PROVINCE OF BRITISH COLUMBIA

Report of the

BRITISH COLUMBIA ROYAL COMMISSION ON EXPROPRIATION

1961-63

THE HONOURABLE J. V. CLYNE
Commissioner

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ERRATUM

On page 25 delete "British Columbia Federation of Agriculture--represented by K. R. MacLeod" and substitute "British Columbia Federation of Agriculture--represented by C.E.S. Wall," and add "British Columbia Power Commission--represented by K. R. MacLeod."

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REPORT OF ROYAL COMMISSION ON EXPROPRIATION

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1. SUMMARY OF FINDINGS AND RECOMMENDATIONS

In the main body of the report regarding the law of expropriation in the Province of British Columbia[1] I have dealt somewhat exhaustively with the development of jurisprudence relating to the compulsory taking of land not only in British Columbia but elsewhere, in order to be of assistance, if possible, to those charged with the duty of formulating policy governing expropriation of land in this Province. I have also made specific suggestions as to the drafting of a new statute if the recommendations which I have made are found to be acceptable. As these recommendations are the result of considerable research, it may be useful to present them in summary form, leaving the detailed reasoning to be elaborated in the main body of the report.

The background of the law of expropriation in England is contained in the following brief statement:

> " Modern statute law governing the compulsory purchase of land," comments an English writer on

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1. The term "expropriation", as used in this Province, encompasses not only the compulsory acquisition of property but also injurious affection to property resulting from the exercise of powers of expropriation. Compulsory acquisition provides for a transfer of property rights carried out under statutory compulsion and is therefore analogous to a contract for the purchase of property. Injurious affection denotes the causing of damage to property, irrespective of whether property is acquired from the owner, and is therefore analogous to an injury giving a right of action for damages. These two matters will be dealt with separately in this report, but they both come within the area of law covered by the term "expropriation".

> compulsory acquisition, "cannot be fully understood without a brief review of its historical background. The evolution of this species of legislation has been conditioned by the changing economic and social needs of the times. Land in private ownership had first to be acquired on a large scale in order to provide the better communications which the Industrial Revolution rendered both necessary and possible of achievement. The Acts passed by Parliament to enable the Duke of Bridgewater and his imitators to construct canals are among the earliest examplies of Legislation conferring power to purchase specified lands compulsorily, and these were followed by a large number of private Acts authorizing the taking of lands for the construction of railways. It was no accident that the usual clauses, which Parliament required to be inserted in Acts authorizing compulsory purchase of land, were first collected and passed into law in the same year as that in which the Royal Assent was given to a Clauses Act governing the construction of railways (The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. 20). The Lands Clauses Consolidation Act, 1845, applies to every undertaking authorized by an Act passed after 1845, which authorizes the purchase or taking of lands for such undertaking save insofar as expressly excepted. The clauses were intended to be incorporated in private or, more rarely, public Acts conferring power upon bodies or persons called the promoters of the undertaking to purchase specific lands or lands within certain limits of deviation for works of a public nature." 2.

In British Columbia we still retain as our central expropriation statute the Lands Clauses Act which is substantially the same as the English Act of 1845, with its concept of value to the owner. England has since made significant changes in its law of expropriation, commencing with the Acquisition of Land (Assessment of Compensation) Act of 1919. The most important of these changes has been the introduction of statutory rules governing the assessment of compensation based on market value rather than on

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2. R. D. Stewart-Brown: Encyclopaedia of Compulsory Purchase and Compensation, pp. 1005, 1006.

value to the owner. Another important change occurred in 1949 with the establishment of a permanent Lands Tribunal to hear disputes over compensation arising from expropriations.

The Lands Clauses Act of 1845 as amended to 1858 became a part of the law of British Columbia with the passing of the English Law Act, 1858. Because of the inadequacy of our Lands Clauses Act to meet changing conditions which have arisen in British Columbia since 1858, a considerable number of special statutory provisions have been enacted from time to time. A parallel can be drawn between the situation in British Columbia in 1963 and that existing in England in 1918 when the Scott Committee made the following comments in its report to the British Parliament:

> " The Act of 1845, which purported to collect and codify the provisions usually inserted in Acts for the compulsory acquisition of land, sets forth with great precision the machinery for assessing compensation. But it is not surprising that the experience of two generations has shown that some of its provisions require amendment, more especially as the provisions of the Act only represented a codification of the provisions then usually inserted in Acts conferring compulsory powers on trading companies and other private promotors, and did not, even at that date, codify the provisions which were common in Acts conferring similar powers on public bodies. We are unanimously of the opinion that the Lands Clauses Acts as a whole do not embody the best procedure for assessing the compensation for land compulsorily acquired, and that the practice under these Acts has developed in a way which in some instances has permitted grave abuses.... We are of the opinion that the Lands Clauses Acts are out of date and fail to give effect to the requirements of the community of

today, and therefore that they should be repealed and replaced by a fresh Code." 3.

British Columbia has in addition to the Lands Clauses Act some twenty-eight Provincial public statutes containing expropriation clauses. In view of this multiplicity of special enactments, it is well to recall the original preamble to the Lands Clauses Act, wherein the purpose of that statute was clearly stated:

" Whereas it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required

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3. Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and valuation of Land for Public Purposes, 1918, p. 7. This distinguished Committee was appointed by Royal Command "To consider and report upon the defects in the existing system of law and practice involved in the acquisition and valuation of land for public purposes; and to recommend any changes that may be desirable in the public interest." The Committee was chaired by Mr. Leslie Scott, K.C., M.P., later a Justice of the English Court of Appeal. The other members of the Committee were Sir Alexander Kaye Butterworth, Mr. A. S. Comyns Carr, Sir Harcourt E. Clare, Mr. Dixon H. Davies, Mr. Ellis Davies, M.P., Mr. George M. Freeman, K. C., Mr. E. Honoratus Lloyd, K. C., Mr. Howard Martin, P.P.S.I., Sir William Middlebrook, M.P., and Sir Arthur T. Thring, K.C.B. The first Report of the Committee, which dealt with power to expropriate land, was submitted in January, 1918. The second Report of this Committee, dealing with acquisition procedure and rules for assessing compensation, was submitted to Parliament later in the same year and became a landmark in expropriation law in England. This second Report lead to the enactment of the Acquisition of Land (Assessment of Compensation) 1919 Act. This Act set out statutory rules for the assessment of compensation which are still in force at this date, although somewhat modified by subsequent Town and Country Planning Legislation.

> for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves:"

In British Columbia the consolidation achieved by the adoption of the English Act has gradually been undone by the introduction of the many special enactments to which I have referred.

The rapid expansion in British Columbia during the past two decades has rendered re-examination of our expropriation laws and practices imperative. In 1941 the population of British Columbia was 817,861 while that of metropolitan Vancouver was 377,447; by 1951 British Columbia's population was 1,165,210 and at the corresponding time metropolitan Vancouver had 561,960 residents. By 1961 these figures had risen to 1,629, 082 and 777,197 respectively. During this period of growth there has been a vast road development program which has included the building of a highway from Hope to Princeton, another highway from Vancouver to Squamish, a freeway system in the Lower Mainland, the erection of a new Second Narrows Bridge and the creation of the Upper Levels Highway on the North Shore of Greater Vancouver. This expansion period has also seen construction of the first storage dam in the Peace River project as well as oil and gas pipelines to transport oil and natural gas from the petroleum fields of Northern British Columbia to the Lower Mainland and the Southern

Interior. The municipalities of the Province have also engaged in a program of expansion. As a result, municipal services have been improved by the creation of new water and sewer systems, schools, public buildings and parks. For these developments the use of expropriation measures have been necessary. This need will be accelerated by the requirements of the proposed Columbia River and Peace River projects.

It is well to remember that the law of expropriation is applied alike to a wide range of property owners. In addition to farmers with large agricultural holdings, there are great numbers of independent farmers with small holdings of rural land. In the cities and municipalities, there are the owners of small residential properties at one end of the scale and the owners of commercial city property at the other. And there are owners of lands with potential development value over which difficult questions of valuation arise.

The kind of criticism of present expropriation law and procedure made in evidence before me depended upon whether the critic was owner or taker. Landowners complained that they are at the mercy of large and powerful bodies seeking their land without payment of proper compensation. On the other hand the expropriating bodies, public and private, complained that the ad hoc arbitration boards provided for under the majority of public statutes not only make inflated

awards but also often saddle the taker with the costs of the proceedings.

Since only a small percentage of the expropriation cases go to arbitration, the compensation to be paid is in most cases, worked out by private negotiation. In these cases, the taker has the initial advantage. The evidence suggests that the initial offer will generally be a conservative one, but quite often the owner will accept it simply because he is not prepared to go to arbitration and does not know that if he refuses the initial offer a second higher offer, may be made. Once the owner has refused the initial offer, the advantage shifts to him. The taker must then consider what amount of compensation an arbitration board might award, as well as the costs involved. Since costs are frequently awarded against the taker, he sometimes makes a final "without prejudice" offer which may be more than the property is really worth but less than the sum of the real value of the property plus the cost of arbitration. However, such an offer will not likely be made in a test case where it is known that the compensation paid for a particular piece of property will set a pattern for settlement in an area where many properties are being acquired.

The City of Vancouver complained of the excessive cost of arbitration under the present system. The City stated in its brief:

> " In order to obtain the services of professional persons to serve on the arbitration boards, it is necessary to agree to pay between three and five times the per diem rate of $40, per day laid down in the schedule to the "Arbitration Act". Thus each side, in an endeavour to obtain the services of a competent appointee, is willing to agree to such fees, and the chairman is not willing to sit for less. The result is that each day the board sits costs between $300.00 and $600.00, which amount is usually borne by the expropriating authority. The same fees are charged by the members of the board while meeting to discuss their award. Since some appointees have in the past misconceived their function and considered themselves to be advocates for the persons by whom they were appointed, the time spent in arriving at the amount of the award may conceivably and in fact has, on occasion in the past, exceeded the time spent in hearing the evidence."

If the City of Vancouver feels that the costs involved in a disputed compensation case are excessive there is all the more reason that small landowners should be apprehensive in agreeing to submit their cases to arbitration.

The central problem of expropriation lies in formulating rules for the assessment of compensation which will ensure fair awards to both the owner and taker. Whereas in the United Kingdom and in a great number of American states compensation is awarded on the basis of the land's market value, in British Columbia it is awarded on the basis of value to the owner. This "value to the owner" concept has evolved through judicial interpretation of Section 64 of the Lands Clauses Act[4] which provides for payment based on "value of the land to be purchased or taken".

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4. Lands Clauses Act, R.S.B.C. 1960, Ch.209. Sec. 64

In enunciating this principle of "value to the owner" the judges were in the first instance clearly indicating that claims for compensation should not be based on the value of the land to the taker.[5] Obviously it would be unfair to require the taker to pay compensation for the enhancement of the value of an owner's land created by the taker himself. Having distinguished value to the owner from value to the taker the word "value" was then interpreted to mean the particular value (excluding sentimental value) of the land to its owner which value it may or may not have to any other person.[6] This rationale was rejected by the Scott Committee,[7]

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4. cont. which states: "In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the Justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

5. Lord Dunedin in Cedar Rapids v. Lacoste (1914) A.C.569 at p. 576, and Audette, J. in Belanger v. The King (1917) 42 D.L.R. 138 at p. 148.

6. Stedding v. Metropolitan Board of Works (1870) L.R. 6 Q.B. 37 and Commissioners of Inland Revenue v. Glasgow & Southwestern Railway (1887) A.C. 315.

7. The Second Report of the Committee dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes, Cmd 9229, 1918 etc.

and legislation was enacted in Great Britain establishing a system for the payment of compensation based essentially on the market value of the land together with additional compensation for disturbance, severance and injurious affection.

Now the question before me is whether the reasons which in 1919 impelled the British Parliament to enact the market value rules exist today in British Columbia.

I have come to the conclusion that the reasons advanced by the Scott Committee do exist in British Columbia today and accordingly that there should be legislation enacted similar in scope to the British expropriation rules. In the main body of my report I will examine in some detail the inadequacies of our present system. In this summary it is sufficient to say that after hearing the interested parties and after examining statutes and proposed statutes in Great Britain, Canada and the United States, I have come to the conclusion that the concept of "value to the owner" as the measure of compensation has resulted in many inappropriate and unjust awards. The result of such awards is uncertainty in the application of the rule and distrust in its validity.

Not only has the application of the "value to the owner" rule created difficulty, but also a mass of statutory enactments has made the establishment of proper rules and

procedures in each case still more difficult. The type of tribunal, for example, to which parties refer a dispute depends upon the statute under which an expropriation is carried out. Under the Highway Act[8]. if parties cannot reach agreement upon the compensation to be paid for land acquired for highways, the Act, if the parties agree, refers the matter to a single arbitrator, and if the parties do not agree, to two arbitrators who appoint an umpire to resolve differences between themselves. Under the Power Act[9]. a valuator or a board of valuators appointed by the Government determines the value of land acquired. That Act provides a right of appeal from the decision of the valuator or valuators to a Judge appointed for that purpose. The finding of the Judge can in turn be appealed to the Court of Appeal. By contrast, when arbitrators under other statutes decide compensation disputes the rules of administrative law limit the right to challenge the findings made.

Landowners complain that, by great and unlimited powers, takers can too easily deprive them of their land. Very often the filing of a document at the Land Registry Office or the publication of a notice in the B. C. Gazette is enough to

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8. R.S.B.C. 1960 c. 172.

9. R.S.B.C. 1960 c. 293.

transfer title from owner to taker, forcing the owner to pursue a compensation award if he feels the amount offered is inadequate. The Minister of Highways, under the Highways Act, may in his absolute discretion enter and take possession of land, or take gravel, timber, stone or other materials without notice to or the consent of the owner. The present law does not protect the landowner by requiring that notice must be given him before an expropriating authority can enter upon his land and conduct studies and surveys which may or may not foreshadow expropriation of all or part of his land.

Expropriation of land raises an important question of civil rights. In expropriation matters the civil rights of an American landowner differ from those of a Canadian landowner because of the differences embodied in the constitutions of the two countries. The constitutional right of an American landowner entitles him to fair compensation and due process of law. His Canadian counterpart across the border has no such written protection of his civil rights. The legislative assembly in each Canadian province, under the British North America Act, decides what his civil rights are.

In the public interest and to achieve uniformity and the elimination of injustices, I have come to the conclusion that it is desirable, subject to possible minor exceptions, to repeal all existing expropriation legislation in British

Columbia and in its place enact a statute governing expropriation. My report sets out in full the recommendations summarized here for convenience.

SUMMARY OF RECOMMENDATIONS

It is recommended that:

(a) The Crown must enjoy a paramount right to expropriate land for public use. Thus when expropriation is undertaken by the Crown there need not be provision for a public hearing.

(b) Municipal expropriation should take effect only after a public hearing similar to those now held on rezoning applications. Such a hearing, with a consideration of all submissions from interested parties, should be the sole prerequisite for expropriation by a Municipality.

(c) The power of expropriation granted to private corporations should be embodied in the special statute establishing the corporation, but should be exercised in compliance with the proposed Expropriation Act. The authority for expropriation should be limited to land reasonably required for the purpose of the special statute. The proposed Expropriation Act need not provide for a public hearing but should provide summary procedure for contest by an owner of the taker's authority to expropriate the land taken. The onus under such procedure should

be on the taker to demonstrate reasonable requirement.

Preliminary Surveys

It is recommended that before land is entered upon for preliminary surveys, notice shall be given the owner and separate provision made for all damage caused by any such entry or survey.

Negotiation and Purchase by Agreement

It is recommended that parties be left free to negotiate a voluntary purchase where possible, but that the taker, in fairness to the owners, should be required to inform the owners of their legal rights should negotiations fail.

Taking More Land than Required

It is recommended that where a taker requires only part of an owner's parcel of land and it is not economically feasible to divide the parcel, the taker be authorized to take the entire parcel, pay compensation accordingly, and dispose of the unrequired portion of the parcel as the taker may see fit.

Right to Compensation

It is recommended that for greater certainty the Legislature of this Province enact an express right to compensation for land taken or injuriously affected by

any expropriating body acting in pursuance of its statutory authority.

Principles of Compensation

It is recommended that the following rules for assessing compensation be enacted:

(a) Where expropriation of an entire parcel of land takes place, compensation paid shall be based on market value (assuming a willing seller and a willing buyer). No account shall be taken of value peculiar to the taker nor of any effect on value attributable to expropriation or threat of expropriation nor of any increased value arising from unlawful or unhealthful uses. The practice of adding a percentage to value by reason of compulsory purchase or otherwise, should be abolished. In special cases where the property has no real market value (for example, with churches and schools) an alternative rule should allow compensation based on reinstatement.

(b) Where the taker expropriates only a portion of a parcel of land, compensation should be paid for the portion taken and for consequential damages to the remainder through severance or other injurious affection. Against such compensation should be set-off any increase in value to the remainder attributable to any act or acts of the taker. The "before and after" method of

valuation should be used to determine the net compensation due namely: the amount of compensation due is the difference between the value of the whole parcel before taking and the value of the remainder after taking. If the "before and after" method results in compensation being payable less than the value of the kind taken, the taker should be required either to pay compensation equal to the value of the land taken or to expropriate the whole parcel and pay compensation accordingly.

(c) In any expropriation of land, compensation should be paid for all disturbance attributable directly to the expropriation.

(d) If an owner's land is not taken in an expropriation but is nevertheless in some way injuriously affected by the expropriation, compensation should be paid for such injurious affection and for loss of business profits, provided such loss is permanent. When market price reflects loss of business profits no separate allowance for such loss should be made.

Mitigation of Injury

It is recommended that expropriating bodies be empowered to mitigate by any means injuries to land, including the construction of accommodation works and such

mitigation should be considered when compensation is determined.

Costs

It is recommended that the tribunal which decides questions of disputed compensation be given full discretion in the matter of costs.

Interest

It is recommended that compensation awards bear interest at 5% calculated from the date of the award or from the effective date of an order for early possession, whichever is the earlier.

The Tribunal

It is recommended that compensation be determined by summary procedure in the Supreme Court of British Columbia or in the County Courts according to their respective jurisdictions. After consideration of the alternatives, the existing system, single arbitrators, panels of arbitrators and a permanent tribunal for expropriations, I have come to the conclusion that no tribunal, other than the one I have recommended, can determine satisfactorily the amount of compensation. Only the Courts can assure the determination of compensation disputes by persons who are impartial, trained in the law, and who enjoy full public confidence.

The British North America Act, Section 92, sub-section 14, empowers this Province to create an additional Supreme Court judgeship if the volume of work and the need for expedition make desirable the appointment of a designated Judge to hear expropriation matters.

Possession Prior to Final Award

It is recommended that the expropriating body be enabled to obtain possession of land before the compensation is judicially determined by payment into court of such amount as the court summarily determines to be the probable just compensation, and that the owner be enabled to withdraw such moneys without prejudice to his right to dispute the sufficiency of the compensation offered.

Procedure To Expropriate

Commencement of Proceedings

In the event of disagreement by the parties as to the amount of compensation, it is recommended that proceedings be instituted by the taker by filing a Notice of Expropriation in the appropriate Court Registry and by service on the owner.

Statement of Particulars of Claim

It is recommended that the owner file an Answer to the Notice of Expropriation setting forth the particulars of his claim for compensation and that such Answer be

served on the taker within twenty-one days of service of the Notice of Expropriation.

Procedure in Default of Owner's Answer

It is recommended that in default of such Answer, the Court proceed at the instance of the taker to assess the compensation ex parte.

Setting Down for Hearing

It is recommended that either the owner or the taker should, within eight days of the service of the Answer on the taker or within eight days from the expiration of the time for filing an Answer in the case of an ex parte application, be at liberty to set the matter down for hearing. Provision should be made that unless otherwise agreed by the parties the hearing take place within two months of the filing or time for filing of the owner's Answer.

Demand for Discovery of Documents Including Appraisal Reports

It is recommended that there be an exchange of appraisal reports within eight days after the filing of the Answer, and that the Supreme Court Rules for discovery of documents be extended to expropriation hearings.

Evidence

The ordinary rules of evidence should apply save that an expert should be permitted to present the information

upon which he relied on forming his opinion even though he has no personal knowledge of the facts.

Passage of Title

It is recommended that title should pass upon the entry of the final order in the appropriate Land Registry Office or where the taker desires immediate possession upon withdrawal by the owner of the deposit paid into court by the taker.

View of Property

It is recommended that the Judge be entitled to view the property.

Valuation of Several Interests

It is recommended that the market value of the separate interests in the property expropriated should be separately assessed, but by the same Judge at the same time.

Abandonment

It is recommended that the taker be entitled to abandon his Notice of Expropriation within eight days after the service of the owner's Answer.

Reasons

It is recommended that the Court should specify the amount awarded in respect of each matter for which compensation is being claimed, and the reasons for the amounts so awarded.

Place of Trial

It is recommended that the hearing should be held in the County where the property taken is registered if the amount involved is within the jurisdiction of the County Court; otherwise the hearing should be held in the Supreme Court at Victoria if the property is taken on Vancouver Island, and either at Vancouver or New Westminster if the property taken is on the mainland.

