Expropriate Been Conferred*

Our review of the general and specific statutes that confer, or may attempt to confer, the power of expropriation reveals serious inadequacies. Some of these flow from the different ways in which our legislators have conferred the power and attempted to place time limits on its use. It is not always clear from the language used in Special Acts whether the power has indeed been granted, what procedures govern its use if it has been granted, and how long it lasts.

A. *Clearly Conferring the Power*

Whenever our legislators have decided to confer the power to expropriate, one would think they would simply enact a statute saying "X may expropriate . . .", or some equivalent phrase. But this approach has not been generally used. Special Acts, in particular, use ways of conferring the power that mask the legislative intent.

These Acts often refer to enabling expropriation statutes, like the Railway Act, in order to confer the power and indicate how it should be used. And these references normally state that the Railway Act, or parts of it, are to apply to the company's undertakings. So the possibility exists for a company to be granted the expropriation power by a Special Act without any mention of expropriation.

A company, of course, may have the power to expropriate because of general enabling legislation, even though its Special Act says nothing, directly or by reference, about it. However, as most general statutes provide, Special Acts have priority. If a railway company's Special Act stated the company could not expropriate, then the company is effectively barred from expropriating whatever the Railway Act may say about the powers of railway companies in general.

Many Special Acts have conferred the expropriation power merely by referring to the Railway Act. These references follow no particular pattern. Some are precise, and some are vague. And occasionally, it is not entirely certain whether a reference has actually conferred the power. Take the Ontario-Niagara Connecting Bridge Company Act of 1916, for example:

> . . . the Railway Act shall apply to the works and undertakings of the company and wherever in this said Act the word "railway" occurs, it shall, for the purposes of the company, and unless the context otherwise requires, mean the said bridge.

Does this mean that the Company has all the rights and powers concerning land acquisition conferred by the Railway Act on railway companies?

Some Acts say even less. All that the Burrard Inlet Tunnel and Bridge Company Act of 1910 mentions is that

> ... the Railway Act shall apply to the company and its undertaking.

When a Special Act also specifies that certain procedures must be followed in the event of an expropriation, conflicts often arise. The reference to the Railway Act contained in the River St. Clair Railway Bridge and Tunnel Company Act of 1872 states that

> ... the Railway Act ... is hereby incorporated with this Act, and shall form part hereof and be construed therewith as forming one Act.

The Act goes on to require the company to have the plans and the site for the bridge or tunnel approved by the Cabinet. Does this mean that the sections in the Railway Act requiring approval of general location, followed by approval of a plan, profile and book of reference, still apply?

Some Acts make fairly satisfactory references to the Railway Act. One of these is the Fort-Falls Bridge Authority Act of 1971, a public Act, which provides

> ... the Authority may ... take or acquire without the consent of the owner any lands or interest therein actually required for the construction, maintenance and operation of the bridge, and sections [156-184] of the Railway Act apply with such modifications as the circumstance require.

Here it is clear that the Railway Act provisions respecting the acquisition of title and the determination of compensation are applicable, but that the provisions concerning the selection of the land to be expropriated are not. Being specific thus promotes a clearer understanding of the legislators' intentions.

We agree with the McRuer Report that whenever the power to expropriate is conferred, the language used should be "forthright and clear". Furthermore, *it is preferable that "the power should immediately be recognizable without the examination of any other statute".*

B. *Setting Time Limits on the Power's Use*

Some Special Acts limit the expropriation power's use by specifying a date after which the power is lost. A typical example appears in the Medicine Hat and Northern Alberta Railway Act of 1902.

> ... if the railway is not finished and put in operation within five years after the passing of this Act, the powers of construction granted by Parliament shall cease and be null and void as respects so much of the railway as then remains uncompleted.

If construction is not completed within five years, and assuming that no statutes extending the five-year limit have been passed (although many such statutes have been enacted), it seems clear that the company no longer has the power to expropriate any land. At the end of five years, the company would no longer be a "company" as defined by the Railway Act and under that Act only "companies" can expropriate. So we see that Parliament has attempted to control the powers of expropriation it has given to many private enterprises. Indeed, the Railway Act declares that the powers granted by it "cease and are void" if construction has not begun within two years, or the line remains uncompleted after five years, from the authorizing of construction.

However, companies governed only by the Railway Act, or by Special Acts similar to the one quoted above, still have the power to expropriate for branch lines running from the portion of the main line completed. And they may also take additional land at any point along the constructed portion.

Another kind of time limit, which was used with less frequency, is more permanent in its effect.

> ... the works authorized by this Act shall be commenced within three years, and the main ditch or canal completed within six years from the passing of this Act; otherwise the rights and privileges herein conferred shall cease and determine.[14]

In this case, the powers of the company come to an end at the end of the time period leaving no possibility for the exercise of residual powers.

Many Special Acts passed years ago, however, do contain residual or dormant expropriation powers. A company may no longer be operating. And the public interest that once justified giving the company a power to expropriate may have disappeared. Yet, the company if activated may still be able to use its expropriation power. We are troubled by this. Special Acts are rarely repealed, and never consolidated and included in the up-dated publication of federal legislation, the Revised Statutes of Canada. They have for all practical purposes dropped from public view, although not from possible use.

