



The Law of EXPROPRIATION AND COMPENSATION in Canada

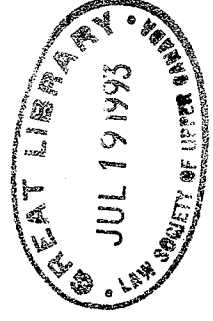
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by

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other hand, where the language of the statute is free from doubt, and admits of only one meaning, the Court would have no power, under such language, to sanction an award of more than the compensation provided for by the statute.

In *British Columbia Medical Association v. British Columbia*⁹¹ it was held that by the enactment of legislation the Legislature had effectively and intentionally taken away the doctors' option of "balance billing" without permitting any compensation other than through the negotiation of a new fee schedule. The Court conveniently summarized the statutory expropriation construction rule as follows:⁹²

1. The property of a subject cannot be taken without authorization in the form of a legislative enactment.
2. The authorization must be clear. If there is any ambiguity about whether the authority may take the subject's property, the legislation must be construed in favour of the subject.
3. Even if the legislation clearly permits the taking of the subject's property, there is a presumption, based on justice and fairness, that the authority will pay compensation to the subject.
4. "The rule is not a purely mechanical matter of examining the legislation and asking whether there is an express written reference to the fact that the taking is to be without compensation, in words that say 'without compensation of any kind', or some equivalent; and that, failing such words, compensation must be paid. Rather, it is the intention of the Legislature that is being sought. The Legislature will not be presumed to have countenanced an injustice, unless the contrary intention appears. But the rule does not override the legislative intention. It is not a device by which the courts can enable a claimant to outwit the Legislature."

91. (1984) 15 D.L.R. (4th) 568, [1985] 2 W.W.R. 327 (B.C.C.A.), leave to appeal to S.C.C. refused, *id.*

92. *Id.* 572.

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1. Pre-expropriation Procedure

A valid criticism of the old law is that it usually permitted expropriation without any preliminary prerequisites. In particular, most acts authorized expropriation without any prior notice to the affected owner who might be unaware that the property had been expropriated until formal notice was served, or appeared in a local newspaper, after the event had legally occurred.¹ Moreover, the owner had no statutory right to appear

1. Referring to the absence of a prior notice requirement under the former federal expropriation legislation, President Thorson described Canada as having "the most

before the expropriating authority or any other body to question the compulsory taking of the property.

The expropriation codes significantly change the above situation by involving the owner in the pre-expropriation procedure. The details of the procedure vary from statute to statute but the acts have common features, namely:

- (a) Notice of intention to expropriate;
- (b) Public hearing or inquiry procedure;
- (c) Confirmation or approval of intention to expropriate;
- (d) Registration of confirmation or approval;
- (e) Abandonment of intention to expropriate; and
- (f) Entry for survey.

(a) Notice of Intention to Expropriate

(1) Canada

Under the Canada Act the Minister of Public Works, or his or her delegate, may expropriate any interest in land that, "in the opinion of the Minister, is required by the Crown for a public work or other public purpose".² The Act does not define "public work or other public purpose". The Minister may also expropriate land which is considered to be required by certain Crown agencies.³ The Minister requests the Attorney-General of Canada to register a notice of intention to expropriate the interest in the appropriate land registry or land title office. The prescribed contents of the notice include a description of the land, the nature of the interest intended to be expropriated, an indication of the public work or other public purpose for which the interest is required, a statement that it is intended to expropriate the interest, a statement that objections may be made and, if such be the case, that the Governor in Council has directed that there be no public hearing.⁴

The Attorney-General registers the notice and searches the title to the property to ascertain the names and current addresses of those appearing to

arbitrary system of expropriation of land in the whole of the civilized world". *Grayson v. R.* [1956-60] Ex. C.R. 331, 336.

2. Ss. 2, 4(1). See also N.W.T. ss. 2(1)(g), 3.

3. Broadcasting Act, R.S. 1985, c. B-9, s. 33; Canada Ports Corporation Act, R.S. 1985, c. C-9, s. 37; National Capital Act, R.S. 1985, c. N-4, s. 14; Northern Canada Power Commission Act, R.S. 1985, c. N-24, s. 9; St. Lawrence Seaway Authority Act, R.S. 1985, c. S-2, s. 19; Teleglobe Canada Act, R.S. 1985, c. T-4, s. 15; Telesat Canada Act, R.S. 1985, c. T-6, s. 36.

