CIVIL RIGHTS IN EXPROPRIATION

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The time for review of the procedural aspects of expropriation in Ontario is long overdue[1] in view of the growth in the province of some eight thousand expropriating authorities of twenty-six different types, under sixty separate statutory provisions. On May 21st, 1964, the Honourable J. C. McRuer was appointed a Royal Commissioner to inquire into Ontario laws "affecting the personal freedoms, rights and liberties"[2] of the citizens and residents. It is not surprising that his first *Report* dated February, 1968, devotes a good part of the third volume to this topic. The first recommendation on expropriation reads: "The right of an owner, whose property has been expropriated, to be paid compensation should be secured in the Constitution."

Historically, the right to enjoyment of one's own property was regarded as a fundamental law of the English constitution, and there appears to be little evidence that there was, even in time of war, a Royal prerogative to take property without compensation.[3] The King in Parliament, however, has long been accorded the power to acquire land without the consent of the owner upon payment of compensation,[4] and in modern times, this fundamental law has been reduced to a canon of interpretation, stated by the Judicial Committee of the Privy Council as follows:

> Under these circumstances their Lordships think that the construction ought to be in favour of the subject, in the sense that general or am-

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[1] In Quebec, it is said there are 308 Acts which give power to expropriate (1968), 113 H. of C. Deb. 1232.

[2] Royal Commission Inquiry into Civil Rights (1968), 3 Vols, Report Number One, referred to herein as the "Report".

[3] Gough, Fundamental Law in English Constitutional History (1955), pp. 54, 59 and 62; Mann, Outlines of a History of Expropriation (1959), 73 L.Q. Rev. 188; *A.G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, at p. 539, per Lord Atkinson.

[4] See (1541), 33 Henry 8, c. 35 (*City of Gloucester Water Works*); (1543), 35 Henry 8, c. 10 (*City of London Water Works*), and generally, Clifford, History of Private Bill Legislation (1855).

> biguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction. . . .[5]

This quotation from the *Simmer* case probably understates the principle involved. Acts of Parliament which take the fee in and possession of real property without compensation, are almost unknown. An American judge, as early as 1785, said: "Such an act would be a monster in legislation and shock all mankind."[6] It is probably still a true statement.

Entrenched constitutional provisions are, of course, not uncommon. The Fifth Amendment and the Fourteenth Amendment of the American Constitution, requiring "due process", are well known.[7] The United Kingdom, in setting up a Parliament in Dublin and one in Belfast in 1920, provided that the new legislatures "shall make no law so as to either directly or indirectly take property without compensation".[8]

Before Canada embarks on the recommended "entrenched provisions", it must be determined exactly what kind of interference with private property will constitute expropriation under a new constitutional section. No one will question the right of the owner to compensation if a municipality takes a surface easement over a parcel of land to facilitate an airstrip approach. Compensation is not paid in Ontario, however, if the same effect is achieved by zoning this parcel as "private open space, no buildings of any kind permitted".

Westenhaver J., an American District Judge, on the application of the Fifth and Fourteenth Amendments to this issue, puts the question very neatly:

> Property, generally speaking, defendant's counsel concede, is protected against a taking without compensation, by the guaranties of the Ohio and United States Constitutions. But their view seems to be that so long as the owner remains clothed with the legal title thereto and is not ousted from the physical possession thereof, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its present or prospective value is depreciated. This is an erroneous view. The right to property, as used in the Constitution, has

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[5] *Union of South Africa (Minister of Railways and Harbours)* v. *Simmer and Jack Proprietary Mines*, [1918] A.C. 591, at p. 603, quoted in *Report, op. cit.*, footnote 1, at p. 965.

[6] Patterson J. in *Vanhornes Lessee* v. *Dorrance* (1795), 2 Dall. 304, quoted by Mann, *op. cit.*, footnote 3, at p. 199.

[7] ". . . nor shall private property be taken for public use without just compensation." (1791), Art. 5, Bill of Rights, 1 U.S. Statutes at Large 21.

[8] Government of Ireland Act, 1920, Geo. 5, c. 67.

> no such limited meaning. As has often been said in substance by the Supreme Court: "There can be no conception of property aside from its control and use, and upon its use depends its value." . . . The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket.[9]

On appeal to the Supreme Court of the United States the decision was reversed[10] on the ground that the zoning ordinance had not been shown not to be within an exercise of the police power for the public good. The reasoning of Mr. Justice Sutherland, for the majority of that court is not very appealing, because it does not draw a satisfactory line between restrictions on the use of property less than expropriation and restrictions that are, in effect, expropriation. Probably the solution lies in a definition of "expropriation", which recognizes that there are at least three areas which constitute expropriation: (i) the taking of possession of the private land; (ii) placing restrictions upon the use of the land for, or ancillary to a public work; and (iii) placing restrictions upon the use of the land, which renders it virtually useless for any normal economic activity.

In developing a definition for an entrenched provision, the concepts developed by the Uthwatt *Report*[11] should be of help, because they clearly recognize that in a modern city or built-up area, some land must be restricted from all ordinary development on basic aesthetic grounds. It seems only "just", and the *Report* recognizes this, that if "A's" land is locked out of any economic use, while "B's" lands are permitted to be used to be developed in a gainful way, "A" should receive compensation.

