WINDS OF CHANGE AND THE LAW OF EXPROPRIATION

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From time to time in the development of our laws, circumstances created or accidental, bring within the spotlight of the attention of our legislatures branches of the law which are long overdue for a check-up, diagnosis and rejuvenating treatment.

The aim of this article is twofold, namely (1) to draw attention to the fact that at the present time the law of expropriation is beneath the spotlight in Ontario and British Columbia and to suggest that the other Canadian provinces might follow the leaders; and (2) to stimulate a concern for the development and clarification of this branch of the law greater than has hitherto been shown by Canadian writers and commentators.

I. *The Law of Expropriation Defined.*

Whilst in Canada the right to take property for public use is termed the power of "expropriation",[1] in the United States our neighbours speak of the power of "eminent domain",[2] and in England it is the power of "compulsory purchase".[3] This latter term is probably more truly expressive of what in fact happens. The owner of land, or some interest therein, is compelled to "sell" it, whether he likes or not, and the authority which "buys" is obliged to pay a "purchase price" or, as it is usually called, "compensation".

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[1] The only Canadian text book on the subject is Challies, The Law of Expropriation (1954).

[2] Nichols on Eminent Domain (3rd ed., 1950), Vol. I, p. 6, traces the expression to Grotius, (*De Jure Belli et Pacis* (1625)) and notes that one of the earliest uses of the expression in the United States is in Kent's Commentaries (1827). Nichols concludes his historical excursus with the wry observation: "At present, however, 'eminent domain' is not merely a legal term of precise meaning well understood by the profession, but it is familiar to all but the more illiterate members of the community at large"! (p. 8).

[3] Hence the title of a leading practitioner's text R. D. Stewart-Brown, Encyclopedia of Compulsory Purchase and Compensation (1960).

However, whether property is subject to the power of expropriation, eminent domain or compulsory purchase, in all jurisdictions compensation is a natural corollary of the exercise of that power. In the United States it is guaranteed by express provisions of the federal constitution,[4] and all but two of the state constitutions spell out the requirement to pay compensation.[5]

In England and Canada there is no such constitutional guarantee[6] but the courts have achieved almost the same result by construing statutes on the premise that if the legislature intends to authorize a person's property to be taken without compensation (that is to confiscate it) it must expressly so provide. In short, there is a presumption that compensation is to be paid.[7]

The law of expropriation may therefore be defined as: "The legal rules, derived from statutes and judicial decisions, which regulate the rights and liabilities of persons authorized to acquire property, without the owner's consent, for express statutory purposes."

II. *Functions of the Law of Expropriation.*

Like other branches of law, the functions of the law of expropriation are twofold: the provision of (i) substantive and (ii) procedural rules.

[4] ". . . Nor shall any state deprive any person of . . . property, without due process of law." Fourteenth Amendment.

[5] For example, the Wisconsin constitution provides: "The property of no person shall be taken without just compensation." Art. 1, s. 13. The two exceptional states, New Hampshire and North Carolina (*Staton* v. *Norfolk & C.R. Co.* (1892), 111 N.C. 278, 16 S.E. 181) have had the requirement read into their constitution by judicial decisions. For most of my information concerning the law and practice of expropriation in Wisconsin I, am indebted to the following publications of Donald L. Heaney, attorney-at-law, Madison, Wisconsin: Valuation of Property for Highways Under Eminent Domain, (Automotive Safety Foundation, Washington, D.C.); Land Condemnation (University of Wisconsin, Extension Department); The New Eminent Domain Law and the Wisconsin Practitioner, [1960] Wis. L. Rev. 430.

[6] Note, however, the Canadian Bill of Rights, S.C., 1960, c. 44, s. 1(a) ". . . the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." *Cf.* ". . . the owner of expropriated property has no inherent right to compensation for the property lawfully taken from him. Nor has he any constitutional right, such as an owner has in the United States, to 'just' or 'reasonable' or 'adequate' compensation. He has only such right as is conferred upon him by statute and no right at all apart therefrom." Thorson P. in *The King* v. *Woods Manufacturing Co. Ltd.*, [1949] Ex. C. R. 9, at p. 13, citing Lord Parmoor in *Sisters of Charity of Rockingham* v. *The King*, [1922] 2 A.C. 315, at p. 322.

[7] ". . . it will not be presumed that the legislature intends that a man's land shall be taken for public purposes without compensation; if it does so intend it must clearly appear." *Per* McLeod J. in *Chittick* v. *The City of St. John* (1907), 38 N.B.R. 249, at p. 250. See also *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Ltd.*, [1919] A.C. 744.

(i) The substantive rules determine, (a) the interest which may be acquired, by whom and for what purpose(s); (b) the interests for which the expropriated owner is entitled to be compensated; and (c) the criteria by which the compensation so payable is to be calculated.

(ii) The procedural rules embrace, (a) the ground rules to be followed by the expropriating authority when the expropriation takes place. These cover everything from the notice to be given to the owner to the way in which and the time at which the title or interest is transferred from owner to expropriator; and (b) the agency, be it individual arbitrator, a triumvirate of arbitrators, judge, board, tribunal or court, whereby the amount of the compensation is determined in the event that the two parties fail to reach a voluntary settlement.

It is unarguable that we should take a good hard look at our current procedures. It is monstrous that in some provinces there is a myriad of different statutory procedures. Nevertheless, it is submitted that the principal problem is to hammer out the substantive rules, particularly the criteria by which the compensation payable is to be calculated.

The statutory definition of such criteria will not make the expropriation of land as simple as the completion of a voluntary sale. It will, however, eliminate much of the uncertainty and consequent discontent in the minds of both expropriators and owners concerning the present state of the law.

III. *The Present Discontent.*

At the best of times expropriation proceedings are charged with emotional tensions. There is, of course, good newspaper copy in the picture of the irate farmer standing with loaded shotgun in the path of the approaching highway crew "dragging their blacktop behind them". A witness before the Wisconsin committee described the expropriating highway authority as "robbers, second-hand men. . . ".[8] If the Englishman's home is his castle, no less is the Canadian's or the American's.

The expropriating authority is always a "they", an impersonal and heartless municipality, school board, utility company or highway authority. The sympathy of the reasonable man is with the private owner, the underdog, though as an elector our reasonable man is also the person who demands the services, streets, free-

[8] Valuation of Property for Highways Under Eminent Domain, *op. cit.*, *supra*, footnote 5, p. 6.

ways, bridges, schools, parks and the like, which create the necessity for expropriation.

Though the planned economy, with its necessary corollary—government intervention in private affairs—has been with us for a half century, the folklore of laissez-faire lingers on. Collectively we accept, even demand, positive and active government. Individually we remain individuals with an innate and healthy distrust of, and disrespect for, authority. The expropriating authority is government and instinctively we feel, *a fortiori* if we happen to be the expropriated owner, that the government should pay, and pay handsomely, for the property it acquires.

Hence some of our Canadian courts still do not find it at all difficult to continue the logically indefensible practice of awarding additional percentage allowances for "compulsory taking". It should be recalled that this practice originated during the English railway boom of the 1840's when it was thought legitimate to require "speculators to pay *largely* for the rights which they acquire over the property of others".[9] The practice was abolished in England by statute in 1919.[10]

In a familiar dictum, President Thorson has put the matter fairly and to the point:

> It is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of trespass to the conditions of the present times when it frequently happens that the property of individuals has to be expropriated for important public purposes. There is no element of tort or delict in an expropriation under the Expropriation Act. It is the lawful exercise by the Crown in right of Canada of its right of eminent domain under the authority of an enactment of the Parliament of Canada. All that the owner is entitled to is such compensation as

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[9] H.L. Sessional Papers 1845, No. 184 cited by Thorson P. in *The Queen* v. *Sisters of Charity of Providence*, [1952] Ex. C.R. 113, at p. 132. It would appear that such allowances have never been made in the United States and were abolished in England, for all practical purposes by the Acquisition of Land (Assessment of Compensation) Act, 1919, 9 & 10 Geo. 5, c. 57, s. 2(2). In *The Queen* v. *Supertest Petroleum Corp. Ltd*, [1954] Ex. C.R. 105, at p. 145, Thorson P. comments that the allowance amounts to what ". . . may crudely but accurately be called a policy of 'soaking' the speculators . . . ." The learned President thought it ". . . singularly inappropriate to extend this idea . . . to expropriations of property for public purposes lawfully made by the Crown. . . ." See further, Eric C. E. Todd, The 10% Allowance in Assessing Compensation Payable for Property Expropriated Under Statutory Authority (1958), 11 U.B.C. Legal Notes 623.