4. Ss. 5(1), 8(3), 10(11).

have an interest in it. This information is communicated to the Minister who, within thirty days after the registration, is required to publish a copy of the notice in a local publication and the Canada Gazette and also to serve copies of the notice by registered mail on those persons named in the Attorney-General's report as having an interest in the property.⁵

The notice does not affect the owner's title but, by virtue of its registration, is notice to the whole world of the Crown's intention. Moreover, the owner, or any person interested, within thirty days from the date the notice is gazetted, may serve notice of objection on the Minister.⁶

(2) The Provinces

Under provincial legislation the power of expropriation is usually conferred by particular statutes on particular bodies for general or specific purposes.⁷ Modern provincial legislation also provides for the service of a notice of intention to expropriate on the approving (confirming) authority and affected owners.⁸ Failure to serve a notice of intention will render the expropriation void *ab initio* and therefore it will not be saved by any legislative curative provisions.⁹

Neither under the Canada nor the provincial legislation is there an obligation on the expropriating authority to notify the owner and give an opportunity for representations to be made *prior* to the formulation and

5. Ss. 5(2), 8(1).

6. Ss. 8(2), 9.

7. The McRuer Report noted that under Ontario legislation there were over eight thousand individual authorities with the power of expropriation. The Report suggested that "the power to expropriate land has been conferred ... with reckless and unnecessary liberality." (p. 980). The power of expropriation may be conferred in broad terms. For example under N.B., s. 4 the Lieutenant-Governor in Council or a Minister of the Crown may expropriate "where he considers it necessary or desirable for establishing or carrying out (a) any work or enterprise that he considers to be in the public interest, (b) any public purposes, or (c) any commercial, industrial or utility purpose." See also N.S. s. 10.

8. Ont. s. 6(1); N.B. s. 6; Man. s. 4 and Schedule A, ss. 2, 3; Alta. s. 8; B.C. s. 6. Some of the older enabling statutes (e.g. Nfld. s. 4(1)(g)) require that expropriating authorities secure some authorization, consent or approval for the exercise of their powers. However, the requirement may amount to nothing more than a *pro forma* application to the Lieutenant-Governor in Council, to which the affected owner is not privy and concerning which there is no entitlement to voice objections. Cf. *Young v. Cape Breton (County)* (1987) 36 L.C.R. 289 (N.S.T.D.) (general non statutory duty to act fairly may involve requirement of notice and opportunity to be heard).

9. *Costello v. Calgary (City)* (1983) 26 L.C.R. 97, 143 D.L.R. (3d) 385, [1983] 1 S.C.R. 14, [1983] 2 W.W.R. 673.

registration of the notice of intention to expropriate.

The whole scheme of the *Expropriation Act* is based upon a declaration of expropriation being made and registered by the expropriating authority, with discussion to follow. Advertising the intent to expropriate before a declaration is made would constitute an invitation to landowners either to try to subvert an intended expropriation or take steps to increase valuations before the date on which the expropriation becomes effective. The intent of the *Expropriation Act* is to make the declaration, and argue about the merits of the expropriation later on.¹⁰

(b) Public Hearing or Inquiry Procedure

The McRuer Report pointed out that an owner whose property has been expropriated understandably resents the fact when the action has been taken not only without the owner's consent but also without a hearing. "The right to a hearing is fundamental justice".¹¹ The Report also suggested that the right to be heard would "tend to produce expropriation decisions which will reflect more consideration for the rights of the owner and produce better plans, without sacrificing matters of vital public interest."¹²

The expropriation codes provide for a public inquiry concerning proposed expropriations.¹³

(1) Canada

Under the Canada Act, within thirty days of the gazetting of the notice of intention, any person may serve a written objection on the Minister, stat-

10. *Per* Huband J.A. in *Favor v. Winnipeg (City)* (1988) 40 L.C.R. 162, 171, 51 D.L.R. (4th) 345 (Man. C.A.); leave to appeal to S.C.C. refused, *id.*

11. McRuer Report p. 1002.

12. *Ibid.*

13. There are occasional modest types of objection procedures in some of the older provincial statutes. For example, Sask. s. 7(1) provides for a review by the Public and Private Rights Board of "the route, situation or design of the public improvement or the proposed public improvement" upon application by a landowner whose land is to be expropriated. The Board "may ... conduct an investigation into the complaint" (s. 7(2)). The "complaint" presumably means the "review" requested pursuant to s. 7(1). The Act does not state what the Board can do, having reviewed a complaint, other than to indicate the nature of its investigation in its annual report (s. 6(3)). It would not seem that the Board could require any changes in route etc. to be made by the expropriating authority. There is no provision for a public hearing or inquiry procedure under the Nova Scotia, Newfoundland, P.E.I. or Quebec Acts or the Yukon Ordinance. However, the duty to act fairly may impose on the authority the obligation to afford the owner an opportunity to intervene and make representations; see *Young v. Cape Breton (County)* (1987) 36 L.C.R. 289, 299 (N.S.T.D.).

ing the grounds of the objection and the nature of the interest in the intended expropriation.¹⁴ Objectors need not have a proprietary interest in the property covered by the notice of intention. For example, they may be members of a historical, archaeological or conservation society who object to the expropriation and subsequent demolition of a property which, in their opinion, should be preserved.

