Manitoba Law Reform Commission

CREATING EFFICIENCIES IN THE LAW: *THE EXPROPRIATION ACT* OF MANITOBA

Final Report

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CREATING EFFICIENCIES IN THE LAW:

THE EXPROPRIATION ACT OF MANITOBA

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The Commission offices are located at 432–405 Broadway, Winnipeg, MB R3C 3L6.

Tel: (204) 945-2896 **Email:** mail@manitobalawreform.ca

Fax: (204) 948-2184 **Website:** http://manitobalawreform.ca

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Please note that the information provided and recommendations made in this report do not necessarily represent the views of those who have so generously assisted the Commission in this project.

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EXECUTIVE SUMMARY

When an authority takes land from its owner for public use, the law recognizes that the owner is entitled to some form of compensation. In Manitoba, *The Expropriation Act*[1] sets out the process that must be followed by any expropriating authority and prescribes how the owner should be compensated.[2] *The Land Acquisition Act*[3] establishes the Land Value Appraisal Commission, which is the administrative body that hears applications and determines due compensation in respect of land acquisition, including expropriations.[4]

In addition to providing compensation for lands taken by an authority, *The Expropriation Act* also provides compensation to owners for "injurious affection", which occurs when damages are sustained by an owner when only part of the land is taken, or even where no lands are taken but the owner nonetheless sustains damages to their land as a result of an expropriation.[5] The Manitoba Law Reform Commission ("Commission") has learned that provisions in *The Expropriation Act* that deal with injurious affection are inconsistent with other Canadian expropriation statutes and may hinder the ability of an owner to claim due compensation in certain circumstances. In the Commission's view, the restrictive wording in the Act prevents landowners from making claims and should therefore be removed.

In January 2018, the Commission released a Consultation Report entitled *The Expropriation Act of Manitoba*. The Commission received input from practitioners with expertise in the area of expropriation. Through the consultation process, several other matters relating to *The Expropriation Act* respecting disturbance compensation, consulting costs, and abandonment of expropriation, were brought to the Commission's attention. These additional matters are addressed in this report. The Commission makes ten recommendations to improve *The Expropriation Act*. If implemented, these recommendations would provide better guidance to practitioners, landowners and the Land Value Appraisal Commission, and put the injurious affection provisions on par with other jurisdictions in Canada.

This report is limited to reviewing the particular aspects of *The Expropriation Act* which have been identified by legal practitioners as problematic. It forms part of a series of reports entitled *Creating Efficiencies in the Law*, which seek to address discrete, straightforward issues that, in the Commission's view, can be improved with relatively simple legislative amendments.

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[1] RSM 1987, c E190.
[2] *Ibid*, s 2(1).
[3] RSM 1987, c L40.
[4] *Ibid*, s 14(1).
[5] *Supra* note 1, ss 30(1) & 31(1).

RÉSUMÉ

Lorsqu'une autorité s'approprie un bien-fonds aux fins de rendre son utilisation publique, la loi reconnaît que le propriétaire de ce bien-fonds a droit à une indemnité. Au Manitoba, la Loi sur l'expropriation énonce le processus qui doit être suivi par une autorité expropriatrice et prescrit la manière dont le propriétaire devrait être indemnisé.[6] La Loi sur l'acquisition foncière établit la Commission de l'évaluation foncière, l'organe administratif qui entend les demandes et fixe le montant de la compensation payable en ce qui concerne les acquisitions foncières, y compris les expropriations.[7]

En plus de fournir une indemnisation pour les biens-fonds saisis par une autorité, la Loi sur l'expropriation prévoit également une indemnisation pour les propriétaires en cas d'« atteinte préjudiciable », ce qui a lieu lorsqu'un propriétaire subit des dommages causés par une expropriation partielle, ou même lorsqu'il n'y a pas d'acquisition mais que le propriétaire subit tout de même des dommages à son bien-fonds en raison d'une expropriation.[8] La Commission de réforme du droit du Manitoba (la « Commission ») a appris que les dispositions de la Loi sur l'expropriation traitant de l'atteinte préjudiciable ne correspondent pas aux lois relatives aux expropriations d'autres provinces canadiennes et pourraient nuire à la capacité d'un propriétaire de demander une compensation payable dans certaines circonstances. La Commission est d'avis que la formulation restrictive de certaines dispositions dans la Loi empêche les propriétaires de biens-fonds de présenter des demandes, et que ces dispositions devraient donc être supprimées.

En janvier 2018, la Commission a publié un rapport de consultation intitulé *The Expropriation Act of Manitoba*. La Commission a reçu des commentaires d'intervenants possédant de l'expertise dans le domaine de l'expropriation. Pendant le processus de consultation, plusieurs autres questions relatives à la Loi sur l'expropriation concernant l'indemnité pour trouble de jouissance, les frais de consultation et l'abandon de l'expropriation ont été portées à l'attention de la Commission. Ces questions additionnelles sont traitées dans le présent rapport. La Commission fait dix recommandations pour améliorer la Loi sur l'expropriation. Si elles sont mises en œuvre, ces recommandations permettront de mieux orienter les intervenants, les propriétaires de biens-fonds et la Commission de l'évaluation foncière au moment de déterminer la compensation des propriétaires.

Le présent rapport est limité à l'examen des aspects particuliers de la Loi sur l'expropriation que des professionnels du droit ont déterminés comme étant problématiques. Il fait partie de la série de rapports *Creating Efficiencies in the Law*, abordant des questions distinctes et directes qui, du point de vue de la Commission, peuvent être améliorées en procédant à des modifications législatives relativement simples.

[6] RSM 1987, c E190.
[7] LRM 1987, c L40, par. 14(1).
[8] *Supra* note 6, par. 30(1) et 31(1).

CHAPTER 1: INTRODUCTION

In Canada, federal, provincial and municipal governments acquire privately owned land for public purposes in two ways: by mutually agreeable voluntary purchase and by compulsory purchase. The latter is more commonly known as expropriation. *The Expropriation Act*[9] ("the Act" or "the Manitoba Act"), *inter alia*, provides for the "due compensation" payable to and the payment of consulting costs incurred by an owner from whom an estate or interest in land is expropriated. The Act lists in s. 26(1) four of the six bases of the due compensation payable:[10]

> **Due Compensation for Land**
>
> 26(1) Where land is expropriated, the due compensation payable to the owner therefor shall be the aggregate of
>
> (a) the market value of the land determined as hereinafter set forth;
>
> (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;
>
> (c) damages for injurious affection as hereinafter set forth; and
>
> (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

Market value compensation is always payable and, likewise, disturbance compensation is almost always payable. Injurious affection compensation is occasionally payable while special value, equivalent reinstatement, and special economic advantage compensation are rarely payable. The Act provides for the due compensation payable to be determined by the Land Value Appraisal Commission ("LVAC") in s. 15(2):

> **Certification of Amount by Commission**
>
> 15(2) On receiving an application under subsection (1), the commission shall give the authority and owner of the land an opportunity to be heard and shall determine and certify the compensation payable by the authority to the owner.