As an example of what can happen, we note that in 1960 the Restigouche Boom Company, incorporated by private Act in 1910, applied to the Board of Transport Commissioners, the predecessor to the CTC, for leave to expropriate additional lands under the Railway Act. The company had not been active for many years. Yet as the company's Special Act required, the Cabinet approved plans showing the lands to

[14] MacLeod Irrigation Company Act of 1891.

be acquired. After a public hearing, at which no one appeared to oppose the application, the CTC approved the expropriation. Admittedly, there may have been no harm caused to anyone in this case. But what Parliament considered to be in the public interest in 1910 may not have been what it considered to be in the public interest in 1960. *The power to expropriate given to private enterprises for specific purposes should end when the public interest justifying its existence disappears.*

III. *Rationalizing Expropriation Powers Held by Private Enterprises*

A. *The Unfortunate Legacy of the Special Acts*

One finds the essentials of good expropriation law with difficulty in the legacy of Special Acts we have described. Different procedures may apply to expropriations by similar companies, hardly a pattern that promotes equal treatment of owners facing expropriation. The power to expropriate may not even be clearly conferred. The Special Acts that confer the power, directly or by reference, are difficult to find since they are scattered through more than 100 years of annual volumes of federal statutes. And there is no easy way of determining whether a Special Act has been amended, for example, to extend the time period during which a company can expropriate. We know there are dormant expropriation powers. But no one knows exactly how many. Many Special Acts rely on the expropriation provisions of the Railway Act, sometimes when there is no strip-taking involved. And this, given our previous conclusions about the adequacy of the Railway Act, does not provide affected owners with the protections we consider essential to good expropriation law.

The need for change here is clear. To begin with, *the Expropriation Act, amended as we have suggested, should apply to expropriations by all private enterprises.* This is the only way of ensuring equal treatment.

While the power to expropriate should be clearly conferred, it is impractical to suggest the amendment of more than 1000 Special Acts that confer the power. It is also impractical to call for the identification and repealing of all dormant expropriation powers. Instead, it seems more appropriate to set a time period of five years similar to the time period allowed by the Railway Act and many Special Acts, for the exercise of the expropriation power. Dormant powers could be used during this five-year period provided the Minister of Public Works issued a reasoned decision that the use of the power is in the public interest. However, at the end of the period all expropriation powers conferred

on private enterprises by Special Acts before the period began should be terminated. The five-year life period should apply to all similar expropriation powers granted in the future. And these, of course, should be conferred in clear expressed terms so that no one can be uncertain about what has been done.

B. *Private Enterprises Granted the Power to Expropriate by other Public Acts*

There are five public statutes listed in Table II other than the Railway Act and the National Energy Board Act, that confer the expropriation power on certain private enterprises.

1. *The National Transportation Act and Commodity Pipeline Companies*

Pipelines carrying solids suspended in liquid are technologically feasible but not yet operational in Canada, as far as we are aware. Nevertheless, the National Transportation Act gives commodity pipeline companies the expropriation power by referring to the Railway Act's title, acquisition of possession and compensation provisions. It also brings these pipelines under the regulatory authority of the CTC. However, no doubt since pipelines are involved, the certificate of public convenience and necessity, plan, profile and book of reference provisions of the National Energy Board Act apply to commodity pipelines even though the approval authority is vested in the CTC rather than the NEB.

In contrast to CTC decisions concerning approvals of general locations under the Railway Act, a decision of the CTC on the issuance of a certificate of public convenience and necessity here may be appealed to the Minister of Transport. Furthermore, regulatory authority for a combined pipeline, a commodity pipeline which can carry oil and gas as well, is shared between the CTC and the NEB. Their joint decision on issuing a certificate must be approved by Cabinet. We note also that the Cabinet can give the NEB sole jurisdiction over combined pipelines.

The only sensible way to treat commodity pipeline companys' powers of land acquisition and expropriation is to subject them to the same provisions that apply to other strip-takers. It does not matter which regulatory agency grants approval for particular pipelines, provided political responsibility, exercised either by the Cabinet or an individual minister, exists for the final approval that activates the use of the expropriation power. (So our previous comments and suggestions about

pipelines apply here as well.) *The Railway Act, as it now is, is as inadequate for commodity pipelines as it is for oil and gas pipelines, and railways.*

2. *The Dominion Water Power Act and Power Companies*

Power companies, authorized by the Minister of Indian and Northern Affairs, may expropriate for certain purposes and

> ... all the provisions of the *Railway Act* ... [that] are applicable to the taking and acquisition of lands by any railway company, apply as if they were included in this Act ...

Paradoxically, the Act also authorizes government expropriations for virtually the same purposes but makes the Expropriation Act apply to these. Consequently, we have no hesitation in concluding that the same laws and procedures should apply to all expropriations under the Dominion Water Power Act. And the applicable Act should be the Expropriation Act. However, we have been informed that it is not likely that there will be future expropriations under the Dominion Water Power Act. Presently, only four companies have potential powers of expropriation under this Act. We know of no expropriations by these or other companies that previously had similar powers during the past twenty years. *It would, therefore, be simpler to repeal the provision in the Act that allows these companies to expropriate.*

3. *Companies under the Dry Docks Subsidies Act*

Companies having agreements with the Government to construct a dry dock may, with Cabinet's approval, expropriate the land necessary for a site, and the Railway Act governs such expropriations. No such expropriations have occurred for at least twenty years. The only company that could expropriate under this Act has advised us that "there remains very little need for the (authorizing provision) to be retained." We agree. *The provision allowing expropriation in the Dry Docks Subsidies Act should be repealed.*

4. *Holders of Water Use Licences under the Northern Inland Waters Act*

Holders of these licences may expropriate land with the approval of the responsible Minister, and on the recommendation of either the Yukon Territory Water Board or the Northwest Territories Water Board. The holder must demonstrate that it reasonably requires the land involved for a use related to its licence, that it has made reasonable efforts to acquire these lands and has been unable to do so. Furthermore,

the holder must show that the expropriation is in the public interest. Unless all interested persons indicate otherwise, a public hearing is mandatory when a holder applies for use of the power.