Appeal Procedure

It is recommended that an appeal be allowed to the Court of Appeal on a question of law only, and from there to the Supreme Court of Canada on a question of law if the amount involved is in excess of $10,000.00.

Assessors

It is recommended that the Supreme Court Rules regarding assessors be made applicable in expropriation proceedings.

Sealed Offers

It is recommended that the taker be permitted to file in the Court Registry a sealed offer of compensation to be reviewed by the Judge at the time he is exercising his discretion as to costs.

Rules of Procedure

It is recommended that the Judges of the Supreme Court of British Columbia be given authority to make such

rules as they deem necessary for the proper administration of all expropriation cases.

Procedure for Claims where no Land is Taken

Sometimes an owner from whom no land is taken will claim for injurious affection and disturbance. It is recommended that such an owner institute proceedings by filing a Notice of Claim for Injurious Affection in the appropriate Court Registry, that the taker file an Answer to the Notice, and that substantially the same procedure be followed as where a taker files a Notice of Expropriation.

Special Problems Arising From Plans of Development

When an expropriating body announces a plan of development, or when such plan becomes known, land in the development area may increase or decrease in value, or become unmarketable at a reasonable price, or at all. This happens most often in urban areas.

It is recommended that when an owner cannot sell his property at a reasonable price because a plan of development makes probable the expropriation of that property, the expropriating body should be required to purchase or expropriate that property within thirty days of the owner providing satisfactory evidence to the expropriating body that the owner wishes to sell his property and cannot do so at a reasonable price due to the plan of development.

REPORT OF AN ENQUIRY RELATING TO THE LAW OF EXPROPRIATION IN THE PROVINCE OF BRITISH COLUMBIA

TO HIS HONOUR THE LIEUTENANT-GOVERNOR OF THE PROVINCE OF BRITISH COLUMBIA:

2. PROCEEDINGS OF THE COMMISSION

By commission dated the 27th day of January, 1961, issued to me under and by virtue of the provisions of the "Public Inquiries Act"[10]. I was directed: "to inquire into the need, if any, for a revision of the expropriation statutes of the Province and in particular into the appraisals, methods and procedures adopted and used in expropriation proceedings and into the justification or desirability for

(a) limiting the liability of the Crown to make compensation significantly at variance with the market price for property acquired shortly before expropriation,

(b) compensation for injurious affection,

(c) a general arbitration board for determining compensation in all cases where arbitration is necessary, and

(d) minimum requirements for persons engaged in the business of appraising lands within the province."

I was further directed to inquire: "into any other matters that in your opinion it is in the public interest to inquire

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10. R.S.B.C. 1960, c. 315

into as a result of the inquiry into the matters hereinbefore set out, and to report thereon in due course to the Lieutenant-Governor in Council, with the opinions and recommendations as you may think proper."[11].

Proceedings Under the Commission

The Commission sat eighteen days in Vancouver. The transcript of evidence and argument runs to 2,566 pages. In addition, Commission Counsel carried out an extensive legal research from which the Commission acquired numerous reports and documents.

Mr. N. T. Nemetz, Q.C. was appointed to act as Counsel to the Commission, and Mr. R. C. Bray was appointed Assistant Counsel. Mr. J. N. Lyon was appointed Registrar to the Commission.

Public notice of the hearings was duly given, and the following organizations and parties appeared either in person or through counsel:

Department of Highways - represented by Mr. N. A. McDiarmaid

Interior Lumber Manufacturers' Association - represented by Mr. Allan D. MacDonald

British Columbia Electric Company Limited - represented by Mr. R. R. Dodd.

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11. Entire commission is appended as Schedule 1.

Mr. E.C.E. Todd, Associate Professor of Law, University of British Columbia.

Municipal Law Subsection, B. C. Section of the Canadian Bar Association - represented by Mr. B.E. Emerson.

The Appraisal Institute of Canada Incorporated - represented by Mr. J. A. Baker.

British Columbia Federation of Agriculture - represented by Mr. K.R. MacLeod.

K. I. Williamson & Co. Ltd., Real Estate Appraisers, Vancouver - represented by Mr. K. I. Williamson.

The Real Estate Institute of British Columbia - represented by Mr. I. Davis.

American Society of Appraisers (Vancouver Chapter) - represented by Mr. Hugo Ray, Q.C.

Western Canadian Committee of the Royal Institution of Chartered Surveyors - represented by Mr. D.P. Squarey.

Civil Justice Committee, B. C. Section of the Canadian Bar Association - represented by Mr. T. C. Marshall.

Mr. Hugo Ray, Q. C.

Chinatown Property Owners' Association of Vancouver - represented by Mr. Harry Fan.

Mr. John Hawkins, Real Estate Manager of the firm of Macaulay, Nicolls, Maitland & Co. Ltd., Vancouver.

The American Institute of Real Estate Appraisers - represented by Mr. R. E. Grant.

Society of Residential Appraisers, Vancouver Chapter No. 32 - represented by Mr. D. W. C. Ricardo.

City of Vancouver - represented by Mr. R. K. Baker.

Planning Institute of British Columbia and B. C. Division of the Community Planning Association of Canada - jointly represented by Mr. R. A. Williams.

Mr. N. D. Elsom.

Mrs. M. M. O'Brien.

Professor Philip H. White, Faculty of Commerce and Business Administration, University of British Columbia.

Mr. Alfred Rawlins.

The Association of Professional Engineers of British Columbia - represented by Mr. J. A. Merchant.

The Consolidated Mining & Smelting Company of Canada Limited - represented by Mr. M. H. Mason.

Mr. J. W. Marshall, Los Angeles, California, U. S. A.

Board of School Trustees, School District No. 57 (Prince George) - represented by Mr. R. Gracey.

Farmers' Union of B. C., District No. 8, Farmers' Institute of Ft. St. John, Surface Owners' Protective Association, North Peace Milk Producers' Association, and Peace River Branch of the B. C. Seed Growers' Association - jointly represented by Mr. R. J. Todd.

Vancouver Board of Trade - represented by Mr. D.T.B. Braidwood.

Union of British Columbia Municipalities - represented by Mr. C. D. McQuarrie, Q. C.

West Kootenay Power & Light Co. Ltd. - represented by Mr. M. H. Mason.

British Columbia Power Corporation - represented by Mr. L. St. M. DuMoulin, Q. C.

Fairview Ratepayers Association, Vancouver - represented by Mrs. A. McKenzie.

Notice was given of the time and place of each of the sittings of the Commission. Copies of written briefs were obtained in advance of their presentation and made available to all interested parties present at the hearings or who requested copies. Ample opportunity was given for the examination and cross-examination of all witnesses and all parties who appeared were given an opportunity to present oral argument at the close of the hearings.

For the sake of brevity, I will define a number of terms which will be used frequently throughout this report:

"Taker" means a body with authority to acquire property by expropriation. Its English Equivalent is commonly known as "undertaker".

"Owner" means the owner of property subject to expropriation and includes all persons who have a legal interest in such property.

"Compulsory acquisition" is the term used for expropriation in the United Kingdom.

"Condemnation" is the term used for expropriation in the United States of America.

"Betterment" means the increased value of property due to the execution of public works by the taker.

"Disturbance" means interference by an expropriating authority with an owner's lawful use and occupation of his property.

"Trial of Necessity" means hearing held to determine whether or not the taker in fact needs the property in question for the construction of works.

3. ANSWERS TO QUESTIONS CONTAINED IN COMMISSION

The Commission issued to me specifically directed me to inquire into the justification for or desirability of the following propositions. My answers are as follows:

Question 1: Is it desirable to limit the liability of the Crown to pay compensation significantly at variance with the market price for property acquired shortly before expropriation?

There appears to be no justification for imposing artificial limits on the liability of the Crown to pay compensation, nor does it appear desirable to do so.

Question 2: Should compensation be paid for injurious affection?

The statutory right to compensation for injurious affection should be continued and clarified. Rules for determining entitlement to such compensation and the amount thereof should be defined by statute as fully as possible.

Question 3: Is it desirable to have a general arbitration board for determining compensation in all cases where arbitration is necessary?

Expropriation cases should be heard by the Courts subject to the existing right of the parties to submit their dispute to arbitration pursuant to the Arbitration Act. A general arbitration board is neither required nor desirable.

Question 4: Should there be minimum requirements for persons engaged in the business of appraising lands within the Province?

Persons engaged in the business of appraising lands within the Province should satisfy minimum requirements. However, it does not follow that minimum requirements be prescribed by statute.

4. HISTORICAL BACKGROUND

The right to the enjoyment of private property has always been subject to the right of the state to take property required for public use. This right of Government is aptly described in the United States by the expression "eminent domain" and in Canada by the term "expropriation". The right to take land for public use is not a right of confiscation but a power limited by basic civil rights recognized and recorded as long ago as Magna Carta. Clause 39 of Magna Carta Provided that:

> "no free man shall be . . . dispossessed . . . except by the legal judgment of his peers or by the law of the land."

In the United States the Fifth[12] and Fourteenth[13] Amendments to the Constitution subject the taking of private property to clear safeguards: just compensation and due process of law.

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12. See infra Page 77

13. See infra Page 78

Parliament, supreme in England, can divest a private owner of his property and vest it in the Crown. In practice, English expropriation legislation has traditionally included provision for compensation and provided an independent forum to determine the amount of compensation. Until 1845, each expropriation scheme required a private statute which was introduced at the instance of the statutory taker. When the coming of the era of railway construction had made such procedure cumbersome, Parliament passed the Lands Clauses (Consolidation) Act, 1845. This statute consolidated the lands clauses contained in railway and other statutes and provided a procedure for the expropriation of private lands by statutory takers. This Act became the statutory authority for the right to such compensation.

The Act provided no details as to the measure and extent of compensation and in its interpretation the English Courts established a wide right to compensation. From the word "value" in Section 63 of the Lands Clauses Act the English Courts evolved the common law rule of "value to the owner". This rule requires that the owner be compensated not only for the market value of his land, but also for the additional value of his special use of his land, and for losses deriving from the expropriation. In addition to compensating the owner for his economic loss, the English Courts began adding an additional amount because the pur-

chase was compulsory. This additional amount which began at about 50% was eventually reduced to 10%. The application of the "value to the owner" rule together with this percentage allowance resulted in excessive awards which eventually led to a parliamentary inquiry.

In 1917 the British Parliament appointed a committee to deal with the law and practice relating to the acquisition and valuation of land for public purposes. The chairman was Mr. Leslie Scott, K.C., M.P. The terms of reference of the committee were

> "to consider and report upon the defects in the existing system of law and practice involved in the acquisition and valuation of land for public purposes; and to recommend any changes that may be desirable in the public interest."

The Scott Committee published an extensive report. In recommending the repeal of the Lands Clauses Act, 1845, the Committee made the following comments which are well applicable to the situation in British Columbia today:

> "The Act of 1845, which purported to collect and codify the provisions usually inserted in acts for the compulsory acquisition of land, set forth with great precision the machinery for assessing compensation. But is is not surprising that the experience of two generations has shown that some of its provisions require amendment, more especially as the provisions of the Act only represent a codification of the provisions then usually inserted in acts conferring compulsory powers on trading companies and other private promoters, and did not, even at that date, codify the provisions which were common in acts which

were conferring similar powers on public bodies. We are unanimously of the opinion that the Lands Clauses Acts 14. as a whole do not embody the best procedure for assessing the compensation of land compulsorily acquired and that the practice under these Acts had developed in a way which in some instances had permitted grave abuses." 15.

The Scott Committee proceeded to state its conclusions and recommendations:

"We are of the opinion that the Lands Clauses Acts are out-of-date, and fail to give effect to the requirements of the community of today, and therefore that they should be repealed and replaced by a fresh code.

The absence of any definition of land in the Land Clauses Acts and the erroneous application to particular cases of the principles of valuation originally laid down by the Courts, which have opened the door to fanciful valuations and conventional allowances; the uncertainty as to the constitution of the tribunal, the choice of which lies largely in the hands of the claimant; the absence of proper provision for particulars of claims; and perhaps most important of all the provisions as to costs of proceedings, both in obtaining compulsory powers and in the assessment of compensation; all these are elements which have contributed to the result. The effect has been that promoters have found it prudent to settle claims at prices arrived at by adding to a generous estimate of the value of the property a large part of the costs which they would have to pay if the case were contested. This again has reacted upon the claims habitually put forward, and has led to the fiction of a 'compensation value' which has affected the verdict of juries and even the boards of arbitrators."

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14. Lands Clauses (Consolidation) Act, 1845, and the Lands Clauses Consolidation (Scotland) Act, 1845.

15. Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes, Cmd 9229 (1918), p. 7.

Following the recommendations of the second report of the Scott Committee, Parliament passed the Acquisition of Land (Assessment of Compensation) 1919 Act. This statute contained rules for assessing compensation which were referred to throughout the Commission hearings as "the six English rules". The most important feature of the 1919 Act was the establishment of market value as the basis of compensation in place of the concept of "value to the owner".

Parliament did not follow the recommendation of the Scott Committee that the Lands Clauses Act, 1845, be repealed but left that Act in force as the governing statute in cases where expropriation is carried out by private takers as opposed to public authorities. The Lands Clauses Act, 1845, is still in force in England. It provides the basis for granting compensation for severance and injurious affection and is the foundation of a considerable body of common law which deals with matters not contained in the 1919 statute. The 1919 statute superimposed material changes on the existing expropriation law.

In 1941 the British Parliament appointed a committee "to make an objective analysis of the subject of the payment of compensation and recovery of betterment in respect of public control of the use of land" and "to advise what steps

should be taken to prevent the work of reconstruction being prejudiced". This was the Uthwatt Committee.[16.]

By 1961 English Town and Country Planning Acts had from time to time modified and hence dispersed the law throughout a variety of statutes. To counteract this dispersal the English Parliament enacted the Land Compensation Act, 1961, consolidating the provisions of the Acquisition of Land Act, 1919, and provisions from other statutes dealing with compensation for expropriated land. The 1919 statute was repealed.

Between 1919 and 1949 official arbitrators, appointed full time in a particular area, heard all compensation claims despite the recommendation by the Scott Committee of the use of panels of arbitrators. In his dissent with respect to panels of arbitrators, Mr. Dickson H. Davies, a member of the Scott Committee, stated:[17.]

> " Whilst I am in general agreement with the conclusions arrived at by the Committee, I cannot see may way to sign the report, as I am satisfied that the greater part of the difficulties experienced in the past has arisen from the uncertainty as to the price which might be exacted for the land. This uncertainty arose, in

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16. Cmd 6386, Expert Committee on Compensation and Betterment.

17. Page 27 of the Second Report of the Scott Committee.

> my opinion, from the fact that the gentlemen appointed to make the valuations were those who in private practice depended upon the land-owning class for their business and who, quite unintentionally no doubt, placed exorbitant values on the land, so exorbitant indeed as to deter other local authorities from going into arbitration.
>
> The Committee, by Clause 27 propose to continue this system as they recommend the appointment of a panel of arbitrators, and though they may not, so long as they remain on the panel, give evidence in disputed cases on behalf of either party, they still advise in private practice.
>
> As the recommendation stands, there is nothing even to prevent the partner of the arbitrator advising or acting for one of the parties concerned, but even apart from this, in view of the very limited number of surveyors who are consulted by the larger land-owners, it seems to me that the Committee's recommendations leaves the system of valuation open to all the abuses against which such a body of evidence has been tendered us. In my opinion those employed on sanctioning authority, except where they are members of either House of Parliament, should be absolutely independent and should devote the whole of their time to the work, the payment being adequate as in the case of the Judicial Bench."

The Lands Tribunal Act, 1949, established the Lands Tribunal, composed of a president and members appointed by the Lord Chancellor as prescribed by Section 2 (2):

> " The President shall be either a person who has held judicial office under the Crown (whether in the United Kingdom or not) or a Barrister-at-Law of at least seven years standing, and of the other members of the lands tribunal such number as the Lord Chancellor may determine shall be Barristers-at-Law or Solicitors of the like standing and the others shall be persons who have had experience in the valuation of land appointed after consultation with the President of Chartered Surveyors."

An appeal lies on a question of law from the Lands Tribunal to the Court of Appeal and thence to the House of Lords.

In the United States the Bill of Rights, enacted by Congress in 1791, expressly granted a right to compensation for property taken by the Federal Government. Thus there has never been any dispute regarding this right in Federal expropriations.

The Constitutions of the various states of the Union do not provide an express right to compensation, and even in 1866 when Congress proposed the Fourteenth Amendment which the state legislatures adopted, this right was not stipulated for in the Statute. That Amendment enacted a right to "due process" for citizens deprived of their property by state expropriations. The absence of such specific enactment by state legislatures granting a right to "just compensation" has not proved serious since the Supreme Court of the United States has held that such compensation is a natural right and thus need not be enacted expressly in any statute.[18.]

I will treat this subject in more detail in a subsequent section dealing with compensation in the United States.

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18. Monongahela Navigation Co. v United States (1893) 148 U.S. 312.

Because the Fifth Amendment has prevented Federal Courts in the United States from using a "value to the owner" concept they have always applied a market value rule in assessing compensation for owners' economic loss. This in turn has left owners only partially recompensed, since neither injury to business nor severance of land come within the meaning of "private property. . . taken" these categories have not been allowed.

The first Canadian statute governing expropriation was the Public Works Act of the Province of Canada 1841. This Act became the Federal Works Act of 1867 after Confederation and gave the Minister of Public Works the right to take property for public purposes, and governed compensation disputes. Disputes under this Act were referred to three arbitrators. The series of Railways Acts, beginning with the Railways Act of 1850, governed expropriation by the railways. In 1886 the first Federal Expropriation Act, based on the Public Works Act, was passed. This Act referred compensation cases to the Exchequer Court. Needless to say, these Federal statutes governed only expropriation by the Crown in the Right of Canada and each Canadian province must enact its own expropriation legislation.

When in 1858 the English Law Act made English law at that date part of the law of British Columbia, the English Lands Clauses Act of 1845, as amended to that time,

became part of the law of this Province. Later, in 1897, the British Columbia Legislature enacted the Lands Clauses Consolidation Act, being virtually identical to the English Statute of 1845 as amended to that date. In no other province is the English Act in force, although the law in the Provinces and the Federal law is derived from the rules for assessing compensation evolved by the Courts in England out of the general words of that statute. This has happened because the Provincial and Federal laws give a right to compensation only in general words. The common law has had to provide the means of measuring what compensation should be paid.

In Canada we use the rules for determining compensation worked out by the English Courts in the second half of the nineteenth century. The English Parliament replaced those rules in 1919 by statutory rules, which, with modifications, are in use today in England but not in Canada.

5. EXERCISE OF POWER OF EXPROPRIATION

Governments have responsibility for public development. For public development they require the power of expropriation. The Crown sometimes delegates this power to municipal governments and other bodies who carry out public development. Such extreme power should be exercised with care and due regard for private rights. Land owners who suffer loss or injury when governments or other bodies carry through

expropriation must have a right to compensation, and there should be safeguards against abuses of the power.

There was a time in England when a taker by expropriation required separate parliamentary sanction for every taking. Today when authority for expropriation is limited to public purposes, statutes grant to appropriate bodies the general power to expropriate. These powers require safeguards against abuse. In my opinion the safeguards appropriate to the Crown, to municipalities and to private corporations differ. Some witnesses have suggested a "trial of necessity" whenever any taker is authorized to expropriate any particular land. Such trial would decide whether the particular land was necessary for the scheme in question. I consider such procedure impracticable and undesirable. It would cause undue delay in public development, would invite prolonged debate over sites and routes and would force upon the tribunal duplication of the technical planning already undertaken in deciding upon the scheme and its location. This does not mean however that some form of public hearing is undesirable in certain cases.

The Crown

When public use demands expropriation of private land the Crown must carry out its responsibilities within the realm of public conscience, and questions of necessity of

the expropriation or of the suitability of land expropriated cannot, from a practical point of view be open to dispute. Under our constitutional system within their respective jurisdictions the Federal Parliament and Provincial Legislatures reign supreme in the same manner as does the British Parliament and it would be futile to suggest limitations upon the right of the Province to expropriate such as a "trial of necessity" or other form of public hearing as urged upon me by some witnesses. Any such legislation could be repealed as readily as it was enacted by a legislative body determined to proceed with expropriation of land within its jurisdiction. The remedy for any possible abuse in this respect by the Crown within the right of the province must lie in debate in the legislature itself or in public opinion. However, it would be interesting to speculate, if the British North America Act were opened for amendment by the common consent of the governments of Canada and the Provinces, as appears to be possible in the future, whether appropriate safeguards might be inserted for the protection of individual rights and liberties as are provided by the American Constitution. However, such speculation is beyond the scope of this report.