Sections 15(6) and (7) of the Act provide for the payment of consulting costs:

> **Authority to Pay Costs of Owner**
>
> 15(6) The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.

[9] RSM 1987, c E190.

[10] Two other bases of compensation are provided in s 26(2) and (3), special value compensation in connection with residences and equivalent reinstatement compensation, neither of which is considered further in this Report.

Commission May Determine Costs

15(7) Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the commission, the commission may, on application by the authority or owner, determine the costs.

This Report deals with concerns brought to the attention of the Manitoba Law Reform Commission ("Commission") respecting the due compensation payable for injurious affection and disturbance, and the payment of consulting costs, plus some other matters raised during the consultation phase of the project.

CHAPTER 2: INJURIOUS AFFECTION COMPENSATION

Upon the expropriation of land, injurious affection can occur in several ways including: the severance of an owner's land into two parcels negatively affecting its efficient use, the reduction of a front yard negatively affecting its use and increasing the proximity of structures to traffic noise, dust, and litter, the loss of shelterbelt or privacy hedging, the loss of ability to subdivide and the reduction of ingress and egress.

In addition to ss. 2(1), 25(1), and 26(1)(c), compensation for injurious affection is elaborated upon in ss. 30 and 31; the pertinent components of those sections to this Report are ss. 30(1) and 31(1) and (2):

> **Injurious Affection in Partial Takings**
>
> 30(1) Compensation for injurious affection where an authority expropriates part of the land of an owner shall consist of the amount of
>
> > (a) any reduction in market value of the remaining land of the owner caused by the expropriation of the part;
> >
> > (b) the damages sustained by the owner as a result of the existence[11] and the use but not the construction of the works upon the part of the land expropriated; and
> >
> > (c) such other damages sustained by the owner as a result of the existence, but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute.
>
> **Injurious Affection where No Land Taken**
>
> 31(1) Due compensation for injurious affection where an authority does not acquire part of the land of an owner shall consist of the amount of such damages sustained by the owner, including any reduction in the market value of the land, as are the result of the existence, but not the construction or use, of the works and for which the authority would be responsible in law if the works were maintained otherwise than pursuant to the authority of a statute.
>
> **Time for Making Claim Limited**
>
> 31(2) Subject to subsection (3), a claim for due compensation under this section shall be made by the person suffering the damage or loss by application to the court within two years after the work is first used for the purpose for which it was constructed or acquired or after it has been substantially completed, and if not so made the right to compensation is forever barred.

[11] An example of "existence", although there is no record of litigation resulting from the re-construction of the St. James Bridge in 1961-62, is the houses on the west side of Kenaston Blvd., between Wellington Crescent and Academy Road, facing the massive concrete southbound down ramp on the east side of Kenaston Road. The existence of this structure, almost in their front yards, no doubt negatively affected their market value.

On the issue of injurious affection compensation, four concerns were expressed to the Commission.

1. Sections 30(1)(b)(c) and 31(1), "…but not the construction…"

In *Houle v. Manitoba,*[12] the Province of Manitoba expropriated land from the Houle family located on the south side of PR 201, bordered by the Red River to the east, in order to replace a bridge crossing the Red River. The Houles also own the land directly across PR 201 from the expropriated land where there is a residence. The Houles alleged that cracking occurred to this house from pile driving during the construction of the new bridge; the Houles' compensation claim included, pursuant to s. 30(1), a claim for the inspection and repair costs incurred.[13] Quoting s. 30(1) and referring to a Supreme Court of Canada decision involving a similar claim decided pursuant to the *Expropriations Act* of Ontario, the LVAC dismissed the Houles' claim stating:

> 510 The Authority [the respondent, Province of Manitoba] notes that the Ontario injurious affection provisions for either a partial taking or where no land is taken are distinct from that of Manitoba's injurious affection legislation and therefore no award can be made.
>
> 511 The Manitoba legislation in Section 30(1)… says in (b) the damages sustained by the owner as a result of the existence, *but not the construction of the works upon the part of the land expropriated*; and (c) such other damages sustained by the owner as a result of the existence, *but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute*. Comparable provisions are not found in [the] Ontario legislation.
>
> 512 It strikes the Commission as unusual that the provisions in Manitoba legislation are so restrictive. However, given these provisions do exist in Manitoba legislation, the Commission concludes that no award can be made.

As noted by the LVAC in the *Houle* decision quoted above, the wording in ss. 30(1)(b) and 31(1), "but not the construction of the works", is unique to the Manitoba's legislation. The comparable injurious affection damage sections in all of the other Canadian expropriation statutes do not proscribe a claim such as the one made by the Houles.[14] Presumably, their claim would be compensated elsewhere in Canada, assuming a causal connection is proved.

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[12] (2015), 115 LCR 77, reversed in part in (2016), 1 LCR (2d) 189 (Man CA).

[13] Although no land was actually expropriated from this parcel of land, pursuant to s 30(2) it was treated as if it were a part of the parcel across PR 201.

[14] *Expropriation Act*, RSBC 1996, c 125, s 40(1); *Expropriation Act* RSA 2000, c E 13, s 56; *Expropriation Act*, RSO 1990, c E 26, s 1, "injurious affection"; *Expropriation Act*, RSNB, 1973, c E 14, s 1, "injurious affection"; *Expropriation Act*, RSNS, 1989, c 156, s 3(1)(h); *Expropriation Act*, RSPEI, 1988, c E 13, s 11; *Expropriation Act*, RSY 2002, c 81, s 7(1); *Expropriation Act*, RSC, 1985, c E-21, s 27(1).

The purpose of the rules governing expropriation compensation is to make financially whole an expropriated landowner. As Justice Kerwin said in *Irving Oil Ltd. v. R.*: "… the displaced owner should be left as nearly as possible in the same position financially as … [the owner] was prior to the taking, provided that the damage, loss, or expense for which compensation … [is] claimed …[is] directly attributable to the taking of the lands."[15] The anomalous, restrictive wording in ss. 30(1)(b) and (c) and 31(1) prevents landowners from making claims to make themselves financially whole and therefore should be deleted.

Recommendation #1

The Commission recommends the deletion of the proscriptive wording in ss. 30(1)(b) and (c) and 31(1) to damages being awarded for damage as a result of the construction of the works for which an expropriation has been instituted, so that construction damage resulting from construction is compensable.