These procedures accord with our notion of what is essential to good expropriation law. There is a right to a public hearing and political responsibility exists for the final decision to expropriate. However, we are not certain if the Railway Act, which the Northern Inland Waters Act incorporates by reference, should apply to expropriations here. *We see no obstacles to having the Expropriation Act govern expropriations by holders of water use licences.*

5. *Marine Electric Telegraph Companies and the Telegraphs Act*

The Telegraphs Act provides that these companies may expropriate land after receiving Cabinet approval. The Railway Act applies to these expropriations. We understand that it is unlikely that companies of this type will ever acquire land in the future. *The expropriation provisions of the Telegraphs Act that confer the expropriation power on these companies should therefore be repealed.*

6. *Summary*

Our review of the other public statutes that permit private enterprises to expropriate has indicated that under three Acts the need for the power no longer exists. *We have therefore suggested that the provisions enabling expropriation by certain private enterprises in the Dominion Water Powers Act, the Dry Docks Subsidies Act and the Telegraphs Act be repealed.* Expropriations by *commodity pipeline companies under the National Transportation Act* and *water use licencees under the Northern Inland Waters Act* are presently governed by the Railway Act, although no strip-taking is involved. *The Expropriation Act should be the governing Act here,* so that the essentials of good expropriation law are in place. If repealing the provisions we mentioned above proves problematic, then the Expropriation Act should apply to those Acts as well.

IV. *Government as Expropriator*

The Expropriation Act does not apply to all expropriations by the federal government, or to be more precise, by Her Majesty, a federal Minister, or the Cabinet or a federal public authority. And this is strange. By its own provisions, the Expropriation Act applies to six major federal crown corporations and agencies, to Telesat Canada, a government-owned company and in all situations where a statutory reference

has been made to its predecessor, the old Expropriation Act. But this ample casting of the Expropriation Act's jurisdictional net did not catch all governmental or quasi-governmental expropriators. For some, like the Canadian National Railway or the Government when acting in emergency situations, the omissions were intentional. For others, legislative oversight is the only sensible explanation. We deal with these first.

1. *Harbour Commissions*

The Harbour Commissions Act enables the five harbour commissions established under the Act to expropriate lands, with Cabinet approval, "for the purposes of this Act". There are also six harbour commissions with similar powers operating under Special Acts. And all of the harbour commissions' expropriations are governed by the Railway Act.

Strangely, the National Harbours Board, with similar responsibilities to these harbour commissions has an expropriation power that falls under the Expropriation Act. Why all harbour commissions are not governed in the same manner escapes us. *They should be, and the governing Act should be the Expropriation Act.*

A discrepancy that needs tending to is the absence of any requirement of Cabinet approval prior to expropriations under the Toronto Harbour Commissions Act. This would, of course, be remedied once all harbour commissions are brought under the Expropriation Act's procedures.

2. *The Fort-Falls Bridge Authority*

We have already mentioned the Act establishing this authority as an example of a precise and understandable incorporation by reference of the Railway Act. However, the land acquisition requirements of a public authority charged with the responsibility of building, operating and maintaining a bridge would be better served by the Expropriation Act, particularly if this Act is amended as we have suggested.

We note that the Act establishing this bridge authority may have been drafted after the Expropriation Act. If so, it continues a bad habit by referring to the Railway Act when the obvious source of expropriation procedures for governmental or quasi-governmental expropriators is the Expropriation Act. *The Fort-Falls Bridge Authority Act should therefore be amended to bring the Expropriation Act into play.*

Five Acts allow expropriations by the Government for national security reasons or in emergency situations. Inevitably, there is some

overlap between these Acts. And none of them prescribe procedures for the exercise of the expropriation power or adequately establish an enforceable right to compensation for all losses.

3. *Under the Atomic Energy Control Act*

Either the Minister of Energy, Mines and Resources, or a government-owned company as defined in the Act, may expropriate

> ... prescribed substances and patent rights relating to atomic energy and any works or property for production or preparation for production of, or for research or investigation with respect to, atomic energy.

The Act says nothing about procedures for implementing these powers. It does provide, however, that if

> ... the compensation to be made ... has not been agreed upon, the claim for compensation shall be referred by the Minister of Justice to the [Federal] Court of Canada.

The Act does not set forth the right to compensation, or define its content or scope. What precisely is the meaning of the phrase "and the compensation to be made therefor"? The Minister of Justice might decide that in the circumstances of a given case no compensation is payable, and thus refuse to refer the matter to the appropriate court.

Similar problems arise in the Radio Act, the Telegraphs Act and the War Measures Act, to be considered shortly. And all of these draw attention to the fact that there is in Canada no constitutional guarantee of compensation for property taken by the Government or any other body expropriating under statutory authority. If the right to compensation is not legislatively spelled out, it does not exist as a legally enforceable right. As one judge put it

> ... the prohibition "thou shalt not steal" has no legal force upon the sovereign body.[15]

The Canadian Bill of Rights speaks of the right of the individual to enjoyment of property, "and the right not to be deprived thereof except by due process of law." If this right can be considered to encompass the enjoyment of the reasonable money equivalent to the property on its expropriation, then the Bill of Rights may be helpful in interpreting provisions such as those in the Atomic Energy Control Act. The Bill of Rights implies that the right to compensation exists for individuals deprived of their property.

One may ask whether all property can be owned by individuals. What of the air, electro-magnetic waves, natural resources such as oil?