Except in special circumstances,¹⁵ if objections are served the Minister must order a public hearing and request the Attorney General to appoint a hearing officer who must be a "suitable person" and not a civil servant.¹⁶ After due notice the officer holds the public hearing, and must "provide an opportunity to be heard to each person appearing thereat who served an objection on the Minister or such of those persons as the officer deems necessary in order to report to the Minister on the nature and grounds of the objections."¹⁷ The officer may disregard objections which appear to be "frivolous or vexatious or ... not made in good faith,"¹⁸ may inspect the land and receive written representations filed by objectors either prior to or at the hearing.¹⁹ Objectors may be represented by counsel.²⁰

Within a period of thirty to sixty days after appointment²¹ the officer must submit a written report to the Minister "on the nature and grounds of the objections made"²² and may award costs incurred by persons who assert objections.²³

(2) The Provinces

The Ontario, Manitoba, New Brunswick, Alberta and British Columbia Acts²⁴ also provide for an inquiry officer to hold a public hearing of objections. However, there are some very significant differences between these provincial provisions and the Canada provisions outlined

14. S. 9. See also N.W.T. ss. 7, 8.

15. See s. 10(11).

16. S. 10(2).

17. S. 10(4)(b).

18. S. 10(5).

19. S. 10(4)(c).

20. S. 10(6).

21. S. 10(4)(d), (8).

22. S. 10(4)(b), (d).

23. S. 10(9) (not exceeding such maximum amount as may be authorized by any tariff of costs prescribed by the Governor in Council). See Chapter 16, p. 501, note 11.

24. Ont. ss. 6, 7; Man. Sch. A; N.B. ss. 9-17; Alta. ss. 9-17; B.C. ss. 9-16. As to the obligation of an owner to ask for an inquiry, see *Magic Meadows Ltd. v. Peel (Regional Municipality)* (1976) 11 L.C.R. 290 (Ont. H.C.).

above. These differences relate to (i) dispensing with the inquiry, (ii) *locus standi* and the "parties" at the inquiry, and (iii) the scope of the inquiry and of the inquiry officer's report.

(i) *Dispensing with the inquiry*

The British Columbia Act is unique in providing that an inquiry cannot be requested in cases involving "linear developments", namely "a highway, railway, hydro or other electric transmission or distribution line, a pipeline or a sewer, water or drainage line or main".²⁵

The Alberta and British Columbia Acts provide that an inquiry may be denied where the owner has already had the same opportunity to object to the expropriation under other legislation.²⁶

In more general terms an inquiry may be avoided by executive action on the grounds of urgency and to avoid prejudicial delay,²⁷ emergency or undue delay,²⁸ or public interest.²⁹ In Ontario and British Columbia an order dispensing with an inquiry must be reported to the legislative assembly.³⁰

It has been held that the decision to dispense with an inquiry is purely ministerial and may be based on political considerations or broad grounds of public policy. Consequently an owner has no procedural protection. In particular there is no legal requirement for the Lieutenant Governor in Council to give notice to and afford affected parties an opportunity to be heard prior to the making of the decision.³¹

(ii) *Locus standi and the parties*

Under the Canada Act, as already noted, any person may object and appear at the hearing whether or not that person has a proprietary interest

in the land which is proposed to be expropriated. On the other hand, the Act does not provide that the Minister of Public Works, or the government department or Crown corporation on whose behalf the Minister intends to expropriate, or the Attorney General of Canada, will be represented at the hearing in order to present the case in support of the expropriation or to respond to matters raised by the objectors. Therefore, critics have suggested that at a federal expropriation hearing the objectors may find themselves speaking to an empty room. Certainly the objectors may be handicapped by lack of information, such as plans, documents and concrete information as to the Crown's needs and intentions with regard to the property in question. The only information which necessarily will be available to the objectors will be the "indication of the public work or other public purpose for which the interest is required" in the notice of intention³² and such information as may have been made available, upon request, by the Minister.³³ Moreover, the objectors have no opportunity to cross-examine the expropriating authority or anyone else.

The intended purpose of the Canada inquiry was indicated by the Minister of Justice during the Third Reading Debate on the Canada Bill when he said:³⁴

The hearing is not a judicial inquiry; it is not an adversary procedure pitting the Minister against the expropriated owners or others interested. The purpose of the hearing is to bring to the public attention the objections and the reasons for those objections. The purpose is not to force the Minister of Public Works, on behalf of the people of Canada, to a trial of necessity. The Minister of Public Works will be responsible for the expropriation to his colleagues and to the Parliament of this country, and that is a responsibility he will have to accept. His responsibility will be a political one not a judicial one, because the decision to expropriate is, in the first instance, an administrative decision for which he bears political responsibility here.