2. Section 30(1)(b), "…upon the part of the land expropriated…"

A related matter is the wording in section 30(1)(b), which restricts the compensation payable to "damages sustained by the owner … upon the part of the land expropriated". It is not apparent from the reasons written in *Houle* whether the piles, which were alleged to have caused the damage, were driven on land expropriated from the Houles. If they were not, and even if section 30(1)(b) provided for a claim to be made for damage caused by the construction of the works for which an expropriation has occurred, the Houles would be unable to make a claim for compensation.[16]

The restrictive, "iniquitous"[17] wording, "upon the part of the land expropriated", codifies the common law Edwards Rule, derived from *Edwards v. Minister of Transport.*[18] The Minister of Transport expropriated land from Mr. Edwards and several other landowners to improve a highway. In addition to compensation for the market value of the land expropriated from him, Edwards claimed compensation for the injurious effect, such as noise and light that the improved highway would have on the market value of his remaining land. The Court of Appeal reduced his claim, finding as a matter of fact that most of the injurious effect to Edwards' remaining land

[15] [1946] SCR 551, 556.
[16] For ex. see *Hamilton & Cropo v City of Winnipeg*. Unreported, July 19, 1995, 10-11 and 15, Manitoba Land Value Appraisal Commission, available from the Commission.
[17] ECE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed 1992, 340.
[18] [1964] 2 QB 134, which was anticipated by *Sisters of Charity of Rockingham v R* [1922] AC 315 (JCPC) on appeal from the SCC, dismissing an appeal from the Exchequer Court, the trial judge having "reluctantly" concluded that the Sisters were not entitled to compensation for what occurred on other nearby taken land, but only for the construction and use of the works on the land taken from them, [1922] AC 315, 318 (JCPC).

resulted not from the improvement of the highway on the land expropriated from him, but rather on the land expropriated from other landowners.

On this issue, the wording of the other Canadian Acts falls into two groupings. Canada, Ontario, New Brunswick, and Nova Scotia, have wording similar to that of Manitoba; the Acts of British Columbia, Alberta, Prince Edward Island, and Yukon, do not restrict claims to damage stemming from the land taken.

In *The Law of Expropriation and Compensation in Canada*,[19] E.C.E. Todd describes the Edwards Rule as:

> "… inconsistent with the conceptual basis of compensation where a portion of land is expropriated. An owner is deemed to be a willing vendor of the portion and entitled to compensation for the market value of it and any economic loss (injurious affection) caused to the remaining land as a result of the construction or use of works on the expropriated portion. However, a prudent, informed and willing vendor would not sell a portion of land at a price that did not take into account the total decrease in value of the remaining land whether that decrease was caused by the construction or use of works wholly or only partially on the land which was originally his …"[20]

The Edwards Rule was abolished in England.[21] In Canada, two reports have recommended its abolition.[22] The Commission agrees with Todd and the two reports,[23] which recommend the abolition of the Edwards Rule.

Recommendation #2

The Commission recommends the deletion from s. 30(1)(b) of the words "upon the part of the land expropriated" and the substitution of wording found in comparable sections in the British Columbia, Alberta, Prince Edward Island, and Yukon Acts.

3. Sections 30(1)(c) and 31(1), "…and the use…"

[19] *Supra* note 17.
[20] *Ibid*. For further commentary see Paul Scargall, Shane Rayman and Shara Wright, *Private Rights, Public Good: Balancing Competing Interests Under Expropriation Law*, online: Rayman Beithcan LLP http://sokllp.com/resources/publications/publication/private-rights-public-good-balancing-competing-interests-under-expropriation-law.
[21] *Land Compensation Act*, 1973, c 26, s 44(1): "Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him."
[22] Law Reform Commission of Canada, *Report on Expropriation*, 1976, 23 and *Report of The Expropriations Act*, RB Robinson, QC, (1974), 32.
[23] *Ibid*.

Regarding injurious affection resulting from the use of the works for which an expropriation occurs, such as noise, dust, litter, and vibration, compensation is payable pursuant to s. 30(1)(b), but proscribed in ss. 30(1)(c) and 31(1). The proscription in s. 31(1) also exists in the legislation of British Columbia, Ontario, New Brunswick, and Nova Scotia, and in every other Canadian jurisdiction by common law. However the proscription in s. 30(1)(c) of the Manitoba Act is unique. For the same reason that is the basis of *Recommendation #1,* the proscriptive wording respecting "use" in s. 30(1)(c) should be deleted.

Recommendation #3

The Commission recommends the deletion of wording in s. 30(1)(c) that proscribes damages being awarded for damage as a result of the use of the works for which an expropriation has been instituted, so that damage resulting from use is compensable.

4. Section 31(2)

The jurisdiction to hear an application for due compensation under s. 31(2) is vested in the Court of Queen's Bench, not the LVAC,[24] which one lawyer advised the Commission "does not make sense." To understand this comment requires a brief description of the legislative history of expropriation compensation jurisdiction.

Until 1970, *The Expropriation Act*[25] provided for a compensation dispute to be determined initially by the Minister responsible for the expropriation and ultimately, if necessary, by a judge of the County Court pursuant to *The Arbitration Act*.

In 1965, *The Land Acquisition Act* was enacted.[26] Part I of the Act deals with the acquisition of land by purchase by a government authority. Part II of the Act creates the LVAC and vests it with the jurisdiction to determine the due compensation payable for the acquisition of land pursuant to Part I, which is binding on the government authority, but not on the owner. If an owner is not satisfied with the LVAC decision and the government authority needs the land, it can expropriate land.

In 1970, *The Expropriation Act* was repealed and a new Act was enacted.[27] By s. 37(1), the Court of Queen's Bench replaced the County Court and, by s. 15, the LVAC was granted a concurrent jurisdiction. The decision of the LVAC was final regarding expropriating authorities but not

[24] *The Expropriation Act*, *supra* note 9. In s 1(1) "court" is defined to mean the Court of Queen's Bench.
[25] RSM 1970, c E190, ss 15-18.
[26] SM 1965, c 43.
[27] SM 1970, c 78, RSM 1987, c E190.

owners who could reject an LVAC decision and proceed afresh to the Court of Queen's Bench. The interpretation given to s. 15 by both owners and government lawyers that LVAC decisions were binding on expropriating authorities was crushed by the Court of Appeal in *Manitoba v. Leather Ranch Ltd.*,[28] where the Court decided that LVAC decisions were not binding on expropriating authorities. Rather "the Commission is to function as a moderator appointed to assist the parties reach agreement".[29]

In 1993, *The Expropriation Amendment Act*,[30] *inter alia*, ended the jurisdiction of the Court of Queen's Bench respecting compensation claims by owners from whom an estate or interest in their land was expropriated. The legislature did so by repealing s. 37(1) of *The Expropriation Act*, repealing and re-enacting s. 15 to supersede *Manitoba v. Leather Ranch Ltd.* and giving the LVAC sole original compensation jurisdiction with a full right of appeal to the Court of Appeal by owners and expropriating authorities pursuant to a re-enacted s. 44.

