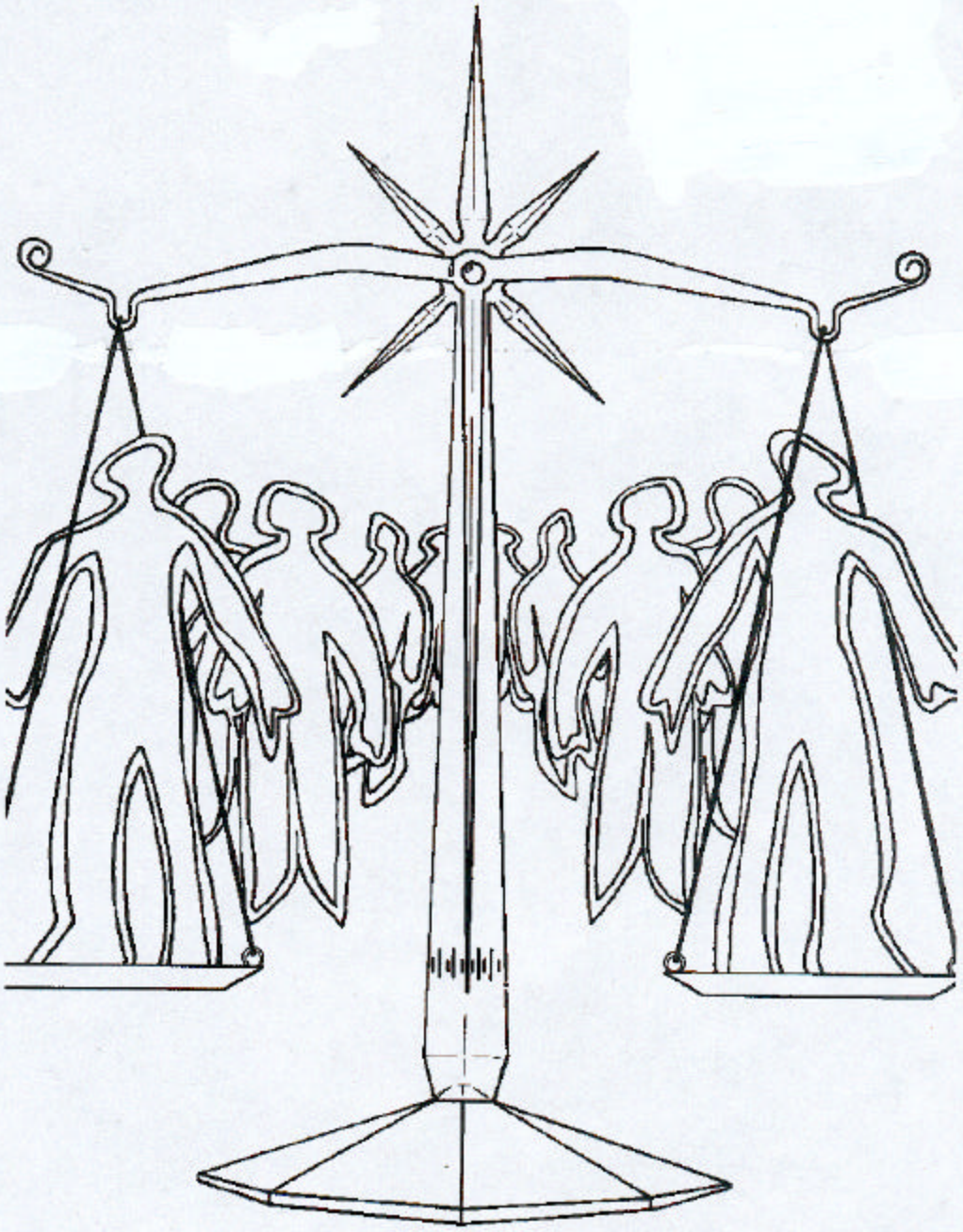
EXPROPRIATION

Law Reform Commission of Canada

Commission de réforme du droit du Canada

REPORT



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March 1976

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario.

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on expropriation laws.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

REPORT
ON
EXPROPRIATION

Commission

Honourable E. Patrick Hartt, Chairman
Honourable Antonio Lamer, Vice-Chairman
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Introduction

Our concern with expropriation began in 1972, following a suggestion by the Department of Justice. Coming so shortly after the enactment of a new *Expropriation Act* in 1970, the suggestion did not at first glance appear to involve an obvious area for reform. The 1970 Act was clearly progressive legislation that ended much of the unfairness possible under the earlier law. But we soon learned there were solid grounds for continuing to improve federal expropriation law.

The 1970 Act left untouched more than twelve hundred expropriation powers—including some that could be used without any obligation to provide compensation, let alone fair procedures. How these various powers were conferred, how they could be used, how long they might last—provisions on these matters vary widely. Many powers are governed by the clearly inadequate provisions of the *Railway Act* that date from the last century and give no right of notice or hearing to the landowner. Others are subject to the equally inadequate procedural requirements of the pre-1970 *Expropriation Act*. Some powers have special procedures, like the rather arbitrary ones that may be used by the Canadian National Railway Company. The CNR's procedures at least appear in a public statute. Many expropriation powers and procedures are buried in private Acts passed decades ago and never published again. And to add to the burden of those

seeking to find the law, rarely is all the applicable law found in one statute. The need for a single federal expropriation statute containing all expropriation powers and procedures was obvious. How else could we remove the "legal jungle surrounding federal expropriations"—as one comment on our Working Paper put it?

We initially hoped that the *Expropriation Act* of 1970 could simply be extended to govern all federal expropriations. But we soon discovered that many powers outside the Act, and particularly those available to strip-takers such as railway and pipeline companies, have procedural and regulatory needs that the Act does not meet. A close analysis also revealed a number of features that required strengthening if this Act was to serve as the foundation for the single expropriation statute we believe is necessary.