The Canada Working Report³⁵ rejected this argument and recommended that the expropriating authority should "appear at the hearing, present the reasoning behind the proposed expropriation, raise alternative sites and be cross-examined by objectors on this presentation."

32. Can. s. 5(1)(c). The Canada Working Report (p. 27) notes that "this obligation can be and is met tersely."

33. *Id.* s. 5(4). The Canada Working Report (p. 27) notes that "extensive information has in fact been furnished to objectors."

34. H.C. Deb. (1970) Vol. IV. 3373-4.

35. P. 27. See also the Canada Report (pp. 10-12).

25. B.C. 9(1)(2). *McKinnon v. Duncan (City)* (1989) 41 L.C.R. 217 (B.C.E.C.B.). In *Karn v. Ontario Hydro* (1977) 11 L.C.R. 1, 16 O.R. (2d) 737, 79 D.L.R. (3d) 256, the Ontario Court of Appeal pointed out (L.C.R. 9) that as a practical matter the statutory inquiry procedure "does not seem to sit well with a linear taking as in the case of (a) transmission line..."

26. *Alta. s. 9(1)*; B.C. s. 10(1)(b); and see *Calgary Power Ltd., Re* (1976) 10 L.C.R. 136 (*Alta. C.A.*).

27. Can. s. 10(11); *Alta. s. 13*.

28. B.C. s. 5.

29. N.B. s. 10(2); Ont. s. 6(3); Man. s. 9(7)(a). *Hall v. New Brunswick (Attorney-General)* (1986) 36 L.C.R. 232 (N.B.Q.B.).

30. Ont. s. 6(5); B.C. s. 5(2).

31. *Vincent Nociia Construction Co. v. R.* (1977) 13 L.C.R. 99 (Man. Q.B.); *Favor v. Winnipeg (City)* (1988) 40 L.C.R. 162, 51 D.L.R. (4th) 345 (Man. C.A.) (leave to appeal to S.C.C. refused, *id.*).

Locus standi at a provincial inquiry is restricted to the expropriating authority and to "any owner of lands" in respect of which a notice of application for approval to expropriate has been given.³⁶ Under the provincial codes, therefore, members of conservation groups, for example, have no status either to object, or to require a hearing, or to be present as participants.³⁷

At a provincial inquiry both the objectors and the expropriating authority are "parties".³⁸ The expropriating authority attends and takes part in the hearing and makes available for inspection any documents, including maps and plans, that it intends to use at the hearing.³⁹ The Ontario and New Brunswick Acts even provide that the authority shall give the objectors notice of "the grounds upon which it intends to rely at the hearing..."⁴⁰ The right to present evidence and argument and to examine and cross-examine witnesses is expressly conferred.⁴¹

36. Ont. s. 6(2); B.C. ss. 9, 15(3) and B.C. Reg. 451/87 Form 2; Man. Sch. A-3 refers to "The owner of any interest in the land..."; N.B. s. 9(1)(a) "any owner of the land to be expropriated or of land that, in the opinion of the (Expropriations Advisory) Officer, may be injuriously affected by the proposed expropriation..." Note the discretion conferred on the Officer by N.B. s. 15(2)(b); Alta. s. 10 and 1(i) and Alta. Reg. 1/75, Form 2 and note also the discretion to add as a party "any person who appears to have a material interest in the outcome of the expropriation" (s. 15(9)(b)), which might include, for example, the owner of other land which is suggested as an alternative to the land which is the subject matter of the inquiry. Cf. Ont. s. 7(9)(a); B.C. s. 15(3).

37. N.B. s. 9(1)(b) provides that "any person" may object to an application for an expropriation under s. 7 (in effect acquisitions for industrial or utility purposes by non-governmental entities). For the form of notice of objection see N.B. Reg. 84-11, Form A-10.

38. Man. Sch. A-6(1); N.B. refers *passim* to parties, e.g. s. 14(1); Ont. s. 7(8); Alta. s. 14(6) The B.C. Act s. 11(3) defines "the participants in the inquiry."

39. Man. Sch. A-6(2); N.B. s. 12(1); Ont. s. 7(4); Alta. s. 15(9)(a). An Ontario expropriating authority is not required to make available a long-range planning report which does not represent policy but only tentative proposals of future plans: *Ball v. Ont. Hydro* (1974) 8 L.C.R. 217, 6 O.R. (2d) 631, 53 D.L.R. (3d) 519 (Div. Ct.).