The McRuer *Report* regards it a civil right that one entitled to compensation should have it determined by an independent tribunal; that is, a tribunal other than the executive branch that decided to expropriate the land. Examples such as the *Parkford Estate* case in British Columbia,[12] where a Bill was introduced into the legislature to reduce a large award given by arbitrators, is probably not unique.

A constitutional right to "compensation" is only needed in

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[9] *Amber Realty Co.* v. *Village of Euclid* (1924), 297 F. 307, reproduced in part in Milner, Community Planning, A Casebook on Law and Administration (1963), p. 98.

[10] *Amber Realty Co.* v. *Village of Euclid* (1926), 272 U.S. 385, quoted in part in Milner, *op. cit., ibid.*, p. 472.

[11] Expert Committee on Compensation and Betterment, 1942, Cmd 6386.

[12] Parkford Estate Bill, 1961. See Todd, Winds of change and the Law of Expropriation (1961), 34 Can. Bar Rev. 542.

those periods of excitement when government, impelled by some emotional force, forgets its duty to the individual citizen.[13] Hence it would seem that an entrenched provision requires for its effectiveness that it include a section providing for an independent assessment of the compensation.

It has long been held that expropriation is only justified when "in the public benefit" or when there is "justa causa". To require this determination to be made by a body independent of government is not in our constitutional tradition, thus the decision as to "public benefit" should be in a responsible executive. It should not be left to courts or others to determine the public interest. Changes in the concept as to what is the public benefit occur over a period of time and courts are ill equipped to respond rapidly to these changes.[14] Nevertheless, some safeguards are required to protect against discriminatory decisions of a power-happy executive.

The McRuer *Report* shows recognition of this by a detailed examination of the various agencies of government that can decide that the taking is for just cause. It finds that the power to expropriate in Ontario has been conferred with "reckless and unnecessary liberality without sufficient control over the exercise of the power".[15] It goes on:

> Where expropriation authorities are not responsible politically for their decisions, as ministers of the Crown and municipal councils are, the existence of their powers of expropriation is a much greater encroachment on civil rights than is the case where the powers are held by politically responsible authorities. This statement applies with even greater force to private bodies or persons who have expropriatory powers, such as those found in the Lakes and Rivers Improvement Act and the Ontario Energy Board Act.[16]

While one may question the language employed here—it appears to me that if the power is, in fact, exercised in the public interest, it does not encroach on civil rights—still the problem attacked is a vital one. The civil right is only preserved if there is some check on the power to ensure that when an expropriating authority does not act in the public interest while pretending to do so, there is some political control which will right the injustice.

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[13] The events leading up to the revocation of a liquor licence by Mr. Duplessis while Premier of Quebec, constitute a typical example of emotion overriding individual liberty. See *Roncarelli* v. *Duplessis*, [1959] S.C.R. 122.

[14] The Planning Act, R.S.O., 1960, c. 296 as am.

[15] Report, Vol. 3, p. 980.

[16] *Ibid.*, p. 981.

Three of the *Report* recommendations to cope with the multitude of authorities can be summarized:

(a) The body on whom expropriating power is conferred should be defined clearly in the legislation.[17]

(b) The grant of power should be clearly not euphemistically stated—the verb "expropriate" should be used in the statute to describe the power.[18]

(c) The purpose for which the power is granted should be set forth in the statute in "clear and precise language".[19]

With these three recommendations as background, the *Report* suggests a new approach to "responsibility". In provincial government condemnations, the power should be conferred "only with reluctance upon bodies that are less responsible to public opinion"[20] and the body enjoying the grant should only be able to act after approval of the expropriation has been granted by a Minister of the Crown designated in the statute. The initial decison of the authorized authority is to be published, and if objection or complaint is lodged before the approving Minister, he must direct an inquiry into the objection. The inquiry, according to the *Report*, is to be modelled on the British practice, which is described in the *Report*.[21] In the case of municipalities, it is suggested that the council of the municipal corporation be its own "approving authority", except in cases where it is expropriating for a purpose other than its own use of the land, "such as the disposal of the land to private persons or bodies for their own purposes".[22] School Board expropriations should be approved by the Minister of Education.

This concept of an approving authority who acts after the initial decision of the expropriating authority is publicly known, is new. Apart from a court "approval" introduced in 1966, the idea of a review of the expropriation after it is published breaks with a tradition that has held that the owner has no say in the decision which determined that the taking of his land was "in the public interest".[23]

In 1966 a section was introduced into the Ontario Expropria-

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[17] *Ibid.*, Recommendation 5, p. 1083.

[18] *Ibid.*, Recommendation 6, p. 1083, and ". . . lest my heart turn to thoughts of evil, to cover sin with smooth names . . ." (Ps. 140, Verse 4, Knox Translation).

[19] *Ibid.*, Recommendation 7, p. 1083.

[20] *Ibid.*, Recommendation 4, p. 1083.

[21] *Ibid.*, Vol. 1, p. 182, ch. 13. Tribunal and Inquiries Act, 1958, 7 & 8 Eliz. 2, c. 66 is discussed at p. 200 *et seq.*

[22] Report, Vol. 3, Recommendation 12, pp. 999 and 1084.