Following our study of the area, we published and circulated a Working Paper on Expropriation in May of 1975, and invited comments on it. Comments came from a variety of individuals and organizations. They provided us with additional insights, pointed out a number of shortcomings, but in the end, supported most of our proposals. As a result, this report is, to a considerable extent, based on our earlier Working Paper. Here we have attempted to set forth our conclusions and recommendations concisely and clearly. For more detailed discussion of the analysis and reasoning underlying the positions we have now reached, reference should be made to our Working Paper.

The Essentials of Good Expropriation Law

1. Guiding Principles

From our study of the law of expropriation, comments on our Working Paper and the experience of others in the field, we have gleaned a number of guiding principles that appear to be essential to good expropriation law and practice. These may be simply stated.

(1) *Equality*—the same law for all expropriations, the same rights for all people facing expropriation, and the use of standard acquisition practices and agreements.

(2) *Clarity and accessibility*—all grants of the power and all the applicable law in one statute, written in simple language, and supplemented by an information booklet telling people in a straightforward fashion just what rights, options and procedures are available.

(3) *Openness*—by all expropriators acquiring land by purchase or expropriation, in providing information about plans, rights and procedures, appraisal methods, prices paid and settlements reached.

(4) *Fairness*—early notice of proposed land acquisitions and expropriations, pre-expropriation public hearings or inquiries where all people objecting or affected may be heard, and *fair compensa-*

tion for all reasonable proven costs and losses resulting from acquisitions and expropriations by federal expropriators.

(5) *Political responsibility*—for the use of the expropriation power through final approval with reasons by a political authority.

Of course, these essentials by themselves won't solve everyone's difficulties. Even the best possible expropriation law will not cushion the blow of expropriation for many people. Some hardship to individuals is at times inevitable, for the greater benefit of the public-at-large. Still, from what we have learned, misunderstanding, ill will and the feeling of oppression can be avoided by thoughtful practices in land acquisition and an open planning process. As we have discovered in other areas, how a law is administered may have more impact on individual welfare and the common good than what the law may decree.

2. One Expropriation Statute

The essentials of good expropriation law are best implemented if one statute governs all federal expropriations. This statute should contain all grants of the power. It should identify all entities that may expropriate and indicate when and how this can happen. It should state clearly the rights and remedies of people whose lands are expropriated.

Who Should Be Able to Expropriate?

In passing the many federal statutes that have conferred the expropriation power over the last one hundred and nine years, Parliament has been very generous. It has given the power to virtually anyone that in meeting a public need might require land. As a result, expropriation powers are held by a wide variety of governmental and non-governmental entities.

1. Government as Expropriator

Some twenty-nine governmental entities—the Cabinet, individual Ministers, commissions, Crown corporations, and other public authorities—have been granted the power to expropriate. Every one of these powers should be governed by the same law—the single expropriation statute **we recommend**. For most powers this change would be relatively painless to make, and clearly beneficial. Twelve entities are already governed by the *Expropriation Act* of 1970. Another twelve—harbour commissions and a bridge authority –currently expropriate under the *Railway Act*, a statute that lacks the broader compensation and fair procedure provisions of the 1970 Act.

Some difficulty is presented by the five powers that may be exercised in extraordinary circumstances under the *National Defence Act*, the *Atomic Energy Control Act*, the *War Measures Act*, the *Radio and Telegraphs Acts*. National security, emergency and strategic needs were no doubt in the mind of Parliament when

it granted these very broad powers. None of them give much protection to the owner—some even leave the owner without any right to compensation. We recommend that the new expropriation statute apply to all these expropriation powers, subject to a discretion in the Cabinet to limit its application in the light of the situation involved. In most instances, these statutes call for an Order-in-Council by the Cabinet before expropriation becomes possible. An Order-in-Council should spell out the extent to which the new expropriation statute would not govern expropriations under each of these five Acts.

The Canadian National Railway's expropriation power and special procedures under the company's enabling statute are anomalous. Although the CNR is government-owned, its major land needs are for railway line rights-of-way. It should therefore be subject to the same requirements as other railway companies.

Future grants of expropriation powers to governmental entities, in our view, could well become unnecessary if the new expropriation statute continued the broad enabling provision contained in the *Expropriation Act* of 1970. Land may now be taken without the owner's consent whenever the Minister of Public Works believes it is required by the government "for a public work or other public purpose."

Suggestions we will make later in this report concerning the centralization of government land acquisition activities would also contribute to ending the need for legislative grants of the expropriation power to new governmental entities. But centralization should not reduce political responsibility for the decision to expropriate. The Minister responsible for the department, commission or other public authority seeking to acquire land should have the responsibility of approving its expropriations. In other words, political accountability for an expropriation should be borne by the Minister most likely to be aware of the policies, reasons and problems involved.

2. Private Enterprises as Expropriators

(a) *Strip-takers*

In our Working Paper we expressed the view that expropriations by private enterprises granted the power to expropriate

by federal legislation could and should be subjected to the same expropriation law as government. Furthermore, we stated that the intermittent nature of expropriations by non-governmental expropriators did not justify government expropriating on their behalf. Although we have received a number of complaints about expropriations by private enterprises (and about those by government as well), not one of these suggested that government undertake all federal expropriations.

While we believe that private enterprises should be governed by the same expropriation law as government, subjecting them to the same procedures is both difficult and impractical. The vast majority of private enterprises that may expropriate are railway and pipeline companies regulated by federal agencies, the Canadian Transport Commission and the National Energy Board, respectively. The regulatory mandate of these agencies extends to the location of railways and pipelines, and thus to identifying the land these companies may expropriate. And their major concerns are public convenience and safety—concerns that are difficult to separate from the determination of what land is best suited to a project.