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[15] Mr. Justice Riddell, in *Florence Mining Company* v. *Colbalt Lake Mining Company* (1908), 18 O.L.R. 275, at 279.

Some things cannot be owned by their very nature. Others, we may think should not be owned by individuals because the public interest demands public ownership of them. For being deprived of things that can not or should not be owned, one ought not expect to be compensated. However, most expropriations do affect property such as land, buildings, and houses. For the loss of these, compensation should be paid. We think there should be a right to compensation for losses of this nature established in all expropriation statutes, including the Atomic Energy Control Act. Emergency situations could be covered by reserving to the Cabinet the power to declare that by reason of the overwhelming national interest, no compensation would be payable for certain expropriations. Thus, Parliament would affirm the basic right to compensation in all cases, and the Government of the day would be forced to accept full responsibility for abrogating this right.

A provision affirming the right to compensation should therefore be added to the Atomic Energy Control Act. As well, compensation for expropriations under the Act should be determined using the Expropriation Act's procedures amended as we have suggested, with whatever modifications the Cabinet may consider necessary for national security reasons.

4. *Under the Radio Act*

This Act allows the Government to expropriate temporarily or permanently, radio stations and related property necessary for operating them. This Act however is more explicit than the Atomic Energy Control Act about what is to be done to determine the compensation payable. If disagreement occurs, the responsible Minister must refer the matter to court for adjudication and the Expropriation Act is applicable for the purpose of determining the amount of the compensation "if any". Once again, though, the right to compensation is not clearly established. We think it should be expressly stated in the Radio Act, and that the Expropriation Act should apply to all aspects of the determination of compensation, with whatever appropriate modifications the Cabinet deems necessary for national security reasons.

5. *Under the Telegraphs Act*

Under this Act, the Government has been granted powers similar to those under the Radio Act, but applicable to telegraph lines and equipment instead. However, the provision in the Telegraphs Act concerning compensation is unique. The Act provides that where there is

disagreement on the amount of compensation to be paid for the telegraph line and related property that had been expropriated, this disagreement shall be referred

> ... to three arbitrators, one to be appointed on the part of the Crown, another by the company, and the third by the two arbitrators so appointed.

The award of any two of these arbitrators is deemed to be final and if the company does not appoint an arbitrator, or if the two arbitrators cannot agree on the third, then the third arbitrator shall be appointed by any two judges of the Supreme Court of Canada on application by the Crown.

We have not been able to determine why expropriations under this Act merit this special treatment. Our preference is, of course, to suggest that the Expropriation Act, amended as we have suggested, apply to the determination of compensation under the Telegraphs Act. Technological advances in communications obviously make likelihood of such expropriations very small. Nevertheless, *the Expropriation Act should apply here subject to the Cabinet's limiting its application as national security may require.* Again too, *a provision guaranteeing the right to compensation should be included in the Telegraphs Act.*

6. *Under the War Measures Act*

Under this Act, the Cabinet may appropriate, control, forfeit and dispose of property in situations of great emergency. However, the power of appropriation is only effective after the issue of a Cabinet proclamation declaring that "war, invasion or insurrection, real or apprehended, exists." We note that actions under the War Measures Act are "deemed not to be an abrogation, abridgment or infringement of any right or freedom recognized by the Canadian Bill of Rights."

Compensation for appropriations of property under the War Measures Act is governed by the following provision:

> ... whenever any property or the use thereof has been appropriated by Her Majesty under this Act ... and compensation is to be made therefore and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court of Canada, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

The word "appropriate" used in the War Measures Act is obviously the equivalent of "expropriate" in effect and result. We are concerned that a reasonable interpretation of the provision just quoted could lead to denying a person a right to compensation for property appropriated. But given the nature of the War Measures Act, we cannot responsibly

advocate a change in its expropriation powers. Nevertheless, *the right to compensation should be stated in the Act, the amount of compensation, while subject to Cabinet review, to be determined under the Expropriation Act, amended as we have suggested, unless Cabinet otherwise decrees.*

7. *Under the National Defence Act*

Property can be expropriated under this Act if the Minister of National Defence considers it necessary for defence purposes. The Cabinet must, however, agree that an emergency justifies expropriation. This emergency closely resembles the situations activating the War Measures Act and its expropriation power—"war, invasion, riot, or insurrection, real or apprehended."

The National Defence Act also empowers the commanding officer of a Canadian Forces' unit to expropriate property when it is imperative to do so immediately in order to cope with an emergency, presumably war, invasion or riot. Although this power is subject to Cabinet regulations, it is the officer who must justify his decision to expropriate by pointing, for example, to a local riot and the overriding need to take and destroy certain property in order to deal with it.

Because of the situations in which these expropriation powers would be used, a number of the rights and protections normally available to owners facing expropriation are lost. However, the National Defence Act does provide that the persons suffering loss, damage or injury from expropriations some under the Act are to be compensated by the Government. So the right to compensation exists. But no guidance is given on how one determines who should be compensated or on how much they should get.

Though rarely used, the expropriation powers under the National Defence Act are clearly necessary for the Canadian Forces to be able to tackle emergency situations. We do believe, however, that the National Defence Act could say more about what happens to people whose lands are expropriated. *The right to compensation could be stated more forcefully and directly. And compensation should be determined under the Expropriation Act, amended as we have suggested, unless Cabinet decides otherwise.*

We now turn to the unusual situation of the Canadian National Railway Company.