[23] The Expropriation Procedures Act, S.O., 1962-1963, c. 43, 1965, c. 38, 1966, c. 53, s. 1(a).

tion Procedures Act providing that in condemnations made by conservation authorities, hospitals and universities, a county judge must authorize the exercise of the power and determine if the taking in whole or in part is reasonably necessary for the purpose of the authority requiring the land.[24] The *Report* rightly concludes that this is not a function properly exercised by the judiciary. The notion of an independent judiciary literally requires that the decision as to the "public interest" be made with the executive branch of government.

The "approval" concept is further developed in the *Report* by detailed suggestions on the conduct of the "inquiry". In essence, the Attorney General is to appoint the "Inquiry Officer" and fix the time and place for his sitting. Prior to the hearing, the expropriating authority should deliver to all interested parties a notice indicating the grounds upon which it intends to rely at the hearing, together with a list of any documents (including maps and plans) which the authority intends to use at the hearing. The parties at the hearing should be entitled to present their own cases or to be represented by members of the legal profession or laymen. The expropriating authority should present its case first and have a right of reply following the case for the objectors. Cross-examination of witnesses should be allowed. The ordinary rules of evidence should not apply. The main criterion for the admissibility of evidence should be its relevance. Hearsay evidence should be admitted if, in the opinion of the inquiry officer, it may have probative value.[25]

The *Report* justifies this very elaborate procedure upon these grounds: (i) that submissions were made to the Commission that disclosed hasty, ill considered action by some authorities with power to expropriate; (ii) the right to a hearing is fundamental justice, the civil rights of the landowner are insufficiently safeguarded in our expropriation procedure; and (iii) in the United Kingdom, the inquiry procedure has been well tried and has been found to be necessary, desirable and successful.

"Successful" solutions to problems in the United Kingdom, are little guide to Ontario or other provinces of Canada unless one digs deeper and determines why it worked in the United Kingdom, and if the same conditions prevail here. The very magnitude of the public works required in Canadian cities with their populations increasing and creating shortages in every area of the social utili-

[24] *Ibid.*
[25] Report, Vol. 3, Recommendation 15 (d), (e) and (f), p. 1085.

ties, highways, schools, parks, public housing, and so on would seem to indicate that procedures should not be over elaborated to the point that the attendant bureaucracy slows down movement to a crawl. The citizens of the United Kingdom may be more patient than the citizens of Canada, not demanding inquiries unless there is a real hope of successful results or a real oversight. The civil service in the two jurisdictions is very different in temperament, attitudes and organization. This does not say that Ontario may not be as "successful" in using this solution as the United Kingdom, but it does require more study to be able to recommend it.

The *Report,* in quoting from Professor Wade, makes clear that the action of the Minister need not follow logically from what transpires at the hearing.[26] The scope of the hearing recommended for Ontario will not include "the merits of the proposed work" although this is part of the inquiry in the United Kingdom.

Is the land owner, who always wants the school in the next block, the expressway just a half mile further away, the park on someone else's potential apartment site, going to be more satisfied because he had "his day" before the "Officer"? How do we involve in the proceeding, without endless notices, those persons whose land will be taken if the complainer successfully moves the proposed work a little further away? Presumably, if the Inquiry Officer says "not here, but somewhere else" and the Minister follows the report, the procedure starts over again with a new complainant who says the first plan was best. Anyone who has watched "subdividers" trying to convince a School Board that the land reserved for a school should be in an adjacent subdivision, will appreciate the burden to be carried by Inquiry Officers and Ministers. The system will only work if Inquiry Officers are so consistently reluctant to interfere with the original decision that Ministers are not called upon to make "hard" decisions, and over a period of time the public becomes convinced that lodging a complaint is an exercise in frustration.

Both Dr. McRuer and Professor Wade regard the right to a hearing as fundamental justice, while recognizing that to expropriate here is a "policy" decision. This concept of fundamental justice extending to policy decisions which affect individuals, requires some elaboration to define the limits of its application beyond the problem of expropriation. The launching of a prosecu-

[26] Report, Vol. 3, p. 1004, quoting Wade, Administrative Law (1961), p. 171.

tion is an executive decision based upon an *ex parte* review of the facts by a Police Officer or Crown Attorney—the effects of which, even if conviction does not follow, may damage a person seriously. Is some hearing required by fundamental justice? A new pollution control measure may have devastating effects upon a group of individuals or firms: does fundamental justice require a hearing?

That every citizen affected by government decisions or enactments should play some part in influencing those decisions, is consistent with ordinary democratic procedures. Civil servants, Ministers and municipal officials are waited upon every day in great numbers to hear the protests of the citizens affected or likely to be affected by the decisions being made. It would be most unhappy if the very constructive suggestion that lesser political bodies should require ministerial approval of their expropriations after public disclosure should fail of enactment in legislation because it is tied up with these elaborate inquiry provisions. Let us leave it to the ordinary machinery for making representations to the Minister and his department. To proceed with the "Inquiry" system will either be useless for the reasons stated, or it will make even routine inauguration of a public work a "federal case" and put a premium upon inaction and caution in making decisions. In these times of impatience, because our whole system seems to move too slowly to accommodate to the required changes, we must concentrate upon ensuring just compensation to the land owner in the way of progress—not arm him to reinforce even more the natural reluctance of politicians and civil servants to make decisions that do not please everyone.