We have concluded that these companies- strip-takers in terms of their major land requirements—require special procedures during what we have called the pre-expropriation phase. Once the land needed for the proposed railway or pipeline is clearly identified and the regulatory agency has approved the line location, the statutory provisions we recommend for all expropriations are easily applied to strip-takers. In other words, the new expropriation statute must contain special provisions for strip-takers during the pre-expropriation phase, but provisions that also contain the essentials of good expropriation law and procedure.

(b) *Private Enterprises Generally*

Many companies—at least 1,234 at last counting—have been granted expropriation powers by general or specific legislative enactments. Special Acts incorporating a variety of companies often include the power and usually, the applicable procedures are the archaic and unfair expropriation provisions of the Railway Act. Moreover, certain kinds of companies have the power under general statutes conferring it on that kind of enterprise.

Some of the powers conferred by Special Acts were for fixed periods—they expired after a number of years, usually five. But others have no time limitation, so they continue even though the company granted the power may have ceased operations, or the public interest justifying the power has disappeared. Some house-cleaning is obviously required.

To clear up this multitude of dormant expropriation powers, the statute we recommend should provide for their expiration in five years. This is the life span for powers governed by the *Railway Act*. Should expropriation become necessary after this time, it should be expropriation by government or as authorized by the CTC or NEB for railway and pipeline companies. Nevertheless, existing powers held by other companies should be exercisable during the five-year period if the Minister of Public Works issued a reasoned decision that the use of the power was in the public interest and all other necessary regulatory approvals were obtained.

Given the ease with which companies can now be incorporated under the *Canada Business Corporations Act*, we doubt that Parliament will in future need to pass Special Acts for this purpose. Nor, because of general enabling legislation, should Parliament find it necessary to confer the power to expropriate on private enterprises. And this is just as well. Such an extreme power should be closely monitored and controlled.

General grants of the power to expropriate to certain kinds of enterprises occur in seven statutes. Three of these grants—those in the *Dominion Water Powers Act*, the *Drydocks Subsidies Act*, and the *Telegraphs Act*—should be repealed simply because the power is no longer needed. The remaining grants in the *Railway Act*, the *National Energy Board Act*, the *National Transportation Act* and the *Northern Inland Waters Act* currently rely on the inadequate expropriation provisions of the *Railway Act*. The new expropriation statute we recommend should obviously govern the exercise of these powers by the private enterprises concerned.

The Pre-Expropriation Phase

The thrust of the new expropriation statute we recommend is best described in terms of what we have called the three phases of expropriation. These are: first, the formal steps leading to the decision to expropriate—the pre-expropriation phase; second, the taking of the property interest—the expropriation phase; and, third, the determination of compensation—the post-expropriation phase. The first or pre-expropriation phase covers the decision identifying the land needed as well as the decision to expropriate. It is here that many essentials of good expropriation law are now lacking. This is particularly true for companies seeking to require long strips of land that are in most instances governed by the *Railway Act* and the *National Energy Board Act*.

1. Under the *Expropriation Act* of 1970

The provisions in the 1970 *Expropriation Act* governing the pre-expropriation phase are, with one major exception that involves the pre-expropriation hearing, both fair and reasonable. The Act calls for notice of the intention to expropriate. The general public in the area where the land is located, the community affected and individuals whose interests may be expropriated are made aware by newspaper and direct notice of the intended expropriation. They are told that "any person" may object to a proposed

expropriation by writing to the Minister of Public Works. And if someone does object, a public hearing is held at which the objection is heard. The hearing officer, appointed by the Attorney-General of Canada—not the Minister seeking the expropriation—reports to the Minister of Public Works "on the nature and grounds of the objections made". Once the Minister has received this report, he may either confirm or abandon the intention to expropriate. When an objection to an expropriation is rejected by the Minister, the person objecting has the right to receive on request "a statement of reasons" from the Minister.

In general, and apart from hearing procedures and the hearing officer's role, the provisions of the 1970 Act that govern the pre-expropriation phase are suitable for inclusion in the statute we recommend. However, we have learned that many people are uncertain of their existing rights and remedies. The legislation establishing these should be clearly and simply written, and complemented by additional supporting explanation perhaps in the form of the legal rights booklet we describe later in this report.

2. The Pre-Expropriation Hearing

Many of the comments on our Working Paper confirmed our description of the pre-expropriation hearing as it has operated under the 1970 *Expropriation Act*. It is unrealistic to view it as more than a conduit for complaints to the Minister of Public Works. Many people admittedly expect the pre-expropriation hearing to be more than it can ever be. Yet the present hearing process achieves even less than it should.

Problems with pre-expropriation hearing procedures are not confined to the federal Act. Hearings under the Ontario Expropriation Act are also considered to be inadequate—as the recent Robinson Report on the Ontario Expropriation Act indicates. In fact, our observations and recommendations for hearings under a new federal expropriation statute parallel those made in the Robinson Report.

Why are people's expectations about the pre-expropriation hearing so unrealistically high? The answer is fairly obvious. In many cases, the hearing is the first available public forum for

people affected by a proposed project. These people have not had a previous opportunity to learn why the project is needed, to comment on or criticize that need. But the pre-expropriation hearing has what is usually the more limited function of considering the appropriateness of expropriating a particular tract of land—not the necessity for the project that requires the land. Frustration then becomes inevitable. How can a consideration of necessity be excluded when people have not been able to express their views publicly before?

Whether objections at pre-expropriation hearings concern necessity or location, we have observed they are often misdirected and inaccurate. Objectors usually lack information about the project; the expropriator currently has no obligation to provide details of the project and its planning at the hearing, let alone before. Furthermore, not having information limits the number of objections. As one comment we received put it: "It is difficult to object to what is unknown."

The basic problems, then, do not lie with the pre-expropriation hearing itself (although improvements are required in hearing procedures) but with the prior lack of information about and public participation in the planning process. What happens before the pre-expropriation hearing is crucial to its success, and to the ease with which land acquisition eventually occurs. Early public involvement in the planning process seems to be an essential prerequisite to an effective pre-expropriation hearing.