8. *The Canadian National Railway Company*

Although it is government-owned, the status of the CNR is unique among government-owned enterprises. It is not what lawyers refer to

as "an agent of the Crown" nor can property owned by the CNR be considered to be government property. So the CNR is not a crown corporation in the usual sense of that term. Indeed, the courts have held that

> ... The CNR Company is admittedly a corporation entirely distinct from the Crown, and is not to be regarded as a department of the Government of Canada.[16]

The CNR thus is in some ways more independant of the Government than crown corporations. However, the Financial Administration Act subjects the company to governmental financial control as a proprietary crown corporation. This control, along with the Parliamentary financial control over new CNR lines and the Cabinet and ministerial control over the location and building of new lines that is required by the Canadian National Railway Act, does not, of course, exist for private railway companies. But, on the other hand, the CNR does not need the CTC's approval of the location of the line it proposes to build, as other railway companies do. And this has a significant effect on CNR pre-expropriation procedures.

The public Act establishing the CNR more than half a century ago conferred the power of expropriation by incorporating certain parts of the old Expropriation Act. The new Expropriation Act continues this anomolous situation. Alone among operating railways, the CNR's expropriations continue to be governed by the old Expropriation Act, rather than the Railway Act.

The old Expropriation Act has been declared by legislators and judges to be deficient and arbitrary.[17] It does not give affected persons any right to a hearing. It says very little about the compensation that may be payable. So the old Act suffers badly by comparison with the new Expropriation Act. What is ironic about the CNR's special position is that the company's expropriation powers are more free-wheeling and potentially arbitrary than those of the Government of Canada, and of private railways as well. However, our legislators did not intend to allow the situation to continue indefinitely. As the Minister of Justice stated in the House of Commons during the debate on the bill that became the new Expropriation Act:

> The legislation ... will not ... extend to inter-provincial railways or to private companies under Special Acts which exercise expropriation

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[16] *Re Exchequer Court Jurisdiction,* [1925] 4 D.L.R. 673.

[17] The classic criticism is by Mr. Justice Thorson, then President of the Exchequer Court, in *Grayson* v. *The Queen,* [1956-60] Ex.C.R. 331, 335-336; "I have frequently called attention to these provisions of the law and stated that Canada has the most arbitrary system of expropriation of land in the whole of the civilized world."

powers. We plan to deal separately with these companies in the future. Obviously, if we had applied this bill to the Canadian National Railways without having corresponding legislation affecting the Canadian Pacific Railway it would not have been a just piece of legislation.[18]

As the preface to this Paper indicated, part of our responsibility here is to suggest how the expropriation powers of railway companies, including the CNR, can be rationalized. The need to do so is evident.

Most of the inadequacies in the CNR's expropriation procedures are found during the pre-expropriation phase. The initial preliminary to railway line expropriations—the approval of the line and its location, and hence of the land that may be expropriated—is less onerous for the CNR than for other railway companies. The CNR's Act describes its pre-expropriation requirements, as follows:

> With the approval of the Governor-in-Council and upon any location sanctioned by the Minister of Transport, the National Company may construct, maintain and operate railway lines, branches and extensions.
>
> (a) If the line, branch, or extension does not exceed twenty miles in length, and
>
> (b) In any other case, if Parliament has, in respect of the construction thereof, authorized the necessary expenditure or the guarantee of an issue of the National Company's securities.
>
> A copy of any plan and profile made in respect of any complete railway shall be deposited with the Commission (CTC).

Our review of how this provision operates in practice reveals that affected owners have no role in the approval process it establishes. Nor does the process provide the systematic analysis of proposed routes that other railway companies face before the CTC. The primary purpose of the exercise appears to be financial control by Government and Parliament.

What happens normally is that the CNR applies for what it needs by sending a letter along with supporting information to the Minister of Transport. These applications are then reviewed internally and routinely approved. Sometimes, liaison with the Department of the Environment or the CTC may occur. But hearings have never been held.

The first question to ask about this approval process is obvious: why shouldn't the laws and procedures governing other railway companies during the pre-expropriation phase also apply to the CNR?

An equally obvious answer is that the old Expropriation Act's method of effecting expropriations merely by filing a plan in the land registry office prevents speculation. And a government-owned railway

[18] House of Commons Debates (1969), Vol. I, 648.

should be protected from this. We believe this answer in 1973 is anachronistic. Expropriation legislation in many Canadian jurisdictions demonstrates broad support for advance notice of the intention to expropriate, and the efficient operation of compensation provisions, like those in the Expropriation Act, that protect the expropriator from paying compensation that has been inflated by speculation.

It has also been argued that subjecting the CNR to the normal pre-expropriation approval process is inappropriate because it would place a government-owned railway under the regulatory authority of a government agency, namely the CTC. For example, how could the Cabinet deal with an appeal from the CTC decision concerning the CNR?

Oddly this has not seemed to be a problem in the other matters in which the CNR is already subject to CTC control. And these matters cannot lightly be brushed aside, for they include general regulation of tolls and rates, jurisdiction over 'deviations, changes or alterations, approval of the location and adequacy of stations, construction of works in navigable waters, approval of bridges, tunnels and other structures, crossings and junctions with other railways, highway crossings, and last but most importantly, the opening of a railway for operation after its construction.

So while the CTC doe not approve the location of the CNR railway line, it can nevertheless refuse to approve the opening of the line for traffic once it has been constructed, whatever the prior determinations of the CNR, the Minister of Transport, the Cabinet and Parliament might have been.

It therefore seems obvious that the CTC should exercise control over CNR route selection during the pre-expropriation phase, just as it already does over so many other aspects of the CNR's activities.