Finally, pertinent to this Report, *The Expropriation Amendment Act* amended s. 31(2) regarding injurious affection claims by owners who are adversely affected by an expropriation or nearby expropriation but have no land expropriated. Prior to the 1993 amendments, s. 31(2) of the re-enacted *Expropriation Act*, 1970, read:

> **Time for Making Claim Limited**
>
> 31(2) Subject to subsection (3), a claim for due compensation under this section shall be made by the person suffering the damage or loss **in writing, giving particulars of the claim, before the expiration of two years** after the work is first used for the purpose for which it was constructed or acquired or after it has been substantially completed, and if not so made the right to compensation is forever barred. (Emphasis added)

The Expropriation Amendment Act amended s. 31(2) by striking out "in writing, giving particulars of the claim, before the expiration of two years" and substituting "by application to the court within two years", thus leaving the Court of Queen's Bench with this one original jurisdiction. There is no indication in legislative record of debate respecting *The Expropriation Amendment Act* why the LVAC was not also given the jurisdiction respecting s. 31.[31] This is the legislative history explaining the earlier quoted comment. To quote the lawyer completely:

> "It does not make any sense to have the Court [of Queen's Bench] deal with injurious affection where no land is taken. It is out of the loop on expropriation matters."

The Commission agrees. The Commission was advised in the consultation phase of this Report that the government was concerned that giving jurisdiction to the LVAC respecting s. 31 will result in frivolous claims, with consultation costs nonetheless awarded, which will not occur if potential claimants must pursue a claim in the Court of Queen's Bench; as well, it was felt that with such a

[28] (1987) 38 LCR 44(CA).
[29] *Ibid*, 48.
[30] SM 1993, c 25.
[31] Legislative Assembly of Manitoba, Debates and Proceedings, April 21, 28, July 6, 16, 19, 26, and 27, 1993, and Legislative Assembly of Manitoba, Standing Committee, July 21, 1993.

claim, being governed by the common law of nuisance, the Court of Queen's Bench is a better forum than the LVAC, notwithstanding the incongruity of the jurisdiction of the LVAC respecting s. 30(1)(c). The Commission is not persuaded for two reasons. First, of course, it is purely speculative that, if the LVAC were to have jurisdiction respecting s. 31, a deluge of meritless claims will occur and costs regarding any claim are governed by s. 15(6), *supra*, and must have been "reasonably incurred". Second, aside from the incongruity of the LVAC's jurisdiction respecting s. 30(1)(c), with respect to s. 31, as well as s. 30(1)(c), surely competent legal counsel can explain adequately the common law of nuisance to the LVAC and there is available an appeal to the Court of Appeal by s. 44.

Recommendation #4

The Commission recommends the deletion of the word "court" in s. 31(2), and the substitution of the word "commission".

CHAPTER 3: DISTURBANCE COMPENSATION

Disturbance compensation is payable pursuant to ss. 26(1)(b), 28 and 29 of *The Expropriation Act*. Two issues have been brought to the attention of the Commission.

First, during the construction of a public work for which an expropriation has happened, there may occur trespass on or the blocking of access to the remaining land of the owner and, similarly, on or to the land of an owner from whom no land has been expropriated. This construction issue is different from the construction issue considered in *Recommendation # 1*, regarding the damaging effect of an expropriation to the market value of the claimant's (remaining) land. The construction issue now being addressed is disturbance damage, which does not have to do with the market value of the claimant's (remaining) land.

Probably, compensation for damage caused by trespass and impeded access does not come within the wording of s. 28(1) and thus must be pursued in the Court of Queen's Bench, which likely will be cost prohibitive. The Commission is persuaded that compensation for damage caused by trespass by the authority or its contractor(s) should be explicitly articulated in the Act. The Commission is not persuaded respecting the impeding of access mainly because of the difficult matter of proof.

Recommendation #5

The Commission recommends the addition to s. 28(1) a sub-section:

> ***(e) costs, expenses, and losses, which arise out of or are incidental to the authority or contactor(s) constructing the public works trespassing on an owner's land, including an owner from whom no land has been expropriated.***

Second, *The Expropriation Act* provides in s. 16(1)(b) and (c):

> **Offer of Compensation**
>
> 16(1) Within 120 days after the registration of the declaration and before serving a notice for possession of the land the authority shall serve upon every registered owner of the land an offer in writing stating…
>
> (b) that the authority offers to pay immediately to the person entitled thereto the entire amount offered in compensation for the market value of the owner's estate or interest in the land;
>
> (c) unless the market value has been estimated for the purposes of clause (b) upon the basis of a use of the land other than the existing use, that the authority offers to pay

> (i) the moving costs, as they are incurred, that are reasonably incurred by an owner in possession of the land at the time the declaration or expropriation was filed, and
>
> (ii) the costs, as they are incurred, that are reasonably incurred by any owner in possession of the land at the time the declaration or expropriation was filed of removing and relocating any fixture or structure owned by that owner and situated on the land at the time the declaration or expropriation was filed; …

It has been pointed out that there is no method provided in the Act for the enforcement of this obligation. This issue is treated in Recommendation #6.

CHAPTER 4: CONSULTING COSTS

As indicated in Chapter 1, the "due compensation" payable to an owner from whom an estate or interest in land is expropriated is outlined in s. 26. Quite separately, not as a component of the "due compensation" payable, provision is made in s. 15(6)-(7) for the payment of consulting costs incurred by an owner in connection with the determination of the due compensation payable.

> **Authority to Pay Costs of Owner**
>
> 15(6) The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.
>
> **Commission May Determine Costs**
>
> 15(7) Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the commission, the commission may, on application by the authority or owner, determine the costs.

The "other costs" referenced in s. 15(6) above include expert reports and testimony relating to accounting, business valuation, planning and development, engineering, architectural, and construction issues. Occasionally, realtor expertise is also required. Lawyers comprising the expropriation bar have voiced four concerns to the Commission, namely:

1. the lack of any incentive in the Act for owners to settle compensation claims rather than proceeding to the LVAC, which results in increased legal costs,
2. the inability to obtain interim payment of consulting costs incurred by an owner for expert assistance in preparing the compensation claim,
3. the legal cost incurred by an owner in connection with a s. 15(7) application, and
4. the appeal of a consulting costs award made by the LVAC.

1. Lack of Incentive to Settle

Since the re-enactment of *The Expropriation Act* in 1970, in line with the basic principle of "due compensation" stated earlier in this Report with reference to *Irving Oil Ltd. v. R.*, the regime of awarding consulting costs incurred in connection with LVAC hearings has been full indemnification, subject to the qualifications contained in s. 15(6) that the costs are "reasonably incurred" and "reasonable" in quantum. In *Gulak v. City of Winnipeg*,[32] the LVAC made the following comments:

[32] (1983) 29 LCR 261, 271. In the quotes of Master McBride in the *Kolbrich* and *Stanton* cases McBride uses the terms tax, taxing, and taxation respecting expropriation consultation costs, not in the same sense that a lawyer's bill can be taxed, i.e. actually reduced, but rather in the context of a determination by the LVAC of the amount an expropriated owner shall receive from the expropriating authority as reimbursement for consulting costs incurred.