Prior to the introduction of the Ontario Expropriation Procedures Act in 1963, there was no requirement on expropriating authorities in Ontario to give notice of the exercise of the power to those having an interest in the land.[27] By the 1963 Act, the "plan" showing the expropriation is to be registered "without undue delay", whereupon the land vests in the authority and the date for fixing compensation is determined. Then within sixty days, notice of the expropriation is to be served upon the "registered owner" but "failure to serve the notice does not invalidate the expropriation".[28] Late service gives the owner the right to elect to determine compensation at the date of service instead of the date of plan registration. Within six months of the plan registra-

[27] The federal expropriation Acts generally do not require notice or payment of advances on the compensation.

[28] The Expropriation Procedures Act, *supra*, footnote 23, s. 5(1).

tion, or the date of taking possession, the authority shall serve upon the owner an offer "in full payment of the compensation" but "failure to serve the offer does not invalidate the expropriation". The penalty for a late offer is that interest runs from the plan registration date instead of the date of taking possession.[29] In addition to the offer, before taking possession, the authority shall also offer "in partial payment of any compensation subsequently to be settled" fifty per cent of the amount to which the owner may be entitled as estimated by the authority.[30] Ten days' notice of requiring possession is also provided by the Act, with power in a County Judge to extend the time.[31]

The *Report* deals at some length with the notice of the taking and the notice requiring possession. It suggests that sixty days is too long for the first notice, but hesitates to fix an express shorter time. If another recommendation, that the owner be compensated for repairs and improvements made between the plan registration and the receipt of the notice, is implemented, there would seem to be no need to reduce the sixty day period.[32] The *Report* specifies in detail the form of each notice. In the first notice, the owner is to be advised that he "may consult a solicitor to advise him as to his legal rights and that the Expropriation Authority will pay the preliminary costs of the solicitor fixed according to a prescribed tariff".[33] The *Report* does not articulate very clearly the extent of this prepaid consultation with a solicitor, nor any idea of what the proposed tariff of fees will embrace. Is the solicitor merely to explain fully the owner's legal rights—an information session—or is the solicitor to advise and be paid to advise the owner whether or not the owner should object and cause an "inquiry" to be held? Will the proposed tariff fee include costs of the inquiry if one is held? While the *Report* does not answer these questions, it seems reasonable that a very modest fee is likely to be prescribed by regulations and will be limited to prepaid legal advice for the purpose of explaining the procedures available.

Whether or not the "inquiry" procedure is implemented, house owners who are expropriated are in many cases weary of seeking legal advice because the costs involved seem to be just another deduction from the expected compensation, which will be little enough, and delayed long enough to make relocation a serious problem. The recommendation is important therefore in en-

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[29] *Ibid.*, s. 8. [30] *Ibid.*, s. 18. [31] *Ibid.*, s. 19 (1), (2), and (3).
[32] Report, Vol. 3, Recommendation 26, p. 1087.
[33] *Ibid.*, Recommendation 28, p. 1087.

couraging the owner to find out his rights from a lawyer rather than trying to find out, as he does now, by going to representatives of the authority, who must be cautious in giving advice against their employers' interests and yet undoubtedly try to be fair. For the cost involved, this is a "new" and happy recognition of the responsibility of the state to tell the citizen of his rights, and is parallel to the obligation in the United States to tell the arrested person of his right to silence and to legal assistance. The studies recently undertaken by Georgetown University[34] seem to indicate that advice given by the representative of the power does not achieve the purpose and support the suggestion of paying a lawyer to do it.

The notice required on taking possession similarly, according to the *Report*, should advise the owner that he may apply to a local judge to extend the time for possession. The reluctance of government to tell all is shown by the fact that the *Report of the Select Committee of the Legislature on Land Expropriation*[35] made this very recommendation, but the government obviously feared it would encourage applications to extend the date for possession, hence it was not carried into the Act. The question now is: will the McRuer *Report* be more successful than the Select Committee of the Legislature in convincing the government to act? In my view, it is more important that this concept of full information be carried into legislation than that the "inquiry" procedure be implemented.

The *Report* is critical of the present law, which permits the authority to demand possession in ten days and does not require it to take possession after a notice that it intends to do so. The *Report* recommends:[36]

> The expropriating authority should be required to take possession of the land, with all the attendant liabilities, on the date fixed for giving possession in the notice under section 19(1) of the Expropriation Procedures Act, or on a date fixed by the judge. The expropriating authority, subject to an "adjustment of the date" under section 19(3), should be required to give a minimum of three months' notice of possession under section 19(1) of the Expropriation Procedures Act. The notice of possession under section 19(1) of the Expropriation Procedures Act should contain a statement of the options available to the owner—specifically, that he has the right to apply to the judge for an order extending the time, and that the expropriating authority has a corresponding right to apply for a reduction of the time specified in the notice.

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[34] Reported in Time Magazine, Can. Ed., Nov. 1st, 1968.
[35] (1962), Ontario. [36] Report, Vol. 3, p. 1088, pars 31, 32 and 33.