We think that the necessary executive and legislative approvals of the capital expenditure involved in proposed CNR railway projects are compatible with CTC approval of proposed routes. Our review of the present approval process demonstrates that there would be no duplication of regulatory effort if the CNR would be brought under the jurisdiction of the CTC for approvals of lines as well. Furthermore, a CTC approval does not commit the CNR, or any other railway, to build the proposed line should it turn out to be economically unfeasible. However, proper planning and realistic communication between the Ministry of Transport and the Canadian Transport Commission should result in tentative financial approvals and make the abandonment of projects for financial reasons rare indeed.

Yet the most important reason for suggesting the changing of the CNR pre-expropriation procedures is the fact that they do not give any significant protection to affected owners. Totally lacking are many essentials of good expropriation law, and for us this is decisive.

The CNR should be subject to the same rules and procedures that govern the pre-expropriation phase for other railway companies. And if these rules and procedures are amended as we have already suggested, then our concerns for affected owners will be reduced. However, even if these amendments are not made, affected owners would still be better off if the CNR's proposed routes were brought under the CTC's approval procedures.

Our suggestion is not new. The Royal Commission that inquired into railways and transportation and reported in 1917 before the CNR Act was passed by Parliament made a similar recommendation:

> We have referred more than once in this report to the Board of Railway Commissioners for Canada, and have recommended [that the CNR] should be subject to their jurisdiction. We attach great importance to this recommendation. Hitherto this Board has had jurisdiction only over the railways that are in the hands of companies. It has had no jurisdiction over Government lines. We think that this distinction cannot be justified, and that the Commission should have jurisdiction over all railways other than those operating solely under provincial charters. The public may from time to time have just cause of complaint against the management of any railway. It is not right that anyone, even a government official or public trustee, should be judge in his own cause. Moreover, unless the final decision in matter of rate policy and the like is in the hands of a single authority, there may be in Canada two conflicting policies at the same time. There is yet another reason on which we would lay stress. Railway policy is a sealed book to the ordinary citizen.

It should also be noted that the British Railways Board, the government railway in Great Britain, has managed to survive under the same rules controlling compulsory purchase and compensation as other railway corporations and public authority expropriators. We believe that all owners affected by government expropriations should be treated equally, not only in the pre-expropriation phase, but also in determining compensation. Consequently, *the compensation provisions of the Expropriation Act, amended as we have suggested, that would apply to other railway companies, should also apply to the CNR.*

9. *Canadian Government Railways*

To complete our consideration of government as expropriator, we must now deal with what the Railway Act describes as "government railways". The Railway Act excludes these from its application.

To find out what government railways are, one must read with care several provisions in the Canadian National Railways Act and the Government Railways Act. What emerges is that they are two classes of government railways, all of which are government-owned, as one might expect. There are those railways, some seven in number,[19] that have been entrusted to the CNR, railways that are "vested in Her Majesty, and that are under the control of management of the Minister [of Transport]" and there are those which are not entrusted to the CNR. Currently there are no government railways in this second class.

It is our view that expropriations for government railways which are not entrusted to the CNR, if they existed, would fall under the new Expropriation Act. However, expropriations for government railways which are entrusted to the CNR are governed by the arbitrary provisions of the old Expropriation Act.

We suggest that expropriations for all government railways should be subject to the same rules and procedures that are applicable to expropriations for railway purposes generally. In other words, *all expropriations for railway purposes, including expropriations for government railways, whether entrusted to the CNR or not, should be governed by the same law.* We have already indicated what we think that law should be.

To complete our review of federal expropriation law, we now turn to several related matters, namely personal property expropriation and injurious affection.

[19] Entrusted railways are the Intercolonial Railway, the National Trans-Continental Railway, the Lake Superior Branch, the Prince Edward Island Railway, the Hudson Bay Railway, the Newfoundland Railway, and the Temiscouata Railway.

Expropriation of Personal Property

A number of federal statutes allow the expropriation of interests other than those in land. Among these are the Atomic Energy Control Act, the Cape Breton Development Corporation Act, the Radio Act, the Telegraphs Act and the War Measures Act. The interests that may be expropriated under these Acts include patent rights, machinery, stocks of coal and personal property, in general.

Our concern here is not with expropriation procedures as such, for the same procedures apply to the expropriation of both land and other interests. It is with the lack of recording of compulsory transfers of personal property or other rights under several Acts.

When land is expropriated, what has happened is recorded in the land registry office by the registration of an appropriate document, (for example, the notice of confirmation under the Expropriation Act). But only under the Cape Breton Development Corporation Act is there provision for registration of the expropriation of personal property. Fortunately, this Act is a suitable model for other registration systems. We suggest that all Acts allowing such expropriations follow its lead.

The system established by the Cape Breton Development Corporation Act calls upon the Corporation to register with the Registrar General of Canada

> An inventory of the personal property or any part thereof that the corporation is empowered to acquire . . .

Expropriation does not occur until a notice has been published in the Canada Gazette that the inventory has been so registered.

Injurious Affection

Previously in our discussion of the Expropriation Act's formula for determining compensation for a partial taking, we considered the problem of compensating for injurious affection of land retained on an expropriation. We found the Act's approach unfairly restrictive. It allows an owner to claim compensation for injurious affection only for damages caused by the use of the part of his or her land that was taken. However, the project involved may use other land as well, and even though the use of this land may also cause damage to the owner, no recovery is possible for these damages under an injurious affection claim. We also mentioned that removing this inconsistency would not touch cases of injurious affection where no land is taken.