40. Ont. s. 7(4); and see Forms 3 & 4, R.R.O. 1990, Reg. 363; N.B. s. 12(1). The acts do not make any provision for the order of presentations by the "parties". In Ontario it is the practice for the expropriating authority to put its "case" first; it is followed by the objector(s) and then replies. Finally both parties make submissions. The same practice appears to be contemplated by N.B. s. 15(1).

41. Man. Sch. A-6(2)(c); Ont. s. 7(9)(b); Alta. s. 15(9)(c); B.C. s. 13(4); cf. N.B. s. 15(2) (no reference to cross-examination).

(iii) Scope of inquiry and report

The Canada hearing officer must submit a written report to the Minister "on the nature and grounds of the objections made."⁴² The Canada Act confers no other jurisdiction on the hearing officer. He "simply hears objections and merely reports on their nature and grounds. He has no power to make any decision in respect to (sic) objections made to the scheme or proposal."⁴³ Moreover, the Act affords no guidance to the objectors as to the type of evidence and breadth of argument which may influence the Minister when considering the officer's report.⁴⁴

The Ontario inquiry provisions, adopted in a modified form in Manitoba, New Brunswick, Alberta, and British Columbia⁴⁵ are based on the recommendations of the McRuer Report which stated:⁴⁶

The merits of the expropriating authority's general policy should not be considered relevant. For example, any evidence as to whether the public work contemplated, e.g., a new road or school, was necessary from a policy point of view, should be inadmissible. The necessity of the work should be assumed and treated as being beyond comment. The soundness and fairness of taking the particular piece of land described in the proposed expropriation plan should be the main issue at the hearing. The public interest and the interests of the owner must be considered. Evidence and comment on this issue, and on related issues such as the feasibility of the modification of the expropriation plan, or alternative sites or routes, or the taking of a lesser estate or interest in the land, should be relevant. The scope of the hearing we recommend is more restricted than in the United Kingdom, where the merits of the proposed work may be examined.

The Robinson Report⁴⁷ noted that after six years of experience in Ontario there was still doubt as to the scope of the inquiry. The practice is to hear evidence of alternative sites,⁴⁸ and the objectives of the expropriation

42. Can. s. 10(4)(b) and (d).

43. *Per Collier J. in Grauer v. R.* (1973) 5 L.C.R. 249, 252, [1973] F.C. 355 (T.D.); (*held*, the functions exercised by a Canada hearing officer are purely administrative in character and prohibition does not lie).

44. The Canada Working Report [p. 28] recommended that the necessity of the public work or public purpose and its proposed location both be proper issues for objection at the inquiry and that the hearing officer should make findings of fact and express an opinion on the issues involved. See also Canada Report pp. 10-12.

45. Ont. s. 7; Man. Sch. A; N.B. s. 17; Alta. ss. 15, 16; B.C. ss. 9-16.

46. At p. 1007.

47. Pp. 3, 4.

48. Cf. *Stark J. obiter*, in *Walters v. Essex (County) Board of Education* [1971] 3 O.R.

ing authority "are challenged in almost every hearing, and much time is wasted in minutely defining what the objectives are in the individual case."⁴⁹ The Report recommended that the Ontario inquiry procedure should be retained but that the reference to "objectives of the expropriation" should be removed from the Ontario Act and that there should be a clearer indication of the issues which may be brought before the inquiry officer.⁵⁰

The phrase "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority"⁵¹ is somewhat subjective. In *Walters v. Essex (County) Board of Education*⁵² Mr. Justice Stark observed that the inquiry officer in that case had understood the formula "as conveying the broad standard - having regard to the objectives of the authority is this expropriation reasonably defensible" and had construed "fair" as meaning "that it involves a balancing of the public interest allegedly being advanced by the expropriation with that of the private interest of the owner."⁵³ It is not necessary that each of the words "fair, sound and reasonably necessary" be treated separately in all cases. There are too many variables, one of them being the point or points which the owner may wish to make.⁵⁴

As already noted, the Canada hearing officer "simply hears objections

346, 347, 20 D.L.R. (3d) 386, 390 (H.C.), *affid.* (1973) 5 L.C.R. 144, 38 D.L.R. (3d) 693, [1974] S.C.R. 481 (S.C.C.).

49. Robinson Report p. 4. See, for example *Karn v. Ontario Hydro* (1977) 11 L.C.R. 1, 16 O.R. (2d) 737, 79 D.L.R. (3d) 256 (C.A.); *Grey County Hydro Corridor Committee v. Ontario Hydro* (1977) 12 L.C.R. 193 (Ont. Div. Ct.).

50. *Id.* p. 5.

51. *Cf.* B.C. s. 13 "necessary".

52. 20 D.L.R. (3d) 386, [1971] 3 O.R. 346, *affid.* (1973) 5 L.C.R. 144, 38 D.L.R. (3d) 693 [1974] S.C.R. 481, (S.C.C.).