The background of these resolutions is given as follows:

> . . . expropriating authorities, as part of their planning for the project involved, should determine, at the time of the expropriation, exactly when they will require possession. We realize the difficulties which face expropriating authorities concerning such matters as the making of contracts for the demolition of existing buildings, and for the construction of new works or buildings. But we feel that the expropriating authority rather than the owner should assume the hardships and risks which might flow from having, or not having, as the case may be, possession of the land involved. The expropriating authority should be required to give a minimum of three months notice of possession under section 19 of the Act. We stress that this is the minimum period and it should be provided by legislation.[37]

As stated above, the Ontario Act requires an offer of compensation prior to possession being taken and requires a second offer of fifty per cent of the amount "without prejudice". The *Report* of the Ontario Law Reform Commission on *The Basis for Compensation on Expropriation*[38] recommends that instead of fifty per cent being tendered, the amount be raised to eighty-five per cent of the valuation, but applied only to the market value part of the compensation.[39] The McRuer *Report* states:[40]

> We think this [eighty-five per cent] is the minimum. We prefer the principle of the Pennsylvania law requiring that the full amount of the compensation, as estimated by the expropriating authority, should be offered to the owner as a condition precedent to taking possession.

This aspect of the law of expropriation has always been neglected because the tradition of English law is that "lack of funds" to tide over after a loss is not included in the damages recovered. The failure to pay a debt when due may cause a small income person to miss his mortgage payment and lose his house, but the court considers justice is done when it awards judgment for the debt, interest at an unrealistic rate by 1968 standards[41] and an indemnity for part of his lawyer's costs.[42] A failure to perform an agreement to loan money, however, can lead to damages actually flowing.[43] The first of these principles assumes that poverty is not a factor in determining loss; in expropriation there is also an assumption that if one loses his house or his business

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[37] *Ibid.*, p. 1026. [38] Sept. 1967. [39] *Ibid.*, p. 54.
[40] Report, Vol. 3, Recommendation 34, pp. 1029 and 1088.
[41] The Ontario Law Reform Commission Report, *op. cit.*, footnote 38, also deals with interest rates. It recommends at p. 52 "Instead of a fixed 5% rate, interest be paid at ½ of 1% above the current National Housing Act rate for ordinary home owner loans".
[42] *Fletcher* v. *Tayleur* (1855), 17 C.B. 21.
[43] *Manchester & Oldham Bank* v. *Cook* (1883), 49 L.T. 674.

to a public work, he can finance relocation, and at some much later date bring his books in balance by the receipt of the award and interest. The *Report* makes some recognition of this problem by suggesting a hundred per cent advance and also copes with the real issue: when is it to be paid in relation to the time and money required to relocate, and in relation to a steadily rising price structure? Under the present law, the householder receives his notice of expropriation; his lawyer cannot advise the date a new home may be purchased because the date on which money will be available is unknown; but on the other hand, the date is already fixed for determining the compensation.[44] The *Report* makes this new approach: it permits the owner to elect whether the compensation shall be determined (i) as of the approval date; (ii) as of the date of notice, or (iii) as of the date possession is taken.[45] If these recommendations are accepted, it will permit the displaced owner to plan that when possession is requested (and he is to get longer notice) he can afford to purchase at the same market level at which he is selling to the authority.

From the viewpoint of the authority, it will face the problem of predicting the ultimate cost of its schemes, since the time between planning and taking possession of the site is inevitably long, because of the variety of permissions within the government or municipal structure that must be obtained. In the past, these considerations—the self-interest of the authority—have overridden suggestions to improve the lot of the land owner. This *Report*, backed by the prestige of the Royal Commissioner, may succeed in overcoming the reluctance of government to make its own task that much harder—to transfer the uncertainties in the situation from the risk of the land owner, to the risk of the authority.

The *Report on the Basis of Compensation on Expropriation*[46] goes on in its recommendations beyond the ordinary monetary considerations of relocation. It suggests a public education programme to advise displaced owners on the finding of new accommodation, market conditions, and so on. It also suggests that immigrants with language difficulties should have an interpreter service available. For displaced businessmen, it suggests an agency to assist and provide short term low interest loans, to be repaid out of the damages ultimately awarded for business disturbance. These recommendations, while not specifically mentioned in the

[44] The Expropriation Procedures Act, *supra*, footnote 28, ss 12 and 5.
[45] Report, Vol. 3, p. 1012. [46] *Supra*, footnote 38.

McRuer *Report*, clearly recognize that "civil rights" extend into the area of advice and other help.

The reluctance to pay a larger percentage of the compensation as an advance, has probably stemmed in the past both from a fear that the owner would in the long run be overpaid, and collection back from the owner would be difficult, and from the desire to encourage settlement when the land owner is short of funds. Here again, the solution depends upon the point of view: with houses mortgaged at up to eighty-five per cent of value, nothing less than one hundred per cent of market price will provide a down payment on a new location. Once the owner has a realistic price in his hands, there will be little incentive not to haggle over the difference between his valuation and the valuation of the authority on which he has been paid.

If this situation is compared with the lot of the present owner, who has fifty per cent paid, which will all go to the mortgage, and yet must somehow relocate, it will be apparent that the authority will lose a tremendous bargaining power with which it has become very comfortable. In time, under the suggested system, the balance will be restored because arbitrators will recognize that the real issue is between the amount paid and the owner's idea of the value. If costs followed the event, there will be an incentive on the part of the authority to offer and pay a realistic price, and an incentive in the owner to avoid an arbitration unless there is a reasonable chance of success.