The conditions giving rise to a claim for compensation for injurious affection to a property where no land belonging to the claimant has been taken, are:

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 use.[20]

There have been numerous criticisms of the nature and practical effect of these conditions.[21] And some criticisms have led to reform, notably in Great Britain.[22] However, since the offending activity need not take place on land that has been expropriated to found a claim for compensation in this area of the law, there is no legal connection as such

[20] *The Queen* v. *Loiselle*, [1962] S.C.R. 624 at 627 (Supreme Court of Canada).

[21] A Report by the British section of the International Commission of Jurists, entitled, *Compensation for Compulsory Acquisition and Remedies for Planning Restrictions*, (1973), 22-26; Todd, *The Mystique of Injurious Affection in the Law of Expropriation*, [1967] UBC Law Review 127.

[22] See the Land Compensation Act, 1973, c. 26.

with the law of expropriation.[23] As the Ontario Law Reform Commission has observed,

> ... it is really a question of tort law and of the interaction of the nuisance concept with the defences of statutory authority and the immunity of the Crown.[24]

A review of this branch of the law of injurious affection is thus outside the scope of this Working Paper. We are, however, considering the preparation of a separate study on the law of injurious affection.

Nevertheless, we cannot avoid some comment on this area, because of its intimate relationship with expropriation law and some of our proposals. This relationship stems from the practice of our legislators who have traditionally conferred the right to compensation for injurious affection where no land is taken in statutes which also contain provisions on expropriation. For example, the Railway Act confers this right in the same provision that establishes the right to compensation for expropriated land.[25] If expropriations under the Railway Act are brought under a uniform compensation code, as we propose, then care must be taken to preserve this right to damages for injurious affection.

We note that this right was not preserved when (for most purposes) the new Expropriation Act repealed the old Expropriation Act. The Supreme Court of Canada has considered that the old Expropriation Act established a right to damages for injurious affection where no land was taken, even though the right was not directly spelled out in the old Act.[26] The new Expropriation Act, however, makes no mention of injurious affection. Nevertheless, there may be another possible source of the right to damages for injurious affection where no land is taken.

The Federal Court Act gives the Trial Division of the Federal Court exclusive jurisdiction ". . . in all cases where there is a claim against the Crown for injurious affection." Judicial interpretation of a similar provision defining the jurisdiction of the Exchequer Court, which the Federal Court replaced, indicates that the section may not only define jurisdiction but also confer the right to compensation for damages for injurious affection.[27] In any event, such an important right should be clearly and directly stated in the appropriate legislation if it is to exist at all.

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[23] *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437.

[24] In its Report on the Basis of Compensation on Expropriation (1967), at 46. Other common law causes of action, notably deprivation of access to one's property, may also be involved here.

[25] See also *Canadian National Railway Company* v. *Trudeau*, [1962] S.C.R. 398, 405-406.

[26] *Imperial Oil Limited* v. *The Queen* (1973), 35 D.L.R. (3d) 73.

[27] *The King* v. *Thomas Lawson & Sons Limited*, [1948] Ex. C.R. 44, 57-60; *The King* v. *Woods*, [1948] Ex. C.R. 9, 13-14; But see also *Irving Oil Company Limited* v. *The King*, [1946] S.C.R. 551, 560-561. The Supreme Court in the Imperial Oil case did not mention the Exchequer Court Act section.

We note too that the new Expropriation Act in bringing five crown corporations[28] and Telesat Canada under its wing, repealed sections that had established the bases for claims for damages for injurious affection when no land is taken in the Acts empowering these corporations. However, the right to such a claim against these crown corporations may not be totally lost. These corporations exercise their statutory powers as agents of the Crown. Consequently, the Federal Court Act's provision mentioned earlier may allow a claim to be made against the Government for injurious affection caused by them. Admittedly, the law is not clear here.

Although it is possible that claims for damages for injurious affection may be made against these crown corporations, we must point out that other crown corporations may not be in the same position. For example, harbour boards empowered under the National Harbours Board Act have never been made subject to such claims. There is obviously a need here for greater clarity and uniformity. And this can only be achieved after further study.

[28] The Canadian Broadcasting Corporation, the Canadian Overseas Telecommunication Corporation, the National Capital Commission, the Northern Canada Power Commission and the St. Lawrence Seaway Authority.

Conclusions

(A Summary of this Paper's Major Proposals)

A uniform expropriation statute, applicable to all federal expropriation powers, is the best way to ensure the fair and reasonable exercise of these powers.

Such a statute would recognize and implement the following essentials of good expropriation law:

(1) Equal treatment of those affected;

(2) Simplicity and accessibility—the statute should be clear and easily understandable by those affected;

(3) Compensation for all proven losses of those affected;

(4) The right to a hearing for those affected, and public scrutiny of the proposed expropriation decision;

(5) Political responsibility for the decision to expropriate.

The federal Expropriation Act of 1970 could serve as a model for this uniform statute. But first, several inadequacies in the Act should be remedied.

For the Act's pre-expropriation provisions to be fair and effective, the pre-expropriation hearing must become more than a conduit-pipe between objectors and the Minister. The person presiding at the pre-expropriation hearing should have the power to make findings of fact and to express an opinion on the issues involved. The expropriator should present the reasoning behind the proposed project that has caused the need for land. People opposing the proposed expropriation should be able to ask questions about this reasoning at the hearing, and present their own views. These views would normally encompass both necessity and location. But if a previous public hearing on necessity had been held, the major issues at a pre-expropriation hearing would tend to focus on location. We believe the pre-expropriation hearing should not be the only forum for public participation in deciding on the necessity of projects for which land may have to be expropriated. Hearings on necessity ought to be held prior to pre-expropriation hearings whenever

possible and particularly for large projects. If not, pre-expropriation hearing will be burdened with issues unrelated to expropriation that ought to have been considered and settled elsewhere.