". . . The final point which [the City of Winnipeg's counsel] raised concerning the claim for compensation for the account of [a planning and development expert and the owner's lawyer]…namely, that their fees were unreasonable in that they were excessive. On occasion the commission has not compensated landowners for the full amount of their legal and appraisal fees because the commission felt that the fees were excessive. However, there is a major problem with not compensating landowners for the full amount of their experts' fees, especially respecting experts other than lawyers, for lawyers' bills can be taken for taxation by unhappy clients. The problem has been lucidly articulated by Master McBride in *Kolbrich et al. v. Ministry of Housing* (1981), 23 L.C.R. 1 and *Stanton v. Scarborough (No. 3),* (1983), 26 L.C.R. 292, at pp. 4-6 in the *Kolbrich* case, Master McBride said:

> The matter of the costs of experts is perhaps the most difficult and perplexing of any of the costs of expropriation. The claimant must engage the services of appraisers and other specialists. He has no choice. He did not ask to be expropriated nor did he create the system of arbitration. He merely had the temerity to own some real estate that the state later decided to acquire. After he has incurred the expense of engaging appraisers and establishing his right to compensation he is then told that he has paid them too much, or, more accurately, that they have charged him too much. He is told that they used the wrong approach, that they should not have used the subdivision approach, or that they should have or that they used the wrong or too many comparables. All this flows from the supposition that the claimant has control over the activities of the appraiser.
>
> The real problem is that the claimant is the victim of a system created by the state. As I have said, he must employ appraisers, town planners and other experts if he is to have any hope at all of being adequately compensated for the taking of all or part of his land….
>
> Where does he find them? The most commonly employed experts seem to be appraisers and town planners. There are very few of either species of experts practising in the Metropolitan Toronto area. Very few when one considers the number of expropriations that have taken place over the last 20 years or so. The same experts are employed by either the expropriating authority or the claimant in case after case after case. They know what the Land Compensation Board will accept and what will not be accepted or they should know. Claimants cannot be expected to know. If an appraiser says he considers it essential or advisable to adopt a particular approach to compensation most claimants are almost forced to accept his advice and to instruct him to proceed accordingly. So he does a great deal of work, runs up a very large fee, and has some, most or all of his work rejected by the Board. Then the expropriating authority complains about a claimant's disbursements and says he has paid his appraiser too much. What is a landowner supposed to do when

> faced with this kind of situation? I do not know, but I do know that it is long past time that the expropriating authorities and the provincial Government worked out with the appraisers and town planners, and perhaps other groups of experts, some system of limiting the cost of their services in expropriation proceedings… In my opinion, it is up to the state and not the expropriated landowners to control these costs. I have no doubt that a reasonable but restricting tariff would be accepted, probably with much grumbling, by the appraisers generally….
>
> Really the one consideration that makes the taxation of the experts' accounts impossible is the fact that if such an account is reduced on taxation the expropriating authority need pay to the claimant only the reduced amount but the claimant must pay the full amount to the expert. Indeed in many cases he has already paid the account in full before the taxation. Why should I reduce the costs payable by the party which has created the need for an arbitration proceeding and add it to the financial burden to be borne by the claimant personally? Surely it would not be an impossible task to work out a system of taxation of experts' accounts where the experts would be required to accept the taxed amounts. There is something a little weird about a system of taxation that is binding on the claimant but is of no consequence to the very person who has drawn the account that is taxed and who expects it to be paid.
>
> In my opinion, if the claimant has acted reasonably in hiring his experts he is entitled to be fully reimbursed for payment for their services even if they have charged him too much or their services were in fact of little value. But he must have acted reasonably in engaging them...

Master McBride was overruled on appeal in *Kolbrich v. Minister of Housing, supra*. In the *Stanton* case, at pp. 294-6, Master McBride had an opportunity to comment on the reasoning of the appellate court:

> …the learned judge held that not only must such costs have been reasonably incurred in order that the expropriating authority might be held liable to reimburse the claimant for them but they must have been reasonable in amount for the work done and services rendered….It follows that his lordship has ruled that even if a claimant has acted reasonably in engaging the services of an expert, if the fee charged by such expert is excessive for what he has done, or to put it another way, if the value of his work is, in the result, less than the fee he has charged, it is the claimant who is to be victimized, not the expropriating authority which created the need for the claimant to hire an expert in the first place. If I may make the observation with great respect, I suggest that the learned judge may have

> overlooked the fact that what I was taxing were the costs payable by the expropriating authority to the claimant, not those payable by the claimant to his experts. A taxing officer [such as the LVAC] simply does not have jurisdiction to reduce the amount of an expert's account in the sense that the expert is required to make do with the reduced amount. What the taxing officer does have jurisdiction to do and is required to do, according to the reasoning of [the learned judge] is to assess what amount the expropriating authority must pay to the claimant on account of the costs of a particular expert without regard to what amount the claimant may be obliged by contract to pay to that expert. If the assessed amount is less than the contract amount, the expropriated landowner is liable for the difference….
>
> Before leaving [the reasoning of the appellate court in the *Kolbrich* case], I record the following from the [judgment]: "If the decision of the master is correct, there is nothing to stop an appraiser from using his retainer as a *carte blanche* for any fee his conscience will allow."
>
> With great respect I say that if the decision [of the appellate court] is correct, there is equally nothing to stop an appraiser from using his retainer as a *carte blanche* for any fee his conscience will allow. I repeat that no taxing officer has any authority under the *Expropriations Act* … to restrict or assess what an appraiser or other expert may charge a claimant for his services. All he can do is regulate what amoung the expropriating authority is required to pay to the claimant on account of the expense of retaining such experts. As I have said on more than one occasion in the past, this is an unsatisfactory, unreasonable and unnecessary state of affairs but I do not have the impression that anyone with authority to correct it is concerned about it.

> The Commission [i.e. the LVAC] agrees completely with Master McBride. Even if the fees of [the planning and development expert and the landowner's lawyer] are excessive, which the Commission has not found as a fact, the Commission is not prepared in this case to place that burden on the shoulders of Michael Gulak *et al*...."