Municipalities

In cities and municipalities complex and conflicting interests and the magnified effects of public taking on

private use and interest make a hearing advisable before a city or municipality acquires land. The hearing should be public, and notice of it be given generally as well as specifically to interested parties. All interested parties wishing to be heard should have an opportunity to make representations, and the decision of the city or municipal council made after consideration of such submissions should be conclusive authority to expropriate land for public use. Again the responsibility for the proper use of the power of expropriation must rest, under our system, upon the elected representatives of the community. The Vancouver Charter[19.] and the Municipal Act[20.] provide for a public hearing on every application for rezoning. In the event that necessary land cannot be acquired by private purchase, similar provisions for a public hearing should be made in respect of every proposal by a city or municipality involving the expropriation of land. However, this procedure should not apply where the land is to be acquired either for street widening purposes or for lane construction. In such cases where the value is slight, or if other special circumstances exist rendering a public hearing unnecessary or undesirable, the taker, should

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19. Section 703 (1) Ch. 255, 1960 R.S.B.C.

20. Section 566 (1) Ch. 55, 1960 R.S.B.C.

be entitled to apply ex parte to a Supreme Court Judge for an order dispensing with the hearing.

Private Corporations

I consider that if the special statutes granting authority for expropriation to private corporations limit that authority to "land which is reasonably required" for the purposes of the special statute, such limitation would effectively check any possible abuse. Then any owner by appropriate legal procedure could take the preliminary objection before the expropriation tribunal or the ordinary Courts that his land was not reasonably required for the statutory purpose. Upon showing an abuse by the corporation of its authority to expropriate the owner would no doubt succeed in preventing the expropriation and should be awarded costs.

I THEREFORE RECOMMEND:

(a) That there be no limitation on the authority of the Crown to expropriate land for a public use.

(b) (i) That subject to (iii) a city or municipality which desires to carry out a scheme, project or work of any kind which may involve expropriation of land be required to hold a public hearing upon due notice to all interested parties. All interested parties should be entitled to make representations to the city or municipality at the hearing and no final decision to

proceed with the scheme, project or work should be made until all such representations had been heard and considered.

(ii) That the decision to acquire the land made by the city or municipality after such a hearing should be conclusive of its right to acquire the land, either by purchase or expropriation, for the stated purpose.

(iii) That the city or municipality be permitted, when expropriating lands for street widening purposes or for lane construction, to proceed without holding the required public hearing stipulated by recommendation (b) (i). The city or municipality should also be permitted, when the value of the land to be acquired for a scheme, project or work is slight or if other special circumstances exist which render a public hearing unnecessary or undesirable, to apply ex parte to a Supreme Court Judge for an order dispensing with the hearing. Supreme Court Judges should be empowered to dispense with the hearing in respect of any scheme, project or work or in respect of any particular piece or pieces of land. Provision should be made for consolidation of any number of such applications.

(c) That any special statute authorizing expropriation by a private corporation be limited to "land which is reasonably required" for the purpose of the special statute.

Preliminary Surveys

Very often the choice of a site or route of a public development or a private development for public use, depends upon preliminary surveys, test borings or other examinations on possible sites or routes. The public interest demands that such preliminary tests be efficient and proceed without delay. Private owners and occupiers are entitled to receive reasonable notice of persons coming on their land, an explanation of why they are there and evidence of the authority under which these persons do acts which lacking such authority would be trespass at common law.

Such surveys and examinations may damage private property. This damage may or may not be compensated for in subsequent proceedings since the particular land may not be expropriated. A separate right to compensation for such damage is desirable.

I THEREFORE RECOMMEND:

(a) That the central statute prescribe purposes for and circumstances in which an expropriating authority may enter upon private property.

(b) That any expropriating authority be required to give notice to owners and occupiers of land before entering that land to conduct surveys or other preliminary examinations.

(c) That there be enacted a right to compensation for any damage to private property caused by surveys or other preliminary examinations made by an expropriating authority.

Negotiation and Purchase by Agreement

In my view expropriation is a last resort to be used where lands necessary for public uses cannot be acquired by private agreement. It follows that bodies with authority to expropriate should have the fullest possible freedom to obtain land by negotiation and private purchase.

The acquiring authority generally has an advantage in such negotiations because of its greater resources and its knowledge and experience in the valuation and acquisition of land. For this reason it is desirable that an acquiring authority should, in making overtures to owners for the purchase of their land, advise those owners of their legal rights in respect to compensation, including their right to have the matter determined by an independent tribunal.

The incidence of acquisition of land for public use

by private purchase will be highest where there is full and frank disclosure by both parties of the information on which they rely. Such disclosures should be required and unjustifiable failure to make full disclosure should be considered in awarding costs in later expropriation proceedings.

I THEREFORE RECOMMEND:

(a) That it be made clear, by statutory provision if necessary, that the authority to expropriate land does not detract from the right to acquire land by private purchase.

(b) That bodies with authority to expropriate land be required, before beginning negotiations for the private purchase of land, to inform the owner of his legal rights as against the acquiring authority.

(c) That any offer by the acquiring authority or demand by the owner made in private negotiations be accompanied by a disclosure of any information including appraisals upon which the offer or demand is based.

Taking More Land Than Required

An expropriating body often requires only part of a parcel of land for a public purpose. Sometimes the value of the remainder is increased by the works performed by the

expropriating body to an amount in excess of the value of the entire parcel before the taking. Under these circumstances the taker should have the option of taking the entire parcel.

There are also cases where a partial taking renders a remainder of little value as a separate holding. Therefore there should be a provision empowering the expropriating authority to take an owner's entire parcel of land when the value of the remainder exceeds the value of the entire parcel before the taking or when it is unsound economically to divide the entire parcel.

6. EXPRESS RIGHT TO AND PRINCIPLES OF COMPENSATION

The right of the owner to just compensation is the corollary of the right of the Crown and other authorities to expropriate. I shall deal later with the principles upon which I consider just compensation ought to be based. I propose first to review the statute which has formed the basis of the existing law of compensation in Canada, and England, as well as the Court decisions interpreting it.

Compensation Under the Land Clauses Act

The Lands Clauses Act of 1845 with subsequent amendments served as the central expropriation statute in England until 1919 when the Acquisition of Land Act was enacted.

The British Columbia Lands Clauses Act (virtually identical to the 1845 English statute) remains the central statute dealing with compensation in expropriation cases in British Columbia though numerous special enactments have been introduced. The whole basis of compensation in England was altered in 1919 by the introduction of the concept of market value in substitution for the concept of value to the owner. In both jurisdictions, claims for severance damage, disturbance and injurious affection are dealt with according to the rules formulated by the Courts in judicial interpretation of the Lands Clauses Act of 1845 as amended. In any attempt at revision of the law of compensation one must consider the sections of the 1845 Act.

(a) Compensation for Land Taken

Section 64,[21] of the Lands Clauses Act, 1845, provides:

> " In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the Justices, arbitrators, or surveyors, as the case may be, not only to THE VALUE OF THE LAND TO BE PURCHASED OR TAKEN BY THE PROMOTERS OF THE UNDERTAKING, but also

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21. The Act referred to in this report is the Lands Clauses Act, R.S.B.C. 1960 c.209, section numbers of which do not necessarily correspond to the same sections in the original English Act of 1845. However, provisions quoted in this report are identical to the equivalent English section unless stated to be otherwise.

> to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

The English Courts have interpreted the words "value of the land" as "value to the owner".[22.]

The judicial reasoning used in reaching this interpretation has not always been consistent. In the early leading case of In Re Lucas[23.] the land expropriated was specially adapted to the construction of a proposed reservoir and the owner claimed that he was entitled to compensation based on value of the land to the taker. The expropriating authority claimed that the special value of the land attributable to its adaptability as a reservoir site should be entirely excluded since the authority had the power to withhold authorization of this particular use of the land. Thus the taker had power to eliminate all competition for the purchase of the land for that particular

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22. The earliest English authority on this point appears to be Jubb vs Hull Dock (1846) 9 Q.B. 443, followed by the cases of In Re Countess Ossalinsky and the Manchester Corporation 1883 unreported and Commissioner of Inland Revenue vs Glasgow and Southwestern Railway (1887) A.C. 315.

23. (1909) 1 K.B. 16.

purpose. The English Court of Appeal refused to accept either of these positions. It decided that compensation must be based on value of the land from the owner's point of view but that some allowance should be made for the land's adaptability as a reservoir site.

This concept of "value to the owner" was initially introduced as a means of limiting compensation by preventing the owner from claiming the value of the land to the taker.

The term "value to the owner" has further significance. Compensation is based on the value of the land to the particular owner, not just to any owner. The Supreme Court of Canada in an early leading case[24] stated that market value ought to be prima facie the basis of valuation in determining compensation and that an additional amount should be added for the value of any special use by the owner.

A classic illustration of such special use was a claim for compensation arising out of the expropriation by the Government of Canada of the vast tract of land in New Brunswick for the Gagetown Military Camp.[25] The claimant

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24. Dodge v. The King (1906) 38 S.C.R. 149 at 155, 157.

25. Gagetown Lumber v. The Queen (1957) S.C.R. 44.

lost extensive timbered lands and the benefit of timber licenses over other lands as a result of the expropriation. These lands and licenses would not have attracted a price on the open market as high as the value to the claimant company, since the purchaserwould have had to expend considerable capital to provide necessary facilities and equipment for exploitation of such timber holdings. In order to put the land to its highest and best use, the claimant had already invested heavily. The Company argued that the value of the land to it was substantially higher than the value of the land on the open market. The Court awarded compensation for this enhanced value of the land. I believe it was a proper and just result. Later in this report when I recommend the introduction into British Columbia of a "market value"rule it will not be my intention that such special elements as existed in the Gagetown case be eliminated. Rather I shall suggest that such elements be dealt with separately as elements of severance damage or disturbance after the market value of the land has been determined.

The Supreme Court of Canada has stated[26] that the "value to the owner" rule carries dual significance:

(a) its excludes the value of the land to the taker, and

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26. Diggon-Hibben v. The King (1949) S.C.R. 712 @ 713.

(b) it includes the value of any special worth of the land to the particular owner.

In deciding upon the value of the land to the owner, one must understand the distinction between the following elements of special value:

(a) Special value to the owner arising from unusual and special circumstances which is to be compensated for in full;

(b) Special adaptability of the land for a particular purpose, which is to be considered for its effect, if any, on the market value of the land;

(c) Potential or speculative value which is to be considered in determining market value according to the probability of realization of such value in the foreseeable future.

(d) Special value resulting from qualities of the owner rather than qualities of the land which is not compensable.[27.]

Failure to distinguish market value of land taken from special losses suffered by the owner has in my opinion

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27. For judicial statements of these distinctions see Dodge v. The King (1906) 38 S.C.R. 149@ 157, In Re Lucas (1909) 1 K. B. 16 @ 26, Irving Oil Company v. The King (1946) S.C.R. 551 @ 563.

led to judicial attempts to create a simple formula for determining value to the owner. These attempts have not been successful and render the law of compensation more difficult to understand. They have increased the risk of excessive compensation awards and of duplication in awards.[28]

Such attempts began when the Privy Council, in deciding an appeal from the High Court of Australia in 1914,[29] stated that value to the owner includes market value plus the value of any special advantage the land has to its particular owners. Apparently by way of illustration the Court added that this amount could be equated to the amount which a prudent man in the position of the owners would be willing to pay for the land sooner than fail to obtain it.

In a subsequent decision of the Supreme Court of Canada[30] this formula was varied to "the amount which a

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28. Warning against the possiblity of duplication under the existing rules were sounded by Thorson J. in The Queen v. Supertest (1954) Ex. C.R. 105 and in The Queen v. The Hall School Commissioners (1954) Ex. C.R. 453 and by the Ontario Court of Appeal in Brown v. Peterborough (1957) 8 D.L.R. (2nd) 626.

29. Pastoral Finance v. The Minister (1914) AC 1083.

30. Diggon-Hibben v. The King (4) see Judgment of Rand, J.

prudent man in the position of the owner would be willing to pay sooner than be ejected from the land". The judgments in this case made it clear that the Supreme Court of Canada was not intending to modify the rule enunciated by the Privy Council, but undue attention appears to have been paid to the figurative illustration used by the Court and to the change in the Privy Council wording.[31.]

In Woods Manufacturing v The King[32.], considered as the leading Canadian case on compensation for land taken, the Supreme Court of Canada said that the common law principles for determining compensation are clear and well settled. In the course of delivering his judgment, Chief Justice Rinfret, stated:

> " While the principles to be applied in assessing compensation to the owner for property expropriated by the Crown under the provisions of the Expropriation Act, c. 64, R.S.C. 1927, and under various other Canadian statutes in which powers of expropriation are given, have been long since settled by decisions of the Judicial Committee and this Court in a manner which appears to us to be clear, it is perhaps well to restate them. The decision of the Judicial Committee in Cedar Rapids Manufacturing and Power Co. v. Lacoste, where expropriation proceedings were taken under the provisions of The Railway Act, 1903, determined that the law

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31. A helpful analysis of this problem is found in an article by Tallin in 33 C.B.R. at p. 483.

32. (1951) S.C.R. 504.

of Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England at that time and the judgment delivered by Lord Dunedin expressly approved the statement of these principles contained in the judgments of Vaughan-Williams and Fletcher-Moulton, LL. JJ. in Re Lucas and Chesterfield Gas and Water Board. The subject-matter of the expropriation in the Cedars Rapids case consisted of two islands and certain reserved rights over a point of land in the St. Lawrence River, the principal value of which lay not in the land itself but in the fact that these islands were so situate as to be necessary for the construction of a water power development on the river. It is in this case that the expression appears that where the element of value over and above the bare value of the ground itself consists in adaptability for a certain undertaking, the value to the owner is to be taken as the price which possible intended undertakers would give and that that price must be tested by the imaginary market which would have rules had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which make the undertaking as a whole a realized possibility. That decision was followed in the same year by a second judgment of the Judicial Committee in the case of Pastoral Finance Association v The Minister, where Lord Moulton, in considering a claim for compensation for properties taken by the Government of New South Wales under the Public Works Act 1900 of that State, said that the owners were entitled to receive as compensation the value of the land to them and that probably the most practical form in which the matter could be put was that they were entitled to that which a prudent man, in their position, would have been willing to give for the land sooner than fail to obtain it.

These statements of the law have been followed consistently in the judgments of this Court. In Lake Erie and Northern Railway v. Brantford Golf and Country Club, in proceedings under the Railway Act, R.S.C. 1906, c.37, Duff J. as he then was, in discussing the phrase "the value of the land to them", after saying that the phrase does not imply that compensation is to be given for value resting on motives and considerations that cannot be measured by any economic standard, said in part:

' It does not follow, of course, that the

> owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in Pastoral Finance Association v. The Minister, has given what he describes as a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.'

In the same year, in Lake Erie and Northern Railway v. Schooley, Davies J. quoted the passage from the judgment of Lord Moulton above referred to and adopted it as stating the true principal, a statement with which Anglin J. concurred. In Montreal Island Power Co. v. The Town of Laval, Duff C. J. again referred to the formula enunciated by Lord Moulton as accurately stating the principle to be applied where land was compulsorily taken under the authority of an expropriation act, and in Jalbert v. The King, The King v. Northumberland Ferries and in Diggon-Hibben Ltd. v. The King, the principle so stated was adopted and applied. The proper manner of the application of the principle so clearly stated cannot, in our opinion, be more accurately stated than in the judgment of Rand J. in the last-mentioned case at p.715.

> . . . 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."

A statement of the main principle involved in determining compensation for land taken is found in an earlier

decision of the Supreme Court of Canada, Irving Oil Company v. The King.[33] The Court decided that if the land is such as to have no special value to the owner then the general market value, including the present worth of all possibilities, is the measure of compensation. Unfortunately, the concept of value to the owner has not, in my view, proved satisfactory in the complex field of valuation and compensation. Tribunals have been confused by the variety of judicial utterances which have been made in the attempt to define it. Further sharp judicial controversies have arisen in turn over the meaning of those utterances.

The extent of these difficulties is well illustrated by the following statement made by President Thorson in the Exchequer Court of Canada in the course of his decision in The Queen v. Supertest Petroleum Corporation Limited:[34]

> " It is obvious that it is impossible to reconcile all the statements. For example, there is a sharp divergence between the statement of Fletcher Moulton L. J. in the Lucas and Chesterfield Gas and Water Board case that the owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized and that subject to that he is to be paid the full price of his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him and the state-

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33. (1946) S.C.R. 551 @ 561.

34. (1954) Ex. C.R. 105 @ 121.

ment in the Diggon-Hibben case. The two tests cannot possibly stand together. In the King v. Thomas Lawson & Sons Limited I expressed the opinion that the definition of value to the owner as realizable money value which I had deduced from the cases was essentially the same as that of fair market value, as given in Nichols on Eminent Domain, 2nd edition, at page 658, but in the Woods Manufacturing Company case, at page 509, Rinfret C. J. expressly rejected this definition as not a true expression of the law. It must follow I respectfully suggest that in rejecting this definition the Supreme Court of Canada has also disapproved the limitation of market value, which Fletcher Moulton L. J. expressly put on value to the owner in the Lucas and Chesterfield Gas and Water Board case.

It follows, as a matter of course, that the statement in the Diggon-Hibben case is at variance with the decision of the Judicial Committee in the Cedars Rapids Manufacturing Company case for in that case Lord Dunedin expressly adopted the test of value laid down by Fletcher Moulton L. J. Moreover, I cannot see how the statement can be reconciled with the test put by Lord Dunedin that the value was a price that must be tested by the imaginary market which would have ruled had the land been exposed for sale under the conditions specified or his statement that the real question was for what would the properties have been sold had they been put up for auction under the conditions specified.

And I must confess that I cannot see how the test in the Diggon-Hibben case can be considered the same as that put by Lord Moulton in the Pastoral Finance Association case. As I read his statement the value of the property is the amount which a prudent purchaser, in a position similar to that of the owner, would have been willing to pay for it after he had considered the elements of value indicated by the possibility of the savings and additional profits referred to and been guided by them in arriving at the price he would be willing to pay. But the statement in the Diggon-Hibben case rejects any such limitation.

And, of course, the test stated in the Diggon-Hibben case is quite different from that laid down by Lord Romer in Vyricherla case that the compensation must be determined by reference to the price which a

willing vendor might reasonably expect to obtain from a willing purchaser.

It is thus plainly evident that the law on this vesatious question is, to say the least, in a very unsatisfactory state and it is very doubtful that any clarification by Judicial decision is possible. Under the circumstances, I have come to the conclusion that it is essential to the fair administration of this branch of the law that there should be a statutory definition of value. It was found necessary in the United Kingdom, as long ago as 1919, to lay down such a definition for use in the case of all lands compulsorily acquired by a government department or a local or public authority. This was accomplished by the Acquisition of Land (Assessment of Compensation) Act, 1919. In my opinion, similar action should be taken in Canada.

In view of this recommendation it would not be out of order to express my opinion on what would be the most desirable definition even although this will involve critical comment on some of the tests of value that have been laid down. My first comment must, with respect, be on the test stated in the Diggon-Hibben case and adopted in Woods Manufacturing Company case. This is a novel one for which there is no precedent in England. But the criticism of the test is not on the ground of its novelty. I think it will be conceded that it is the most expensive test that has been laid down. My experience in expropriation cases makes me fearful that attempts to apply it will result in excessive awards through the difficulty of avoiding duplication in the weighting of the various factors of value that should be taken into account just as there has been duplication in the defendant's claim for the value of the land in the present case. But whether there is such danger or not there is a more serious objection to the test, namely, the difficulty of applying it. For my part, I must frankly confess that I do not understand it and I am at a loss to know how to operate it. Is the market value of the land to be wholly disregarded? How is the amount which the assumed owner would be willing to pay to be determined? Whose opinion on this subject, if it is not left to the owner to decide, will be available to the Court? Real Estate experts will not be able to give it any help. During the trial I put the test to Mr. Bosley,

one of the most experienced and reliable real estate experts in the country, but he could not assist the Court in arriving at an answer to it. He explained that he could not apply the test because he could not know what was in the owner's mind. In his opinion, it was only the owner who could decide how much he would be willing to pay. While the wording of the test lends itself to such an opinion it could not have been intended that the owner should be the arbiter of his own entitlement. Under these circumstances it seems to me that in view of the difficulty of applying this test a search should be made for a more easily applicable one.

Some help towards the solution of the problem is to be found in the remarks of Rand J. in the Diggon-Hibben case. He drew a distinction between those factors of value that might influence the judgment of a purchaser and those with which a purchaser would not be concerned. After pointing out that the meaning of Lord Moulton's language in the Pastoral Finance Association case had been somewhat misconceived by me in the course of the trial and in my reasons for judgment, he said at page 715:

> ' It is obvious that the purchaser will pay according to the strength or value of his interest or his "anxiety" to obtain the property and to nothing else. He is not concerned with the consequences of disturbance to the owner.'

But he made it very clear that in his view value to the owner includes factors of value other than those with which a purchaser would be concerned. He refers to factors of this sort at page 714:

> ' The question arises here in connection with the claim for disturbance of possession, including expenses of moving, damages to or loss of fixtures, and for interruption of business generally. The debate is whether these are to be taken as elements of the value of the land to the owner or items of an independent claim for damages. There is no serious dispute that they should be allowed; that they must be such as can be brought within the scope of the "value of the land to the owner" has not been questioned; and what is at issue in the particular items is in reality a conceptual refinement which is devoid of practical significance.'