[10] Acquisition of Land (Assessment of Compensation) Act, 1919, 9 & 10 Geo. 5 c. 57, s. 2(1). See *infra*. Two Canadian Statutes also abolish the allowance, namely, the Water Act, R.C.B.C., 1960, c. 405, s. 75(9)(a) and The Power Corporation Act, R.S.S. 1953, c. 35, s. 26(3) 1, (as amended 1959, c. 88, s. 2.).

> Parliament has decreed. There is no value in sweeping generalizations of inherent right to compensation.[11]

But there are two sides to every problem and the problem of achieving equity in the field of expropriation is no exception. If it be conceded, as assuredly it must, that the prime task of expropriation law is to arrive at the payment of compensation which is "just" not only to the property owner but also to the acquiring authority (ultimately the taxpayer in most instances), it must also be conceded that the present law is not achieving this *desideratum*. The taxpayers' side of the case is well illustrated by the preamble to the Order in Council appointing the Hon. J. V. Clyne to investigate the operation of expropriation laws in British Columbia:[12]

> THAT 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; THAT 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 THAT the amount 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. . . .

The government felt sufficiently strongly about the award of the Parkford arbitration board to take the drastic step of introducing a bill into the legislature on March 25th, 1961, limiting the compensation payable to $350,000.00. The Bill was ordered dropped from the order paper five days later, the government having come to terms with the Parkford Estate at a figure of $425,000.00 plus interest on that amount from December 7th, 1960, when the British Columbia Supreme Court had upheld the award.

It should be added that the three man board constituted under the Highway Act[13] had failed to agree on a formal award and the compensation had, in fact, been fixed by the "umpire". Moreover, interest payable on the amount awarded, calculated from the date of expropriation together with costs had boosted the total amount payable by the government to more than $566,000.00. The compromise settlement resulted therefore in a saving to the public of $141,000.00. The Attorney General, in announcing withdrawal of

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[11] *The Queen* v. *Supertest etc.*, *supra*, footnote 9, at p. 146.
[12] B.C. Gazette (1961), vol. C 1, p. 223.
[13] R.S.B.C., 1960, c. 172, s. 16(2) and Department of Highways Act, R.S.B.C., 1960, c. 103, s. 26.

the bill said, that it had been proposed "with great reluctance because it went against a basic principle, but [the government] felt that a large sum of money was involved and the government must proceed in that manner to protect the public purse."[14]

In the result neither side is satisfied with the current situation:

> Each "side" . . ., believes its rights to be violated; each "side" calls for reform. Out of this cauldron of conflict, confused juries and oftentimes judges yield to the "practical" by "splitting the difference" between the condemnor's and condemnee's claims. Although this arrangement tends to keep both parties reasonably satisfied and often produces just compensation, such a policy, on its face, is not and should not be the criterion of just compensation.[15]

Evidence of discontent with expropriation laws is manifest by the fact that, in two of the Canadian provinces, and at least six of the United States, official studies have been completed, or are currently under way, or are about to start.[16]

In Wisconsin, as a result of the recommendations of a special Governor's Committee on the Revision of Eminent Domain, which was appointed at the request of the State's Highway Commission, the expropriation law of that state was repealed and rewritten in 1959.[17]

> The intent of the Legislature in making the revision was to change it to the benefit of the condemnee.[18]

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[14] Vancouver Sun Newspaper, March 27th, 1961.

[15] California Law Revision Commission; Recommendations and Study Relating to Evidence in Eminent Domain Proceedings, October 1960, p. A12-13. The Commission has retained as its research consultant the Los Angeles law firm, Hill, Farrer and Burrill. The report cited is one of three made to date by the consultants and on which the Commission has made its recommendations. The other two reports, also dated October 1960, deal with "Taking Possession and Passage of Title in Eminent Domain Proceedings" and "The Reimbursement for Moving Expenses When Property is Acquired for Public Use". These studies are models of thoroughness and objectivity and are invaluable sources of information concerning the situation in the United States of America with occasional cross-reference to Canada and England.

I am indebted to Professor John H. DeMoully of Stanford Law School and Executive Secretary to the Commission for making these reports available.

[16] Massachusetts (1957), Nebraska (1959), New Jersey (1960), Wisconsin (1958), Virginia (1958), California (1956). Dates indicate initiation of official studies. In Ohio and Alabama, the Bar Associations are reported to be working on draft revisions.

[17] Wis. Laws 1959, cc. 639, 640.

[18] Heaney, *op., cit. supra*, footnote 5, in Wis. L. Rev., states in footnote 2, "In the period immediately preceding enactment of the legislation, dissatisfaction by condemnees had become quite apparent. The following newspaper headlines suggest some of the criticisms leveled primarily at the state highway commission: 'Citizens Object to Buying Methods of State for Land Along Highway 57 and 141'; 'Only Thompson is Paid Less Than $1,000 per Acre'; 'Ozaukee Farmers Protest Grab of Access Rights.'"

In California, the legislature in 1956 authorized the California Law Revision Commission to make a study,

> . . . to determine whether the law and procedure relating to condemnation should be revised in order to safeguard the property rights of private citizens.[19]

The Commission has now issued three sets of recommendations for amendment of certain aspects of the law and these are being considered by the California legislature. The recommendations are based on, but do not in all respects adopt, studies prepared for the Commission by its research consultants, a Los Angeles law firm. More studies are in the course of preparation.[20]

In Ontario, a special committee of the Municipal Law Subsection of the Canadian Bar Association was appointed to study and make recommendations concerning expropriation proceedings in the province, and, in particular, to draft a bill which would render uniform expropriation proceedings of all public authorities. The committee produced a number of drafts which were submitted to the Subsection and finally to the Attorney General's Advisory Committee on the Administration of Justice. The matter was then referred to a small committee which produced a revised draft bill. In substance this is Bill 120, which was introduced into the Ontario Legislature in the 1960 session and given first reading on March 11th, 1960. This was done in order that it could be printed and distributed throughout the province for discussion. In April 1960 the legislature set up a Select Committee under the chairmanship of the Hon. F. M. Cass, Q.C., the Minister of Highways. The Committee has held meetings, and received briefs and representations. The Committee's interim report, dated November 4th, 1960, discloses that up to that time written submissions had been received from forty-five organizations and individuals including government agencies. The Committee had held thirteen meetings at which approximately fifty attendances had been made by chief executive officers of government agencies and representatives of other organizations and individuals. The Committee recommended that other public meetings should be held throughout the province and that a comparative study of the expropriation legislation and proceedings of other jurisdictions would be of material assistance in revising the expropriation legislation of Ontario.[21] Among questions which the Committee found had

[19] Cal. Stat. 1956, res. ch. 42, at 265, cited, *op. cit., supra*, footnote 15 at p. A-11.

[20] See *supra*, footnote 15.

[21] The Committee made on the spot investigations of the situation in

become apparent during the investigations were:

1. Is a uniform expropriation statute possible and advisable?
2. What should be the basis for compensation for expropriation or injurious affection?
3. What form of tribunal should assess compensation?
4. What procedure should be established for assessing compensation?
5. Should special powers of a public authority be dealt with in a uniform statute?
6. How should the costs and expenses of assessing compensation be fixed and by whom should they be borne?

The Committee asked for and received an extension of time during which to complete its investigations.

In British Columbia, in January 1961, the Hon. J. V. Clyne was appointed as sole Commissioner under the Public Inquiries Act,[22]

> . . . 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.

The Commissioner commenced public hearings in Vancouver on July 17th, 1961.

In the newspaper column adjoining that in which the Clyne Commission was announced appeared a report of the setting aside by the British Columbia Supreme Court of an arbitration award involving an owner called Walsh.[23] Between April 1954 and November 1955, Walsh bought three lots in downtown Vancouver for $100,000.00 intending to build a hotel-motel thereon. He excavated, without a city permit, and then in August 1959 the land was expropriated by the city for a proposed freeway. The city offered Walsh $215,000.00 less $6,000.00 being the cost of filling the unauthorized excavation. Walsh claimed $6,292,000.00 which he later reduced, before the arbitration proceedings commenced to $1,967,800.00 plus ten per cent for compulsory taking. A

California and British Columbia in May 1961. In June 1961, the Committee held public meetings in Ottawa, North Bay, Fort William, Chatham, St. Catharines and Kitchener.

[22] R.S.B.C., 1960 c. 315.

[23] *Re City of Vancouver and Walsh* (1961), 27 D.L.R. (2d) 234. (McInnes J.).

majority of the three-man board awarded $401,000.00; the dissenting arbitrator, the City's appointee, set a value of $220,000.00 plus ten per cent for compulsory taking.[24]

It is this sort of expropriation proceeding which has led to concern, certainly in British Columbia.