Land acquisition should be an important aspect in project planning. As planners have learned, the implementation of a proposed project becomes extremely difficult if they exclude early consideration of its impact on the people living in the project area. Without early public participation in planning, an individual's access to a public forum should not depend solely on the fact that some of the land necessary for a project may have to be expropriated.

What should the pre-expropriation hearing achieve? The hearing, in our view, should consider the suitability of expropriating a particular tract of land for the site of the public project in question. This should mean that alternative sites should be considered as major issues. To make participation meaningful, the expropriator should state in advance and be questioned at the

hearing on why the proposed site was chosen. Furthermore, the hearing officer should have the responsibility of making recommendations based on what he has heard. How else can his report be of any assistance to the responsible Minister? **Our recommendations** would make the pre-expropriation hearing into somewhat of an inquiry. But this is unavoidable if our legislators wish to ensure that the individual's right to be heard is at all meaningful and that the bureaucratic decision locating a project is tested by the people who know the proposed locale best.

We recommend that the new expropriation statute include provisions for all pre-expropriation hearings of the following nature:

1. Persons objecting and requesting a hearing should provide a brief written indication of the nature and grounds of their concern. If no written objection is received, no hearing should be held.
2. The hearing officer should attempt to consolidate similar submissions at pre-hearing conferences.
3. Alternative sites or routes should be major issues at a pre-expropriation hearing, and participants should be notified of this.
4. The expropriator should provide the reasons for the proposed expropriations and the advantages and disadvantages of alternate sites both before the hearing to objectors and at the hearing for the benefit of all people attending.
5. All objectors should have the right to question persons making oral submissions, subject to the discretion of the hearing officer to limit repetitious or irrelevant questioning.
6. The hearing officer should make findings of fact and express an opinion on the issues in his report to the responsible Minister.
7. The hearing officer's report and the decision of the Minister, with reasons, should be made public.

3. Strip-takers

Although special pre-expropriation procedures are required for strip-takers, the procedures we recommend are similar in

nature to those recommended for other expropriations. As we stated in our Working Paper, strip-takers such as railway and pipeline companies can expropriate without the owners affected having any notice of their intention or an opportunity to be heard. Furthermore, no political responsibility exists for the regulatory agency's decision that allows expropriation to occur.

The decision that approves the location of a proposed railway or pipeline, and as a consequence allows expropriation by the companies concerned, is made by the government agency regulating these public utilities—the Canadian Transport Commission for railways, the National Energy Board for pipelines. These agencies approve location in two separate procedural steps. First, the general merits and location of the line are approved. At this point, it is usually difficult to know exactly what land will be required. Railway companies will already have received governmental approval of the proposed line and, if a new company is involved, a certificate of public convenience and necessity. Pipeline companies are issued a similar certificate of public convenience and necessity on the approval of the general location.

Second, following survey and engineering work, the specific right-of-way is located by the agency's approval of documents known as the plan, profile and book of reference. The company may then expropriate even though both these steps may have occurred without an affected land owner knowing anything about them at all.

How can these procedures be modified to implement the essentials of good expropriation law? **We recommend** that both CTC and NEB approval procedures be modified to parallel pre-expropriation procedures applicable to other federal expropriators, as follows:

1. On an application for approval of a line and its general location, the agency should give notice of the application whenever possible and in a manner convenient to all persons who might reasonably be affected by the proposed line.
2. Notice of the application should be given as well in local newspapers.
3. Any person should be permitted to object to the application. Notice of objection should be filed with the agency.

4. Objections should be heard at a public hearing when the necessity for the line as well as its location could be raised. Notice of the hearing should be given by the agency to all objectors and other interested parties.
5. At the public hearing the company proposing to build the line should begin by presenting the reasons for doing so. Objections would then be heard, with the company having the opportunity to reply. Cross-examination by objectors should be permitted.
6. For the purposes of the hearing, the agency should have the power to make findings of fact and express an opinion on all relevant issues.
7. The agency should submit its findings and decision on matters raised at the hearing to the Minister of Transport in the case of the CTC, or the Minister of Energy, Mines and Resources in the case of the NEB, and that Minister should be free to accept or reject them. Both the agency's and the Minister's decision should be made public.
8. Agency and ministerial approval of necessity and general location would then allow the agency to issue a certificate of public convenience and necessity approving the general location of the line. One consideration in issuing the certificate would, of course, be the financial viability of the particular company to undertake the proposed project and acquire the necessary lands to do so. This consideration would meet our concern that landowners not be subjected to offers of purchase or expropriation by companies that might become unable to meet their financial obligations.

The company would at this stage normally carry out the work necessary to locate an appropriate right-of-way. Once this was done, it would submit a plan, profile and book of reference to the appropriate agency. The proposed line would by then have been sufficiently identified so that the affected landowners could be ascertained. CTC and NEB approval procedures should then include the following elements:

9. All affected persons should be notified of the company's application for approval of the specific right-of-way. So too, in the discretion of the agency, should other persons whose participation would be beneficial.

10. All such persons, on notifying the agency, should have the opportunity of participating in a local public hearing held to determine the best possible location of the proposed line, the most appropriate methods and timing of land acquisition and construction for all people affected. Notices seeking the opportunity to participate in hearings should provide a brief written indication of the nature and grounds of concern.
11. After the hearing the agency should submit a report of findings, its assessment of relevant submissions and its proposed decision with accompanying conditions to the responsible Minister for acceptance, modification or rejection. Both the agency and the Minister should be empowered to attach conditions to their decision concerning location, methods and timing of land acquisition and construction of the line, and repair of damages caused by construction. Both the agency and the Minister's decisions should be made public.
12. Following the Minister's full or conditional approval, expropriation by the company would be possible on the registration of the plan, profile and book of reference in the appropriate local land registry office.