> With deference I suggest that the last part of the statement is open to question. In my opinion, it is essential, in the interests of precision, to recognize the distinction between the factors of value that would be likely to affect the judgment of a purchaser and those that would not. The statutory definition of value should be such as to exclude from consideration all factors that would not be likely to affect the judgment of a prudent purchaser. I do not see how there could be any objection to such a definition of those factors of value to the owner with which a purchaser would not be concerned. I shall defer the discussion of such a provision until I deal with the defendant's claim for disturbance. In the meantime, I shall confine myself to consideration of what definition of value would best meet the suggested condition."

These comments bear a marked resemblance to the remarks made by the Scott Committee in its second report which was published in 1918:

> " We believe that we can best comply with the terms of our reference by dealing under separate heads with the more important points which arise in the Assessment of Compensation, and indicating in each case the recommendations which we propose rather than by dealing seriatim with the existing legislation affecting the subject, and detailing all the alterations of the law necessary to carry our recommendations into effect. It has become notorious, and the experience both of our own members and of the witnesses who have assisted us confirms the general public impression that the sums paid for the acquisition of property for public purposes, not only in contested, but also in uncontested, cases, have for many years past been in many cases excessive. During recent years the tendency, partly under the influence of a revised procedure in various Statutes, partly owing to a change in public opinion, has been towards an improvement; nevertheless, the statement is still undoubtedly true. It is impossible to assign any one cause for this result. The absence of any definition of value in the Lands Clauses Acts and the erroneous application to particular cases of the principles of valuation originally laid down by

the Courts, which have opened the door to fanciful valuations and conventional allowances; the uncertainty as to the constitution of the tribunal, the choice of which lies largely in the hands of the claimants;- the absence of proper provision for particulars of claim; and perhaps most important of all, the provisions as to costs of proceedings, both in obtaining compulsory powers and in the assessment of compensation;-all these are elements which have contributed to the result. The effect has been that promoters have found it prudent to settle claims at prices arrived at by adding to a generous estimate of the value of the property a large part of the costs which they would have to pay if the case were contested. This again has re-acted upon the claims habitually put forward, and has led to the fiction of "compensation value" which has affected the verdicts of juries and even the awards of arbitrators. We proceed to deal with these matters in detail.

The Lands Clauses Acts do not in terms define the basis of valuation for the purposes of assessing the price to be paid for land, but judicial decisions interpreting the Acts have adopted the criterion of "the value to the owner". The reason for this criterion of value was that the alternative basis of the value to the Statutory Purchaser would, as a rule, have given the owner too much, and been unfair to the purchaser.

But if the object of the Courts was to prevent the owner getting more than he ought, they have not succeeded. Their own decisions have quite logically said that all "potential" as well as actual value must be included under the head of "value to the owner." But under the cloak of this criterion merely hypothetical and often highly speculative elements of value which had no real existence have crept into awards as if they were actual; while elements of remote future value have too often been inadequately discounted, and valued as if there were a readily available market. "Full compensation" is another phrase used by the Courts in this context. It is in itself unobjectionable, but undue emphasis has unconsciously been placed on the adjective and combined with "value to the owner", "full compensation" has led to the owner being unduly given the benefit of the doubt. The extent to which excessive valuation for compensation purposes has in the past been pushed is well

illustrated by the contrast, which has been too often presented, between the value of land when acquired for public purposes, and the value of the same land when estimated on behalf of the private owner for the purpose of taxation.

Compulsory acquisition of land to any great extent first took place in connection with the Railway development in the first half of the 19th century, and public opinion in regard to compensation was undoubtedly much influenced by the fact that railway enterprise undertaken for profit rather than the direct interest of the State was the moving force. The sense of grievance which an owner at that time felt when his property was acquired by railway promoters, then regarded as speculative adventurers, led to sympathetic treatment by the tribunal which assessed the compensation payable to the owner, and this point of view became general and continued for many years to influence all awards of compensation for land expropriated for public purposes.

It is because of the practice which has thus grown up and the consequent expectations of owners that we are impressed with the necessity of defining more clearly and accurately the price which an owner is entitled to be paid for his land.

It ought to be recognized, and we believe is today recognized, that the exclusive right to the enjoyment of land which is involved in private ownership necessarily carries with it the duty of surrendering such land to the community when the needs of the community require it. In our opinion no landowner can, having regard to the fact that he holds his property subject to the right of the State to expropriate his interest for public purposes, be entitled to a higher price when in the public interest such expropriation takes place, than the fair market value apart from compensation for injurious affection etc.

Having regard to these considerations we think it desirable that it should be definitely provided that the standard of the value to be paid to the owner is to be the market value as between a willing seller and a willing buyer; though, as we make

> clear below, the owner should, of course, in addition, receive fair compensation for consequential injury."

Though the problems existing in British Columbia are not as acute as those described by the Scott Committee, nevertheless the use of the "value to the owner" rule remains an ambiguous and unsatisfactory method of dealing with compensation.

I believe that this can be overcome only by the enactment of statutory rules basing compensation upon market vlaue and taking special value to the owner into consideration only if it can be brought within the scope of disturbance or severance damage.

A source of confusion and controversy in compensation law is the percentage allowance sometimes added to compensation for land taken. In the nineteenth century this allowance originated in England as an additional allowance for the element of compulsion in the purchase. In a sense it was a penalty imposed upon early private takers, such as railroad builders, for depriving Englishmen of their property.

This allowance has come to be known as the ten percent (10%) allowance. In Canada until recently it was considered to be awarded because of uncertainty or difficulty in appraising values. In 1961 the Supreme Court of Canada ruled in

Drew v. The Queen[35] that this allowance can be made only where special circumstances render value to the owner virtually unassessable. In such cases this allowance serves as an alternative to an attempted assessment of factors not easily calculated.

The following remarks of Mr. Justice Locke in the Drew case indicate the difficulties which surround the ten per cent (10%) allowance:

> " I have considered with care all of the reported cases in the Exchequer Court and in this Court in which the question of an allowance for compulsory taking has been considered and I am unable to discover in any of them any support for the proposition that such an allowance is made in circumstances presenting difficulty or uncertainty in appraising values. An examination of the authorities and the early works on compensation in England following the passing of the Lands Clauses Consolidation Act of 1845 does not make clear either the reason for the making of such an allowance or the value upon which the percentage is reckoned. I have searched and have been unable to find any cases prior to 1845 where any such allowance was made.
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> In the 2nd edition of Cripps on Compensation published in 1884 it is said at p.98 that it was customary to add ten per cent to the value of lands taken under compulsory powers, but what value is not stated. In Lloyd on Compensation, 1895 p. 70, dealing with the practice under the Lands Clauses Consolidation Act and others of a like nature, the author says that when a leasehold is expropriated, ten per cent for compulsory sale is usually added to the total sum at which the value of the lease is assessed, and the ten per cent was considered sufficient compensation for compulsory sale, in addition to the assessed value

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35. (1961) S.C.R. 614.

of house property. In Browne and Allan on Compensation, 1903, p. 97, it is said that a percentage is regularly

> ' added to the market price and this is usually right for the sum to be ascertained is not the market price but the value of the land to the owner.'

In Dodge v. The King, Idington J. at p. 156 said that there might be added to the market price a percentage to cover contingencies of many kinds.

In more recent years the practice where the allowance is made appears to have been to compute it on the value of the property to the owner, excluding therefrom any allowance made for disturbance, moving costs or loss of profits or business.

The principle applicable in determining compensation, stated in the Woods Manufacturing case, was not new. Thirty-four years earlier it had been stated in similar terms by Duff J. (as he then was) in Lake Erie and Northern Ry. Co. v Brantford Golf and Country Club. An element very often of great importance to be considered in determining what a prudent man would pay for the property rather than to be ejected from it is the expense and inconvenience of moving elsewhere, the loss of benefits enjoyed by the owner due to the location of the property taken and, where a business is carried on which the owner proposes to continue elsewhere, the loss due to the dislocation of the business, the loss of profit in the interval before it can be established elsewhere, moving costs and other unavoidable expenses. The allowance made in respect of the dislocation of any business carried on and the loss of profit in the interval before it can be established elsewhere is, of necessity, in the nature of unliquidated damages and, except in very rare circumstances cannot be determined with complete accuracy.

In my opinion, and despite the expression of opinions to the contrary by individual judges in some of the decided cases, I think the reason for the allowance of a percentage of the value of the land as part of the compensation was to provide for damage and expense of this nature.

This allowance gradually decreased to ten per cent (10%) and in Canada it ceased to be awarded for the element of compulsion[36] and until recently was considered to be justified on the basis of uncertainty or difficulty in appraising values. The Drew case has resolved the dispute as to whether these bases of award are still valid by ruling that the ten per cent allowance applies only where there are special circumstances such that value to the owner cannot be fully assessed.

In my view, the ten per cent allowance should be abolished upon the enactment of statutory rules for determining compensation upon the basis of market value with due allowance for proved disturbance or severance damage.

(b) Compensation for Disturbance

The term "disturbance" covers losses and expenses to an owner as a result of forcible ejection from his land, and this term is not related to the value of the land. This head of compensation covers such matters as moving expenses, loss of goodwill of the business and the cost of relocating. Under the existing law disturbance is treated as an integral part of value to the owner since this was the only way in which the Courts could justify its allowance as a compensable item under Section 64 of the Lands Clauses Act. Thus

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36. The King v. Lavoie (Dec.18, 1950 S.C.C.) unreported.

the word "value" in that section was given the broad meaning "value to the owner" and was interpreted to include disturbance.

It is my opinion that market value is the fair and proper way to assess compensation. However, the introduction of market value as the basis of compensation for land taken will make necessary the provision of an award for disturbance as a separate head of compensation.

(c) Compensation for Severance Damage

Section 64 of the Lands Clauses Act directs compensation tribunals to have regard to "the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner".

Section 50 of the Act contemplates an inquiry which "relates to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith."

From the wording of these two sections the Courts have established three tests which must be met by an owner claiming compensation for severance damage.

1. There must be unity of tenure between the land taken and the land severed.

2. The injury must result from acts done on the land which has been taken from the claimant.

3. The damage must not be too remote and must arise from the exercise of the power of expropriation.[37.]

The Privy Council has held that compensation for severance damage is justifiable only where there is some unity of ownership conducing to the advantage or protection of two or more properties as a single holding.[38.] The mere fact of severance is not sufficient. There must be a real injury beyond the loss of land taken, and an injury attributable to the severance from the remaining land. In other words, the severed properties before taking must be so related that those taken give additional value to those remaining.[39.]

(d) Compensation for Injurious Affection Where No Land Is Taken

Section 69 of the Lands Clauses Act begins:

" If any party is entitled to any compensation in respect of any land or of any interest therein which

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37. Challies, Law of Expropriation, 2nd Ed. p. 139.

38. Holditch v. C.N.R. (1916) 1 A.C. 536.

39. The King v Halin (1944) S.C.R. 119.

> has been taken for or injuriously affected by the execution of the works. . ."

and then provides procedures for recovering compensation. The English courts have interpreted this section as giving a right to compensation for injurious affection in cases where no land is taken.[40] The Courts took the view that since the expropriation legislation sanctioned acts which under common law were tortious, sounding in nuisance, that this right to compensation was given in substitution for the common law right of an action for damages for nuisance. The Courts were restricted by the words of Section 69, which specified "land or any interest therein" and "the execution of the works". The Courts have developed four conditions which an owner must satisfy if he claims compensation for injurious affection when none of his land has been taken:

1. The damage must result from an act which has been rendered lawful by the statutory powers.

2. The damage must be such that it would be actionable but for the statutory powers.

3. There must be an injury to the land, and not just a personal or business injury.

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40. The leading case on this matter in Metropolitan Board of Works v. McCarthy (1974) 7 H. L. 243.

4. The injury must result from the construction of the works, not the use thereof.[41]

The first two conditions flow logically from the view that Section 69 simply provides a substitute for a right of action which has been taken away. The third and fourth conditions, on the other hand, arise solely as a result of the words chosen by the draftsman of the 1845 statute and their effect is often to deprive an owner who has suffered substantial injury of any right to compensation. Indeed in one early Canadian case an owner was put out of business through injurious affection but without redress since the injury was to his business and not to the land.[42]

It will therefore be my recommendation that the third condition be modified and the fourth condition abolished.

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41. These rules were first stated in the McCarthy case (supra) and received express approval as part of the law of compensation in Canada in Autographic Register v. C.N.R. (1933) Ex. C.R. 152 @ 155. The rules have now received the approval of the Supreme Court of Canada in the recent case of The Queen v. Edgar Loiselle (1962) S.C.R. 624.

42. McPherson v. The Queen (1882) 1 Ex. C.R. 53.

In order to determine the proper basis for compensation it is my view that consideration of the existing law of England, the United States and Canada will be helpful.

I. COMPENSATION IN ENGLAND

Awards of compensation in England now fall under The Land Compensation Act, 1961, a consolidation of the various compensation acts which have been passed since the first major revision of compensation law in 1919. I will outline briefly the evolution of this new English statute because it illustrates the complexity of the problem and the extreme difficulty of framing an effective and comprehensive code of compensation law.

The Lands Clauses Consolidation Act, 1845, as previously mentioned, served as the basis of compensation law and compulsory acquisition procedure for some seventy-five years in England. By the end of the First World War the inadequacy of the 1845 Act was so apparent that the Scott Committee was appointed to study the question of acquisition of land for public purposes and compensation therefor and to make recommendations. As a result of the Scott Committee reports Parliament passed the Acquisition of Land Act, 1919. The most important change affected by this Act was the introduction of statutory rules for assessing compensation. These rules substituted market value in place of value to the

owner concept of compensation evolved by the Courts from the wording of the 1845 Act. In addition, the 1919 Act:

(a) abolished the practice of adding an allowance on account of the acquisition being compulsory.

(b) eliminated any element of value which can be exploited only through statutory powers,

(c) attempted to eliminate the inflated price created by the needs of a particular purchaser,

(d) eliminated any element of value arising from illegal or unhealthful use of the premises,

(e) provided a reinstatement principle for assessing compensation for land "devoted to a purpose of such a nature that there is no general demand or market for land for that purpose", e.g. churches and schools, and,

(f) expressly preserved the right of an owner to compensation for "disturbance or any other matter not directly based on the value of land", i.e. severance and injurious affection.

It is important to remember that the 1845 Act was not repealed in 1919 and is still in force in England. Its scope was greatly limited in that the Acquisition of Land Act, 1919, was made applicable whenever any Government

Department or any local or public authority is authorized by statute to acquire land compulsorily and compensation is in dispute. The private taker to whom the 1845 Act applies appears today to be virtually extinct but the 1845 Act retains importance as the statutory foundation upon which is based the rules for determining compensation for disturbance, severance and injurious affection.[43.]

The English rules for assessing compensation appear to have served their purpose fairly well since they were first formulated in 1919. The 1944 Report of the Uthwatt Committee[44.] on Compensation and Betterment, indicates that the Committee considered the six rules in the 1919 Act generally satisfactory. Subject to variations in the statutory definition of the market value which have been made in Town and Country Planning legislation since 1919, the six rules have remained substantially unchanged. However, the Town and Country Planning Act, 1959, returned to the market value standard of the Acquisition of Land Act, 1919, and in addition made provision for the following

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43. Rule 6 - of Section 5 of the Land Compensation Act simply provides that "the provisions of (the market value rule for land taken) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

44. Cmd 6386, Expert Committee on Compensation and Betterment.

three difficult problems of valuation not previously covered by statute:

(a) whether any effect on land values either caused by or peculiar to the scheme of development should be ignored in determining compensation;

(b) whether any enhancement to the severed remainder where part of the owner's land is taken which is caused by or peculiar to the scheme of development should be set off against the compensation payable for the land taken;

(c) whether any depreciation in value resulting from the "threat of compulsory purchase" should not be taken into account in determining compensation.[45]

With the enactment of the Land Compensation Act, the provisions for determining compensation have once again been consolidated and its predecessors have been repealed (including the whole of the Acquisition of Land Act, 1919) except the Lands Clauses Act, 1845.

It is apparent that the English Parliament has found desirable a comprehensive codification of the law of expro-

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45. These provisions are set out in subsections 2, 3 and 6 respectively of Section 9 of the Town and Country Planning Act, 1959.

priation and has progressively codified that law as the complex problems of compensation policy and valuation practices have become better understood. For this reason I will attempt to analyze all ramifications of this problem and recommend ways of dealing with them by legislation.

Another significant development in England has been the creation of a special Lands Tribunal under the Lands Tribunal Act, 1949. The necessity of creating a special tribunal of experts to replace the official arbitrators (pursuant to Section 1 of the Acquisition of Land Act, 1919)[46] indicates the inherent difficulty involved in determining compensation questions.

Thus in England today questions of disputed compensation are determined by a special statutory tribunal composed of expert lawyers and valuators who apply the fairly

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46. Section 2 (2) of the Lands Tribunal Act, 1949, provides that: "The President shall be either a person who has held judicial office under the Crown (whether in the United Kingdom or not) or a barrister-at-law of at least seven years' standing, and of the other members of the Lands Tribunal such number as the Lord Chancellor may determine shall be barristers-at-law or solicitors of the like standing and the others shall be persons who have had experience in the valuation of land appointed after consultation with the president of the Royal Institution of Chartered Surveyors".

comprehensive statutory rules for assessing compensation. From their decision an appeal lies to the English Court of Appeal on a question of law only.[47]

II. COMPENSATION IN THE UNITED STATES

As I have already indicated in the section on Historical Background, in the United States there is a constitutional right to "just compensation" for private property taken by the Federal Government for public use. Where a state authority takes property there is a constitutional right to "due process" which the United States Supreme Court has interpreted as including just compensation.[48]

In the United States of America the framers of the ten original Amendments to the Constitution, commonly known as the Bill of Rights, enacted by Congress in 1791, included in those Amendments a right to compensation for property taken by the Republic. The relevant parts of the Fifth Amendment read as follows:

> "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Thus in Federal expropriations in the United States the right to compensation has never been in dispute.

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47. Lands Tribunal Act, 1949, subsections (4) and (11)a of section 3.
48. Monongehala Navigation v. U.S. (1893) 148 U.S. 312.

Not all Constitutions of American States contain provision for compensation for land taken. The Fourteenth Amendment, proposed by Congress in 1866 to the State Legislatures, and later ratified by them, gave American citizens right to "due process" when deprived of land by State expropriations. Part of the Fourteenth Amendment reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The absence of a "just compensation" provision in the Fourteenth Amendment was not serious because the Supreme Court of the United States has held, even where there was a constitutional right to compensation by reason of the Fifth Amendment, that natural justice demands that just compensation be paid when land is taken and that the Fifth Amendment was simply declaratory of this natural right.[49.]

The words of Mr. Justice Story speaking for the unanimous court in the case of Wilkinson v. Leland[50.] in 1829 illustrate the approach taken:

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49. Monongahela Navigation Co. v. United States (1893) 148 U.S. 312.
50. 2 Peters 627.

> "In a government professing to regard the great principles of personal liberty and of property... it would not lightly be presumed that the great principles of Magna Carta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence... That government can scarcely be deemed to be free where the rights of property are left solely dependant upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

The Seventh Amendment to the United States Constitution gives citizens a right to jury trial, thus compensation cases in the United States are usually tried by judge and jury. For example, in California, which has a comprehensive code of expropriation in its Civil Code of Procedure, Sections 1237 to 1266.2 provide that the taker must bring an action in Court by way of complaint to condemn land for public use and proceed to judgment which vests the land in the taker and fixes compensation.

A number of states have recently conducted studies of their condemnation codes and some have revised or are in the process of revising their codes. During the past three years, Wisconsin and Florida have modernized their law of eminent domain by revision of their condemnation codes. In California, comprehensive study of this field has been carried out under the auspices of the California Law Revision Commission. The Commission in turn is recommending significant changes in the California code of eminent domain.

The California Law Revision Commission has directed separate studies on the following topics:

(1) Taking possession and Passage of Title in Eminent Domain proceedings.

(2) Reimbursement for moving expenses when property is acquired for public use.

(3) Evidence in Eminent Domain proceedings.

(4) Procedural problems in Eminent Domain cases.

(5) Pre-trial and Discovery in Eminent Domain cases.

(6) The question of compensability of certain consequential damages.

(7) Whether the owner of real property should be compensated for incidental business losses cuased by the taking of real property by Eminent Domain.

(8) "Larger parcel" in Eminent Domain.

(9) Problems connected with the date of valuation in Eminent Domain cases.

(10) Apportionment and allocation of the award in Eminent Domain cases.

(11) Settlement negotiations in Eminent Domain.

Perhaps the most significant change proposed for California is the attempted relaxation of the strict market value rule generally considered unjust to owners who frequently bear heavy loss from disturbance and injurious affection.