It has been asserted to the Commission that Manitoba is an outlier when it comes to awarding the landowner's costs in expropriation proceedings, and that there is little or no discipline in the system, which has the effect of encouraging lawyers, who are acting for landowners, to trigger inquiries, pursuant to s. 9 and Schedule A of *The Expropriation Act,* and LVAC hearings rather than negotiate. It has been suggested that the Commission consider recommending either a tariff of costs, as exists by regulation in British Columbia, or an assessment of costs based upon the degree of success as exists in the British Columbia, Ontario, Nova Scotia, and Federal Acts, and

as existed in *The Expropriation Act* of Manitoba prior to its re-enactment in 1970.[33] Also it has been suggested that the Commission consider for recommendation a legislative statement of the criteria to be applied in awarding costs, such as ss. 45(10) and 52(8) of the Expropriation Acts of British Columbia and Nova Scotia.[34]

Finally, it has been suggested that the Commission consider recommending the enactment of a cap on legal fees incurred in connection with inquiries conducted pursuant to s. 9 and Schedule A of *The Expropriation Act* as to whether an "expropriation is fair and reasonably necessary", as exists in s. 7(10) of the *Expropriation Act* of Ontario.

Suffice it to say, bearing in mind Justice Kerwin's pronouncement in *Irving Oil Ltd. v. R, supra,* upon which Master McBride so elegantly and persuasively elaborated in the *Kolbrich* and *Stanton* cases, and the obvious change in government policy, which occurred in the re-enactment of *The Expropriation Act* in 1970, not continuing ss. 19 and 20 of the former *Expropriation Act*, that the Commission is not persuaded to recommend for the reimbursement of consulting costs, a regime involving tariffs, or caps, or compensation based upon degree of success.

2. Interim Payment of Consulting Costs

Consulting costs may be incurred months or even years before the due compensation payable on an expropriation is settled or decided by the LVAC. In *Atkins v. Manitoba*; *Reimer v. Manitoba*[35] the issue before the LVAC was the date from which interest payable pursuant to s. 35 on the due compensation payable should run. In an *obiter dictum* the LVAC said:

> The Commission agrees with [counsel for the claimant] that an expropriating entity should make interim advances to cover consulting costs when provided with accounts (invoices) in usual form.
>
> …
>
> The Commission considered … [Manitoba counsel's] point that an expropriating authority has an obligation to assess the reasonableness of such accounts and such an assessment may not be able to be made until after the due compensation payable has been determined. In the opinion of the Commission this reality does not impact upon an expropriating authority making interim advances to cover consulting costs incurred. An expropriating authority can challenge the reasonableness of such costs, as is done now, after the Commission has rendered its decision

[33] *The Expropriation Act*, RSM 1970, c E190, ss 19 and 20.
[34] Note that in a series of cases the LVAC has articulated similar criteria applies for the determination of the quantum of reasonably incurred consulting costs; see, *inter alia*, *Gulak v. City of Winnipeg* (1983) 29 LCR 261, *Zukawich v Dept. of Urban Affairs* (1990) 43 LCR 300 and other cases to be found in the indices of its cases at the LVAC website, online: <http://www.gov.mb.ca/mit/lvac/index.html>.
[35] (2002), 78 LCR 155.

> on the due compensation otherwise payable, and, if the Commission agrees, take its decision into account in the payment of the remaining due compensation payable.[36]

Following the rendering of this *obiter dictum* and a letter in February 2008 from the LVAC to its Minister complaining that the Province was not paying interim consulting accounts, the Province developed the practice of paying interim accounts, although not necessarily in full, but only those it deems reasonable.

In *Manitoba v. Russell Inns Ltd.*,[37] the Province of Manitoba expropriated land for the widening of PTH 6. Russell Inns Ltd. retained the services of a land appraiser who periodically submitted interim accounts for his services which were forwarded to the Province. Following the practice of paying interim accounts incurred by owners if it deemed the accounts reasonable, portions of the appraiser's accounts were not paid by the Province who deemed them unreasonable. After negotiation between counsel for Russell Inns Ltd. and the Province failed, counsel requested a meeting with the LVAC prior to the scheduled hearing respecting the due compensation payable for the expropriated land. Following that meeting, the LVAC ordered the Province to "pay, on a without prejudice basis, the full fees as submitted". The LVAC indicated that it would entertain arguments from the parties in due course as to the reasonableness of the appraisal fees and order Russell Inns Ltd. to reimburse the Province for any amount in excess of what it determined to be reasonable.[38] The Province applied to the Court of Queen's Bench for an order quashing the LVAC order requiring it to pay Russell Inns Ltd.'s full interim appraisal fees.[39]

Reading ss. 15(6) and (7) together, the Court quashed the LVAC order. In doing so, the Court decided that, as provided in s. 15(7), the LVAC does not have jurisdiction to order the payment of any s. 15(6) costs, including interim accounts, prior to the settlement or determination by the LVAC of the due compensation payable. In so deciding, the Court referred to a Nova Scotia Court of Appeal decision, *Nova Scotia (Attorney General) v. Williams*,[40] which construed s. 35(1) of the *Expropriation Act of Nova Scotia*, to require consulting fees to "be paid without undue delay, that is, upon submission or reasonably soon thereafter." The Court quoted from the *Williams* reasons for judgment:

> [57] At. p. 103 of the decision in *Williams*, the court indicated that '[t]he obvious aim of section 35 (1) is to ensure that an owner whose lands are expropriated can be informed, at the negotiating stage prior to the formal compensation hearing, as to the value of the property and the degree to which it will be injuriously affected, and to be advised as to his or her legal rights. Such a provision facilitates early settlements without compensation hearings. It is also an attempt by the legislature

[36] *Ibid*, 157 & 158.
[37] (2013) 109 LCR 18 (Man CA).
[38] Unreported, Apr 13, 2010.
[39] (2011) 104 LCR 188 (Man QB).
[40] (1995), 56 LCR 99 (NSCA).

> to redress the inequality between the positions of the expropriating authority, with its relatively unlimited resources, and individuals otherwise unable to afford expensive professional services.
>
> . . . .
>
> [64] While it may be that the policy considerations outlined by the Nova Scotia courts make good sense and contribute to the fairness of the expropriation process, these policy considerations cannot be addressed in the narrow confines of this motion. My focus has to be on the wording of the Manitoba *Act*. In this case, the scheme contemplates the amount of costs payable being determined where the amount of compensation is settled by the authority and the owner without a hearing or is determined by the LVAC.