IV. *The Criteria of Value.*

It has been said that one of the functions of the law of expropriation is the enunciation and definition of the criteria by which the compensation payable is determined.

A principal difficulty, and the cause of much of the current dissatisfaction with the operation of the law is that statutes authorizing the expropriation of property rarely prescribe what compensation is payable. Thus, they provide for the payment of "compensation",[25] "due compensation",[26] "reasonable compensation",[27] but rarely have legislatures set down the precise items for which an owner is entitled to be compensated and the basis on which that compensation is to be calculated.[28]

The legislative precedent for leaving this task of working out the criteria to the courts was set in the English Lands Clauses Consolidation Act 1845.[29] The English courts established the test of "value to the owner" and this remained the situation in England until changed by statute to "open market value" in 1919.[30]

The Canadian courts have followed the pre-1919 leading cases of the English House of Lords and Privy Council which propounded the value to the owner approach.

In contrast in the United States, until recently, there was the same absence of legislative definition of the meaning of "just compensation" which is provided in the federal and state constitutions,[31] but for quite different reasons and with different results. In the leading case of *Monongahela Navigation Co.* v. *United States*,[32] the Supreme Court said:

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[24] See also the *Parkford* arbitration award referred to above.

[25] Public Schools Act, R.S.B.C., 1960, c. 319, s. 174(4).

[26] Vancouver Charter, S.B.C., 1953, c. 55, s. 536.

[27] Rural Telephone Act, R.S.B.C., 1960, c. 343, s. 12(2).

[28] A notable exception is the Water Act, *supra*, footnote 10, s. 75(9). The Land Settlement and Development Act, R.S.B.C., 1960, c. 210, s. 56 provides that compensation is to be based on the "appraised value", defined in s. 51 as "value as would be taken in payment of a just debt from a solvent debtor". For Saskatchewan precedent, see The Power Corporation Act, *supra*, footnote 10, s. 26(3).

[29] 8 & 9 Vict. c. 18.

[30] Acquisition of Land (Assessment of Compensation) Act, 1919, 9 & 10 Geo. V., c. 57.

[31] See *supra*, footnote 4.

[32] (1892), 148 U.S. 312, at p. 327.

> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The Legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

In *United States* v. *Miller*,[33] the Supreme Court interpreted "just compensation" to mean "market value" and this is the basis of compensation at both federal and state levels.

In view of the *Monongahela* case, it might be supposed that any attempt by legislatures to define "just compensation" would be *ultra vires*. However, it is now asserted that there is no impediment to a legislature merely stating in statutory form what the courts have held just compensation to mean, that is, market value. In particular, there is no constitutional objection to adding further sums to just compensation.[34]

The question that has to be considered therefore under this heading, is how much an owner should receive by way of compensation when his property is expropriated? This question can be variously answered. For example: "He should receive what the property is worth." But this is equivocal since it may be worth X dollars in terms of the market price and X plus Y, or X minus Y, dollars in terms of the value attached to it by the owner. Alternative answers may be that the owner should be made economically whole or be reinstated and so on. These answers, and many others, are attempts to grapple with the most difficult of legal-economic problems, the meaning of value.

President Thorson has rightfully commented:

> I doubt whether there is any concept in the whole field of law that is more elusive than that of value.[35]

In *Re West Canadian Hydro Electric Corp. Ltd.*,[36] Wilson J. said:

> Value, as has been said by Mr. Justice Brandeis, is a word of many meanings. With respect, I cannot accept the statement of counsel for

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[33] (1942), 317 U.S. 369, at pp. 374-5.

[34] Heaney, *op. cit., supra*, footnote 18, at pp. 431-2 states that the new Wisconsin legislation "in no way restricts just compensation as developed by the Wisconsin Supreme Court, but in some respects does add to that concept and restates in many instances what the court had held".

[35] *The Queen* v. *Supertest etc., supra*, footnote 9, at p. 111.

[36] [1950] 3 D.L.R. 321, at p. 408.

> the Company that "value means value". The cases show very clearly that this is not so; that value in expropriation cases is one thing, while in taxation or rate-fixing cases it may involve quite other concepts. There is no such thing as "true value" or "real value". Where the bare word is used, without qualification, its meaning can only be decided by reference to the context and by a study of the purposes of the Act in question.

The two expressions which are encountered most frequently in expropriation law are "market value" and "value to the owner". Although these two concepts of value are utterly different,[37] the courts have often minced words and ended up with a hybrid formula. For example, Fletcher Moulton L.J. said in *Re Lucas*:[38]

> The owner receives for the lands he gives up their equivalent, i.e., that which they were *worth to him* in money. . . . But the equivalent is estimated on the *value to him*, and not on the value to the purchaser. . . . The owner is only to receive compensation *based upon the market value* of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for 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*.

Lord Romer in *Raja* v. *The Revenue Divisional Officer*[39] said:

> . . . compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser . . . it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its "market value". But the compensation must not be increased by reason of any such consideration. *The vendor is to be treated as a vendor willing to sell at "the market price"*. . . .

The market value criterion is attractive from the point of view of certainty but unattractive from the point of view of equity.

To suggest that market value is "certain" is somewhat misleading. It is more accurate to say that, like the examination system, it is more certain than anything else that has been devised to date. In the valuation process both the taker and the owner are groping in the darkness. Market value supplies some illumination,

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[37] "Of much importance in the law of eminent domain is the distinction . . . between sale value and value to the owner. Real property belongs in that class of wealth which is often worth more to a given owner than to any prospective purchaser. This is true because, instead of being standardized like wheat, or government bonds, or tubes of shaving cream, improved real estate may be specially constructed for, or adapted to, the peculiar needs of its occupants." Bonbright, The Valuation of Property (1937), Vol. I, p. 415.

[38] [1909] 1 K.B. 16, at p. 29.

[39] [1939] A.C. 302, at p. 312 (P.C.).

though it does not totally dispell the gloom. A not unimportant consideration is that the "experts" upon whom both sides depend for valuations know what is meant by the market value approach and in most cases they will have used the market data method in preparing their reports.[40]

The market value approach is unattractive from the point of view of equity, since it does not necessarily make the owner "whole". There is no guarantee that the property, if sold on the open market, might not have brought a price in excess of the estimate of the experts. This is not to say that the experts have miscalculated on the basis of existing data, but only that the existing data may not be very extensive or that purchasers on the open market may not always be "informed". A house may sell for more than "market value" simply because the purchaser's wife falls in love with "that cute patio" or because a reigning monarch slept there. Moreover, there are many things which will not be compensated for by an award of mere market value. These things run all the way from such sentimental considerations as the fact that the property is the family homestead to features which enhance the value of the property to the owner but have no economic significance.[41]

Hence Canadian courts, whilst acknowledging market value to be the principal concern, have refused to accept President Thorson's thesis that it is the only factor. The battle between the learned President of the Exchequer Court and the Supreme Court of Canada has been well described by Mr. John D. Arnup, Q.C.,[42] and need not be repeated here. It is sufficient to note that the Supreme Court in *Woods Manufacturing Company Limited* v. *The King*[43] rejected "market value" as the sole criterion in expropriations under the Dominion Expropriation Act.[44] Chief Justice Rinfret, delivering the judgment of the court, said:[45]

> In *Lake Erie and Northern Railway* v. *Brantford Golf and Country Club* (1917), 32 D.L.R. 219, at 229, . . . Duff J., as he then was, in discussing the phrase "the value of the land to them", after saying that the phrase

[40] See Schmutz, Condemnation Appraisal Handbook (1949), particularly Ch. III.

[41] The writer served on an arbitration board which determined the compensation to be paid to the owner of a quite ordinary old frame house. The owner, however, was almost completely blind and over many years of occupancy had familiarized himself with every nook and cranny of the house. This special feature would have no economic significance — even to another blind man — and is therefore non-compensable under the market-value rule.

[42] Law Society of Upper Canada, Special Lectures on Expropriation (1958), pp. 18-26.

[43] [1951] S.C.R. 504, [1951] 2 D.L.R. 465.

[44] R.S.C., 1952, c. 106.

[45] *Supra*, footnote 43, at p. 507.

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. . . ."

It may therefore be taken as established that in Canada the courts have adopted the formula "value to the owner" which may mean market value plus, in appropriate circumstances, compensation for other factors which would not necessarily have any value in the market but which do have value to the owner. Herein lies the difficulty. What extra factors may be considered and how can they be valued, since, *ex hypothesi*, they have no market value?

President Thorson has drawn attention to the difficulties and has denounced the *Woods* formula as "the most expensive test that has been laid down".[46] He is afraid that:

> . . . attempts to apply [the *Woods* formula] 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. . . .