53. *Id.* at 389. Stark J. also noted that these interpretations had been suggested by J.W. Morden (now Associate Chief Justice Morden of the Ontario Court of Appeal) in the Law Society of Upper Canada, Special Lectures 1970, 225 at 248, 249. Mr. Justice Stark neither approved nor disapproved of the suggested interpretations. It should also be noted that Mr. Justice Morden suggested it is "somewhat unrealistic and pointless to analyse each adjective in the formula separately, either in the abstract or in relation to an actual case, to determine its "meaning" ... (because) the issues relating to a decision to expropriate are not justiciable. Therefore any finely-spun elaboration of the meaning of the words would ... be indulging in a form of theoretic exercise having no relevance to realities respecting the exercise of governmental power", (*id.* 248). Mr. Justice Morden's interpretation of "fair" appears to have been adopted in N.B. s. 17(2)(b).

54. *Parkins v. R.* (1978) 14 L.C.R. 327, 332, 85 D.L.R. (3d) 581 (Ont. C.A.).

and merely reports on their nature and grounds."⁵⁵ The officer functions as a scribe or human tape-recorder. In contrast the provincial inquiry officer is required to give "his or her opinion on the merits of the application for approval with the reasons therefor."⁵⁶ The officer's opinion as to the merits of the application must reflect his or her conclusions as to "whether the taking of the lands ... is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority."⁵⁷

In approximately 5% of the Ontario inquiries the officers' reports have expressed the view that the proposed expropriations were not "fair, sound and reasonably necessary."⁵⁸

Both Canada and the provincial statutes leave to the hearing or inquiry officers a wide discretion as to how to carry out their function. However, it would seem that they should observe the rules of natural justice.⁵⁹ Accordingly, in the absence of express statutory provision to the contrary, an officer should not consider representations made after the hearing or inspect the subject property unless alone or accompanied by all the "parties".⁶⁰ The Alberta Act purports to remove the proceedings, report and recommendations of the inquiry officer from the scope of judicial review.⁶¹ In Ontario and Manitoba judicial review has been exercised.⁶²

In summary, the difference between the concept of the Canada Act on the one hand and the provincial acts on the other, in relation to the inquiry

55. *Per Collier J. in Grauer v. R.* (1973) 5 L.C.R. 249, 252, [1973] F.C. 355 (T.D.).

56. Ont. s. 7(6); Alta. s. 16(1); N.B. s. 17(2); Man. Sch. A-8(c) ("his opinion on the question in issue").

57. Ont. s. 7(5); Alta. s. 15(8); N.B. s. 17(2); Man. Sch. A-6(2).

58. Notwithstanding such a conclusion the proposed expropriation may, of course, nevertheless be approved or confirmed, as was the case in *Walters v. Essex (County) Board of Education*, note 52; *Buttery Construction Ltd. v. Windsor (City)* (1978) 17 L.C.R. 33 (Ont. Div. Ct.); *Ball v. Ont. Hydro* (1974) 8 L.C.R. 217, 220, 6 O.R. (2d) 631, 53 D.L.R. (3d) 519 (Div. Ct.); *Becker v. Alberta* (1983) 27 L.C.R. 321, 323, 148 D.L.R. (3d) 539 (C.A.).

59. This seems to be the accepted position in the U.K. See Swift J. in *Denby (William) & Sons Ltd. v. Minister of Health* [1936] 1 K.B. 337, 342.

60. *Cf.* Can. s. 10(4)(c); Ont. s. 7(9)(d); Alta. s. 15 (9)(d).

61. S. 17. If the Alberta Surface Rights Board acts in a dual capacity as both inquiry officer and approving authority and gives its report and approves an expropriation in the same document, the approval is given by it *qua* approving authority and that decision is subject to appeal under s. 36. *Valentini v. Amerada Minerals Corp.* (1976) 10 L.C.R. 233, 70 D.L.R. (3d) 385 (Alta. C.A.) (leave to appeal to S.C.C. refused, (1976) 11 L.C.R. 191).