Russell Inns Ltd. appealed unsuccessfully,[41] the Court of Appeal agreeing with the trial judge's analysis of s. 15(6) and (7). In its reasons the Court said:

> 115 Even though Manitoba has stated that it will pay interest on any unpaid amount later found to be reasonable, the owner or professional who has to wait for payment may be ill-equipped to carry that cost for a lengthy period of time, not knowing whether or not payment will eventually be made.
>
> 116 To meet the objects of the *Act*, being to avoid victimizing the owner and to provide full indemnification, it would be more consistent with those objects to interpret sections 15(6) and (7) so as to provide for payment of the owner's costs as early and as completely as possible.
>
> . . . .
>
> 126 [But t]he intention of the government is also clear from the 2008 complaint by the LVAC to the Minister and his response. It was clearly put to the Minister that the problem was the hardship to an owner who was required to wait until after the determination of the compensation for the property before receiving compensation for the costs incurred in the process and that the LVAC was of the view that the expropriating authority should pay the full interim costs on a without prejudice basis and have the reasonableness determined at a later date. The Minister rejected this position in favour of requiring the authority to pay only reasonable costs reasonably incurred on an interim basis.
>
> 127 On the question of the LVAC having the power to make interim orders for costs, interpreting the legislation to permit such applications would result in additional proceedings, contrary to the government's intention of reducing the number of proceedings. Adding such a further step would both delay a final resolution of the matter and increase the costs.
>
> 128 If the LVAC were permitted to consider the reasonableness of the costs at that interim hearing, that would complicate the procedure, further increasing both the time and cost of resolving claims. In making an assessment of reasonableness, the LVAC would have to look at many facts and factors. As regards an appraisal report, the LVAC should look at the qualifications and experience of the appraiser, the time spent, the work done and steps taken, the hourly rate charged, the complexity of the appraisal, the amount of the compensation awarded/agreed upon and the quality of the report. Similar factors would be relevant to legal fees, and, in addition, the LVAC

[41] *Supra*, note 37.

> would have to determine whether either the owner or the authority delayed proceedings or undertook steps that were unnecessary. (See Todd at pp. 518-25.) This would not be a simple process, and many of the assessments could only finally be made after a final determination as to the amount of compensation to which the owner was entitled.
>
> 129 Interim decisions would be open to being reargued after the determination of the final costs, in light of the findings of the LVAC regarding the acceptance and utility of expert reports and the final amount of compensation. This further cost would be inconsistent with the government's goals, as stated in 1993, of reducing both the length of time to complete the expropriation process and the costs to the authority.
>
> 130 If the legislation were read to require the authority to pay full costs and seek a determination by the LVAC of the reasonableness of those costs after compensation was determined, that interpretation would be inconsistent with the Minister's direction in April 2008.
>
> 131 On the other hand, interpreting the legislation to require the interim payment of costs, either with or without an interim determination of the reasonableness of those costs, would go the farthest to meeting the object of the *Act* of reducing the victimization of the owner by providing the highest reasonable indemnification at the earliest date.
>
> 132 I will now look at the scheme of the *Act*. The cost provisions that are at issue, being appraisal, legal and other costs related to determining the compensation payable, are found in sections 15(6) and (7) of the *Act*. There is no other provision in the *Act* that gives the LVAC the ability to order or determine these costs and no provision to order the interim payment of any costs. Further, unlike section 47(1) of the Nova Scotia legislation, there is no provision in the *Act* that grants any residual authority to the LVAC to determine "other matters that may arise," such as an application for interim costs or the determination of the reasonableness of costs on an interim basis.

The Commission agrees with the sentiment of the LVAC *obiter dictum* in the *Atkins*; *Reimer* case, quoted earlier, that consulting costs should be reimbursed in full on a rolling basis upon their submission. It also agrees with the Nova Scotia Court of Appeal's words in *Williams*, quoted by the Court of Queens Bench in *Russell Inns Ltd.*, para. 57 and the Court's first sentence of para. 64, and by the Court of Appeal in *Russell Inns Ltd.*, paras. 115-116. There is a simple solution, the addition of a sub-section to s. 15 providing for the interim payment of costs compensable pursuant to s. 15(6). The *Expropriation Act of British Columbia* uniquely contains such a section, s. 48:[42]

> 48(1) An owner may, from time to time after an expropriation notice or an order … has been served on the owner but before the hearing has begun, submit a written bill to the expropriating authority consisting of the reasonable legal, appraisal and other costs that have been incurred by the owner up to the time the bill is submitted.
>
> 48(2) On receiving a bill under subsection (1), the expropriating authority must either promptly pay the bill or apply to have the bill reviewed by a registrar of the court.
>
> . . .

[42] RSBC 1996, c 125. Sections 48(3)-(6) are not pertinent.

48(7) If the amount of costs paid under this section exceeds the amount of costs awarded under section 45, the expropriating authority may

(a) deduct the amount of the difference from any amounts of compensation then outstanding, and

(b) if all compensation has been paid, recover the excess by action against the owner.

Regarding the determination of the reasonableness of such costs and the concern expressed by the Court of Appeal in paras. 127-29 of its reasons, quoted earlier, the Commission agrees with the LVAC in *Russell Inn Ltd.*, quoted earlier, that the reasonableness of such accounts need not be determined upon their submission; determining the reasonableness of such accounts is premature and would cause undue delay. They should be paid in full, conditional on their reasonableness being determined with other such costs claimed at the conclusion of the hearing and subject to a set-off against the due compensation payable pursuant to s. 26 and other costs payable pursuant to s. 15(6) and, if necessary, re-imbursement of the expropriating authority by the expropriated landowner, as provided in s. 45(7) of the *British Columbia Act*, above.

Recommendation #6

a. The Commission recommends that s. 15(1) be amended to read:

Application to commission to determine compensation

15(1) After an offer of compensation is served under s. 16, the authority or an owner of the land may, subject to s. 37 (time limits), apply to the commission, in accordance with the rules of the commission, for the determination of compensation payable by the authority to the owner for:

i. the expropriation,
ii. s. 16(c) costs, as submitted on an interim basis, and
iii. s. 15(6) costs, as submitted on an interim basis

b. The Commission recommends that a further sub-section be added providing for an expropriating authority to pay s. 16(c) and s. 15(6) bills promptly and in full, conditional on their reasonableness being determined, with other such costs claimed at the conclusion of an LVAC hearing, such claims being subject to a set-off of an over-payment against the due compensation payable pursuant to s. 26, other costs payable pursuant to s. 15(6) and, if necessary, reimbursement of the expropriating authority by the landowner.

3. Legal Costs Respecting Section 15(7)

Mr. Hacault in his response to the Consultation Report wrote:

68. … the Province has started to take the position that no [legal] costs can be awarded to an owner when an owner seeks to have his or her consulting costs certified by the LVAC…[by a s.

> 15(7) application]. The Province argues that costs for this type of a hearing are not for the "purpose of determining compensation under this Act for an expropriation" [s. 15(6)]… We note that this is inconsistent with…rulings of the LVAC which made costs awards when the LVAC had a s. 15(7) hearing on consulting costs.
>
> 69. …we note…that s. 4(5) of Schedule A to the *Act* [respecting inquiries pursuant to s. 9 of the *Act*] specifically provides:
>
> > **Taxing of legal costs**
> >
> > 4(5) Where there is a dispute as to the legal costs reasonably incurred to which an owner of land is entitled under subsection (4), the expropriating authority may apply to the taxing officer of the court to tax the legal costs of the owner on a solicitor and client basis and, **in that case, the owner is also entitled to his legal costs reasonably incurred in respect of the taxation of the costs.** (emphasis added)

Again, bearing in mind Justice Kerwin's statement in the *Irving Oil* case,[43] the Commission agrees that legal costs incurred by an owner making a s. 15(7) application should be reimbursed.