And,

> . . . 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 . . . it [is] only the owner who [can] 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.

The difficulties of applying the "value to the owner" test and, in particular, the tendency towards exorbitant awards which results from its application in many instances,[47] led in England to

[46] *The Queen* v. *Supertest*, *supra*, footnote 9, at p. 128.

[47] The consultant of the California Law Revision Commission states: "Value to the owner is a subjective standard; it enables the condemnee to

the setting up of a parliamentary committee in 1917 which produced the Scott Report.[48] The Report stated in part:[49]

> 8. 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 . . . 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 to-day 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 . . . the owner should, of course, in addition, receive fair compensation for consequential injury.

The Report resulted in the enactment of The Acquisition of Land (Assessment of Compensation) Act, 1919[50] which, *inter alia*, changed the basis of compensation from "value to the owner" to "open market value".

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present a myriad of factors that may or may not in fact exist to enlarge his award. It opens the door to sham and fabrication. It has no limits, it has no control. By itself, it seriously weakens the concept of 'just compensation'—'just' to the condemnor as well as the condemnee". *Op. cit.*, *supra*, footnote 15, at p. A-17.

[48] Ministry of Reconstruction, Second Report of the Committee Dealing with the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes. (1918) Cd. 9229.

[49] *Ibid.*, *para.* 8, at p. 8.

[50] 9 & 10 Geo. 5, c. 57.

An English commentator on section 2 of this Act writes: [51]

> The decisions of the courts were considered to be too favourable to the landowner in cases where land was acquired by public bodies and not by companies trading for profit such as railway companies, and the purpose of this section was to provide a new basis for determining the value of land acquired by such bodies.

Section 2 of the 1919 Act is of sufficient interest to warrant reproduction *in extenso*.

> 2. In assessing compensation, an official arbitrator shall act 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: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant:
>
> (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 Government Department or any local or public authority: Provided that any bona fide offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration:
>
> (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 inmates of the premises or to the public health, the amount of that increase shall not be taken into account:
>
> (5) Where the 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 official arbitrator 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 provision of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

With some qualifications, which arise out of the English town-planning legislation, the 1919 Act remains the basis of compensation in England today.

It must be remembered, however, that the English Act did not alter the prevailing practice which had grown up under the Lands

[51] R. D. Stewart-Brown, *op. cit., supra*, footnote 3, at para. 2-270.

Clauses Consolidation Act[52] of awarding damages for disturbance. Subsection 6 of section 2 (above) makes this clear. Section 63 of the Lands Clauses Consolidation Act provided that compensation should be paid not only for the land taken but also for severance damage and injurious affection.

> While disturbance is not expressly mentioned in section 63, it has always been held . . . that compensation under the Lands Clauses Consolidation Act should include in appropriate cases compensation for disturbance.[53]

Upon this heading of disturbance the English Lands Tribunal has made awards for:[54]

> Legal and surveyor's fees, in acquiring other premises. Removal costs.
> Unproductive portion of the cost of providing a new building.
> Dismantling, removing and reinstalling machinery.
> Loss on patent (expropriation had prevented exploitation).
> Temporary loss of profit.
> Permanent loss of profit.
> Repainting of signboards.
> Claimant's time spent on removal.
> Loss on forced sale of plant.
> Loss on forced sale of stock-in-trade, tools and so on.
> Expenses in seeking alternative accommodation.
> Cost of notifying customers of changes of address; alteration of stationery; and reasonable advertising.
> Additional costs (temporary) arising from need to maintain two sets of premises during the period of removal.
> Cost of removing telephone.
> Depreciation of machines resulting from the removal.
> Cost of new curtains and window-beds in new premises.
> Expenses of preparing the claim on receipt of the notice to treat.
> Depreciation and damage to stock during the removal.
> Cost of alteration to curtains to fit them for use in the new premises.
> Cost of repairs to the new premises.
> Certain items of abortive expenditure incurred in the search for new premises.

It will thus be appreciated that the English property owner is not unfairly treated and a degree of certainty exists in the valuation process. This is to be contrasted with the somewhat vague "value to the owner" approach, abandoned in England over forty years ago, whereby Canadian courts take market value, top it off by the

[52] *Supra*, footnote 29.

[53] *Per* Lord Morton of Henryton in *West Suffolk C.C.* v. *W. Rought Ltd.*, [1957] A.C. 403, at p. 411; also Scott L.J. in *Horn* v. *Sunderland Corporation*, [1941] 2 K.B. 26, at p. 41 (CA).

[54] A list compiled by Philip H. White and published in his paper on: Valuation Methods and the Land Tribunal, with Special Reference to Claims for Disturbance (1958), 38 Journal of the Chartered Auctioneers' and Estate Agents' Institute 130 (London, England).

addition of an amount for special value to the owner and often add a cherry that is a percentage for compulsory taking.

If one thing is clear, it is that we need a statutory definition of the valuation rules to be followed. It is therefore disturbing that in Ontario the reformers appear to have lost sight of this goal.

In an earlier draft of a uniform Expropriation Act proposed by a subcommittee to the Ontario Branch of the Canadian Bar Association, there appeared this section:[55]

> (2) The compensation shall be limited to:
> (a) the market value of the land including any buildings and improvements thereon;
> (b) damages occasioned by the taking to any business established previous to the expropriation;
> (c) damages to land, buildings *etc.* —injurious affection;
> (d) the cost of fencing or additional fencing . . . together with 10 per cent of the amount of compensation so determined and 5 per cent per annum by way of interest from the date possession is obtained to the date payment of compensation is made to the owner.

However, Bill 120, which has been introduced into the legislature, contains no definition of compensation. The explanation for this omission appears in the brief of the Ontario Branch of the Canadian Bar Association to the Select Committee, namely:[56]

> The (sub) committee recommended that there be a list of specific headings of compensation comparable to those which form the basis of awarding compensation in the United Kingdom. . . . The Ontario members of the Canadian Bar Association, after deliberation, deleted the above-mentioned recommendation primarily upon the ground that any statement of the headings of compensation would serve to create new uncertainties and confusion rather than clarify the law.

With the greatest respect to those concerned, this is nothing more than legalistic inertia. It would be unkind to suggest that the legal profession has a vested interest in favour of litigation concerning expropriations—a conclusion which a Jeremy Bentham might perhaps draw from such a statement. Putting it on a higher plane, the well-spring of such an attitude is the natural human tendency to prefer the devil one knows. At least the statement acknowledges that the present law contains uncertainties and confusions.

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[55] The authors of the draft were Garth Moore, W. S. Rogers and H. Allan Leal.

[56] Undated Submission of The Ontario Branch, The Canadian Bar Association to the Ontario Select Committee on The Land Compensation Act, J. T. Weir, Vice-President for Ontario, The Canadian Bar Association.

Since reference has been made to the revised law in Wisconsin,[57] it may be of interest to note that it provides for the payment of just compensation (market value) not only for the property taken but also for such items as: (1) severance damages; (2) loss of or damage to improvements and fixtures; (3) destruction of a legal nonconforming use; (4) cost of realigning personal property on the same site in partial takings or where existing used rights of access are eliminated or restricted; (5) damage due to change of grade of highway; (6) deprivation or restriction of existing rights of access to the highway; (7) cost of removal to another site of landowner's personal property not to exceed $150.00 for residences and $2,000.00 for non-residential properties; (8) cost of refinancing mortgages, including any increase in interest cost of new financing over the old, computed on the prevailing rate with prepayment assumed at end of seven years if loan term is longer; (9) rental losses caused by the acquisition; (10) expenses incurred for plans and specifications designed for property taken and of no value elsewhere.

It is beyond the scope of this article to examine, even in outline, the precise form which a statutory definition should take. Certainly it must not be assumed that the examples of legislative definitions which have been referred to are models of perfection. On the contrary, it is understood that the Wisconsin statute has been under fire and is expected to be reviewed. One commentator[58] has described it as:

> . . . a sort of restatement of Wisconsin common law of "fair market value", resulting in a true masterpiece of confusion that caused a statewide epidemic of a brand new disease, which has now been classified as "appraiser's apoplexy".

Referring to item 8 above, which deals with compensation to refinance mortgages, the same commentator stated:

> Here, I might say that a technician in the home office of the American Appraisal Company finally worked out an algebraic formula with a succinct 9-page statement of explanations, claiming that this method is the only proper method to make this computation.

However, it should be stressed that, in my opinion, a statutory definition of the elements on which compensation is to be based is an indispensable part of any uniform expropriation statute.

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[57] *Supra*, footnote 17.