In seeking approval of the specific right-of-way, strip-takers should be required to demonstrate that they have undertaken studies to determine the effects of the line and its construction and operation on the land through which the proposed route is to pass. They should also be required to propose methods for preventing and coping with possible adverse effects.

For shorter lines, or those where few objections are expected, the agency should have the discretion to consider both general and specific locations in the same hearing. However, one of the agency's primary concerns should continue to be the individual landowner's right both to notice, and to an opportunity to have his objection heard, considered and answered.

We note that under the 1970 *Expropriation Act* the normal pre-expropriation procedures may, with the approval of the Cabinet, be departed from in certain special and urgent circumstances. Similar exemptions should be available to non-governmental expropriators in similar situations.

A public purpose, of course, would continue to be the justification for allowing expropriations by strip-takers, or indeed any

other expropriator. Business advantage should not by itself be the reason for allowing an expropriation, as it now is for certain expropriations under the *Railway Act*.

Another consideration for the agency at this stage should be the extent and method of land acquisition by the strip-taker. A standard condition attached to the approval of the specific right-of-way could be the use of a standard form of agreement for acquiring the necessary property interests and the provision of information to landowners about their legal rights. Such agreements could also prescribe the rights and obligations of the parties concerning entry and use of adjacent lands.

A number of comments we received indicate that landowners occasionally signed agreements giving away more than they thought they were selling. For example, some easement agreements used by strip-takers provide for the future possibility of additional construction along the same easement. Standard form agreements should not include such provisions.

The land acquisition and expropriation activities of non-governmental expropriators should obviously be closely monitored by the responsible authorities, for example, the CTC or NEB for railway and pipeline companies. These authorities should attempt to mediate disputes between landowners and companies. They should act quickly to prevent breaches of conditions or damages.

The special pre-expropriation procedures for strip-takers must of necessity be integrated into the regulatory procedures of the CTC and NEB since they are intimately connected with the regulatory approval process for new railways and pipelines. However, the new expropriation statute should clearly indicate where these procedures are found. We would prefer that these procedures be spelled out in detail in the *National Transportation Act*, for the CTC, and in the *National Energy Board Act*, for the NEB. In addition, these procedures should be described in simple language in the legal rights booklet that we recommend later in this report.

The Expropriation Phase

We see few difficulties in extending, with minor modification, the provisions of the *Expropriation Act* of 1970 governing the expropriation phase to all federal expropriations.

1. Title

Title then would pass to every federal expropriator by the deposit and registration in the local land registry office of documents signifying the Minister's approval. Usually, this would be a notice of confirmation. For strip-takers, it should be the plan, profile and book of reference as approved by the responsible regulatory agency and Minister.

2. Possession

Possession can be acquired in four instances: first, at any time if the owner agrees; second, at any time if the owner is not in possession; third, after 90 days' notice and the making of an offer of compensation; and fourth, at any time if the Cabinet decides that special circumstances and an urgent need for the particular land justify the taking of immediate possession.

The price for early possession before the end of the 90 day notice period is ten per cent of the value of the expropriated

interest. However, for some expropriators 90 days may be excessively long. Construction contracts and seasonal constraints are particularly hard on strip-takers where a pipeline or railway line project is held up for even short periods. Strip-takers should be able to apply to the appropriate regulatory agency for permission to shorten the 90 day period by demonstrating that no significant inconvenience or hardship would result from shorter notice. However, the regulatory agency should have the discretion to attach conditions to a grant of shorter notice concerning the nature and timing of construction and the repair of damage.

3. Immediate Funding

We doubt that strip-takers would be forced to use the procedure for obtaining early possession very often if their expropriations were also governed by some of the other innovations and fairer procedures introduced by the 1970 Act. For example, the opportunity to have immediate funding without prejudice to any final determination of full compensation would probably encourage owners to give up possession more quickly. If, as we suggested in our Working Paper, immediate funding included a sum for damages as Ontario law now requires, then a fair minded strip-taker would likely be able to acquire possession voluntarily in most cases.

The 1970 *Expropriation Act*'s provisions for offering compensation and immediate funding are suitable for application to all federal expropriations provided that a sum for damages be included in the initial offer. The offer, we note, is to be based on "a written appraisal of value". Several suggestions concerning appraisals appear later in this report.

4. Abandonment

Again the approach to abandonment of the 1970 Act is generally suitable to all federal expropriations including strip-takers who decide a property they have expropriated is no longer needed. We think, however, that abandonment should be possible until compensation is paid in full, as Ontario legislation provides. The federal Act prevents abandonment if any compensation has been

paid. Owners who have accepted immediate funding should not lose the opportunity to regain their property on an abandonment. Furthermore, as the Robinson Report suggested, the owner's election to accept abandonment should only be an election to negotiate with the expropriator for the return of the land "subject to all proper adjustments of compensation paid and of compensation for consequential damages." It might also be wise to allow either the owner or the expropriator engaged in abandonment negotiations to activate the statutory negotiation process established by the 1970 Act as an aid to reaching voluntary agreement on compensation.

We would also permit the landowner alone to elect to accept abandonment if a suitable arrangement can be made rather than requiring, as the 1970 Act does, the agreement of "each person appearing to have had any right, estate, or interest" in the land. It seems unreasonable to allow one creditor—who, for example, could be an execution creditor owed a small amount—to prevent a landowner regaining his property.

The Post-Expropriation Phase

Determining compensation is the main concern of the post-expropriation phase. Of course, the amount of compensation payable by the expropriator to the owner can be settled by agreement between them at any time. However, agreement is not always easily reached, and hence the need for legislative direction. Here the 1970 Act has generally proved to be workable and acceptable. Its approach to determining compensation with some modification and strengthening should govern all federal expropriations.

1. Statutory Negotiation

The 1970 Act has encouraged voluntary settlements. It provides for the appointment on the request of either party of a negotiator to "endeavour to effect a settlement of the compensation payable". This approach is suitable for all federal expropriations. We would, however, recommend that experienced persons be appointed as negotiators in each province on a relatively permanent basis.