62. *Karn v. Ontario Hydro* (1977) 11 L.C.R. 1, 79 D.L.R. (3d) 256, 16 O.R. (2d) 737 (C.A.); *Bourbonniere v. Manitoba* (1988) 39 L.C.R. 225 (Man. Q.B.).

that the function is administrative.⁷⁷ In that event the only legal questions which can arise are whether the authority has complied with the statutory directions concerning a public inquiry and whether it has considered the officer's report, *inter alia*, in reaching its decision to confirm or approve the expropriation.⁷⁸

In the words of the Minister of Justice, during the parliamentary debate on the Canada Act, the responsibility of the Minister of Works in deciding whether to confirm an intention to expropriate "will be a political one not a judicial one, because the decision to expropriate is, in the first instance, an administrative decision for which he bears political responsibility here."⁷⁹ The effect of the Ontario Act was examined in *Walters v. Essex (County) Board of Education*⁸⁰ where the Board approved an expropriation which the inquiry officer had reported was, in his opinion, "both indefensible and ... not fair or sound and should not be approved."⁸¹ The Court rejected arguments that the statutory procedure had not been followed and referred to the approving authority's function as follows:

It was for the board to determine whether the need and the urgency for a secondary composite school in this township on this particular site was a decision which should be made and should be made promptly and this they did. The chief purpose of the inquiry of course seems to be to ensure that nothing has been overlooked and that the approving authority before it makes its final decision has placed before it all relevant information which may be of assistance to them. It is not for this Court to say whether the board has made a wise or an unwise decision; they have been elected to office for the very purpose of making such decisions.⁸²

The Supreme Court of Canada affirmed that view. Mr. Justice Laskin, as he then was, stated,

The approving authority does not sit ... as an appeal tribunal nor as a tribunal of review of the inquiry officer's report. It has an independent power to approve or disapprove the proposed expropriation, or to approve it with mod-

ifications, subject only to the duty to "consider" the inquiry officer's report. It is not bound by either the findings of fact nor by any interpretation of law in that report.⁸³

and,

The Legislature has, in my opinion, left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation; and, short of an attack upon good faith, I see no ground for enlargement of the scope of judicial supervision merely because the Legislature has seen fit to make the respondent board, "judge in its own cause." It is not for this Court in such a case, and in respect of such a function in relation to expropriation, to revise legislative policy. The Court is given no role to review the merits of an expropriation proposal and, for reasons which follow, the board's function as an approving authority is not one which, on the facts of the present case, is subject to *audi alteram partem* principles.⁸⁴

The Court concluded that the approving authority,

1. Need not carry out its approving function in public.⁸⁵
 2. Is not bound by either the findings of fact or by any interpretation of law in the officer's report.⁸⁶
 3. May, in the absence of bad faith on the part of its members, be briefed or counselled in advance by its solicitor or chair to a rejection of the report.⁸⁷
 4. Is not obliged "to show by its written reasons that its adverse decision is reasonably founded and hence run the risk of review by the Courts if they should conclude that it is not."⁸⁸
 5. Is not limited to considering the report but may also consider other material without giving the objectors an opportunity to make further representations, although in some rare cases this may be necessary.⁸⁹
- It has been held that a confirming authority is not obliged to notify the owner of its confirmation proceedings or to give an opportunity to make

77. So held in *Zaichuk v. Ontario (Water Resources Commission)* (1972) 5 L.C.R. 151 (Ont. C.A.); *Vincent Nocita Construction Co. v. R.* (1977) 13 L.C.R. 99 (Man. Q.B.); and *Favor v. Winnipeg (City)* (1988) 40 L.C.R. 162, 51 D.L.R. (4th) 344 (Man. C.A.) (leave to appeal to S.C.C. refused, *id.*).

78. See Lord Thankerton, [1948] A.C. 87, 102, [1947] 2 All E.R. 289 (H.L.).

79. H.C. Deb. (1970) Vol. IV, 3373-4.

80. 20 D.L.R. (3d) 386, [1971] 3 O.R. 346; *aff'd* (1973) 5 L.C.R. 144, 38 D.L.R. (3d) 693, [1974] S.C.R. 481.

81. *Id.* 390.

82. *Id.* 392.

83. (1973) 5 L.C.R. 144, 148, 38 D.L.R. (3d) 693, 697, [1974] S.C.R. 481, 486.

84. *Id.* L.C.R. 149, D.L.R. 698, S.C.R. 487, cited and applied in *Ball v. Ont. Hydro*, note 39.

85. *Id.* L.C.R. 147, D.L.R. 696, S.C.R. 485.

86. *Id.* L.C.R. 148, D.L.R. 697, S.C.R. 486.

87. *Id.* L.C.R. 148, D.L.R. 697, S.C.R. 487.

88. *Id.* L.C.R. 148, D.L.R. 697, S.C.R. 487.