[58] Richard E. Barrett, Wisconsin Assistant Attorney-General, in a paper "Legislative Changes and Trends Affecting Eminent Domain in Wisconsin," given at the Annual Convention of the American Association of State Highway Officials, Michigan, 1960.

Lest this plea be dismissed as merely the weak voice of an innocent academic in the clamorous market-place of practical life, I take the liberty of calling in support the well-chosen remarks of Mr. John C. Risk, Q.C., Official Arbitrator for the City of Toronto and the Township of Etobicoke, in his Memorandum dated June 1st, 1961 to the Ontario Committee on Land Expropriation, namely:

> (a) The concept of "value to the owner" has become firmly embedded in our case law. We should at least take a fresh look at it, disregarding for the moment the legal wars and skirmishes of the recent past. Nowadays when claimants come before an arbitrator it is quite usual to find them stressing features of their properties which make them particularly valuable to the owners, and testifying that they would pay amounts far in excess of the market value rather than be ejected. I do not say that these people are necessarily insincere. I do say that the concept of value to the owner has increased the natural tendency of human beings to exaggerate their losses. The idea of compensation according to market value has its advantages, among which is the fact that it is easier for both parties to ascertain.
>
> (b) On the other hand, the law as declared by our courts has deprived claimants of other damages to which by any normal standards of fairness they are entitled. I refer to damages which are not part of the value of the real estate itself, but which are the direct consequence of the expropriation. This is a subject which would have to be considered with great care, and much might be said about the dangers of it, yet for the present I shall say only that the law as it now stands results in injustice in some cases.
>
> (c) As to enumerating the different elements on which compensation is to be based there are of course practical difficulties. To specify the items will be to invite new legal arguments and refinements. Nevertheless, I am inclined to feel that it is worth a try. As one member of the Committee put it when these problems were being discussed by an eminent legal expert, "If the lawyers can't agree we shall have to spell it out — one, two, three, four."

V. *The Tribunal to Determine Compensation.*

It has been stated that the procedural rules of expropriation law should provide a suitable instrument whereby the amount of the compensation can be determined in the event that the expropriator and the owner fail to reach a voluntary settlement.

Canadian legislation presents every variety of tribunal, from arbitral arrangements to the traditional courts.

It is submitted that in considering a code of expropriation law, matters of procedure must be left until the tribunal has been chosen. Obviously, if the ordinary courts are to play any part in

the assessment of compensation at the trial level, the litigation might be by action or petition or by originating summons and the normal rules of court would suffice at any rate as a starting point in the enunciation of a code of procedure and evidence.

(a) *The United States*

Constitutional provisions or legislative enactment require[59] that the tribunal be the ordinary courts and juries are required in many states.[60]

This has led to many problems, including the inevitable crowded court calendars resulting in delay in the hearing of expropriation cases and consequent postponement of payment of compensation to property owners. To meet this particular problem, several states have given expropriation cases priority on the court trial calendar.[61]

A majority of the states use the system of Boards of Viewers. As the name signifies, these boards view the property, hear evidence and determine the amount of compensation due the property owner. If accepted by both parties, proceedings are then terminated. If not, an "appeal" is taken to the trial court and tried *de novo*, with or without a jury. Usually the viewers, three in number, are appointed by the court. Most commonly the "viewer" must be a freeholder or citizen of the county in which the subject property is situated.[62]

(b) *England*

Here the tribunal has moved across the spectrum from judge and jury to administrative tribunal. Under the Lands Clauses Consolidation Act, 1845,[63] it was provided that where the amount involved did not exceed fifty pounds sterling it would be determined by two justices of the peace. If the amount exceeded fifty pounds, the parties could have a sole arbitrator by agreement or each could choose an arbitrator who in turn would choose an "umpire" to determine any matters on which the arbitrators could not agree. However, if the claimant (property owner) did not want arbitra-

[59] Nichols, *op. cit. supra*, footnote 2, para. 4.105[1], p. 352: "It is . . . well settled that the assessment of damages in eminent domain proceedings by a judicial tribunal other than a jury constitutes due process of law, and consequently, is not a violation of the Fifth Amendment when the taking is by the United States, or of the Fourteenth Amendment when the taking is by authority of a state."

[60] See Condemnation of Property For Highway Purposes, Part II (1958), Washington, D.C. — Highway Research Board Special Report 33, p. 21 and Special Report 59, p. 21.

[61] *Ibid.* Report 33, p. 15.

[62] *Ibid.*, Report 59, pp. 10-19.

[63] *Supra*, footnote 29, ss. 22-68.

tion, he was entitled to trial by jury. There were certain special cases where "an able and practical surveyor" might be nominated by the two justices to make a valuation.

Referring to this system, the Scott Report contains the following observations.[64]

> A question to which we attach the utmost importance is that of the constitution of the Assessment Tribunal. It has been our own experience, which has been confirmed by all the witnesses whom we have consulted, that the existing procedure under the Lands Clauses Acts has often failed to ensure results fair both to the promoters and the owner. This point has been emphasized so frequently in the Houses of Parliament and in the Press, and is so generally recognized by everyone conversant with the problems of compensation, that we do not think it necessary to lay further stress on the point. It only remains for us to recommend a Tribunal which will be able to make just awards founded on the bases which we have already recommended as in our view sound.

The report continued:

> We are unanimous in agreeing that the assessment by a Jury of the price to be paid should be abolished, and that the Tribunal should consist of one or more arbitrators of an expert character. Such a Tribunal could consist either of independent arbitrators who are not Government servants or of a permanent Tribunal of a semi-judicial character consisting of persons in the Government service, and constituted somewhat on the lines of the Railway and Canal Commission. We have considered the relative merits of those two systems, and are of opinion that independent arbitrators are more likely than a permanent Government Tribunal to keep in touch with the rapidly changing conditions which affect questions of Valuation, and are more likely to command general confidence.

The committee finally recommended that the tribunal should be a single arbitrator appointed by the parties if they so agreed but on failing to agree it should consist of one arbitrator to be appointed by a central authority from a panel. The legislature did not fully adopt the committee's recommendations on this point. The system which was instituted by the Acquisition of Land (Assessment of Compensation) Act 1919[65] was to replace the jury system by the panel of official arbitrators. The arbitrators were selected by a Reference Committee consisting of the Lord Chief Justice, Master of the Rolls, and the President of the Surveyor's Institution. The committee had a statutory duty to appoint persons with special knowledge in the valuation of land. The arbitrators were appointed for a fixed term and were full-time

[64] *Op. cit., supra,* footnote 48, pp. 14 and 15.
[65] *Supra,* footnote 50.

appointments. In practice there were two official arbitrators for England and Wales.

Decisions of the official arbitrators were final on questions of fact but a case stated could be taken to the High Court on matters of law, the decision of the High Court being final and conclusive.

Commenting on the official arbitrator system an English lawyer has stated,

> In Parliament and elsewhere it has been generally conceded that the present system has worked very well, but with the passage of the Town and Country Planning Act, 1947, difficult and complex questions are likely to arise and hence the change in the law.[66]

The change in the law was, of course, the Lands Tribunal Act, 1949.[67] As of January 1st, 1950, this tribunal replaced the official arbitrator system. The tribunal consists of a president who must have held judicial office under the Crown (whether in the United Kingdom or not),[68] or a barrister-at-law of at least seven years' standing, and members who are barristers or solicitors of seven years' standing, or "persons who have had experience in the valuation of land appointed after consultation with the President of the Royal Institution of Chartered Surveyors".[69]

Both president and members are appointed by the Lord Chancellor and he determines the number of members. Their remuneration and so on is paid out of moneys provided by Parliament.

The tribunal, in effect, consists of a panel from which the president selects the member or members to deal with any particular case or group of cases. Decisions of the tribunal are final subject to an appeal to the Court of Appeal by way of case stated on a point of law. Subject to the provisions of the Act, the Lord Chancellor has power to make rules regulating proceedings for the Lands Tribunal.[70]

It should be noted that an additional reason for making the change in the official arbitrator system was, in the words of the then Attorney General, that:

> . . . the official arbitrators, being themselves qualified only as surveyors

[66] Spencer C. Rodgers, The Lands Tribunal, [1949] The Journal of Planning Law 492.

[67] 12 & 13 Geo. 6, c. 42.

[68] The qualification of "judicial office" was added as an amendment during the passage of the bill through Parliament—presumably to accommodate the appointment of the first, and to date the only, President, Sir William Fitzgerald, Chief Justice of Palestine 1944-1948.

[69] The six present members include one barrister (a "Q.C.") and five Fellows of the Royal Institution of Chartered Surveyors.

[70] See Lands Tribunal Rules, 1956, (*am.* 1958, 1959).