The situation today seems to be that offers of compensation are, on the whole, unrealistically low (possibly because the bargaining powers of owners are low) and hence the owner can count upon party and party costs being awarded to him based upon the total amount of the award. If costs were made a penalty upon either party embarking upon unnecessary arbitrations, there would be more tendency in authorities to make proper offers of compensation, and more settlements would result. Even in the present situation, a great many settlements are brought about by the conciliation procedure introduced in Ontario in 1965.[47] Following the pattern set in labour relations and in anti-discrimination legislation, Ontario established a Board of Negotiation before whom the parties in an expropriation must appear unless both agree to proceed directly to arbitration. Proceedings before the Board of three are informal and without prejudice. In many cases,

[47] The Expropriation Procedures Act, *supra*, footnote 23, S.O., 1965, c. 38, s. 2.

a suggested figure from the Board in which it has included some costs for the owner's expenses to date, settles the matter. The *Report* states that of 625 meetings of the Board to consider settlements, sixty-nine per cent of the cases were settled prior to arbitration. The Board of Negotiation is serving a real and satisfactory purpose.

In Ontario the present rule on costs reads:[48]

> 14(3). Notwithstanding subsection 1, where the expropriating authority has offered to the registered owner under section 8 a sum equal to or greater than the compensation determined, the registered owner shall not be allowed any interest after the date of the offer or any costs, unless the tribunal determining the compensation otherwise orders.

The McRuer *Report* adopts the suggestion on costs of the *Report on Basis for Compensation on Expropriation* which recommends that:[49]

> 1. claimants be entitled to their full reasonably-incurred legal and appraisal costs, except as recommended in the following paragraphs;
> 2. claimants be entitled to legal costs on a solicitor-client basis and appraisal costs at the going rates;
> 3. the present discretion in the tribunal determining compensation to deprive claimants of their costs in cases where the amount awarded is less than was offered be retained; and
> 4. the present limitation on the recovery of appraisal costs in awards of under $1,000 be retained.

Recommendation 3, by its language, suggests that the arbitrators shall have a discretion to deprive the claimant of costs in a case where the claimant recovers only the amount offered, whereas the Act, in 14(3) quoted above, suggests that it would be an act of grace to grant costs when the offer is not exceeded. Despite the wording of the *Report on Basis for Compensation*, there is a very practical difference between these two statements. The claimant who has received one hundred per cent of the offer before the arbitration, should not rely upon getting costs unless he recovers more and should expect to pay the party and party costs of the arbitration of the authority if he recovers less than the amount offered and paid to him "without prejudice".

Recommendation 2 introduces the concept of "solicitor-client" costs and appraisal costs at going rates. It is hard to say that a dispossessed owner should be called upon to bear any costs to satisfy himself that the amount offered is proper and that he should settle without an arbitration. It is therefore reasonable to

[48] The Expropriation Procedures Act, *ibid.*, s. 14 (3).
[49] *Op. cit.*, footnote 38, at p. 40.

provide that the settlement offer shall include these disbursements of the claimant. How is it to be arranged: Any tariff established will, in the long run, require constant revision, and experience tells us that the rates fixed will be adequate now but not generous, and subsequently becoming inadequate, because of the influence of inflation and general cost increases. Why not a percentage scale—large when small amounts are involved, and decreasing as the amount increases? Today, in Metropolitan Toronto, an appraisal fee for a $20,000.00 house property would be in the area of $300.00, and a legal fee to advise on the appraisal and other factors should be about the same. $600.00 is three per cent of $20,000.00. On an expropriation of $500,000.00 three per cent is $15,000.00, probably a sum sufficient to indemnify the owner. Over $500,000.00, the percentage should be reduced to two per cent on the increment offered over $500,000.00. This scale will not be adequate on road widenings, and so on, where only a small compensation is offered, say $200.00 or $300.00 and in these cases a flat ten per cent should be added to the offer. Following is a scale suggested:

On compensation up to $1,000.00	10%
On compensation $1,001.00 to $19,999.00	$100.00 + 6%
On compensation $20,000.00 to $500,000.00	$700.00 + 3% on balance over $20,000.00
On compensation over $500,000.00	3% on $500,000.00 + 2% on balance.

This evaluation or settlement fee is to cover legal and appraisal costs and is to be paid in every case not proceeding to arbitration. For the costs and disbursements incurred by the claimant in the arbitration and awarded to him, the tribunal should follow the court tariffs. In the ordinary case it awards party and party costs, including the disbursements actually made for experts necessary for the arbitration hearing alone, disregarding their basic opinion fees already covered above. In cases where the offer made by the authority was clearly unreasonable, the arbitrator should be empowered to award solicitor and client costs. When the arbitrators find the proper award is below the offer made in the ordinary case, the claimant should pay party and party costs and extra experts' fees to the authority, as discussed above. In determining the amount of the offer, the "valuation" allowance should be disregarded. If the award exceeds the offer, the valuation allowance should be adjusted to the scale of amount payable by the actual amount of the award.

The present law in Ontario on the selection of the arbitrator is described at length in chapter 68 of the *Report*. The conclusions are inescapable.