2. Formal Determination of Compensation

The modified compensation code in the 1970 *Expropriation Act*, which is based on market value, provides an acceptable

basis for determining compensation. The code is clearly superior to the uncertainties of the *Railway Act* and the common law. Moreover it is similar in many respects to reforms in many provinces that have supplemented the market value approach with such protections for the owner as the "home for a home" provision.

Most of the compensation provisions of the *Expropriation Act* should apply to all federal expropriations. **We do, however, recommend** a number of minor changes to these provisions in order to better adapt them to expropriations by strip-takers and which are, in any event, useful reforms for both land owners and expropriators.

3. When Should Compensation Be Determined

The most appropriate time to determine the amount of compensation is the date of registration of the notice of confirmation, as the 1970 Act provides. For strip-takers, of course, this would be the date of registration of the plan, profile and book of reference as approved by the appropriate regulatory agency and Minister. Occasionally, it appears that owners may never receive a copy of the notice of confirmation. For certainty, we recommend that where this happens the owner may elect to have compensation determined at the date when court proceedings begin.

4. Prohibiting Double Recovery

Although the 1970 Act prohibits what is known as double recovery of compensation, it does so without stating what is being done or why. The new expropriation statute should state that excessive recoveries are not permissible and define such recoveries to include an amount of compensation greater than what could be obtained on a sale of the land for its best possible use, as a residential development area, for example, rather than as a farm.

5. Partial Taking

The *Expropriation Act*'s approach to calculating the compensation payable when only part of a person's land is expropriated

is not suitable, in our view, to wider application, particularly to strip-takers who normally require only a narrow strip of land or an easement. We continue to support the position taken in our Working Paper and recommend that legislation governing all federal expropriations use the "before and after" approach to determining compensation for partial taking. The following refinements should be added to this approach.

1. The basic entitlement of any owner losing part of his land should be the market value of the land taken. Where market value is elusive, the ratio of the acreage of the part expropriated to the acreage of the whole should be considered equal to the ratio of the market value of the part to the market value of the whole tract.
2. Only increases in the value of the remaining land flowing from construction or use or anticipated construction or use of the work in question "beyond the increased value common to all lands in the locality" should be set off against the total compensation payable.

6. Injurious Affection on a Partial Taking

The 1970 Act allows owners to claim compensation for injurious affection for damages caused by the construction or use of any public work on the part of the land that was taken. Damages, however, could arise from a project situated on land other than the land taken. And in this event, the owner would have no recovery under the Act, and questionable recovery under the common law.

We find the Act's approach narrow and unfairly restrictive. A recent reform in the United Kingdom allows compensation for injurious affection of land retained to be assessed "with reference to the whole of the work and not only the part situated on the land acquired".

Federal expropriation legislation in Canada should adopt this reform, even though it is only a partial solution to the problem of injurious affection. Left untouched are cases of injurious affection where no land is taken, a situation that falls outside the law of expropriation generally, and the scope of this report.

7. Equivalent Reinstatement

Originally developed by the courts, the concept of equivalent reinstatement is limited by the 1970 Act to lands on which there are buildings specially designed for use as schools, hospitals, municipal institutions, religious or charitable institutions "or for any similar purpose".

There are other properties like theatres and golf clubs that fall outside the Act's equivalent reinstatement provision for which full compensation under other elements for determining compensation is difficult to achieve. Attempting to do so may have the effect of distorting these other elements. Consider, for example, using special economic advantage as a basis for recovering the total cost of establishing elsewhere when the market value of a special purpose property is minimal.

We recommend that compensation on the basis of equivalent reinstatement be available as an option to owners of land "devoted to a purpose of such a nature that there is no general demand or market for land for that purpose".

8. Leases and Tenancies

The *Expropriation Act* of 1970 improved the tenant's position under the common law on an expropriation of his leasehold interest. Compensation is calculated taking into account such elements as the term of the lease, how much longer it has to run, and any right or "reasonable prospect of renewal". Landlords facing expropriation on the other hand have no opportunity under the Act to receive compensation for the probable renewal of a lease. Fairness demands that they should have an equivalent right. Consequently, **we recommend** that if a reasonable prospect of renewal can be satisfactorily proved, it should be an element included in determining the market value of leasehold interests expropriated under federal legislation. (This change better approximates what a willing buyer would pay a willing seller for leased premises.)

We also recommend that the new expropriation statute should define the effect of expropriation on existing leases. We would adopt the Ontario legislative approach that deems leases to be frustrated

from the date of expropriation of all or a part of a lessee's interests when the remaining part, if any, is rendered unfit for the purposes of the lease. For partial expropriations where a tenant can continue in possession, his obligation to pay rent under the lease should be proportionately reduced.

9. Mortgage and Other Security Interests

As we mentioned in our Working Paper, the market value approach favoured by the British Columbia Law Reform Commission seems more straightforward than the outstanding balance method adopted by the 1970 *Expropriation Act*. The latter method requires too many supportive provisions and qualifications for it to operate fairly in all market conditions. **We therefore recommend** that the market value approach to compensating mortgages be adopted in federal expropriation legislation.

10. Who Should Determine Compensation

When agreement on compensation cannot be reached, virtually all federal statutes that deal with determining compensation for expropriation call for adjudication of the dispute. At present, who adjudicates these disputes depends on the applicable legislation: for example, it could be a local judge under the *Railway Act,* or a Federal Court judge under the 1970 *Expropriation Act*. All cases concerning compensation for federal expropriations should be adjudicated by the same tribunal. **We recommend** that the Trial Division of the Federal Court hear and decide these cases. Judges of this court sit in centres across the country and have already acquired skills in dealing with compensation cases under the 1970 *Expropriation Act*.