> and valuers, have no means of providing themselves with legal advice or assistance in regard to matters of law, or, indeed, of securing close coordination and consistency of decision with each other.[71]

In addition, it was felt desirable that in cases where real legal difficulties might arise the tribunal of first instance, which hears the witnesses and gives the initial decision, should be capable of giving an authoritative legal decision.

It should be noted that the jurisdiction of the Tribunal presently includes:[72]

1. The determination of compensation to be paid for land acquired compulsorily by government departments, municipalities or public bodies.
2. The determination of valuations of property for estate duty purposes.
3. The hearing of appeals against municipal assessments on real property.
4. An extensive jurisdiction in matters arising under the English Town and Country Planning Acts.

(c) *New Zealand*

In 1948 the New Zealand Legislature faced a problem not unlike that of the Canadian provinces today. Innumerable different tribunals existed under various Acts to determine the valuation of land. To achieve some measure of uniformity in the "approach to valuation and thus in the valuations themselves",[73] the legislature enacted the Land Valuation Court Act of 1948.[74]

The court consists of a judge and two members, all being appointed by the Governor General in Council. The judge must be a barrister or solicitor of seven years' standing, or a Supreme Court judge who may hold both offices concurrently. The qualifications for members are not specified. The judge is appointed for life subject to retirement at seventy-two years of age. The members hold office for five years and are eligible for reappointment. The court sits as a court, the quorum being the judge plus at least one of the two members. The subordinate position of the members is shown by the provision that, if the judge is unable to agree with the decision of the other two members on any question, it must be referred to the Supreme Court for final decision. The jurisdiction of the Land Valuation Court extends to:[75]

[71] The Lands Tribunal Act, 1949 (1949), 93 Sol. J. 621.
[72] *Supra*, footnote 67, s. 1(3), (4) and (5).
[73] J. F. Northey, Land Valuation Tribunals (1958), 34 N.Z.L.J. 120, 134, at p. 120.
[74] New Zealand Statutes Reprint (1908-1957), Vol. 7, p. 728.
[75] Ss. 28, 29 and 30.

1. Assessment of compensation for land taken for public works and land taken under land settlement schemes.
2. The valuation of land for assessment purposes.

In addition to the Land Valuation Court there are local Land Valuation Committees, appointed by the Governor General in Council and each having not more than three members, the chairman in practice being a local magistrate. These have the powers of commissioners of inquiry and have a certain jurisdiction to fix the amount of compensation. Appeal lies to the Land Valuation Court.

The relationship between the committees and the Land Valuation Court is that matters are brought first to the committee. In matters concerning the assessment of compensation for land taken for public works and land taken under land settlement schemes, either party may require the claim not to be referred to the committee but to be heard and determined in the first instance by the Land Valuation Court. In other cases, the committee hears the parties and, subject to the right of appeal to the Valuation Court, its decision is final. Appeals are tried *de novo*.

(d) *Canada*

Canada, as already stated, has at present a great variety of tribunals.

(1) *The Dominion*

The statutes fall roughly into two groups, those adopting in whole or in part the provisions of the Expropriation Act,[76] and the remainder adopting the provisions of the Railway Act.[77] The Expropriation Act, of course, provides for the determination of compensation by the Exchequer Court.[78] The Railway Act provides for an application to be made to the judge of the County Court of the county in which the lands lie or, as in Quebec or other provinces where there is no County Court, to a judge of the Superior Court for the district or place in which the lands lie.[79]

(2) *Ontario*

The principal tribunals are (i) The Ontario Municipal Board; (ii) The Official Arbitrators; and (iii) A senior judge of the County or District Court.

(i) *The Ontario Municipal Board*

The Board is constituted under the Ontario Municipal Board

[76] *Supra*, footnote 44.
[77] R.S.C., 1952, c. 234.
[78] *Supra*, footnote 44, s. 27.
[79] *Ibid.*, s. 222.

Act[80] having such members as may be appointed by the Lieutenant-Governor in Council and holding office during pleasure.[81] Appointments are normally full-time.[82] The chairman, who presides at all sittings, and whose opinion upon any point of law prevails, assigns members of the Board to the various sittings.[83]

The chairman may authorize one member of the Board to conduct the hearing and to report. The report may then be adopted as the order of the Board by two other members, including the chairman or vice-chairman.[84] For purposes of the Act, the Board has all the powers of a court of record and has authority to hear and determine all questions of law or fact as to matters within its jurisdiction. The Board has all the powers of the Supreme Court in matters such as the amendment of proceedings, parties, the production of documents and the enforcement of its orders.[85]

The jurisdiction of the Board includes the approval of municipal by-laws and debentures[86] and the regulation of railway and utility rates and tolls.[87] The latter function was, of course, the primary reason for establishing the Board in 1906 as The Ontario Railway and Municipal Board.[88]

The jurisdiction in expropriation matters arises as follows:

(a) Notwithstanding the provisions of any other statute concerning expropriation the Board is given power to determine compensation in expropriation matters if the expropriating body elects the Board to do so.[89] It is difficult to see why the legislature should not have extended the same right of choice to the owner.

(b) Section 348 of the Municipal Act[90] provides that notwithstanding any other provisions of the Act the municipality may by by-law designate the Board as sole arbitrator. By reference, the provisions of the Municipal Act apply *mutatis mutandis* to ex-

[80] R.S.O., 1960, c. 274.
[81] *Ibid.*, ss. 5 and 7.
[82] *Ibid.*, s. 16. The variety of experience represented in the present Members of the Board is illustrated by the following sketch of their backgrounds: The Chairman is a lawyer who previously practised law in Ontario and had a considerable municipal law practice; one Vice-Chairman is a lawyer, the other was a Town Clerk and at one time in the Administrative Branch of the Department of Municipal Affairs. The Members include a printer, also formerly in the Administrative Branch of the Department of Municipal Affairs; an engineer; a town planner, formerly on a Municipal Planning staff; a farmer, former secretary of the Ontario Federation of Agriculture; and a businessman, formerly active in municipal affairs and at one time Alderman and Mayor of a municipality.
[83] *Ibid.*, s. 14.
[84] *Ibid.*, s. 15.
[85] *Ibid.*, ss. 33, 34 and 37.
[86] *Ibid.*, ss. 53-69.
[87] *Ibid.*, ss. 70-74.
[88] The Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII, c. 31.
[89] Ontario Municipal Board Act, *supra*, footnote 80, s. 36(2).
[90] R.S.O., 1960, c. 249.

propriation under the Public Hospitals Act[91] and the Public Utilities Act.[92]

(c) The Board is given jurisdiction expressly in expropriations arising under the Highway Improvement Act[93] and the Conservation Authorities Act.[94]

(d) The Public Works Act gives the Minister the right to require compensation to be determined by the Board and it is his invariable practice so to do.[95] By reference, provisions of the Public Works Act apply also to the Housing Development Act,[96] Stockyards Act,[97] Ontario-St. Lawrence Development Commission Act,[98] Power Commission Act,[99] Wilderness Areas Act[100] and the Provincial Parks Act.[101]

(e) The Board has jurisdiction on appeals *de novo* from decisions of arbitration boards appointed under the provisions of the Energy Act.[102]

The report of the Committee on the Organization of Government in Ontario[103] noted the jurisdiction of the Board in expropriation matters and commented: "We have not reviewed these responsibilities in detail but it is our general view that they should be left with the Board."

(ii) *The Official Arbitrators*

These are appointed by the Lieutenant-Governor in Council under the provisions of the Municipal Arbitration Act.[104] They must either be a County Court judge or a barrister of ten years' standing and on appointment they have all the powers of a Supreme Court judge. The former official arbitrator of Metropolitan Toronto was a County Court judge, the present incumbent is a practitioner. Official arbitrators determine the compensation payable for property expropriated by:

(a) The municipalities of Metropolitan Toronto, the County

[91] *Ibid.*, c. 322, s. 7.
[92] *Ibid.*, c. 335, ss. 2(1) and 62. *Cf.*, however, s. 58.
[93] *Ibid.*, c. 171, s. 11(2). In 1959 there were 5,024 separate transactions involving the acquisition of highway rights of way. Only ten of these resulted in hearings before the Board.
[94] *Ibid.*, c. 62, s. 25(10).
[95] *Ibid.*, c. 338, s. 28. ". . . a practice which should give pause for thought for those who question the propriety of having the rights of claimants as against the Crown determined by an administrative tribunal in close contact with Government authorities and Government problems." F. A. Brewin, Q.C., *op. cit.*, *supra*, footnote 42, p. 12.
[96] *Ibid.*, c. 182, s. 7.
[97] *Ibid.*, c. 385, s. 5.
[98] *Ibid.*, c. 279, s. 8.
[99] *Ibid.*, c. 300, s. 24(5) and (6).
[100] *Ibid.*, c. 432, s. 4.
[101] *Ibid.*, c. 314, s. 3(3).
[102] *Ibid.*, c. 122, s. 14(9).
[103] Sept. 1959, p. 46.
[104] R.S.O., 1960, c. 250, s. 1.

of York and the Township of York;
(b) cities having a population of not less than 100,000;
(c) other municipalities which by by-law adopt the official arbitrator system.[105]

The jurisdiction, as noted above, is subject to the municipalities' right to have compensation determined by the Board. Subject to this right of election, the official arbitrator is given a jurisdiction under the Schools Administration Act,[106] the Municipal Act,[107] and by reference to the latter, the Public Hospitals Act[108] and the Public Utilities Act.[109]

(iii) *The senior judge of the County Court or District Court within whose jurisdiction the property is situated*

These judges are given jurisdiction under certain statutes[110] where the land is situated in the place for which an official arbitrator has not been appointed and the Board has not been chosen. They likewise have jurisdiction under the Public Works Act[111] and those statutes incorporating its provisions by reference, if the Minister does not elect to have compensation determined by the Board.