> It is wrong in principle that one of the parties to arbitration proceedings should have a right of election between arbitral tribunals, as conferred by the Municipal Arbitrations Act and the Municipal Act; or, put differently, should have power in effect to dismiss the arbitrator from his or its present position as far as future cases are concerned. This is doubly wrong where the arbitrator is paid fees while presiding at arbitrations.[50]

The *Report* then goes on to examine "The Ontario Municipal Board". This Board has presently a variety of functions: for instance it approves the capital borrowing required for public works of municipalities; it has the final say on many planning matters, including the proper zoning of a site and the ripeness of a plan of subdivision, in cases referred to it by the Minister. Both the present alternative tribunals available, and this variety of functions in The Ontario Municipal Board leads the *Report* to suggest a completely new tribunal: "a Lands Tribunal similar to the Lands Tribunal in England".[51]

The essential features of this new tribunal are:

(i) The Chairman and Vice-Chairman to be lawyers;
(ii) Salary to be the same as a judge;
(iii) Definite tenure of office;
(iv) Published reports of reasons for awards.

The question is: will this new Tribunal provide the degree of independence and competence and gain the respect of the public, which is recognized by all as being required?

The answer is not as simple as the *Report* would lead one to believe. One can attempt to give a new body the "status" of a "judge of the Supreme Court of Ontario", but we have spent over two hundred years to create "an independent judiciary". It is not done by passing an Act of the legislature.[52] It takes a tradition which can only be established by the actual performance of the tribunal being so "just" that no one questions the independence and competence of its members. A new body must find members in whom one can expect confidence and then give them time to establish their position.

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[50] Report, Vol. 3, p. 1040 *et seq.*
[51] *Ibid.*, p. 1046.
[52] The Approved Impartial Referees and Arbitrators Act, S.O., 1961-1962, c. 5; Ontario Labour Management Arbitration Commission Act, S.O., 1968, c. 86; Neither Act has been proclaimed as of October, 1968.

We have now, at least, in the Ontario Municipal Board, a tribunal with a history. If in the opinion of the *Report* it has failed, what is the cause of its failure? The *Report* seizes upon its many functions as the reason. This hardly seems a sufficient reason to do away with an existing institution.

No alternative to a new Land Tribunal is mentioned, although when the Expropriation Procedures Act was under discussion, it was suggested that the arbitration tribunal be the High Court in Ontario.

The failure of the Ontario Municipal Board to achieve this "status" is not because of its variety of functions, but because its members have not been treated, in terms of salary or security of tenure, on any different footing from other civil servants with decision-making functions. Possibly the solution is to "reform" the Board; place it under the Attorney General only for administrative budget; put the salary scale in legislation to ensure it is not just another item in the civil service list; and appoint the members for life (say to age seventy) removeable only for cause. A position on the Board must be equally attractive to the lawyer or person with other expert training as an appointment to the court is to a lawyer. The Board must be provided with quarters consistent with an increased dignity, and when outside of Toronto, sit not in schools and dingy halls, but in the County Town, in the Court House, and in a court room. Rather than trying to produce, full blown, a new "court" it would be better to introduce these changes in order to reinforce and bring to maturity the already successful operation of the Board. All too often, the administrative formation of new bodies dooms them to failure. As said earlier, the idea that an English institution can be transplanted to Ontario is not to be accepted without careful study.

If, because of its variety of functions, the Ontario Municipal Board is not considered suitable as the arbitrator, why not adapt the ordinary court to perform the function? Existing rules of court permit the use of "assessors"[53] and a group of qualified persons for that role could be found. One or more judges could normally be assigned by the Chief Justice to these matters, as is presently done in bankruptcy. The court can be augmented to the extent necessary to ensure a minimum of delay, and these claims placed upon special lists to be administered with the recognition that only certain judges will be assigned. The court for large claims should be

[53] Ontario Rules of Practice, r. 267.

the High Court and for smaller claims the County Court. If the right of selection between tribunals is eliminated and fees payable to the arbitrator eliminated, a court will function well because it already has all the marks of independence and status that it is sought to impose from above on the Land Tribunal. If a few additional judges are required for this extended jurisdiction, the cost of providing them is minimal as compared with the budget for a new tribunal.

The costs of the assessors should be paid by the parties as an element of party and party costs and the assessors should be selected by the judge from panels of qualified persons.

Courts will produce reasons and thus develop principles on which settlements can be negotiated. A serious complaint on the past performance of the present arbitration tribunals is the lack of normative reasons and the legal profession's failure to publish them or get them published.

In dealing with the proposed Land Tribunal, the *Report* particularizes its basic procedure. While oral discovery is only to be permitted in special cases when an examination is shown to be necessary, production of documents is mandatory, and is to include plans and written valuation of experts relating to the land, and particulars of comparables that are going to be used. The problems of privilege and how much of the valuation is written down prior to trial complicate all schemes to require production of valuations prior to trial.

The only possible way to accomplish these desirable ends is to provide that the chairman of the tribunal (or the judge, if the arbitrator is a court) hold a pre-trial hearing with counsel, at which he ascertains the valuation procedures adopted by each side, the documents, if any, that are available, and determines then and there what is to be "produced" and whether or not oral discovery should be granted. The frustrating movements that go on when one attempts to adapt the solicitor administered procedures in use in the court to determine "facts"—to find out the opinions and ancillary facts accumulated only for the arbitration—should convince us to develop new techniques. Before we spend years trying to adapt our court procedures, let us learn from experience in the United States the value of the pre-trial conference.