We had suggested in our Working Paper that claims under $5,000 be heard by local judges acting as arbitrators. However, we have learned that all claims under the *Expropriation Act* involving such amounts have in recent years been settled before adjudication. The more generous provisions of the 1970 Act regarding costs and the expensive prospect of litigation seem to have been the deciding factors. That is why we have concluded that all claims for com-

pensation arising from federal expropriations be heard in the Trial Division of the Federal Court. The decisions of the court should be appealable in the ordinary way to the Federal Court of Appeal, and, with leave, to the Supreme Court of Canada.

11. Costs

The 1970 *Expropriation Act*'s provisions on costs are far superior to comparable provisions in the *Railway Act*. The owner can receive his reasonably incurred legal, appraisal and other costs during voluntary negotiations. And some compensation is available for the costs of making an objection at the pre-expropriation hearing. However, a tariff prescribed by Order-In-Council sets limits on these that now seem unrealistically low. The tariff should be reviewed at frequent intervals and expanded to cover costs involved in making objections before the regulatory agencies concerned with expropriations by railway and pipeline companies.

An owner's recovery of the costs of court proceedings is, however, limited. No costs may be received if the court considers the amounts claimed to be unreasonable. If the claim is considered reasonable and the court awards an amount of compensation less than that claimed, then the owner will receive costs on a "party and party" scale. And this means that the owner will be out-of-pocket since recovery on this scale is usually less than the real costs incurred. If, however, the amount awarded exceeds what the expropriator offered, the owner recovers his costs "determined by the Court on a solicitor and client basis". This will usually more closely approximate the owner's actual court costs. Guaranteeing an owner's costs helps to ensure his ability to exercise his legal rights against a usually much stronger opponent. Meagre or uncertain awards of costs may frustrate these rights and subject the owner to what can sometimes be the arbitrary preferences of the expropriator attempting to stretch limited land acquisition funds. On the other hand, allowing overly generous awards of costs may well encourage prolonged negotiation and litigation as well as excessive preparation and high settlements.

We recommend the principle of full indemnity to an owner for all costs, legal and otherwise, if reasonably incurred. We would

accept the 1970 Act's provisions concerning costs during the pre-expropriation hearing and voluntary negotiations. However, federal expropriation legislation should go further and allow owners to be fully indemnified for reasonably incurred costs from the time of expropriation to the date of settlement, the compensation award or the termination of related proceedings.

Should the amount awarded be less than the amounts offered by expropriators, the award of costs to the owner should be in the discretion of the court, subject to a single proviso. Full indemnity for costs in such instances should only be awarded where the court considers it just and equitable to do so.

So that owners may have a better idea of the legal costs they eventually may be able to recover, we recommend that specific guidance be given for the taxing of costs by the Registrar of the Federal Court who acts as the taxing officer under the Federal Court Rules. Here we are influenced by recommendations in the Robinson Report and an awareness of recent cost awards generally.

The Registrar should consider the reasonableness of an owner's legal costs in terms of the size and complexity of the case, the amount in issue, the difference between the amount awarded and amounts offered by the expropriation, and most important, whether the case was prepared and conducted in "a straightforward and economical manner", as the Robinson Report put it. We would also suggest that the Registrar be able to tax costs for agreements reached on compensation after expropriation. Some guidance also seems merited for an owner's recovery of appraisal fees, given the wide discrepancies that now exist. The Registrar should be assisted by a scale of reasonable appraisal fees that would serve as a basis for determining what owners could recover from federal expropriators. This scale should also serve as a guide to expropriators who seek independent appraisals.

Even though owners can recover their reasonable costs, a number of comments we received mentioned difficulties people had encountered in selecting competent professional advisers in expropriation matters. This is, of course, a problem that goes beyond expropriation. There are no easy solutions. However, we hope that the consideration now being given by the legal profession in a number of provinces to the question of specialization might result in at

least a partial easing of the difficulties every person experiences in seeking professional advice. So too, would the strengthening of the appraisal profession that we mention in this report.

Reasonable opportunities for owners to recover their actual costs should, in our view, encourage expropriators to adopt such useful policies as consolidating cases or subsidizing test cases that could serve as models for settlements. This, we learned, has happened and has helped to reduce friction between expropriators and owners and shortened the time involved in negotiating settlements.

Miscellaneous Matters

1. Personal Property

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

Our concern here is only with the general lack of recording of these compulsory transfers. The same procedures apply to the expropriation of personal property as to the expropriation of land so that both would be governed by the new expropriation statute.

We recommend that the procedure under the *Cape Breton Development Corporation Act* for the registration of expropriated personal property with the Registrar General of Canada be expanded to include all such compulsory acquisitions.

2. Injurious Affection

The right to damages for injurious affection when no land is taken is not directly mentioned in the *Expropriation Act* of 1970 although it is granted by the *Railway Act*. The Supreme Court of Canada has considered that the pre-1970 *Expropriation Act*

established a right to damages for injurious effects where no land was taken, even though the right was not directly spelled out in that statute. Since the new expropriation statute would replace the expropriation provisions of the *Railway Act* and the 1970 *Expropriation Act,* it should include the right to damages for injurious affection.

Apart from any statutory confirmation of this right, the common law of injurious affection is badly in need of reform. It is, however, beyond the scope of this paper since it is in essence a matter of tort law and the interaction of the nuisance concept with the defences of statutory authority and Crown immunity.

Land Acquisition Practices

Our concern with expropriation has exposed us to the land acquisition practices of many expropriators, both within the federal government and without. We have noticed inconsistencies and practices that prompt the making of several suggestions.

1. A Central Land Agency

Differences in experience and skill in land acquisition among the various governmental expropriators indicate the need for a single federal land acquisition agency. Some centralization of acquisition has already occurred in the Department of Public Works. But an effective land acquisition agency should be independent of any department or entity that now may acquire or expropriate land for its own purposes. The agency could in fact carry out all government land acquisitions by purchase, or expropriation. It could, at the same time, implement consistently fair practices that would make government land acquisitions a model for the private sector.