American experience in compensation law is useful because the Courts have interpreted the constitutional right to compensation to attain a just result. The large volume and variety of condemnation cases have allowed American Courts to deal with a wide range of compensation and valuation questions, some of which have never arisen in Canada. For this reason I have found American sources most helpful during my investigations.[51.]

III. COMPENSATION IN CANADA

In British Columbia as I have stated, there is a statute virtually identical to the English Lands Clauses Act governing the compensation awards in expropriation cases. In other Provinces the Courts have evolved a law of compensation from the English Act, and in a majority of Canadian Provinces there are central expropriation statutes or such

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51. An especially excellent treatise on valuation questions is Orgel: Valuation under Eminent Domain, published by The Michie Company, Law Publishers, Charlottesville, Va.

statutes are in the process of being prepared.[52]

The Federal Expropriation Act governs expropriation by the Government of Canada.[53] The right to compensation is expressed in Section 23 of that Act which states:

> "The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportion of amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the cases may be, become and be absolutely vested in Her Majesty."

This Act does not specify the elements which are to be the subject of compensation or the criteria for compensation. Section 27 refers to "Land or property... acquired or taken for, or injuriously affected by, the construction of any public work", and the common law rules of compensation are thus brought into operation.

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52. A complete revised Expropriation Act, designated Bill C-50, was given first reading in Parliament on October 3, 1962. Alberta: Expropriation Procedure Act 1961 S.A. Ch. 30. Manitoba: Expropriation Act 1954 R.S.M. Ch.78. New Brunswick: Expropriation Act 1952 R.S.N.B. Ch.77. Nova Scotia: Expropriation Act 1954 R.S.N.S. Ch. 91. Ontario: Bill 120 (1961 Session) now under study by special legislative committee. Saskatchewan: Expropriation Act 1953 R.S.S. Ch. 52.

53. R.S.C. 1952, c. 106.

The Exchequer Court Act grants the Exchequer Court of Canada exclusive original jurisdiction to hear and determine:

(a) Every claim against the Crown for property taken for any public purpose;

(b) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

The Federal Expropriation Act permits the Crown to mitigate injury resulting from expropriation. Section 31 provides:

> "Where the injury to any land or property alleged to be injuriously affected by the construction of any public work may be removed wholly or in party by any alteration in, or addition to, any such public work, or by the construction of any additional work, or by the abandonment of any portion of the land taken from the claimant, or by the grant to him of any land or easement, and the Crown, by its pleadings, or on the trial, or before judgment, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken, or to grant such land or easement, the damage shall be assessed in view of such undertaking, and the Court shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed, or portion of land abandoned, or such grant made to him."

This proviso, copied in substance in a number of provincial expropriation statutes, appears to me to offer a useful alternative or a supplementary method of alleviating injury. I, therefore, recommend that a similar provision

be included in a new expropriation statute for British Columbia.

IV. PROPOSED EXPROPRIATION ACT

In a report of this kind it would be both impossible and improper to attempt to draft a complete new Act containing all the provisions suitable to incorporate in a code governing the law of expropriation in British Columbia but since such law is obviously in need of modernization and since the preparation of this report has necessitated the study of specific common law rules and statutory provisions in this and other areas, and also since the law has been and is in the process of being brought up to date in other jurisdictions, I have ventured to draft, in the hope of being helpful, significant provisions which I think should be incorporated into a new statute. Such changes would introduce certain modern concepts into the present law but it must be emphasized that the changes which I am suggesting are by no means comprehensive and that further work is required by appropriate officials to codify the law of expropriation in British Columbia in its entirety.

As I have already indicated, it is my opinion that the law of expropriation for this Province should be enacted in a single comprehensive statute. The contents of this proposed Act should include:

(a) A definition of the scope of the Act;

(b) A repeal of the Lands Clauses Act;

(c) A statement of the right to compensation;

(d) Rules for assessing compensation;

(e) Procedure in compensation disputes.

Such a general statute will be subject, of course, to minor exceptions in cases where a full code of expropriation law is considered inappropriate. An illustration of such an exception is Section 16 of the Health Act.[54]

> " In cases of actual or apprehended emergency, such possession may be taken without a prior agreement with the owner of the land or building and without his consent, and may be retained for such period as may appear to the Minister, or officers who took possession thereof, to be necessary."

The Civil Defence Act[55] contains a similar provision for expropriation in cases of emergency. I consider it desirable to have a summary procedure available in such cases.

The proposed expropriation statute should contain a complete list of the Provincial Acts granting authority to

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54. R.S.B.C. 1960 c. 170.

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

expropriate and should indicate not only those acts to which its provisions apply but also those to which it does not apply.

I consider it desirable that the Lands Clauses Act and all the special enactments dealing with expropriation found in Provincial statutes be repealed. Only the actual authority to acquire land by purchase or expropriation should be retained in particular statutes.

I therefore recommend the enactment within the uniform statute of a provision of the following nature:

APPLICATION

The Lands Clauses Act, being Chapter 209 of the Revised Statutes of British Columbia 1960, is hereby repealed. The right to compensation and eight rules for determining compensation as provided in this Act shall apply to all expropriations of any lands and premises carried out by authority of any of the Acts listed in Schedules "A" and "B" of this Act.[56] All other provisions of this Act, shall apply to all expropriations of any lands and premises carried out by authority of any of the Acts listed in Schedule "A"

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56. For a list of statutes to be included in Schedule "A" above see Schedule 2 of this Report.

but shall not apply to expropriations on any lands and premises carried out by authority of the Acts listed in Schedule "B".[57.]

RIGHT TO COMPENSATION

Most authorities consider that the only right to compensation in Canada is that given by statute. To remove any doubt it is desirable in my view to begin with a direct statement defining the right to compensation. Such a provision would take the place of Sections 50, 64 and 69 of the repealed Lands Clauses Act and should read as follows:

RIGHT TO COMPENSATION

Compensation shall be paid in accordance with rules 1 to 8 inclusive of this Act in every case where land and premises are taken or injuriously affected by a body authorized to expropriate such land and premises by this or any other statute of British Columbia when acting in pursuance of its statutory authority.

RULES FOR ASSESSING COMPENSATION

As already mentioned I consider it desirable for this

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57. For a list of statutes to be included in Schedule "B" above see Schedule 3 of this Report.

Province to adopt the principles of compensation set out in the Scott Report.

As for the desirability of enacting statutory rules for determining compensation, I am in entire agreement with the opinion expressed by Thorson P. in The Queen v Supertest Petroleum Corporation Ltd.[58] :

> " It is thus plainly evident that the law on this vexatious question is, to say the least, in a very unsatisfactory state and it is very doubtful that any clarification by judicial decision is possible. Under the circumstances, I have come to the conclusion that it is essential to the fair administration of this branch of the law that there should be a statutory definition of value. It was found necessary in the United Kingdom, as long ago as 1919, to lay down such a definition for use in the case of all lands compulsorily acquired by a government department or a local or public authority. This was accomplished by the Acquisition of Land (Assessment of Compensation) Act, 1919. In my opinion, similar action should be taken in Canada."

MARKET VALUE CONCEPT

It will be recalled that the central principle contained in the Scott Report in England in 1919 was that market value should be the basis for determining compensation for land taken and I have already indicated my agreement with that principle. In today's complex society it is essential that the desire of landowners to obtain the maximum value must give way to essential public needs in respect to land. The English rules for determining compensation based on the

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58. (1954) EX.C.R. 105.

Scott Report appear to have worked well in that jurisdiction as has the introduction of market value instead of value to the owner. Except in some instances the principle of market value has also been used satisfactorily in the United States.

By the introduction into British Columbia of statutory rules for the determining of compensation, the Province will have the advantage of the Scott Committee rules and the authorities based thereon. By following these precedents tribunals may avoid any ambiguity arising from the failure to separate clearly the principle of market value and value to the owner which has been the guiding principle in British Columbia. (It appears to me that this distinction was not made clear in the proposed Federal Expropriation Act introduced in the House of Commons in 1962 as Bill C-50),[59]

Not only has the value to the owner rule been difficult to apply but it appears to have led to excessive compensation awards by introducing imaginary and speculative elements of value. In my opinion, market value provides a valuation which is objective and certain. It also facilitates the separation and specification of the other heads of compensation such as disturbance and severance damage claimed by an owner in addition to the value of land taken.

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59. See Section 12 where phraseology appears to be confusing.

Sections 5 to 16 of the English Land Compensation Act, 1961,[60] contain the provisions followed by the English Courts in determining compensation. These sections are reproduced in Schedule 4 to this Report. The main rules, substantially those contained in the repealed Acquisition of Land Act, 1919, are contained in Section 5 and were commonly referred to during the hearings before me as "the six English rules for assessing compensation".

Sections 6 to 16 of the 1961 English Act dealing with the determination of compensation cover problems arising from the effect on land values of developments carried out pursuant to powers of expropriation or the prospect of such development or special cases. These Sections embody important modifications of the English rules made since the rules were first enacted in 1919. I have attempted to incorporate into the original six English rules as modified and as appropriate to this Province and my conclusions reached as a result of the hearings before me.

For convenience I will set out the six English rules found in Section 5 of the 1961 Act together with the equivalent rules which I will recommend.

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60. This Statute was enacted during the year when I conducted my public hearings and was not available to me until the hearings had been completed.

	ENGLISH RULES		PROPOSED RULES
Rule 1	No allowance shall be made on account of the acquisition being compulsory.	Rule 1	No allowance shall be made on account of the acquisition being compulsory or for elements of uncertainty or difficulty of assessment, or special circumstances.*
Rule 2	The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize;	Rule 2	The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller to a willing buyer might be expected to realize. This value shall be determined as of the date of filing of the Notice of Expropriation at the appropriate Land Registry Office.
Rule 3	The special suitability or adaptability of the land for any purpose shall not be taken into	Rule 3	In determining market value, no account shall be taken of (a) value of the land peculiar to the taker.

*the underlining indicates changes in the proposed rule which will be explained in the body of this Report.

	ENGLISH RULES		PROPOSED RULES
	account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers;	(b)	any effect upon the value of the land resulting from the proposed work or undertaking for which the land is being expropriated or resulting from any prospect of expropriation.
Rule 4	Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any Court, or is detrimental to the health of the occupants of the premises, or to the public health, the amount of that increase shall not be taken into account;	Rule 4	Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises, or to the public health, the amount of that increase shall not be taken into account.

	ENGLISH RULES		PROPOSED RULES
Rule 5	Where land is, and but for the compulsory acquisition, would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement;	Rule 5	Where land is, and, but for the expropriation would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the court is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of reasonable cost of reinstatement.

ENGLISH RULES		PROPOSED RULES	
Rule 6	The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land; [61.]	Rule 6	In addition to the value of land taken as defined in Rule (2) where an entire parcel is taken, or for a partial taking, an owner shall be paid compensation for disturbance arising from the expropriation provided that it is not too remote and that it is the natural and reasonable consequence of the dispossession of the owner, and further provided that in no case shall compensation exceed the greater of (a) existing use value plus disturbance, or (b) value based on the highest and best use.
		Rule 7	An owner of land which is injuriously affected although no part of the land is acquired by the expropriating body, shall be paid just compensation for all such injurious affection

61. Since I proposed the repeal of the Lands Clauses Act, Proposed Rules 6, 7 & 8 have been drafted to replace the provisions of that Act.

and for loss of business profits of a permanent nature (after setting off the value of all betterment accruing to that land as a result of acts done by the expropriating authority) which

(a) are the direct consequence of the lawful exercise of the statutory authority,

(b) would give rise to a cause of action but for that statutory authority, and which

(c) in the case of injurious affection, result in a decline in the market value of the land.

In applying this rule no separate allowance shall be made for loss of business profits where such loss is also reflected in a decline of the market value of the land.

Rule 8 Where part only of an owners land is taken or where two or more parcels of land owned by the same person are so situated that the possession and control of one of them gives an enhanced value to all of them, compensation shall be paid for the land taken and for damage through severance or other injurious affection resulting directly to the severed remainder, after setting off any increased value of the remainder resulting from acts performed by the expropriating body. Such compensation shall be the difference between the value, before the taking, of all the lands (determined in accordance with rules 1 to 4) and the actual market value of the remainder immediately after the

taking; PROVIDED that in no case shall the compensation be less than the value of the land taken (determined in accordance with rules 1 to 4).

English Rule 1

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

English Rule 1 was designated to abolish the controversial ten per cent (10%) allowance given for the element of compulsion. Canadian Courts have granted this allowance for a variety of reasons. I am recommending an enlargement of the English Rule so as to make it clear that no such allowance is to be added for any reason.[62.]

I therefore propose the following rule for this purpose.

PROPOSED BRITISH COLUMBIA RULE 1

"No allowance shall be made on account of the acquisition being compulsory or for elements of uncertainty or difficulty of assessment, or special circumstances."

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62. For the most recent judicial pronouncement on the 10% allowance see Drew v. The Queen (1961) S.C.R. 614. As an instance of the difficulty in applying the rule in the Drew case, see Valley Improvement Co. Ltd. v. Metropolitan Toronto and Region Conservation Authority (1961) O.R. 783, and Re Eix and County of Waterloo (1963) 37 D.L.R. 290.

English Rule 2

> The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize;

English Rule 2 established open market value as the basis of compensation. The words "willing seller" in this rule have served their intended purposes: they have eliminated the forced-sale price. In 1942, some twenty-three years after this rule's enactment, the Uthwatt Committee stated that the second rule imported a willing buyer.[63.] I consider that the English Rule would be improved by express inclusion of the words "willing buyer" for greater certainty.

This Rule should also establish the date of the valuation. I recommend that the date of filing the Notice of Expropriation at the appropriate Land Registry Office should be the valuation date.

As I have previously outlined in detail, I consider market value to be the proper basis for determining compensation for land taken. I recommend the enactment of the

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63. Cmd. 6386, Report of the Expert Committee on Compensation and Betterment, at p. 74.

following rule:

PROPOSED BRITISH COLUMBIA RULE 2

"The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller to a willing buyer might be expected to realize. This value shall be determined as of the date of filing of the Notice of Expropriation at the appropriate Land Registry Office."

English Rule 3

The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers;

English Rule 3 eliminates value attributable to "the special suitability or adaptability of the land for any purpose...if that purpose is a purpose to which it could be applied only in pursuance of statutory powers."[64.]

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64. Land Compensation Act (1961) s. 5(3). See also ss. 6 - 9 inc. of that Act which deal at length with the enhancement and diminution of land values resulting from schemes involving expropriation.

The intended effect of these words is the elimination of the value to the taker and of increased value resulting from competition among statutory takers.

With my recommendation that market value be instituted in the stead of the present value to the owner concept, I propose, following the English rule, the elimination of any consideration of value to the taker. Such elimination should be made for two reasons. In the first place, the insertion of the market value concept by its very nature obviates any consideration of special value of the land to the taker. Secondly, it is my opinion that the public or its authorized agents should not be required to compensate owners for any special value of land arising from the fact that it has become essential for public use. Hence, I recommend the inclusion of a statutory provision specifically excluding the taker as a potential purchaser in the market in so far as he can put the land to uses to which a potential purchaser without his statutory authority could not.

The implications of the English Rule as stated above have been analyzed by an American writer.

> " Assuming that the taker is the only potential user for the particular purpose, there are two hypotheses under which the courts may consider a market uninfluenced by the taker's demand. Under one hypothesis, the taker may be considered as entirely excluded from the market. Under the second assumption, the taker would be included but without his powers of eminent domain. These two hypotheses would give the same result in arriving at

> a value uninfluenced by the taker's demand, except in the case where the special value to the taker would not be dependent on his power to condemn. In this latter case, if the taker were included in the market but without his power to condemn, the hypothetical market value would be influenced by the value to the taker. It would not, however, include the entire amount of this value since the desire of the owner to effect the sale would serve to counteract the taker's anxiety to secure the property. Some courts have failed to perceive that the market value may be influenced by the special value to the taker without including the whole of that value and therefore have expressed no opinion as to the possibility of choosing between a hypothetical market which altogether excludes the taker and one which includes the taker without his powers of eminent domain." 65.

The English Rule, as I have stated earlier, eliminates increased compensation resulting from competition among potential statutory takers. I consider the possibility of such competition in British Columbia so remote that the Proposed Rule for this Province can be more simply stated than the third English Rule.

A further element of value which is properly excluded by the proposed rule is increased value based on suitability of the land for the particular undertaking arising out of the special circumstances. For example, when a highway authority has acquired all but one parcel required for a right-of-way, the remaining parcel becomes an essential link in the chain of acquisition. Therefore its value is inflated

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65. Orgel, Valuation under Eminent Domain (2nd ed.) Vol. 1, p. 363.

out of all proportion to its inherent worth by reason of the needs of the taker. Such increased value is due not to any quality of the land but rather to an accident of physical location and timing. To consider such value would give that owner an unjust advantage over other owners.

The proposed rule is also designed to exclude any effect of the announcement of the taker's proposed development on the lands liable to be taken. An expropriating authority can often by threat of expropriation or by declaration of intention to expropriate land in a given area either virtually suspend market transactions in that area on the one hand to the detriment of the owner or precipitate a wave of speculative buying on the other hand if the land is considered to have potential development value which could support high compensation awards. All such effects should be excluded from the open market valuation.

It was argued before me that in some instances owners who faced expropriation of their lands suffer discrimination in the denial of compensation for its enhanced value because of a planned development. They argue that their neighbours unexpropriated land enjoy this enhancement. This argument ignores the incidence of tax on enhanced value.

In theory there should be a charge for betterment against the unexpropriated lands, but it is not practical

to administer. Orgel expresses the difficulty in the following terms:

> " The enhancement in value of adjoining property is a windfall to the owners and a court might readily regard it as better policy to deprive the fortunate owner of this unearned increment than to confer a like unmerited benefit on the condemnee. The aim of the Court would then be to restrict the area of undeserved gain instead of enlarging it, and this aim would be strengthened in the jurisdictions that permit set-off of benefits, since set-off of benefits is an expression of a policy to prevent windfalls and to limit the condemnee to indemnity for his loss." 66.

Many complications in the assessment of compensation would be avoided if the taker could in every case designate the entire area it requires for its undertaking at the time it makes that undertaking known to the public and then proceed to acquire all the necessary land without delay. Unfortunately the surveys, studies and public discussions which are essential to the decision-making process often make such action impossible.

I recommend the enactment of the following rule for the purpose of eliminating those elements of value which I have just mentioned which in my opinion are not properly included in determining compensation:

PROPOSED BRITISH COLUMBIA RULE 3

"In determining market value, no account shall be taken of

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66. Orgel, op. cit. p. 426.

(a) value of the land peculiar to the taker, and

(b) any effect upon the value of the land resulting from the proposed work or undertaking for which the land is being expropriated or resulting from any prospect of expropriation."

English Rule 4

Where the value of land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any Court, or is contrary to law, or is detrimental to the health of the occupants of the premises, or to the public health, the amount of that increase shall not be taken into account;

English Rule 4 is a statement of the rule which the courts apply in dealing with elements of value arising from unlawful or improper uses of property. For example, an owner who has succeeded in extracting inflated revenue from a roominghouse by crowding the house to the point where it is harmful to the health of the occupants would not be entitled to claim compensation on the basis of actual revenue received but only on the revenue earned by a fit and proper use of the premises. Similarly, the owner of a house used as an illegal gaming house cannot claim compensation on the basis of the purchase price obtainable from

someone wishing to operate such gaming house. The courts should rule out any such elements of value but for greater certainty I consider it desirable to enact a rule.

I therefore recommend that a rule identical to the fourth English Rule be enacted:

PROPOSED BRITISH COLUMBIA RULE 4

"Where the value of land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any Court, or is contrary to law, or is detrimental to the health of the occupants of the premises, or to the public health, the amount of that increase shall not be taken into account."

English Rule 5

Where land is, and but for the compulsory acquisition, would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.

English Rule 5 recognizes that circumstances can exist where compensation based on market value would be unjust.

Compensation should therefore be awarded on the basis of reinstatement. The reinstatement principle arises most often in cases of schools and churches. Land occupied by a church has no market value due to the absence of buyers. Such property will generally be of real value only to the particular owners.

It is my opinion that the broad terms of the Rule give it also potential use as a means of dealing with types of property where the application of the usual market value rule might work injustice. I have in mind premises which have been specially adapted to serve the needs of a handicapped person such as a cripple or a blind person. If the special losses of such an owner cannot be recovered as disturbance, then the tribunal could in its discretion use the reinstatement principle as an alternative to strict application of the market value rule.

The English Court of Appeal has decided that the English reinstatement rule is a discretionary rule which the tribunal need not apply even though the necessary conditions exist.[67] I believe it desirable that such a rule be discretionary because its general terms are so wide that

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67. Festining Rwy. Co. v. Central Electricity Generating Board. (1962) P. & C.R. 248.

they might permit the awarding of compensation for fanciful claims. The discretion will allow the court to refuse to apply the rule in cases coming within the literal scope of the rule but outside its intended purview.

The English Rule 5 permits assessment of compensation "on the basis of the reasonable cost of equivalent reinstatement". I consider it advisable to eliminate the word "equivalent" in order to leave the court full discretion in such mattersas depreciation and obsolescence.