The *Report* makes clear that there should be a full right of appeal in expropriation matters to the Court of Appeal with jurisdiction as on an appeal from a judge sitting without a jury. This appeal is presently enjoyed from most arbitrations in com-

pensation matters and needs no discussion, except to extend the appeal to all cases.

The *Report* would, however, introduce a right to a stated case on a question of law to the Court of Appeal, suggesting: "If it is apparent early in the proceedings that a point of law will govern the result, much time and expense might be saved by stating a case for the opinion of an Appellate Court."[54]

In practice, the stated case should be a substitute for other forms of appeal rather than an ancillary right. The time and costs involved in stated cases that do not dispose of the whole issue between the parties far outweigh the advantages of the procedure. It is much more important that a full appeal be provided and that we adapt our appeal practice to reduce the record on the appeal to the essential evidence relating to the point being actually argued in the appellate court.[55]

Almost all expropriation statutes in Ontario permit the expropriating authority to take more land than is actually required, presumably on the theory that it is less expensive in the long run to take the whole holding of one owner rather than take part and pay the severance damages to the remainder. It is customary for authorities in these circumstances to collect the extra land into new parcels and dispose of them to best advantage. The *Report* sees this as an encroachment upon the owner's rights and recommends "that the authority should not be empowerd to expropriate more land than is necessary for the proposed work, except where this can be shown to be in the interest of the owner of the unnecessary land".[56]

Here again, the *Report* comes down heavily on the side of the land owner, and from the general experience of expropriating authorities, it is probably possible to conclude that such a provision would add some cost to the public works programmes while at the same time providing only a small benefit to the land owner.

The *Report* also deals with the problem of the disposal of the expropriated land and recommends that ". . . the claim of an owner whose land has been expropriated, to resume ownership of it in certain circumstances, if it is no longer required by the expropriating authority, should be recognized in some form of legislation".[57] The discussion of this recommendation, recognizes the difficulties of making any such recommendation work, and states

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[54] Report, Vol. 3, p. 1060. [55] *Ibid.*, p. 1092.
[56] *Ibid.*, Recommendation 52, p. 1092.
[57] *Ibid.*, Recommendation 50, p. 1092.

that ". . . it is impractical to confer actual property rights of a residual nature on former owners of expropriated lands".[58] The *Report* concludes that the practical solution would be to require the consent of the appropriate approving authority before any surplus land can be sold by an expropriating authority, and that the approving authority should be required to make inquiry into the position and desires of the former owner, who should be given an opportunity, where practical, to purchase the lands on equitable terms. It is apparent that this recommendation is rather a counsel of wisdom addressed to the province and the municipalities rather than the granting of a right of first refusal by legislation to the land owner. The recommendation in the *Report* is valuable even in this limited way. The concept that the expropriating authority should have permission of a senior level of government prior to disposing of the land, is certainly sound, and the *Report*, of itself, may work a substantial benefit in drawing to the attention of the senior levels of government this recommendation as good and just administration. It is hard to justify that the former owner, who has had the benefit of the compensation in the intervening period, and has been relieved of the burden of carrying the property, should have a right to repurchase at less than market price; but certainly the administrators in the approving department should at least give the former owner something in the nature of a right of first refusal prior to the re-sale.

The *Report* does not deal with another serious problem that arises out of the construction of new works. Because of the lead time required by all agencies to develop major improvements, very frequently it is known a long time ahead that certain parcels of land will be required at some date in the future. The usual effect of this public knowledge is that the land becomes virtually unsaleable, or very depressed in the market, or as it is commonly referred to "blighted". The *Report* does not mention this phenomena, although it has been the subject of legislation in England, and it would be only just to the land owner in this position to provide a requirement that in such circumstances, he may apply to either the approving authority, as defined in the *Report*, or to the arbitration tribunal, a Land Tribunal, or to the Ontario Municipal Board, for an order requiring the public authority to either expropriate the land or declare its intentions with respect to it. This right appears to have been first given in England by the Town and Country Planning Act, 1959,[59] one of the objects of which was "to

[58] *Ibid.*, p. 1072 *et seq.* [59] 7 & 8 Eliz. 2, c. 53.

provide for the obligatory purchase by a local authority of an owner occupier's interest in land detrimentally affected by Town Planning proposals".[60]

It is suggested that a similar provision appear in the Expropriation Procedures Act,[61] not limited to owner occupiers, and not limited to proposals set forth in Official Plans, but giving a right to apply to the appropriate tribunal in every case where public announcements of projected works indicate the expropriation is going to take place at some date in the future. The tribunal should be empowered, when it is satisfied that the land has been, in fact, blighted by the action of the expropriating authority, to require it to expropriate the land forthwith.

In conclusion, this *Report* of the Honourable J. C. McRuer, taken with the *Report* of the Law Reform Commission on *The Basis for Compensation*, provide a most comprehensive and sound programme for reform of the law of expropriation that will be useful and used in every province. The government of Canada is committed to a new statute soon, and it is to be hoped that it will follow closely the recommendations made. The fact that I have commented upon some of the suggestions made is not, however, to be taken as any criticism of the basic soundness of the *Report*.

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[60] Heath, An Outline of Planning Law (4th ed., 1963), p. 17.
[61] *Supra*, footnote 23.