(iv) *Other types*

These seem rather rare in the Ontario statutes. The Agriculture Societies Act[112] provides for a triumvirate arbitration board, both parties appointing an arbitrator and the two appointees appointing a chairman. The Energy Act provides for an arbitration board of one or more appointed by the Minister with an appeal *de novo* to the Board.[113] The Minister has appointed a triumvirate board, consisting of a Queen's Counsel (a former municipal city solicitor), a business executive and a farmer. The board has heard 150 claims since its inception of which twelve have been appealed to the Municipal Board.

The initial impression one gets from an examination of the extant tribunals in Ontario is that they comprise a rather dignified jungle. From the point of view of tidiness and the desirable objective of a uniform expropriation statute, one would like to revamp the system. This, of course, is the academic approach. From

[105] *Ibid.*, s. 15.
[106] R.S.O., 1960, c. 361, s. 79.
[107] *Ibid.*, c. 249, s. 347(1).
[108] *Supra*, footnote 91.
[109] *Supra*, footnote 92.
[110] *E.g.*, The Schools Administration Act, *supra*, footnote 106, ss. 69, 79, Municipal Act, *supra*, footnote 90, s. 347, Public Hospitals Act, *supra*, footnote 91, s. 7, and Public Utilities Act, *supra*, footnote 92, s. 62.
[111] *Supra*, footnote 95.
[112] R.S.O., 1960, c. 11, s. 21(2).
[113] *Supra*, footnote 102, ss. 14(3) and (9).

a practical standpoint, it is more important to ask: "Does the present system work? Might not the uniformity and tidiness be accomplished at the expense of some desirable features of the present system?"

It is beyond my competence and in any event would be presumptuous to make dogmatic assertions either in favour or against the present Ontario system. Undoubtedly, the Ontario committee will examine this matter most carefully. The following tentative observations, however, may be made.

1. There appears to be no substantial evidence that the present tribunals are not working well. Municipalities and other bodies which use the Board express satisfaction with its operation; likewise those who use the Official Arbitrator. The County Court judge is favoured by those who presently have that system and those who have other systems, although satisfied with them, would not apparently object to changing to the County Court judge.
2. The chief concern of those outside Metropolitan Toronto is that they should not have to come "into town" to get compensation claims settled. This accounts in some measure for the popularity of the County Court judge system. It is interesting to note that while advocates of this system find the County Court judge's knowledge of local conditions a decided advantage, opponents argue that County Court judges are very close to the lands which are expropriated and might be subject to local influences, even unwittingly, so that the substitution of an external tribunal might be desirable.
3. Although the Board system works well, its connection with the Department of Municipal Affairs is unfortunate from the point of view of the outsider who may *feel* his case is before a tribunal favourably inclined towards the municipality. That this is, in practice not so, is, of course, irrelevant.
4. Both the Board and the Official Arbitrator system reflect the benefits which arise from specialization, continuity of function, and the utilization of experts, legal or otherwise. The Official Arbitrator system in Ontario can be likened to the pre-1949 system in England. The Board is, in some respects, like the current English Lands Tribunal.
5. The system proposed by Bill 120 is almost uniformly condemned. The bill would reduce the tribunals to two, namely the Board and the Supreme Court.[114] Where the parties agree or the claim or offer was for less than $50,000.00, the Board would have

[114] Ss. 9 and 10.

jurisdiction.[115] Otherwise, compensation would be determined by action brought in the Supreme Court by the owner.[116]

The arguments against the Supreme Court action seem *in toto* to be irrefutable. Thus, it is said:

1. There is a natural reluctance on the part of owners to become involved in a Supreme Court action.
2. Such actions involve pleadings, the production of documents and discovery and interlocutory proceedings—all of which are expensive.
3. Even without a jury, the rules of evidence often result in more lengthy and costly hearings.
4. Court calendars are crowded and considerable delays may result in bringing cases to trial.

(3) *British Columbia*

In British Columbia by far the most common method of determining compensation is by the *ad hoc* arbitration board. The twenty-three public[117] statutes, which provide for expropriation, make provision for the settlement of disputed claims to compensation as follows:

1. Five[118] simply refer to the Arbitration Act,[119] the Schedule of which provides that if no other mode of reference is provided, the reference shall be to a sole arbitrator.
2. Six[120] provide that the Minister and the owner may agree on one arbitrator or each may appoint one and the two appointees choose an umpire to decide any matters on which the appointees cannot agree.
3. Four[121] provide that there be a sole arbitrator appointed by the court or a judge on the application of either party, or three arbitrators similarly appointed but one named by

[115] *Ibid.*, s. 10. [116] S. 9.

[117] Including the Vancouver Charter, *supra*, footnote 26, but excluding such statutes as the British Columbia University Act, R.S.B.C., 1960, c. 38, the Lands Clauses Act, R.S.B.C., 1960, c. 209, and various local sewage, drainage, dyking and water Acts.

[118] Civil Defence Act, R.S.B.C., 1960, c. 55; Drainage, Dyking and Development Act, R.S.B.C., 1960, c. 121; Gas Utilities Act, R.S.B.C., 1960, c. 164; Rural Telephone Act, *supra*, footnote 27, Vancouver Charter, *supra*, footnote 26.

[119] R.S.B.C., 1960, c. 14.

[120] Department of Highways Act, *supra*, footnote 13; Department of Public Works Act, R.S.B.C., 1960, c. 109; Department of Recreation and Conservation Act, R.S.B.C., 1960, c. 110; Highway Act, *supra*, footnote 13; Housing Act, R.S.B.C., 1960, c. 183; Toll Highways and Bridges Authority Act, R.S.B.C., 1960, c. 380.

[121] Forest Act, R.S.B.C., 1960, c. 153; Mines Rights-of-way Act, R.S.B.C., 1960, c. 246; Pipe-lines Act, R.S.B.C., 1960, c. 284; Railway Act, R.S.B.C., 1960, c. 329.

each of the parties to the application.

4. Two[122] require a board appointed by the Lieutenant-Governor in Council.
5. Two[123] require a three-man board, though the parties may agree to a single arbitrator or a judge of the Supreme or County Court.
6. Three[124] specify a judge of the County Court or Supreme Court on the application of either party.
7. The Water Act[125] has a more complicated code. Firstly, if land is acquired by a licensee, the basis of compensation and the tribunal is prescribed by regulations. These[126] require the Comptroller of Water Rights to determine the compensation, if he is of the opinion that the probable cost of having the amount of compensation determined by an arbitrator would be disproportionate to the value of the land affected. Otherwise, compensation will be determined by a single arbitrator chosen by the owner, the licensee and the Comptroller, or failing unanimous agreement, by any two of them. The Comptroller may, however, determine that there should be a three-man board appointed pursuant to the Arbitration Act.

   Secondly, if land is acquired by an improvement district or municipality for water works and so on, the Municipal Act applies, which means a three-man board, subject to the right of the parties to agree to a single arbitrator or a judge of the Supreme or County courts.

   Finally, if land is acquired by an improvement district incorporated before April 16th, 1948, compensation is determined by a sole arbitrator, appointed by the Comptroller and all interested parties.

The old English Lands Clauses Act remains on the statute book[127] and like a sleepy lion occasionally catches the unwary innocent.[128]

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[122] Petroleum and Natural Gas Act, R.S.B.C., 1960, c. 280; Power Act, R.S.B.C., 1960, c. 293.