I therefore recommend the enactment of the following reinstatement rule:

PROPOSED BRITISH COLUMBIA RULE 5

"Where land is, and but for the expropriation would continue to be devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the court is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of reasonable cost of reinstatement."

English Rule 6

The provisions of rule 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

In England the Lands Clauses Act, 1845, remained in force after the enactment of the Scott rules in the Acquisition of Land Act of 1919 and that Act was available as the basis for determining compensation for disturbance, severance and other matters unrelated to the value of land taken. Since in order to modernize the laws of expropriation in British Columbia I have recommended the total repeal of the Lands Clauses Act and since circumstances and requirements differ from those in England I recommend the replacement of English Rule 6 by proposed British Columbia Rules 6, 7, and 8.

English Rule 6 was designed simply to preserve the status quo with regard to disturbance, severance and injurious affection. This rule was necessary because the introduction of a market value basis of compensation in rule 2 eliminated the value to the owner rule under which disturbance loss or other damage not related to the value of the land could be included in the over-all compensation award. Since we in British Columbia have a value to the owner rule in force at present under the Lands Clauses Act, it will be necessary upon the repeal of the Lands Clauses Act and the introduction of a market value rule, to provide for compensation for disturbance and other matters not directly based on the value of land. This requires restatement in

statutory form of the Common Law rules evolved by interpretation of the Lands Clauses Act regarding disturbance and other matters not directly based on the value of land. These "other matters" are injurious affection and severance.

The courts have awarded compensation for disturbance as an integral part of value to the owner arrived at by interpreting the word "value" in Section 64 of the Lands Clauses Act.[68] In making such awards the courts have imposed a requirement that the disturbance be not too remote and be the natural and reasonable consequence of the dispossession of the owner. This requirement is included in the proposed new statutory rule for British Columbia.

One of the leading cases on the interpretation of English Rule 6 is Horn v. Sunderland Corp.[69] The English Court of Appeal ruled there that an owner of farm land who claimed compensation for the land itself on the basis of its development value could not claim additional compensation for disturbance. The Court felt that the owner would have to give vacant possession in order to obtain the development price and thus such allowance would be reflected

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68. Harvey v. Crawley Development Corp. (1957) 1 Q.B. per Romer, L. J. @p. 494.

69. (1941) 2 K.B. 26.

in the price itself. In reaching this decision, the majority were evidently influenced by the fact that the development value was greater than the sum of the existing use value plus disturbance losses. The majority of the Court held that the owner must choose between the two. Lord Justice Goddard, dissenting, held that the English compensation rules entitled the owner to compensation based on open market value between a buyer and a willing seller, not market value limited to the existing use, and in addition, to compensation for disturbance. His Lordship said that denial of compensation for disturbance for the reasons given by the majority was to treat the owner not as a willing seller at all but as one under statutory compulsion to sell.

While I consider that Lord Justice Goddard correctly interpreted the English rules for determining compensation according to their strict and literal application,[70.] nevertheless I am in agreement with the general principle adopted by the majority of the Court. The principle is that the owner is entitled to be paid compensation based on the value of his land limited to its existing use plus compensation for disturbance, or the value of his land based on the highest and best use, whichever is the greater. For example, if a farm holding is worth $20,000.00 as farm land

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70. See also the decision of Brown, J. in Coquitlam School Trustees 32 W.W.R. 532.

and the disturbance losses resulting from the owner being turned out amounted to $5,000.00, or is worth $30,000.00 in the market as development land, the owner would have the election of claiming $20,000.00 plus $5,000.00 damages for disturbance or claiming $30,000.00. He would not be entitled to receive $5,000.00 for disturbance in addition to its value as development land. In this example he would claim and would be entitled to an award of $30,000.00, not $35,000.00.

I therefore recommend that the following rule be enacted to provide for compensation for disturbance:

PROPOSED BRITISH COLUMBIA RULE 6

"In addition to the value of land taken as defined in Rule (2) where an entire parcel is taken, or for a partial taking, an owner shall be paid compensation for disturbance arising from the expropriation provided that it is not too remote and that it is the natural and reasonable consequence of the dispossession of the owner, and further provided that in no case shall compensation exceed the greater of

(a) existing use value plus disturbance, or

(b) value based on the highest and best use."

Rule 7.

The question of whether compensation should be paid for injury or loss suffered by owners from whom no land is taken raises a number of difficult problems. The law at present provides:

> " If any party is entitled to any compensation in respect of any land or of any interest therein which has been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking have not made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of $250.00, the party may have the same settled either by arbitration or by the verdict of a jury, as he thinks fit;.... and the same may be recovered by him with costs, by action in any court of competent jurisdiction." 71.

The English courts adopted the similar section in their Act as authority for granting compensation for injurious affection where no land is taken, and where the special statute did not give an express right to such compensation. 72.

It is stated in Challies' textbook "The Law of Expropriation" that:

> " The conditions that must be fulfilled to justify a claim for injurious affection, if no land is taken, are well set forth by Angers, J. in Autographic Register System v. C.N.R. 73. thus:
>
> Four conditions are required to give rise to a claim

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71. Section 69 of Land Clauses Act R.S.B.C.(1960)c. 209

72. Cripp's Compulsory Acquisition of Land, 11th ed.

73. (1933) Ex. C.R. 152.

for injurious affection to a property, when no land is taken:

(a) The damage must result from an act rendered lawful by statutory powers of the Company;

(b) The damage must be such as would have been actionable under the common law, but for the statutory powers;

(c) The damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

(d) The damage must be occasioned by the construction of a public work, not by its user." 74.

The rationale of the first two conditions is that an owner whose land has been injured by acts, tortious if done without statutory authority, should be given a right to compensation in place of the right of action removed by the statute. The limitation imposed by these two conditions is, in my opinion, sound. These two conditions, incidentally, introduce the common law of private nuisance with its requirement that injury done must be peculiar to the claimant's land, over and above any general injury suffered by all land in the area. 75.

The third condition comes from the use of the word "land or any interest therein" appearing in section 69 of the British Columbia Lands Clauses Act. The principle

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74. Challies, The Law of Expropriation, 2nd, ed. p. 133.

75. Metropolitan Board of Works v. McCarthy supra ©p.263.

underlying this condition was stated in a leading English compensation case:[76]

> " The damage complained of must be one which is sustained in respect of the ownership of the property - in respect of the property itself, and not in respect of any particular use to which it may from time to time be put; in other words, it must, as I read that Judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that, of course, if to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the Judgment in Ricket v. Metropolitan Rail Co. to an absurd extend. The property is to be taken in status quo and to be considered with reference to the use to which any owner might put it in its then condition that is, as a house."

In my view, this principle is generally sound since to allow claims for personal and business injury might render the cost of essential public development prohibitive. However, in cases where an owner suffers a loss of profit of a permanent nature which is not fully reflected in a diminished market value of the property, there can be severe hardship inflicted without redress. This occurred in an early Canadian case which I have already cited.[77] I therefore propose to broaden the scope of the third condition by

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76. Beckett v. Midland Railway Co. (1867) L. R. 3 C.P. 82 @ 92.

77. McPherson v. The Queen (1882) 1 Ex. C.R. 53.

permitting the recovery of compensation for loss of business profits of a permanent nature, subject to a proviso against duplication of compensation awarded for diminished market value of the property.

Subject to this exception, it is my opinion that personal and business injuries must be borne where they fall. They are the unavoidable price of the use of land by the state for essential public purposes.

I am of opinion that the fourth condition does not apply in British Columbia where the authority to award compensation is drawn from section 69 of the Lands Clauses Act. In the Autographic Register[78] case, compensation for injurious affection was being considered under section 23 of the 1927 Expropriation Act of Canada[79] which provided:

> " The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property."

The Exchequer Court also referred to section 17 (2) (c) of the Canadian National Railway Act[80] which provided:

> " The compensation payable in respect of the taking of any lands so vested in the Company, or of interests

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78. (1933) Ex. C.R. 152.

79. R.S.C. 1927 c. 64

80. R.S.C. 1927 c. 172.

> therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with Notice of Expropriation to the opposite party."

When the Autographic Register case was decided, the C. N. R. Act had been amended in 1927 by the deletion of a number of provisions dealing with expropriation including section 17 (2) (c) which were replaced by a provision incorporating the provisions of the Expropriation Act into it. However, the court referred back to section 17 (2) (c) in order to satisfy itself that there was a right to compensation for injurious affection at all.

It should be noticed that the fourth condition stated by Challies as a part of the general law is based on those statutes which unlike the Lands Clauses Act contain the word "construction" rather than the word "execution". This distinction, to the best of my knowledge, has been judicially noticed only in Simeon v. Isle of Wight Rural District Council[81] a decision of the English Court of Chancery:

> " The words of section 68 of the Lands Clauses Consolidation Act (section 69 in the B. C. Lands Clauses Act) are not, as in the case of section 6 of the Railways Clauses Act, 'construction of the works', but 'execution of the works'. In my judgment, the latter words are wider than the former and include the exercise, that is the carrying out and the execution of the appropriate statutory powers."

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81. (1937) Ch. 525.

In that case the local authority was authorized by the Health Act to construct and maintain waterworks. In the maintenance of these works the authority drew off water from private lands causing damage and the court ruled that damage resulting from such acts was compensable under section 69 of the Lands Clauses Act since the word "execution" included the carrying out of all the acts for which the authority is authorized by statute.

It is my opinion that the fourth condition does not apply under the existing British Columbia law, and should not be made applicable now in any new statute. I consider there is no rational basis for limiting compensation to injurious affection resulting from the construction of works and not from their maintenance and continued operation. I therefore do not recommend the enactment of this fourth condition in the proposed statute.

I have considered whether the liberalization of the third condition to cover loss of business profits of a permanent nature and the exclusion of the fourth condition may lead to excessive and unreasonable claims for compensation on the part of owners from whom no land has been taken. I am convinced that these changes will not result in such claims being successfully made since the second condition will serve to limit compensation claims to those which are

proper and reasonable. In effect, a claimant will have to prove common law nuisance, and in such regard the House of Lords pronounced in a nuisance action as follows:

> " An occupier may make in many ways a use of his land which causes damage to the neighbouring land-owners and yet be free from liability. This may be illustrated by Bradford Corporation v. Pickles (1895) A.C. 587. Even where he is liable for nuisance, the redress may fall short of the damage, as, for instance, in Colls v. Home & Colonial Stores (1904) A.C. 178, where the interference was with enjoyment of light. A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society". 82.

I therefore recommend that the following rule be enacted to provide for compensation in cases where no land is taken:

PROPOSED BRITISH COLUMBIA RULE 7

> " An owner of land which is injuriously affected although no part of the land is acquired by the expropriating body, shall be paid just compensation for all such injurious affection and for loss of business profits of a permanent nature, (after setting off the value of all betterment accruing to that land as a result of acts done by the expropriating authority) which
> (a) are the direct consequence of the lawful exercise of the statutory authority,
> (b) would give rise to a cause of action but for that statutory authority, and
> (c) in the case of injurious affection, result in a decline in the market value of the land.
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> In applying this rule no separate allowance shall be made for loss of business profits where such loss is also reflected in a decline of the market value of the land."

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82. Sedleigh - Denfield v. O'Callaghan (1940) A.C. 880 at 902.

Rule 8.

In cases of partial taking under the existing English law, the Lands Tribunal applies Rule 2 of the English statute to determine the market value of the part of the land taken and then applies Rule 6 to determine damage from disturbance, severance, and injurious affection. Upon making these determinations, the Tribunal then considers the common law rules under the Lands Clauses Consolidation Act to determine what compensation is available for severance and other injurious affection.[83]

As I have previously stated, the repeal of the Lands Clauses Act requires a rule for cases of partial taking to be included in any new Act.

The rule should continue the existing practice in making an award of compensation for land taken. However the award should be based on fair market value, plus damages to the remainder, less set-off for any increase created by the taker's acts in the value of the land. The inclusion of

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83. Section 64 of the B. C. Lands Clauses Act provides:

> " In estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such or otherwise injuriously affecting such other lands by the powers of this or the special Act, or any Act incorporated therewith.

set-off provision will facilitate use of the "before and after" method of valuation. Under this method an owner is entitled to compensation equal to the difference between the amounts he would have received if the entire larger parcel would have been taken and the actual value of the remaining parcel after the taking.[84.]

The courts have evolved a rule from their interpretation of sections 50 and 64 of the Lands Clauses Act that there be unity of ownership which conduces to the advantage or the protection of the property as one holding in order to found a claim for severance damages.[85.] I believe this requirement should be incorporated in any new statute.

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84. See Special Lectures, Law Society of Upper Canada-Expropriation, 1958, p. 28.
Re Pulsifer (1962) 35 D.L.R. 647.
Re Hannah and Campbellford Lake Ontario and Western Railway (1915) 34 O.L.R. 615 at 618.
Davies and James Bay Railway (1910) 20 O.L.R. 534 at 550.

85. See Cowper Essex v. Acton Local Board (1889) 14 App. Cas. 153 at p. 175; Sisters of Charity of Rockingham v. The King (1922) 2 A.C. 315, a decision of the Privy Council on appeal from Canada.

A common law rule requires that the damage must not be too remote and must derive from the exercise of the powers of expropriation.[86] I recommend the inclusion in the expropriation statute of a provision providing that the damage results directly from the partial taking.

There is still another common law rule that injury must result from acts done on the land which has been taken from the claimant. The principle underlying this rule can be found in a Canadian case decided by the Judicial Committee of the Privy Council as follows:[87]

> " Where the damage is occasioned by what is done on other land which the company has purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well and causing the abstraction of water by percolation, the company have a right to say, 'We had done what we had a right to do as proprietors, and do not require the protection of any act of Parliament; we, therefore, have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act.' Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, 'It is by the act of Parliament, and the act of Parliament only, that you have done the acts which have caused the damage; without the act of Parliament, everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question.'"

The principle for the rule is that only insofar as injury is caused by the expropriation of land from the owner

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86. Challies: Law of Expropriation, 2nd ed. p. 143.

87. Sisters of Charity of Rockingham v. The King (1922) 3 W.W.R. 33 at 37 quoting Crompton, J. In Re Stockport, etc. Ry. (1864) 33 L. J. Q. B. 251 at 253.

should that owner have any greater right than any other owner with respect to injury to land.

I am aware of the opinion held in some quarters that a set-off against compensation of the increased value of the remainder is inequitable. The argument is that neighbouring property, unsevered or otherwise uninjured, may enjoy an increase of value without charge. This view is fallacious because the windfall enjoyed by the neighbouring properties is not the result of any affirmative policy of conferring such benefits free of charge but rather from the impracticability of any scheme of making charges for betterment. Takers could claim with equal force that a policy is inequitable which denies them the right of making charges for benefits conferred on some owners but not on others.

The set-off provision which I propose to incorporate in my recommendation is based on the principle that the taker should not be required to compensate any owner for the increased value of the property taken resulting from the taker's works. However, I feel that it would be unjust to permit an expropriating body to acquire a parcel of land without paying compensation equal to at least the value of the land taken. For example, suppose one-half of a parcel of land was taken for the purpose of constructing

a highway and the remainder of the land became in consequence an ideal location for the construction of a gas station. Now suppose that the land was worth $10,000.00 before the taking and the value of the part taken was $5,000.00. Then if the severance damage and disturbance amounted to $1,000.00 the total claim would amount to $6,000.00. However, if the taker could prove that the remainder was worth $20,000.00 in the open market an unqualified set-off rule would allow the entire enhancement of $15,000.00 to be set-off against the $6,000.00 claim for compensation. Thus the net effect would be that the owner would get nothing. I consider that in such a case the set-off should be permitted only against severance and disturbance. The owner would in any event be entitled to a minimum compensation of $5,000.00, the market value of the land before it was taken from him.

Therefore I propose a proviso ensuring an owner of entitlement to at least the value of the severed land. If the taker feels that this proviso renders the award excessive, it may elect to expropriate the entire parcel and pay compensation accordingly. Previously in this report I have recommended that provision be made for the taking of the entire parcel in appropriate circumstances.

I therefore recommend the enactment of the following rule for determining compensation in cases of partial taking:

PROPOSED BRITISH COLUMBIA RULE 8

"Where part only of an owner's land is taken or where two or more parcels of land owned by the same person are so situated that the possession and control of one of them gives an enhanced value to all of them, compensation shall be paid for land taken and for damage through severance or other injurious affection resulting directly to the severed remainder, after setting off any increased value of the remainder resulting from acts performed by the expropriating body. Such compensation shallbe the difference between the value, before the taking of all the lands (determined in accordance with rules 1 to 4) and the actual market value of the remainder immediately after the taking; PROVIDED that in no case shall the compensation be less than the value of the land taken (determined in accordance with rules 1 to 4)."

PLANNED FUTURE DEVELOPMENT

Bodies having statutory authority to expropriate land must inevitably make known in advance their plans for development. Frequently public knowledge of such development depresses land values in the area designated or even

"freezes" land in the hands of owners. This problem becomes acute in heavily populated areas subject to municipal planning. An example of this, forcibly put to me, is the case of property in Vancouver's Chinatown. The Chinatown Property Owner's Association alleged that property values were depressed as a result of the redevelopment plan announced by the City of Vancouver and now being carried out. This Association appeared by Counsel before me and filed a brief primarily concerned with this question.

Even the suggestion of a public development is often sufficient to affect the real estate market in the area concerned. However, it is essential as a matter of general principle that the public should have knowledge of plans being formulated, that such plans should not be formulated in private and that they should be made available to all interested parties.

When developers formulate plans or enter into commitments involving the acquisition of private property for public use, the statute should provide redress to owners of land adversely affected by knowledge of these plans or commitments.

This problem was dealt with by the English Parliament in its 1959 planning legislation.[88] The following comment has been made upon it:

> " While it has been recognized freely on all sides that planning proposals involving the future compulsory acquisition of land invariably cast a shadow upon the value of the land in question, hitherto there has been no redress for the owner and no way in which he could dispose of the land, at any time before the threatened compulsory purchase, except at a figure substantially depreciated by reason of the proposals.
>
> Part IV of the 1959 Act now enables restricted classes of owners to compel the authority, from whom the prospect of compulsory acquisition arises, to purchase their land, when they have made reasonable attempts to sell it and have found that they could not do so except at a substantially depreciated price."[89]

The English procedure for dealing with this question is complicated by the existence of extensive planning legislation, imposing on the rules for assessing compensation statutory assumptions as to planning permission.[90] Since British Columbia has no comparable planning legislation, this ancillary question to expropriation can be dealt with

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88. Town and Country Planning Act, 1959, Part IV and Fifth Schedule.

89. Nardecchia and Sullivan: The Town and Country Planning Act, 1959, p. 129.

90. See sections 1 - 9 inclusive, of Town and Country Planning Act, 1959, now incorporated into the Land Compensation Act, 1961.

by a general provision contained in the proposed new expropriation statute.

I recommend that when there is public knowledge of plans or commitments for expropriation of land, and in consequence of that knowledge an owner cannot sell his land at what would have been a fair market price prior to such public knowledge, the new Statute should require the taker, at the request of the owner, to acquire the owner's land. The price should be the fair market price prior to public knowledge of the plans or commitments for expropriation in the area. If the parties cannot agree upon price, the owner should then be enabled to have the Court determine compensation according to the rules for assessing the value of land where an entire parcel is taken. However, in this instance, no compensation should be awarded for disturbance, severance or injurious affection since the owner is selling of his own volition and not under compulsion. This latter limitation is consistent with the English law, except that in England compensation is allowed for damage resulting from the severance of agricultural land from the other land held therewith.[91.]

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91. Town and Country Planning Act, 1959, Fifth Schedule para. 6 & 7.

Mitigation of Injury

Some jurisdictions in Canada permit an expropriating body to mitigate the damage it causes to land by constructing accommodation works, granting easements or in other ways. Such acts are considered when compensation is assessed.[92] I consider it desirable that the legislature empower the taker to mitigate such injury. I therefore recommend that a provision allowing mitigation be enacted.

Costs

I feel that the Judge, having heard all the evidence, is the appropriate person to determine just disposition of costs. Thus, he should be given full discretion to award partial or full costs to either party, to apportion costs, or to deny costs to both parties as he sees fit, irrespective of the award made and its relationship to offers and demands before the hearing.

The scale of costs stipulated in British Columbia Supreme Court or County Court Rules should form the basis of expropriation costs.

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92. Federal Expropriation Act, R.S.C. 1952, c. 106, s.31. Manitoba Expropriation Act, R.S.M. 1954, c. 78, s.68.

Interest

Since compensation is properly owing from the date on which the compensation award is made, interest should run from that date at the rate of five per cent. However, in cases where the taker obtains an order for early possession, interest should run from the effective date of that order on the entire amount awarded.

Where no land is taken and there is a claim for injurious affection resulting in an award interest at the rate of 5% should run from the date when injurious affection arose.