Since the agency would have to work closely with the Department of Justice on the legal aspects of acquiring land, the responsible Minister should be the Minister of Justice.

Our suggestion does not, of course, automatically solve the problem we discussed earlier concerning the early involvement of

the public in project planning. However, officials of the agency would probably soon realize that more voluntary sales and fewer expropriations are possible when the public is able to participate in an open planning process and has access to sufficient information to allow an understanding of a project's rationale and land requirements.

2. Appraisals

From the comments we have received on our Working Paper, we have learned that many expropriation problems are in fact appraisal problems. The appraisal of land values is a very important part of every expropriation or other land acquisition. In fact, how quickly and fairly many expropriations occur depends to a significant extent on the quality of appraisal. At present, owners and expropriators are often confused by conflicting appraisals. The crucial evidence in many cases is that of a real estate appraiser but we have found a great degree of inconsistency in the views of appraisers concerning principles of appraisal, ethics and fees.

One reason for this is that some appraisers have had no special training or experience. Anyone can call himself an appraiser, without even demonstrating that they can meet minimal standards of professional competence. As well, there would appear to be a shortage of skilled and reliable appraisers. There is clearly a need to strengthen the appraisal profession; in particular by promoting generally acceptable appraisal principles and ethics, expanding training programs and accreditation procedures, and perhaps requiring would-be appraisers to be examined in their knowledge and skill before offering their services to the public-at-large. Both federal and provincial governments should encourage this strengthening. So too should all federal expropriators in their policies and practices.

3. Openness

Some of the problems experienced by owners during expropriation stem from a lack of correct information and poor communication between the expropriator and the owners affected. Where some properties have been purchased, rumours abound over the prices paid. These rumours are divisive and inevitably alienate

many landowners, making voluntary sales even more difficult. We believe the prices paid by entities with the power to expropriate should be public information. After all, public funds and public purposes are involved. Openness is a policy that in our view is both fairer to individual landowners and to the public-at-large which, in the end, shares the cost of expropriation.

4. Standard Form Agreements

We would also suggest that all entities with expropriation powers use standard form agreements when acquiring land. Equality, fairness and openness call for such a policy. Many owners have difficulty understanding the "fine print" in the agreements now being used. Standard agreements could be supplemented with explanations in simple language about what their terms really mean. This would be another way in which the confidence of owners in the fairness of the potential expropriator's offer could be bolstered. Provincial experience indicates the feasibility of the reform. The Manitoba Pipeline Act provides for a standard form of instrument granting and governing the right of pipeline companies to enter and use land "for the purposes of a pipeline" whether the right was obtained by agreement or expropriation.

5. A Legal Rights Booklet

No matter how simply or clearly a law is written, it will still be difficult for many people to understand. No matter how reasonable a possible expropriator's offer to a landowner may be, the landowner should still know what his legal rights are. As an aid to these ends, we recommend the preparation and regular updating of a "legal rights booklet" setting out succinctly the law and procedures governing federal expropriations, the rights and remedies of the landowner and the expropriator, and how they can be exercised. The booklet should also, for example, raise the possible effect of expropriation on a landowner's income tax liability and other related matters.

Everyone contemplating selling a property interest or facing expropriation when a federal expropriator is involved should be given a copy of this booklet. Ideally, the booklet should be prepared

and kept up to date by an independent entity that is not involved with federal expropriations or land acquisitions. In the United States, the Department of Justice has for a number of years provided a booklet similar to what we have in mind for Canada. Such a booklet will not ensure that every landowner knows how to cope with expropriation. However, it would help to promote the atmosphere of openness and fairness that is essential to the proper implementation of good expropriation laws and procedure.

Conclusion

This report continues the steps towards better expropriation laws at the federal level that were begun by the *Expropriation Act* of 1970, and continued, we would like to think, by our Working Paper. Although our recommendations are not framed in legislative language, they should provide an adequate foundation for the preparation of the new expropriation statute that we believe is necessary. We look forward to working with the Department of Justice in the drafting of this statute so that every Canadian facing a federal expropriation will soon have all the rights and protections that we believe are essential to good expropriation law.

Appendix

A. Contributions

This report bears the imprint of many people and organizations, of farmers and federal government departments, of some of the people whose land has been taken by the use of a federal expropriation power, as well as some of the railway and pipeline companies, and government agencies who have exercised these powers. Without their assistance and comments, the recommendations in this report would be far less responsive to real problems and needs.

We are also indebted to law reformers in other jurisdictions, notably Ontario and British Columbia, who have considered this area in recent years and recommended legislative reforms. We, of course, were fortunate in being able to base part of our work on a fairly recent reform initiative—the federal *Expropriation Act* of 1970. So our debt extends to the legislators and public servants who were involved in the preparation and enactment of this statute.

Finally, we must express our appreciation for the efforts of those people who have been closely involved in the preparation of our Working Paper on Expropriation and this report. The general direction of this work was under the guidance of former Commissioner William F. Ryan, until his appointment to the Federal Court of Appeal in 1973. Also involved during their time as commissioners were Dean M. L. Friedland, Mme. Justice Claire Barrette-Joncas, and John D. McAlpine. The initial work was undertaken by Mr. Justice John W. Morden of the Supreme Court of Ontario,

who provided us with a detailed study paper. We also had the benefit of the views of Professor Eric C. E. Todd of the University of British Columbia and R. B. Robinson, Q.C., of Toronto. The anchorman throughout has been one of our research consultants, Gaylord Watkins.

B. Publications

This report is based on internal and external documents filed in the archives of the Commission and indicated in our Annual Reports.

Study Paper

Expropriation (1974)

Working Paper

Expropriation (#9—1975), Information Canada

Cat. No. J32-1/8-1975