With these modifications, the Expropriation Act's pre-expropriation provisions would be suitable to govern the pre-expropriation phase for all expropriators under federal legislation.

An exception, however, must be made for railway and pipeline companies. These strip-takers require special pre-expropriation procedures because of the particular problems arising from their land acquisition needs and the general regulatory control over their activities by specialized agencies (the CTC and the NEB). These procedures, although integrated with the regulatory approval process for new lines, should, nevertheless, give affected owners the same rights and protections they have when facing an expropriation by a non-strip-taker. Explanations of how these procedures operate should be clearly spelled out in a special part of the uniform expropriation statute.[29]

Provisions in the uniform statute governing the expropriation phase could be based on the Expropriation Act's provisions concerning the passing of title, the taking of possession (but including the possibility of a shorter period of waiting for strip-takers), abandonment, the offering of compensation and the paying of immediate funding to ease the pressures on an owner without savings who might otherwise be forced to settle for a smaller amount. We make several suggestions for minor improvements to these provisions[30] although, generally, we find them to be suitable for wider application.

Determining compensation is the most important aspect of the post-expropriation phase. And if this can be done voluntarily and informally, all the better. The provisions for negotiation in the Expropriation Act have promoted voluntary settlements. They should be adopted in the uniform statute.

The modified code of compensation in the Expropriation Act, based on market value, provides an acceptable basis for determining compensation which is preferable to the uncertainties of the Railway Act and the common law. The Act introduces several protections for the owner, notably the "home-for-a home" provision.[31] While we suggest that the compensation provisions of the Expropriation Act should apply to all expropriations under federal legislation, we have recognized the need for a number of improvements concerning partial takings, equiv-

[29] See 36-40, *supra.*
[30] See 43-48, *supra.*
[31] See 62, *supra.*

alent re-instatement, leases and tenancies, mortgages and other security interests.[32]

An important aspect of the proposed statute is its system of adjudicating federal expropriation compensation claims. While relying substantially on the Federal Court of Canada, the system gives an individual claiming a small amount a less expensive alternative.[33]

We believe that an owner should not be prevented by the costs involved from ensuring that compensation is fairly determined. This may mean expensive legal and appraisers' fees, especially if the matter goes to court. The Expropriation Act gives the owner the right to recover many of these costs. The uniform statute we propose would go further and compensate the owner for actual expenses reasonably incurred.[34]

The uniform expropriation statute, with its special provisions for strip-takers, could apply without difficulty to all private enterprises granted federal expropriation powers by Special Acts. These powers, however, should end when the public interest justifying their existence disappears. We propose that all existing powers of private enterprises conferred by Special Acts should be terminated in five years, the life span of railway construction and land acquisition powers favoured by the Railway Act. Expropriation powers could be used during this period, provided the Minister of Public Works issued a reasoned decision that the use of the power is in the public interest. Furthermore, all expropriation powers granted in the future to private enterprises should only last for five years. These powers should be conferred clearly so that no one can be uncertain about what has been done.[35]

There are no serious obstacles to making the private enterprises that may expropriate by virtue of the National Transportation Act (commodity pipelines) and the Northern Inland Waters Act (water use licensees) subject to the uniform statute. We do suggest, however, the repeal of the provisions enabling expropriation by certain private enterprises in the Dominion Water Powers Act, the Dry Docks Subsidies Act and the Telegraphs Act. The need for these powers no longer exists.[36]

The uniform statute should also apply to a number of governmental expropriation powers that were also left outside the scope of the

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[32] See 58, 60-62, 62-64, 65-67, *supra*, respectively.

[33] See 70-71, *supra*.

[34] See 76, *supra*.

[35] See 77-83, *supra*.

[36] See 84-86, *supra*.

Expropriation Act of 1970. Included here are the expropriation powers held by the federal harbour commissions and bridge authorities.[37] So too are the powers conferred on government railways and the Canadian National Railway.[38]

We also think that the uniform statute could apply, at least in part, to expropriations under the Atomic Energy Control Act, the Radio Act, the Telegraphs Act, the National Defence Act and the War Measures Act. These statutes give the government or the armed forces the power to expropriate in emergency situations, or as necessary, usually without laying down procedural protections for owners or, indeed, establishing any right to compensation. We believe this right should be expressly established in all statutes that allow expropriation. Furthermore, as a minimum, compensation for expropriation under the four statutes named above should be determined under the uniform expropriation statute. However, the Cabinet should have the power to modify the uniform statute's application if national security so demands.[39]

Preparing this Working Paper has revealed the need for additional study of the law of injurious affection, the law that determines if people may be compensated for damages caused by public projects on nearby lands. We have also become more aware, as the Preface to this Paper indicates, of the possible effects of land purchasing practices of government and private enterprises with expropriation powers.

While the existence of good expropriation law is extremely important, what people know about the law, and how it can help them, is equally important. Without people being aware of the rights and remedies the law provides, the law is a passive element in the relationship between expropriator and owner. Consistency of approach, clarity of expression, one statute for all federal expropriations—these are some of the ways that this Working Paper suggests may make it easier for people to know and understand the law. But there are obviously other ways— such as public information programs—that we have not considered. Achieving good expropriation law, is, however, an essential first step in reform—a step begun at the federal level by the Expropriation Act of 1970, and continued, we hope, by this Working Paper.

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[37] See 87-88, *supra.*

[38] See 91-96, *supra.*

[39] See 88-91, *supra.*