7. THE TRIBUNAL

The following types of tribunals were recommended by witnesses appearing before the Commission:

1. The existing system under the Arbitration Act and Department of Highways Act.

2. Single arbitrator.

3. Panel of arbitrators.

4. Permanent tribunal.

5. The Supreme Court and County Courts.

1. The existing system under the Arbitration Act and Department of Highways Act.

In British Columbia, nearly all compensation disputes in expropriation proceedings are presently determined by three-man boards, one member appointed by the owner, one by the taker, and the third either by the nominees or by application to a Supreme Court Judge or Magistrate depending on the special Act involved.

At the public hearings, the witnesses generally agreed that this type of tribunal was unsatisfactory. The main reasons given for this dissatisfaction were:

(i) The lack of consistency in decisions.

(ii) The tendency on the part of the arbitrator appointed by either the taker or the owner to become an advocate for the party that nominated him to the Board.

(iii) The failure of the system to obtain one of its prime objects - speedy judgment.

(iv) The excessive cost in obtaining the services of professional persons to serve on the arbitration boards. Apparently it is necessary to pay the arbitrators a daily rate between three and five times the $40.00 per diem stipulated in the schedule to the Arbitration Act. Hence the daily cost of the Board ranges from $360.00 to $600.00 and applies not only to the time required for the hearing but also to conferences held for making the decision.

Having heard and weighed the evidence submitted regarding the present procedure of arbitration, I have come to the conclusion that this type of tribunal is cumbersome, expensive, and slow. I, therefore, recommend that the existing system be abolished.

2. Single Arbitrator

In England the 1919 Act established a Reference Committee to appoint as official arbitrators a number of persons having special knowledge in the valuation of lands. Anyone so appointed was "precluded from engaging in private practice or business and from being a partner of any other person who so engages."[93] This in effect established the system of single permanent arbitrators appointed for particular areas.

In England this system lasted until the establishment of the Lands Tribunal in 1949.

In 1942 Mr. Justice Uthwatt commented on the appropriateness of single permanent arbitrators as follows:

> "Our conclusion, therefore, is that the existing system in England and Wales of arbitration before an official arbitrator is one which cannot readily be improved upon, and we do not recommend any amendment."

However, Parliament did not accept this recommendation and in 1949 proceeded to set up a Lands Tribunal under the

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93. See Uthwatt Report, p. 87.

Lands Tribunal Act of that year. One ground of justification used by the then Attorney-General for the change was that the arbitrators had no way of securing close co-ordination and consistency of decision.

In Scotland, experience of eleven years after the 1919 Act showed that the volume of work available was insufficient to justify the retention of the full time arbitrator. Further difficulty came from the fact that with only one arbitrator no deputy was available to act in his stead in cases of illness.

For the reason that it is doubtful that there would be a sufficient volume of work to require the services of full-time arbitrators, I reject this system as being unsuitable to determine compensation in British Columbia.

3. Panel of Arbitrators

The Real Estate Institute suggested this type of tribunal in their brief. An outline of its suggestion is as follows:

(i) That the Chief Justice of the Supreme Court establish a register of competent and available arbitrators consisting of practitioners from the British Columbia Bar Association and qualified appraisers from the Professional Division of the Real Estate Institute of British Columbia. It was suggested that the Chief Justice review this register from time to time.

(11) That where the parties are unable to agree upon the compensation either party may apply or in any event the taking authority must apply within six months to the District Registrar of the Supreme Court who shall then appoint either one, two, or three arbitrators as he in his sole discretion deems advisable.

This was the same recommendation made by the Scott Committee:

> "We think that the sanctioning authority should adopt the same system of appointing a panel of arbitrators selected from the most eminent surveyors and other experts on such conditions, and for such period, and remunerated on such scale as may be determined by the sanctioning authority."

This recommendation was not accepted, and a system of official arbitrators was used in England from 1919 to 1949. Partly as an economy measure, and partly as a more practical arrangement, the Acquisition of Land (Assessment of Compensation Scotland) Act 1931 was passed removing the ban on private practice so far as Scotland was concerned. This Act established a panel of part time arbitrators remunerated by fees and not precluded from engaging in private practice.

Mr. Justice Uthwatt in his Report of 1942 considered the system of determining compensation by panel:

> "The evidence we have received on this aspect from representative Scottish sources is not unanimous in its criticism of the existing procedure, but there is

> considerable indication that it is looked on with disfavour by acquiring authorities. It is stated in some quarters that there has been a noticeable disparity in awards in similar cases and varying attitudes on points of principle. Indeed, this is bound to be so to a greater extent where there is a large panel than would be the case if all awards were made by the same person or by members of the small and closely co-ordinated panel."

In my opinion, a panel, of arbitrators for determining compensation has many disadvantages of the existing system, and I would not recommend that this type of tribunal be instituted in British Columbia.

4. Permanent Tribunal

This system has been in effect in England since the passage of the Lands Tribunal Act in 1949. There is no doubt that a permanent tribunal has some definite advantages. Its awards are likely to be more consistent, and its hearings shorter. In these respects such a Board has definite advantages over our existing system. If this Board were set up, it would require provision for the appointment of members to the Board by someone other than the legislature in order to ensure that justice would not only be done but also appear to be done in cases involving the Crown in the right of the Province.

Among the disadvantages, such Boards are not generally trained to weigh and assess evidence, the members are not

appointed for life and do not as a rule give speedy decisions.

It is doubtful that there is sufficient work in British Columbia to justify the high cost of attracting competent people to such a Board. In England, the Lands Tribunal not only decides expropriation cases, but also settles property valuations in estate duty matters, and hears appeals against municipal assessments on real property and appeals under Planning legislation.

In my opinion this type of Board having diversified functions is not practicable in British Columbia because of constitutional division of administrative function in our federation.

It is my recommendation that a permanent tribunal would not be suitable to determine compensation for expropriation.

5. The Supreme Court and County Court within their respective jurisdictions

After examination of each alternative I am of the strong opinion that the Supreme and County Courts within their jurisdictions should determine in a summary manner compensation in expropriation cases.

Elsewhere in this report I recommend the procedure that I suggest to be followed if the Courts determine compensation.

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

For many years a Judge of the Exchequer Court has heard all compensation cases under the Federal Expropriation Act.

For the above reasons, I have come to the conclusion that hearings before a Supreme Court and County Court within their jurisdictions offer a fair and equitable method of determining compensation.

I recommend that the County Court have jurisdiction to deal with expropriation cases involving the compensation not exceeding $3,000.00 and that all other cases be heard in the Supreme Court.

8. TAKER DESIRING POSSESSION PRIOR TO FINAL AWARD

The existing law providing as it does for passage of title to the taker before compensation has been awarded, is in my view inequitable and works severe hardship upon owners of limited means.

If the taker wishes possession prior to the final award, he should be at liberty in the first instance to make an application ex parte to the Court for an order. Such order would set the probable just compensation for the taking and any damage incidental thereto. The Judge then may order that upon depositing such probable just compensation the taker can prior to the entry of judgment at any time take possession of and use the property on such notice to the owner as the court desires and directs. This application should be supported by an Affidavit of the taker's appraiser setting out his valuation of the property. The Court should have the discretion to refuse to hear the application ex parte and to order service of the notice of the application on the owner.

Provision should be made for application to the Judge by any party to the proceedings by Notice of Motion for an order to increase or decrease the amount of the deposit.

Further provision should be made for an application by an owner to strike out the Notice of Expropriation on the grounds that the taker has not complied with statutory requirements. Such an application might be on the grounds that a private corporation has not shown reasonable requirement of the land in question for its statutory purpose.

The owner should be enabled to apply to the Court for withdrawal of the deposit in whole or in part. Application should be by Notice of Motion with an Affidavit by the owner setting forth his interest in the property.

Any owner who withdraws the deposit or any part of it will be deemed to waive all his defences to the taking except with respect to the quantum of compensation. Any amount so paid should, of course, be credited upon the judgment in the proceeding.

Any amount withdrawn by an order in excess of the compensation determined in the subsequent proceedings, shall be returned to the taker, together with interest at 5% thereon from the date of withdrawal, and the Court or Judge shall enter judgment therefor against the owner.

Provision should be made that the amount of the required deposit by the taker and any amounts withdrawn

from that deposit by the owner may not be given in evidence or referred to when the issue of compensation is tried.

A procedure similar to this was recommended by the California Law Revision Commission in 1960.[94.]

9. PROCEDURE TO EXPROPRIATE

After hearing the evidence at the public hearings, and upon reviewing the present existing procedure under the various Acts, and after my review of the English, Ontario and California systems, I have come to the conclusion that an expeditious and summary procedure in expropriation proceedings is of the utmost importance. The existing system usually involving arbitration appears expensive, cumbersome and slow. For these reasons I have suggested that compensation should be determined by the Courts, and the following procedure is recommended.

1. COMMENCEMENT OF PROCEEDINGS

A. Notice of Expropriation

Notice of Expropriation should be filed in and served out of the Supreme Court or County Court Registry, dependent

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94. California Law Revision Commission Recommendation and Study relating to taking possession and passage of title in Eminent Domain proceedings, Oct. 1960, p.B13 and see Deering's Code of California Law of Eminent Domain, Title 1243.5(c) and (d) and (h) and Title 1243.7 (a) and (c) and (g) and (h).

upon the amount involved. If the taker believes that the amount involved is within the jurisdiction of the County Court, he may file in that Registry, and, if necessary, the owner may make application for transfer of the matter to the Supreme Court. Such Notice of Expropriation should immediately be filed against the title to the property in the appropriate Land Registry Office.

The Notice of Expropriation should contain:

(a) The names of the parties, including all owners of any estate or interest, and the particulars of such estate or interest, and any lien, charge, or encumbrance against such estate or interest.

(b) A general description of the whole property, or a specific description of the parcels to be taken.

(c) A statement of the proposed use of the property to be taken.

(d) A statement that the owners must file an Answer within twenty-one days setting forth the particulars of their claim for compensation.

Both the Dominion Government of Canada[95.] and the State Government of California[96.] have adopted similar procedure.

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95. See the Expropriation Act, R.S.C. 1952, s.27.
96. See Title 1245 Deering's California Code p.99.

B. Service of Notice of Expropriation

The Notice of Expropriation shall be personally served on the owner except that application may be made under Marginal Rule 1017[97] of the Supreme Court Rules for substituted service.[98]

2. STATEMENT OF PARTICULARS OF CLAIM

This shall be known as the owner's "Answer to Notice of Expropriation" and should contain the following information:

(a) The exact nature of the interest in respect of which compensation is claimed.

(b) Details of the compensation claimed, distinguishing the amounts under separate heads, and showing how each amount is calculated.

In England a similar procedure is in force under the Land Compensation Act, 1961.[99]

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97. "Where personal service of any writ...is required by these Rules or otherwise, and it is made to appear to the Court or Judge that prompt personal service cannot be effected, the Court or Judge may make such order, upon such terms and conditions (if any) as may seem just, for substituted or other service, or for substitution of notice for service by letter, advertisement, or otherwise as may seem just; and such order may be made by a Court or a Judge, that such writ, notice, pleading, order, warrant, or other document, proceeding, or written communication will probably reach the defendant or the person against whom such order may be made not only where the defendant or such person is within the jurisdiction, but also where he is, or may be, out of the jurisdiction, in any case where

Service

The Answer to the Notice of Expropriation should be filed in the appropriate Registry and served on the taker or his Solicitor within twenty-one days of service of the Notice of Expropriation.

A provision should be made for an application to the Court to extend the time for filing the Answer and for power to amend.

3. PROCEDURE IN DEFAULT OF OWNER'S ANSWER

At any time after the expiration of the time for filing an Answer and where no answer has been filed, the taker shall be at liberty to set the matter down by praecipe for hearing ex parte. The Court should assess the compensation on the basis of the evidence presented by the taker, or on such other evidence as the Court may direct.

4. SETTING DOWN FOR HEARING

Within eight days of service of the Answer on the taker, either party may issue and serve a Notice of Hearing on the opposite party.

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such writ...or written communication may lawfully be personally served out of the jurisdiction."

98. (See Land Compensation Act 1961, s.38)
(See Deering's California Code, Title 1245.3, Eminent Domain, at p.101.)

99. Section 4 (2).

It is essential that expropriation cases be given priority. Provision should be made that unless otherwise agreed by the parties such cases be heard within two months of the filing of the owner's Answer to the Notice of Expropriation.

5. DEMAND FOR DISCOVERY OF DOCUMENTS, INCLUDING APPRAISAL REPORTS

The proposed Statute should provide that if either party intends to call an expert witness, he shall file and serve on the opposite party within eight days of the date of filing the Answer the following documents related to the evidence:

(a) The plans and valuations of the land in question, including all particulars and computations of the proposed evidence in support of the valuation.

(b) Any proposed evidence consisting of prices, costs, plans or other particulars concerning property other than the land to be taken proposed as evidence in support of the valuation of the land. In default of either party calling such evidence, there should be a statement that no such prices, costs, particulars or plans will be relied upon.[100]

This is substantially the English practice.

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100. - See Lands Tribunal Rules, 1956, s. 38(4).

In addition to the above, I suggest that the Supreme Court Rule relating to discovery of documents [101] be made applicable.

6. EVIDENCE

The ordinary rules of evidence should apply, except an expert should be permitted to state the information upon which he has relied in forming his opinion, whether or not he has personal knowledge of such matters. This is the practice at the present time, but in order to clarify this exception to the hearsay rule, I recommend the enactment of an explicit rule allowing the expert to testify on matters notwithstanding his lack of personal knowledge. It would be virtually impossible to try an expropriation case if all the information introduced in support of the expert testimony had to be established by witnesses with personal knowledge of the facts.

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101. " Any party to a cause or matter may, by notice in writing, require any other party to make discovery on or of the documents which are or have been in his possession or power relating to any matter in question therein. If the party on whom such Notice shall be served shall neglect or refuse to make such discovery within five days after service of such Notice, or such further time as the Court or Judge may allow, or if the party serving the Notice shall deem the discovery given unsatisfactory or insufficient, he may apply to the Judge in respect thereto. On the hearing of such application,

7. PASSAGE OF TITLE

In my opinion, if immediate possession is not taken, title should pass upon the entry of the final Order in the appropriate Land Registry Office. However, if possession is taken prior to that time under an Order for immediate possession, title should pass to the taker upon the withdrawal of the deposit by the owner. The present system whereby the taker can obtain title by the publication of a notice in the Gazette[102.] or by the filing of a plan in the Land Registry Office[103.] is unfair to the owner and should be discontinued.

8. VIEW OF THE PROPERTY

A Judge dealing with the proceedings should be entitled to enter upon and inspect the land in question. I would suggest

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101. (cont'd.) the Court or Judge may refuse or adjourn the same, if satisfied that such discovery is not necessary, not necessary at that stage of the cause or matter, or make such rule, either generally or limited to certain classes of documents, as may, in their or at his discretion, be thought fit . . . . The application or Order shall be in one of the forms number 63 to 64 in Appendix K, as may be applicable thereto."

102. Dept. of Highways Act,R.S.B.C.1960, c.103, s.8.

103. Power Act,R.S.B.C.1960, c.293, s.66(1) (a).

that Marginal Rule 660[104] of the Supreme Court Rules be made applicable.

There is a similar provision in England.[105]

9. VALUATION OF SEVERAL INTERESTS

The market value of the separate interests in the property expropriated should be separately assessed, by the same Judge at the same time.[106] This is the English procedure. Assessment of the undivided fee followed by apportionment of that amount among the separate interests, is not desirable. Aggregate value may be more or less than the market value of the undivided fee.

10. ABANDONMENT

Where a taker has served a Notice of Expropriation upon an owner, it should be allowed, within eight days after service of the Answer, to withdraw that Notice. If it does so, it should be liable to pay compensation to the owner for any loss or expense caused him by the giving and withdrawal of

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104. "It shall be lawful for any judge, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to inspect any property or thing concerning with any question or anything concerning which any question may arise therein."
105. Land Compensation Act 1961, s. 2(4).
106. Land Compensation Act 1961, s. 3.

the notice. This compensation to be determined by a Judge of the Supreme Court. This is comparable to the English procedure.[107]

11. REASONS

In my view, provision should be made in the new Statute requiring that the Court specify the amount awarded in respect of each matter for which compensation has been claimed.[108] The English Statute makes such information mandatory. The Court should in every case give reasons for its award.

12. PLACE OF TRIAL

If the amount involved is within the jurisdiction which I have recommended for the County Court, the hearing should be held in the County where the property to be taken is registered.

If the amount involved is within the jurisdiction of the Supreme Court, the hearing should be held in the Supreme Court at Victoria if the property taken is on Vancouver Island, and either at Vancouver or New Westminster if the property taken is on the Mainland. The Notice of Expropriation may be issued out of any Supreme Court Registry.

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107. Land Compensation Act (1961) s. 31 (s) and (4).

108. Land Compensation Act (1961) s. 2. ss. 5.

Either party may make application to fix or change the place of hearing, having regard to:

(a) the convenience of the parties,

(b) the amount involved,

(c) the situs of the land to be taken,

(d) the means of the parties involved, and

(e) any other relevant circumstances.

13. APPEAL PROCEDURE

It is recommended that an appeal be allowed to the Court of Appeal on a question of law only, and from there to the Supreme Court of Canada on a question of law if the amount involved is in excess of $10,000.00.

The English procedure provides for an appeal by way of Stated Case on a question of law only to the Court of Appeal.[109]

14. ASSESSORS

In my view, it would be advantageous in cases requiring special knowledge for Judges of the Supreme Court to sit with an Assessor. This could be accomplished by making Marginal Rule 467[110] of the Supreme Court Rules of British

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109. Lands Tribunal Act, s.3(4).

110. Trials with Assessors shall take place in such manner and upon such terms as the Court or Judge shall direct.

Columbia applicable, and this is the procedure in England.[111] In difficult cases, this would give the Court the benefit of the experience of an independent appraiser.

15. SEALED OFFERS

Provision should be made enabling a taker to file in the Supreme Court or County Court Registry a sealed offer of compensation. The offer would then be a factor in the determination of costs.[112] This is the English procedure.

An alternative procedure would be to make applicable to expropriation cases Order 22 of the Supreme Court Rules. This Order governs procedure for payment into and out of Court.

16. RULES OF PROCEDURE

The Judge of the Supreme Court of British Columbia should be given authority to make such rules as they deem necessary for the proper administration of all expropriation cases.

This type of provision is in effect in England.[113]

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111. See Lands Tribunal Rules 1956, s.37, ss.1.

112. See Lands Tribunal Rules 1956, s.47.

113. See Lands Tribunal Act 1949. s.3.

10. PROCEDURE FOR COMPENSATION WHERE NO LAND IS TAKEN

There will be some cases embodying claims for injurious affection and disturbance where none of the claimant's land is taken. The claimant should be entitled to initiate proceedings. In order to commence them, he should file in the appropriate Registry a Notice of Claim for Injurious Affection. The Answer in this case will be filed by the taker, and the procedure should be substantially the same as when a Notice of Expropriation is filed by the taker.

10. LAND APPRAISERS

One of the questions put to me by the terms of my Commission was whether there should be minimum requirements for persons engaged in appraising land in this Province. By necessary implication a further question is posed, that being: whether such minimum requirements should be stipulated by Provincial statute. In this area of my inquiry I am particularly indebted to the witnesses at the hearings as there is little written information available regarding appraisal in this area.

Leaving these questions aside for a moment, I believe it would be advantageous to consider the present educational facilities for appraisers in this Province. Most persons

will agree that the complex nature of appraisal work necessitates some form of advanced training and education. As Professor White[114] testified that such education enables a practitioner not only to master the technical problems but also allows the individual to develop an understanding of general principles. Such understanding may in turn lead to the development of improved appraisal technique. An educational program is a useful method of improving the general standard of existing practice, in that it provides an alternative to instruction by practitioners. Appraisers should have some background in finance, economics, expropriation, arbitration law, taxation and land assessment which is best provided by an institution rather than by an apprenticing scheme.

At present the University of British Columbia offers an estate management course in the Faculty of Commerce. The University also offers appraisal courses in connection with the Master's Degree in Business Administration. In addition to the regular courses offered in the University curriculum, there are extra-mural courses leading to a University Diploma in Appraisal. This diploma course is

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114. p.2275 following in Vol. 16 of Proceeding Transcripts.

recognized by the Board of Examiners under the Municipal Act and Real Estate Institute of British Columbia.

These educational facilities, as were outlined by Professor White, are a necessary prerequisite for the attainment of professional status by appraisers. A further prerequisite is the establishment of minimum requirements for persons undertaking appraisal work in this Province. In my opinion, these minimum requirements should be established through regulation by some association rather than by statutory provision. This would be similar to the organizational approach taken by such professional groups as engineers, lawyers, and doctors, with their professional institutes not only dictating minimum requirements, but also enforcing these requirements.

The general consensus of the witnesses seemed to be that such association or institute should be organized and administered at the Provincial level, rather than on the national level. According to Professor White:

> "we know of no other professional institutes which succeeded in developing a federal body of substance which could have a designation protected by law and so on, and then as it were drop its roots down in the provinces. The development that we have always understood is that in each province, a group of these people develops with standards set in that province by its own Legislative Assembly, and then when they

> have got enough of them in the provinces across the country, they agree to combine in a federal organization and they might voluntarily, and for such period as they see fit, surrender some of their local autonomy for the purpose of having a federal organization as well as a provincial one."