[123] Municipal Act, R.S.B.C., 1960, c. 255; Public Schools Act, *supra*, footnote 25.

[124] Health Act, R.S.B.C., 1960, c. 170; Industrial Operations Drainage Compensation Act, R.S.B.C., 1960, c. 189 (County Court judge only); Land Settlement and Development Act, *supra*, footnote 28.

[125] *Supra*, footnote 10.

[126] Water Act Regulations, B.C. Reg. 240/60.

[127] *Supra*, footnote 117.

[128] See *British Pacific Properties Ltd.* v. *B.C. Minister of Highways*, [1960] S.C.R. 561, 23 D.L.R. (2d) 305, affirming (1959), 29 W.W.R. 193, 20 D.L.R. (2d) 187 (B.C.C.A.).

The *ad hoc* arbitration system in British Columbia is under attack from both owners and expropriating authorities. The system suffers from several drawbacks, namely:

1. It is an *ad hoc* system. Although some lawyers and others have sat on a number of boards and have thereby acquired a somewhat specialized knowledge and skill and consequent reputation (not always favourable), the boards are constituted to deal with individual cases and it is only by mere coincidence that the three men or any two of them would find themselves together on another board. There is, therefore, no continuity of personnel or of valuation.
2. Appointment by each side of one member results in the appointees regarding themselves as the champions of their respective appointors. Regretfully, this remains true whether the appointees are lawyers who should know better, or real estate brokers and other laymen who are not always able to grasp the nature of the judicial function.
3. The chairman is usually the deciding member. In agreeing to his appointment both appointees, expect that the chairman is going to come on their side. Needless to say, one member is nearly always disappointed and if ever asked to serve as an arbitrator in the future that member will rarely agree to having that same chairman.
4. The system is expensive. This may be a surprise to those familiar with the commonly asserted text-book statement that arbitration is more desirable than court proceedings, since less expensive. Increasingly this is becoming untrue if it has not already become so. Here we are thinking of the cost to the parties of the members of the Board. Fees demanded, and paid, in British Columbia vary from $100.00 to $200.00 *per diem* and the simplest expropriation case will take two days, including one for the Board to consider the evidence and make its award.[129]
5. Abuse of the system has rendered arbitration less expeditious than it might otherwise be. I have observed that all too often lawyers regard an arbitration proceeding as something to be arranged at their convenience and to be postponed to accommodate all but the most trifling matters which may arise in their offices. Thus, sometimes an arbitration hearing will not be commenced until long after it might

[129] *Re Coquitlam School Trustees and Cameron* (1960), 24 D.L.R. (2d) 589.

have been disposed of by the courts, particularly if the proceedings could be taken before a judge in chambers.

(4) *Alberta and Manitoba*

On April 12th, 1961, assent was given to The Expropriation Procedure Act of Alberta.[130] The Act came into force on July 1st, 1961.

In form, the Alberta statute is similar to the Manitoba Expropriation Act,[131] in that both provide separate and distinct codes of procedure for expropriations by (i) the provincial crown, (ii) municipalities, and (iii) companies or corporations, which include boards of school trustees and any other boards and commissions which are empowered by statute to expropriate land.

Undoubtedly, the Alberta Legislature determined to give attention to the law of expropriation in that province in view of the decision of the Supreme Court of Canada in *Calgary Power Ltd.* v. *Copithorne*[132] allowing an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta.[133] In this case, the company, under statutory authority, obtained the authorization of the appropriate Minister for the expropriation of a right-of-way on the plaintiff's property. The Minister's order was duly filed in the land titles office but the owner received no notice of any of these proceedings nor was he given any opportunity to be heard by the Minister.

The Supreme Court held that there was no requirement under the statute to give notice to the owner nor to hold an inquiry and that the Minister had exercised his powers in accordance with the requirements of the statute.

Under the new Alberta Act, the company would make application to the Public Utilities Board for an expropriation order. The Board would require the company to notify such persons as it might direct and, presumably, give such persons an opportunity to be heard not only as to the amount of compensation but also as to the merits of the expropriation itself.[134]

Where a municipality wishes to expropriate, it must give notice to the property owner and give him an opportunity, before enact-

[130] S.A., 1961, c. 30.
[131] R.S.M., 1254, c. 78.
[132] [1959] S.C.R. 24.
[133] (1957), 22 W.W.R. 406.
[134] *Supra*, footnote 130, s. 35. The section does not provide expressly for this and it may be that it is intended that the Board concern itself solely with the amount of the compensation and not with the merits of the expropriation itself. One would expect, however, that expropriations by companies would be subject to at least the same checks as those by municipalities. In the case of the latter, s. 24(2)(f) is quite specific.

ment of the expropriation by-law, to make representations to the municipality and to set forth his reasons why the land should not be expropriated.[135]

This idea of giving the property owner an opportunity to challenge the merits of the proposed expropriation is worth consideration. It is known as a "trial of necessity" in the United States, and in England as "compulsory purchase order procedure", since the municipality applies to the Minister for an order authorizing the municipality to acquire the subject property by "compulsory purchase". Before granting such an order, a civil servant "inspector" holds a local inquiry, that is, a hearing at which all interested parties may make representations and reports his conclusions in the form of a report to the minister.

The tribunals which determine compensation under the Alberta and Manitoba statutes are as follows:

(A) *Alberta*

(a) *The provincial Crown*[136]
(i) Arbitration if the Minister and owner agree, otherwise
(ii) A judge of the Supreme Court.

(b) *Municipalities*[137]
Public Utilities Board.

(c) *Companies, corporations and other bodies*[138]
Public Utilities Board.

(B) *Manitoba*

A County Court judge in all cases and the provisions of the Arbitration Act apply.

The Alberta statute, like the British Columbia expropriation statutes, does not attempt to provide any statutory definition of the amount of compensation to be paid. Section 65 of the Manitoba Act does particularize to the following extent:[139]

> 65(i). In estimating the amount to which the claimant is entitled, the arbitrator shall consider and find separately as to the following,
> (a) the value of the land taken and all improvements thereon;
> (b) the damage, if any, to the remaining property of the claimant; and
> (c) the original cost only of any extra fencing that may be necessary by reason of the taking of the land.
> (ii). Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance.

[135] *Ibid.*, s. 24(2)(f).
[136] *Ibid.*, s. 20.
[137] *Ibid.*, s. 28.
[138] *Ibid.*, s. 35.
[139] *Supra*, footnote 131.

(iii). Where the value of the remaining land of the claimant is increased by the construction of the works through his land, by the extension of the same in any direction, or by the construction of any other works in connection therewith, the increase in value shall be deducted from the amount to which the claimant would otherwise be entitled, and the balance, if any, shall be the amount awarded to him.

Finally, it should be noted that in both Alberta and Manitoba an appeal lies to the Court of Appeal; in Alberta if the amount of the award is $1,000.00 or more[140] and in Manitoba if $600.00 or more.[141] In all other cases, the leave of an appellate judge is required.[142]

Conclusions

Ideally the best type of tribunal to determine compensation would have the following characteristics:

1. Complete independence in appearance and in fact from any influence on the part of expropriators or owners.
2. Personnel to consist of persons with legal and valuation, that is, appraisal qualifications.
3. Appointments to be part-time for a fixed term, for instance, five years renewable. Remuneration to be paid from consolidated revenues.
4. The tribunal to consist of at least twelve members sitting in four divisions. At the request of the parties, on the ground that the matter in dispute is primarily of a legal or appraisal kind, the chairman might appoint a single member of the tribunal to adjudicate. Otherwise, there would be a three-man tribunal. The chairman of each division to be a lawyer. Two divisions would hold hearings in principal centres throughout the province, two divisions would hear cases arising in the principal metropolitan areas. A schedule of costs would be drawn up and the party against whom costs were awarded by the tribunal would pay them into consolidated revenues.
5. Jurisdiction of the tribunal to be all expropriation matters arising out of the operation of provincial statutes whether public or private.
6. The tribunal to have power to make its own rules of procedure and evidence, any such rules to be published in a form readily available to the public.

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[140] *Supra*, footnote 130, p. 52. [141] *Supra*, footnote 131, s. 70.
[142] *Supra*, footnote 130, s. 52 and footnote 131, s. 70.

7. Awards to be numbered and deposited in a central registry and made available for commercial publication.[143]

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[143] The Planning and Property Reports, Vol. I (1960), Vol. II (1961), which contain Ontario decisions of the official arbitrator, municipal board *etc.*, and are published by the Quinlan Publishing Co. Ltd., Toronto, F. J. Cornish, Q.C., editor, are a commendable precedent. See also Planning and Compensation Reports (1949 — to date) (Sweet & Maxwell Ltd.).