89. *Id.* L.C.R. 149, 150, D.L.R. 698, 699, S.C.R. 488, 489.

submissions on the matter.⁹⁰

Decisions of the Alberta Surface Rights Board, acting in its capacity as an approving authority are subject to appeal.⁹¹

Under the Canada Act confirmation by the Minister of Public Works is effected by the Minister signing a notice of confirmation.⁹² In Ontario, Alberta, British Columbia and Nova Scotia the approving authority certifies its approval in a prescribed form,⁹³ and in Manitoba by a confirming order.⁹⁴ The New Brunswick Act simply provides that confirmation is effected by registration of a notice of expropriation.⁹⁵

(d) Registration of Confirmation or Approval

Under the Canada Act the Minister of Public Works requests the Attorney General to register the notice of confirmation in the same land office where the notice of intention was registered.⁹⁶ Immediately "upon the registration of a notice of confirmation the interest confirmed to be expropriated becomes and is absolutely vested in the Crown."⁹⁷ There are also other significant consequences.⁹⁸

The provincial codes require registration of the approval or confirming order and thereupon the land vests in the expropriating authority.⁹⁹

(e) Abandonment of Intention to Expropriate¹⁰⁰

Under the Canada Act the intention to expropriate may be abandoned

90. *Buttery Construction Ltd. v. Windsor (City)* (1978) 17 L.C.R. 33 (Ont. Div. Ct.); *Favor v. Winnipeg (City)* (1988) 40 L.C.R. 162, 51 D.L.R. (4th) 344 (Man. C.A.) (leave to appeal to S.C.C. refused, *id.*).

91. *Valentini v. Amerada Minerals Corp.* (above note 61).

92. Can. s. 14(1); N.W.T. s. 12(1).

93. Ont. s. 8(3) and Forms 5 & 6, R.R.O. 1990, Reg. 363; Alta. s. 18(4), and Alta. Reg. 1/75 Form 4; B.C. s. 17(2) and B.C. Reg. 451/87 Form 5; N.S. s. 7(4) and N.S. Reg. 1974/1366, R.6.

94. Man. s. 9(1).

95. N.B. s. 19.

96. Can. s. 14; N.W.T. s. 12(2).

97. S. 15(a); N.W.T. s. 13(a).

98. See ss. 15, 25, 28 and 31; N.W.T. ss. 13, 23, 26 and 29.

99. Ont. s. 9(1), (5), and Form 6, R.R.O. 1990, Reg. 363; Man. ss. 10(1), 13(1); N.B. s. 19(1)(2)(3) and (8); Alta. s. 18; N.S. s. 11; B.C. 22(1)(2), on filing of vesting notice in Form 9, B.C. Reg. 451/87. In Ontario, if registration does not take place within the prescribed three month period from the date of approval, the approval is deemed to have lapsed and the expropriating authority must start all over if it still wishes to expropriate; *Metcalfe Realty Co. v. Ottawa-Carleton (Regional Municipality)* (1974) 7 L.C.R. 48 (Ont. Div. Ct.).

100. See also ch. 14.

at any time and it will be deemed to have been abandoned if not confirmed within 120 days from the date when the notice of intention was gazetted.¹⁰¹ Abandonment is also deemed to occur by abandoning the entire interest stated in the notice of intention within 120 days from the date of its gazetting or by confirming a more limited interest than that stated in the notice of intention.¹⁰²

Provision is made for the service of notices of abandonment on persons interested in the land and on those who objected to its expropriation and for the registration by the Attorney General of the notice in the appropriate registry office.¹⁰³

In the event of a total or partial abandonment of the notice of intention, compensation is payable by the Crown to the owners at the date the notice of intention was registered.¹⁰⁴ Compensation is payable for "the amount of any actual loss sustained ... after the time when the notice of intention was registered and before the time when the abandonment of the intention, or the intention to expropriate a more limited interest ... was confirmed..."¹⁰⁵ The loss must have been sustained in consequence of the registration of the notice of intention.¹⁰⁶ Except in the cases of Alberta and New Brunswick,¹⁰⁷ the provincial statutes do not provide specifically for abandonment of the intention to expropriate. The Ontario Act requires the approving authority to give its decision within 90 days of receiving the inquiry officer's report but does not state any consequences for failing so to do.¹⁰⁸ The Manitoba Act provides that if a confirming order has not been made within 120 days of the date the declaration of intention was submitted to it, the declaration is deemed to have been refused.¹⁰⁹ Presumably under both Acts, upon rejection by the approving or confirming authority, the intention to expropriate may be regarded as abandoned. If approval or confirmation is obtained, in Ontario the expropriation will not be complete unless registration of the approval and plan is effected within 3 months after the granting of approval,¹¹⁰ and in Manitoba within 14 days from the

101. S. 11(1)(b); N.W.T. s. 9(1)(b).

102. S. 11(1)(b), (2); N.W.T. s. 9(1)(b), (2).

103. S. 12(1)(b); N.W.T. s. 10(1)(b).

104. S. 12(2); N.W.T. s. 10(2).

105. S. 28(2); N.W.T. s. 26(2).

106. *Id.*

107. See below and ch. 14.

108. S. 8(2).

109. S. 9(4).

110. S. 9(1).