It is my opinion that an organization such as the Real Estate Institute of British Columbia, functioning in a manner similar to other professional organizations in setting educational and ethical requirements and enforcing them, is the most effective way of prescribing minimal requirements for appraisers. Of course, such an organization would require statutory recognition and a certain degree of legislative protection as is afforded to other professional bodies.

In summary, my recommendation is that minimal requirements are best established and maintained through a professional organization rather than by statutory enactment.

CONCLUSION

I have made general recommendations throught this report and in some instances have drafted specific sections of a proposed uniform statute so that there should be no ambiguity concerning the meaning of my suggestions. The recommendations are designed to remedy the many difficulties regarding expropriation in this Province which were exposed by witnesses during the course of the hearings and in the voluminous briefs which were submitted to me by various bodies

and individuals. I am grateful to all those persons who gave evidence and presented the practical problems which require to be solved. The nature of these problems necessitated considerable legal research and I am deeply grateful to Mr. Nathan Nemetz, Q.C. (now Mr. Justice Nemetz of the Supreme Court of British Columbia) who acted as senior counsel to the Commission, to Mr. R. C. Bray who acted as junior counsel, to Mr. J. N. Lyon, registrar and to Mr. C. R. L. Peers, who took Mr. Lyon's place when he was unavoidably absent, for all the very capable assistance which they have given to me.

DATED at Vancouver, B. C. this 24th day of August, 1964.

Commissioner

S C H E D U L E S

Schedule 1 - ROYAL COMMISSION

(Coat of Arms)

CANADA
PROVINCE OF BRITISH COLUMBIA

The Great Seal of the Province } "George Pearkes" Lieutenant-Governor

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

In the matter of the "Public Inquiries Act"

A COMMISSION

To Honourable John Valentine Clyne

WHEREAS under section 3 of the "Public Inquiries Act", being chapter 315 of the "Revised Statutes of British Columbia, 1960", it is provided that whenever the Lieutenant-Governor in Council deems it expedient to cause an inquiry to be made into and concerning any matter connected with the good government of the Province or the conduct of any part of the public business thereof the Lieutenant-Governor in Council may by Commission intituled in the matter of the said Act and issued under the Great Seal, appoint Commissioners or a sole Commissioner to inquire into such matters:

"R.W.Bonner"
ATTORNEY-GENERAL

AND WHEREAS concern is felt over the nature and extent of awards made pursuant to existing legislation arising out of expropriation of property for the public purposes of the Province:

AND WHEREAS an example of such concern is to be found in respect of certain property required for the construction of the Deas Island Tunnel, in which the Estate of Edwin Alston Parkford has been awarded during 1960 the sum of $442,676.00 in respect of a portion of property purchased in 1953 and 1954 for the sum of $143,043.00 and in respect of which expropriation proceedings began in 1956:

AND WHEREAS in the course of these proceedings a wide range of appraisals as to property values was placed before the arbitrators:

AND WHEREAS the amounts of awards of this nature are felt to be an excessive demand upon the public purse and tend to disturb the confidence of the public in the expropriation laws and procedures of the Province:

AND WHEREAS His Honour the Lieutenant-Governor, by and with the advice of his Executive Council hath deemed it expedient to appoint a sole Commissioner to inquire into the need, if any, for a revision of the expropriation statutes of the Province and in particular into the appraisals, methods and procedures adopted and used in expropriation proceedings and into the justification or desirability for

(a) limiting the liability of the Crown to make compensation at variance with the market price for property acquired shortly before expropriation,

(b) compensation for injurious affection,

(c) a general arbitration board for determining compensation in all cases where arbitration is necessary, and

(d) minimum requirements for persons engaged in the business of appraising lands within the Province.

NOW KNOW YE THEREFORE, that reposing every trust and confidence in your loyalty, integrity, and ability, We do by these presents, under and by virtue of the power contained in the said "Public Inquiries Act" and in accordance with an Order of the Lieutenant-Governor in Council, dated the 27th day of January, A.D. 1961, appoint you, Honourable John Valentine Clyne, a sole Commissioner to inquire into the matters aforesaid and into any other matters that in your opinion it is in the public interest to inquire into as a result of the inquiry into the matters hereinbefore set out, and to report thereon in due course to the Lieutenant-Governor in Council, with the opinions and recommendations as you may think proper.

IN TESTIMONY WHEREOF We have caused these Our Letters to be made Patent, and the Great Seal of Our Province to be hereunto affixed.

WITNESS, Major-General the Honourable GEORGE RANDOLPH PEARKES, V.C., P.C., C.B., D.S.O., M.C., Lieutenant-Governor of Our Province of British Columbia, in Our City of Victoria, in Our Province, this twenty-seventh day of January, in the year of Our Lord one thousand nine hundred and sixty-one and in the ninth year of Our Reign

BY COMMAND

PROVINCIAL SECRETARY

Schedule 2 - BRITISH COLUMBIA
STATUTES CONTAINING EXPROPRIATION PROVISIONS
TO BE INCLUDED IN SCHEDULE "A" OF THE PROPOSED
BRITISH COLUMBIA EXPROPRIATION ACT.

1. Arbitration Act
2. Archeological and Historic Sites Protection Act
3. Company Towns Regulation Act
4. Department of Highways Act
5. Department of Public Works Act
6. Department of Recreation and Conservation Act
7. Drainage, Dyking and Development Act
8. Forest Act
9. Gas Utilities Act
10. Highways Act
11. Housing Act
12. Industrial Operations Damage Compensation Act
13. Land Settlement and Development Act
14. Mines Right-of-Way Act
15. Municipal Act
16. Petroleum and Natural Gas Act
17. Pipelines Act
18. Power Act
19. Public Schools Act
20. Railways Act
21. Rural Telephone Act

22. Special Surveys Act

23. Toll Highways and Bridges Authority Act

24. Water Act

25. Mineral Act

26. Universities Act

27. Vancouver Charter

28. West Kootenay Power and Light Company Incorporation Act.

Schedule 3 - BRITISH COLUMBIA
STATUTES CONTAINING EXPROPRIATION PROVISIONS
TO BE INCLUDED IN SCHEDULE "B" OF THE PROPOSED
BRITISH COLUMBIA EXPROPRIATION ACT.

1. Civil Defence Act

2. Health Act.

Schedule 4 - Part ii of
LAND COMPENSATION ACT, 1961

9 & 10 Eliz. 2 Ch.33.

PART II

PROVISIONS DETERMINING AMOUNT OF COMPENSATION

General provisions

Rules for assessing compensation.

5. Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:

(1) No allowance shall be made on account of the acquisition being compulsory:

(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize:

(3) The special suitability or or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers:

(4) Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by a ny court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account:

(5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose

of such a nature that there is no general demand or merket for land for that purpose, the compensation may, if the

PART II

Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement:

(6) The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land:

and the following provisions of this Part of this Act shall have effect with respect to the assessment.

Disregard of actual or prospective development in certain cases.

6. - (1) Subject to section eight of this Act, no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if-

(a) (where the acquisition os for purposes involving development of any of the land authorized to be acquired) the acquiring authority had not acquired and did not propose to acquire any of that land; and

(b) (where the circumstances are those described in one or more of paragraphs 2 to 4 in the said first column) the area or areas referred to in that paragraph or those paragraphs had not been defined or designated as therein mentioned.

(2) The provisions of Part II of the First Schedule to this Act shall have effect with regard to paragraph 3 of Part I of that Schedule.

(3) In this section and in the First Schedule to this Act-

"the land authorized to be acquired" -

(a) in relation to a compulsory acquisition authorized by a compulsory purchase order or a special enactment, means the aggregate of the land comprised in that authorization, and
(b) in relation to a compulsory acquisition not so authorized but effected under powers exercisable by virtue of any enactment for defence purposes, means the aggregate of the land comprised in the notice to treat and of any land contiguous or adjacent thereto which is comprised in any other notice to treat served under the like powers not more than one month before and not more than one month after the date of service of that notice;

"defence purposes" has the same meaning as in the Land Powers (Defence) Act, 1958; PART II

and any reference to development of any land shall be construed as including a reference to the clearing of that land.

Effect of certain actual or prospective development of adjacent land in same ownership.

7. - (1) Subject to section eight of this Act, where, on the date of service of the notice to treat, the person entitled to the relevant interest is also entitled in the same capacity to an interest in other land contiguous or adjacent to the relevant land, there shall be deducted from the amount of the compensation which would be payable apart from this section the amount (if any) of such an increase in the value of the interest in that other land as is mentioned in subsection (2) of this section.

(2) The said increase is such as in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the relevant development as would not have been likely to be carried out if the conditions mentioned in paragraphs (a) and (b) of subsection (1) of section six of this Act had been satisfied; and the relevant developmentfor the purposes of this subsection is, in relation to the circumstances described in any of the said paragraphs, that mentioned in relation thereto in the second column of the said Part I, but modified, as respects the prospect of any development, by the omission of the words "other than the relevant land", wherever they occur.

Subsequent acquisition of adjacent land and acquisition governed by enactment corresponding to s.7.

8. - (1) Where, for the purpose of assessing compensation in respect of a compulsory acquisition of an interest in land, an increase in the value of an interest in other land has, in any of the circumstances mentioned in the first column of Part I of the First Schedule to this Act, been taken into account by virtue of section seven of this Act or any corresponding enactment, then, in connection with any subsequent acquisition to which this subsection applies, that increase shall not be left out of account by virtue of section six of this Act, or taken into account by virtue of section seven of this Act or any corresponding enactment, in so far as it was taken into account in connection with the previous acquisition.

(2) Where, in connection with the compulsory acquisition of an interest in land, a diminution in the value of an interest in other land has, in any of the circumstances mentioned in the first column of the said Part I, been taken into account in assessing compensation for injurious affection, then,

in connection with any subsequent acquisition to which this subsection applies, that diminution shall not be left out of account by virtue of section six of this Act in so far as it was taken into account in connection with the previous acquisition.

PART II

(3) Subsections (1) and (2) of this section apply to any subsequent acquisition where either-

(a) the interest acquired by the subsequent acquisition is the same as the interest previously taken into account (whether the acquisition extends to the whole of the land in which that interest previously subsisted or only to part of that land), or

(b) the person entitled to the interest acquired is, or derives title to that interest from, the person who at the time of the previous acquisition was entitled to the interest previously taken into account;

and in this subsection any reference to the interest previously taken into account is a reference to the interest the increased or diminished value whereof was taken into account as mentioned in subsection (1) or subsection (2) of this section.

(4) Where, in connection with a sale of an interest in land by agreement, the circumstances were such that, if it had been a compulsory acquisition, an increase or diminution of value would have fallen to be taken into account as mentioned in subsection (1) or subsection (2) of this section, the preceding provisions of this section shall apply, with the necessary modifications, as if that sale had been a compulsory acquisition and that increase or diminution of value had been taken into account accordingly.

(5) Section seven of this Act shall not apply to any compulsory acquisition in respect of which the compensation

payable is subject to the provisions of any corresponding enactment, nor to any compulsory acquisition in respect of which the compensation payable is subject to the provisions of any local enactment which provides (in whatever terms) that, in assessing compensation in respect of a compulsory acquisition thereunder account shall be taken of any increase in the value of an interest in contiguous or adjacent land which is attributable to any of the works authorized by that enactment.

(6) Where any such local enactment as is mentioned in subsection (5) of this section includes a provision restricting the assessment of the increase in value thereunder by reference to existing use (that is to say, by providing, in whatever terms, that the increase in value shall be assessed on the assumption that planning permission in respect of the contiguous or adjacent land in question would be granted for development of any class specified in the Third Schedule to the Town and Country Planning Act, 1947, but would not be granted for any other development thereof), the enactment shall have effect as if it did not include that provision.

(7) References in this section to a corresponding enactment are references to any of the following, that is to say,- PART II

(a) section thirteen of the Light Railways Act, 1896;
(b) sub-paragraph (C) of paragraph (2) of the Schedule to the Development and Road Improvement Funds Act, 1909;
(c) subsection (6) of section two hundred and twenty-two of the Highways Act, 1959;
(d) paragraph 4 of Part III of the Third Schedule to the Housing Act, 1957;

and, in subsection (1), include references to any such local enactment as is mentioned in subsection (5).

Disregard of depreciation due to prospect of acquisition by authority possessing compulsory purchase powers.

9. No account shall be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of designation, allocation or other particulars contained in the current development plan, or by any other means) an indication has been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers.

Special Cases

Acquisition of houses unfit for human habitation.

10. The provisions of the Second Schedule to this Act shall have effect as to compensation in respect of the acquisition of land in the circumstances mentioned in that Schedule.

Land of statutory undertaking.

11. In relation to compulsory acquisition of interests in land which has been acquired by statutory undertakers (within the meaning of the Town and Country Planning Act, 1947) for the purpose of their undertaking, the provisions of this Act shall have effect subject to the provisions of subsection (5) of section forty-five of that Act (which makes special provision as to the compensation payable in respect of certain acquisitions of land so acquired).

Outstanding right to compensation for refund etc. of planning permission.

12.- (1) Where, in the case of any compulsory acquisition, a planning decision or order has been made before the service of the notice to treat, and in consequence of the decision or order any person is entitled (subject to the making and determination of a claim in accordance with the relevant provisions, and to the effect of any direction by the Minister under section twenty-three or section forty-five of

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the Town and Country Planning Act, 1954) to compensation for depreciation of the value of an interest in land which consists of or includes the whole or part of the relevant land, then if-

(a) no notice stating that the compensation has become payable has been registered before the date of service of the notice to treat (whether or not a claim for compensation has been made); but

(b) such a notice is registered on or after that date;

the compensation payable in respect of the compulsory acquisition shall be assessed as if the said notice had been registered before the date of service of the notice to treat and had remained on the register of local land charges on that date.

(2) In this section any reference to compensation for depreciation of the value of an interest in land is a reference to compensation payable either-

(a) under Part II or Part V of the Town and Country Planning Act, 1954, in respect of depreciation of the value of that interest, or

(b) under subsection (1) of section twenty-two of the Town and Country Planning Act, 1947, in respect of loss or damage consisting of depreciation of the value of that interest;

any reference to registration is a reference to registration in the register of local land charges under subsection (5) of section twenty-eight of the Act of 1954, or under the provisions of that subsection as applied by section thirty-nine or section forty-six of that Act; and "the relevant provisions", in relation to compensation under the said Part II or the said Part V, means the provisions of the said Part II, or those provisions as applied by the said

Part V, and, in relation to compensation under the said subsection (1), means the provisions of regulations made under the said Act of 1947 with respect to claims for compensation under that subsection.

War-damaged land.

13.- (1) Where an interest in any hereditament or part of a hereditament which has sustained war damage is compulsorily acquired, then if-

(a) any of the damage has not been made good at the date of the notice to treat; and

(b) the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory acquisition and apart from any direction given by the Treasury under paragraph (b) of subsection (2) of section twenty of that Act, be a payment of cost of works;

the following provisions of this section shall have effect.

(2) Where the land would, but for the occurrance of the war damage, be devoted to any such purpose as is mentioned in rule (5) of the rules set out in section five of this Act, the provisions of that rule shall have effect for the purposes of the assessment of compensation payable in respect of the compulsory acquisition as if the land were devoted to that purpose.

(3) Where (whether by virtue of subsection (2) of this section or otherwise) the compensation payable in respect of the acquisition falls to be assessed in accordance with the said rule (5) the reasonable cost of equivalent reinstatement shall be ascertained for the purposes of that rule by reference to the state of the land immediately before the occurrence of the war damage.

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Assumptions as to planning permission

Assumptions as to planning permission.

14.- (1) For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections fifteen and sixteen of this Act as are applicable to the relevant land or any part thereof shall be made in ascertaining the value of the relevant interest.

(2) Any planning permission which is to be assumed in accordance with any of the provisions of those sections is in addition to any planning permission which may be in force at the date of service of the notice to treat.

(3) Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed; but, in determining whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land, regard shall be had to any contrary opinion expressed in relation to that land in any certificate issued under Part III of this Act.

(4) For the purpose of any reference in this section, or in section fifteen of this Act, to planning permission which is in force on the date of service of the notice to treat, it is immaterial whether the planning permission in question was granted-

(a) unconditionally or subject to conditions, or

(b) in respect of the land in question taken by itself or in respect of an area including that land, or

(c) on an ordinary application

or on an outline application or by virtue of a development order,

or is planning permission which, in accordance with any direction or provision given or made by or under any enactment, is deemed to have been granted.

Assumptions not directly derived from development plans.

15.- (1) In case where-

(a) the relevant interest is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for development of the relevant land or part thereof, and

(b) on the date of service of the notice to treat there is not in force planning permission for that development,

it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, such as would permit development thereof in accordance with the proposals of the acquiring authority.

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(2) For the purposes of paragraph (b) of the preceding subsection, no account shall be taken of any planning permission so granted as not to enure (while the permission remains in force) for the benefit of the land and of all persons for the time being interested therein.

(3) Subject to subsection (4) of this section, it shall be assumed that planning permission would be granted, in respect of the relevant land or any part thereof, for development of any class specified in the Third Schedule to the Town and Country Planning Act, 1947 (which relates to development included in the existing use of land).

(4) Notwithstanding anything in subsection (3) of this section-

(a) it shall not by virtue of that subsection be assumed that planning permission would be granted, in respect of the relevant land or any part thereof, for development of any class specified in Part II of the said Third Schedule, if it is development for which planning permission was refused at any time before the date of service of the notice to treat and compensation under section twenty of the said Act of 1947 became payable in respect of that refusal;

(b) where, at any time before the said date, planning permission was granted, in respect of the relevant land or any part thereof, for development of any class specified in the said Part II, but was so granted subject to conditions, and compensation under the said section twenty became payable in respect of the imposition of the conditions, it shall not by virtue of the said subsection (3) be assumed that planning permission for that development, in respect of the relevant land or that part thereof, as the case may be, would be granted otherwise than subject to those conditions;

(c) where, at any time before the said date, an order was made under section twenty-six of the said Act of 1947 in respect of the relevant land or any part thereof requiring the removal of any building or the discontinuance of any use, and compensation became payable in respect of that order under section twenty-seven of that Act, it shall not by virtue of the said subsection (3)

be assumed that planning permission would be granted in respect of the relevant land or that part thereof, as the case may be, for the rebuilding of that building or the resumption of that use.

(5) Where a certificate is issued under the provisions of Part II of this Act, it shall be assumed that any planning permission which, according to the certificate, might reasonably have been expected to be granted in respect of the relevant land or part thereof would be so granted, but, where any conditions are, in accordance with those provisions, specified in the certificate, only subject to those conditions and, if any future time is so specified, only at that time. PART II

Special assumptions in respect of certain land comprised in development plans.

16.- (1) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of a site defined in the current development plan as the site of proposed development of a description specified in relation thereto in the plan, it shall be assumed that planning permission would be granted for that development.

(2) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which-

(a) is development for the purposes of that use of the relevant land or that part thereof, and

(b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.

(3) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a range of two or more uses specified in the plan in relation to the whole of that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which-

(a) is development for the purposes of a use of the relevant land or that part thereof, being a use falling within that range of uses, and

(b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.

(4) If the relevant land or any part thereof is land subject to comprehensive development, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development for the purposes of a use of the relevant land or that part thereof falling within the planned range of

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uses (whether it is the use which, in accordance with the particulars and proposals comprised in the current development plan in relation to the area in question, is indicated in the plan as the proposed use of the relevant land or that part thereof, or is any other use falling within the planned range

of uses) being development for which, in the circumstances specified in the next following subsection, planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.

(5) The circumstances referred to in the last preceding subsection are those which would have existed if-

(a) the area in question had not been defined in the current development plan as an area of comprehensive development, and no particulars or proposals relating to any land in that area had been comprised in the plan, and

(b) in a case where, on the date of service of the notice to treat, land in that area has already been developed in the course of the development or redevelopment of the area in accordance with the plan, no land in that area had been so developed on or before that date;

and in that subsection "the planned range of uses" means the range of uses which, in accordance with the particulars and proposals comprised in the current development plan in relation to the area in question, are indicated in the plan as proposed uses of land in that area.

(6) Where in accordance with any of the preceding subsections it is to be assumed that planning permission would be granted as therein mentioned-

(a) the assumption shall be that planning permission would be so granted subject to such conditions (if any) as, in the circumstances mentioned in the subsection in question, might reasonably be expected to be imposed by the authority granting the permission, and

(b) if, in accordance with any map or statement comprised in the current development plan, it is indicated that any such planning permission would be granted only at a future time, then (without prejudice to the preceding paragraph) the assumption shall be that the planning permission in question would be granted at the time when, in accordance with the indications in the plan, that permission might reasonably be expected to be granted.

(7) Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might reasonably have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.

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(8) In this section "land subject to comprehensive development" means land which consists or forms part of an area defined in the current development plan as an area of comprehensive development.