Recommendation #7

The Commission recommends that the words "including a legal cost incurred pursuant to s. 15(7)" be added to s. 15(6).

4. Appeal of a Consulting Costs Award

As indicated at the beginning of this chapter, "due compensation" payable pursuant to s. 26 of *The Expropriation Act* and reimbursement of consulting costs pursuant to s. 15(6) are separate entitlements. Reimbursement of consulting costs is not a component of "due compensation." Also, as indicated earlier in this chapter, pursuant to s. 15(7) of the Act, upon application by either an expropriating authority or an owner, the LVAC has the original jurisdiction to determine the consulting costs payable by an authority to an owner. Section 44 provides for an appeal from an LVAC compensation decision:

> **Appeal of Certified Amount to Court of Appeal**
>
> 44(1) A party to a proceeding before the commission may appeal the amount certified as compensation payable to The Court of Appeal within 40 days after the day the commission certifies the amount under subsection 15(2), or within seven days from the day the commission issues a decision or certifies an amount under subsection 15(5), whichever is the later.[44]

In *Russell Inn Ltd. v. Manitoba*[45] the Court of Appeal dismissed an appeal by Manitoba, pursuant to s. 44, respecting a s. 15(7) costs award of the LVAC, for the reason that a s. 15(7) costs award

[43] *Supra* note 15.
[44] Section 15(5) empowers the LVAC to vary a section 15(2) certification upon "new evidence" coming to light.
[45] *Supra* note 37.

does not come within the word "compensation" in s. 44(1), leaving an expropriating authority with only a Court of Queen's Bench judicial review of a s. 15(7) costs award.[46]

Recommendation #8

The Commission recommends that s. 44(1) be amended to include an amount determined payable by the LVAC pursuant to s. 15(7).

[46] *Ibid*, paras 31-41.

CHAPTER 5: SECTION 50(1) - ABANDONMENT OF EXPROPRIATION

Section 50(1) of *The Expropriation Act* provides:

> **Abandonment of Expropriation**
>
> 50(1) Where, at any time before the due compensation payable upon an expropriation is paid in full, the land or any part thereof is found to be unnecessary for the purposes of the authority, or it is found that a more limited estate or interest therein only is required, the authority shall so notify each owner of the land, or estate or interest, who has been served or is entitled to be served with the notice of expropriation, and each of them may by writing elect
>
> (a) to take back the land, estate or interest, in which case he has the right to compensation for consequential damages; or
>
> (b) to require the authority to retain the land, estate or interest, in which case he has the right to due compensation therefor.

It has been pointed out to the Commission that when a residence is expropriated and the expropriated owner wishes to buy and move the house, "there is [occasionally] a refusal [by the expropriating authority]… the house is put on a tender list without notice to the owner and sold to a third party. Section 50(1) is interpreted [by some expropriating authorities] as only applying to land in the narrow sense", not including buildings and fixtures. This surprises the Commission, given the definition of "land" in section 1(1) of the Act:

> **"land"** means land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto, and all trees and timber thereon, and all mines and minerals and quarries, unless specially excepted, and includes an interest in land;

The statutory definition of "land" includes "messuages"[47] and "corporeal hereditaments."[48] Although this matter can be left to an owner to seek judicial clarification of "land" in section 50(1), it can also be clarified by adding to the wording of section 50(1) after the word "land", each time it occurs in the section, the words "residence of the owner, buildings, structures, and fixtures."

Recommendation #9

The Commission recommends adding to the wording of s. 50(1) after the word "land", each time it occurs in the section, the words "residence of the owner, buildings, structures, and fixtures".

[47] Black's Law Dictionary, Bryan A Garner, ed, *Black's Law Dictionary*, 10th ed (Thomson Reuters, 2014), defines "messuage" to be "[a] dwelling house together with the curtilage [defined to be the land surrounding a dwelling house], including any outbuildings."

[48] *Ibid*, defines "corporeal hereditament" to be "[a] tangible item of property, such as land, a building, or a fixture".

CHAPTER 6: ADDITIONAL MATTERS

1. Changes to ss. 26(3) and 29(1) were suggested:

> **Equivalent reinstatement in certain cases**
>
> 26(3) Where land is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner intends in good faith to relocate in some other place, the due compensation shall be assessed on the basis of the reasonable cost of equivalent reinstatement.
>
> **Loss of goodwill of business**
>
> 29(1) Where the commission is satisfied that an owner does not intend to relocate any business carried on upon the land expropriated, and that the relocation thereof would not be feasible, and if the owner's interest in the land has not been valued on a basis inconsistent with its use for the purposes of the business, due compensation may include compensation for the extinction of the goodwill of the business.

It was submitted that the LVAC has applied s. 26(3) too widely, for example to include a curling rink, and that its application should be narrowed by including reference to specific buildings or uses, such as hospitals, churches, schools, and municipal buildings, as does the comparable legislation of British Columbia, Alberta and New Brunswick but not Ontario. It was also suggested that the section should require an owner to undertake to relocate as, it was asserted, the Ontario comparable s. 14(2) requires:

> 14(2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner genuinely intends to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement.

The Commission is not persuaded to recommend any changes to s. 26(3). Regarding the first submission, if an expropriating authority thinks the section is not applicable it can appeal an LVAC award. Regarding the second submission that Commission sees no requirement for a relocation undertaking in the Ontario s. 14(2); indeed, its wording is virtually the same as the wording of s. 26(3) of the Manitoba Act.

Regarding section 29(1), it was suggested that the determination of the feasibility of relocation is that of the owner and not an objective determination. The Commission does not so read the section, but perhaps the section could be clarified by deleting the words "an owner does not intend to relocate any business carried on upon the land expropriated and that the relocation thereof would not be feasible" and substituting the words "it is not feasible to relocate the business carried on upon the land expropriated". The Commission makes no recommendation.

2. *The Expropriation Act*, s. 25, provides:

> **Authority to compensate for injurious affection**

25(1) An authority that expropriates land or that in the exercise of its lawful powers causes the injurious affection of land shall pay to the owner thereof due compensation in accordance with this Act for the loss or damage thereby caused.

Effect of injurious affection under certain Acts

25(2) Nothing herein shall be construed as requiring the payment of compensation for the injurious affection of land, where the injurious affection is a result of the application of a provision of *The Transportation Infrastructure Act* and that provision expressly prohibits or denies the right to compensation, rent or other payment therefor.

Effective date for determining compensation

25(3) The due compensation payable for land expropriated shall be determined as of the date the declaration of expropriation is signed by or on behalf of the expropriating authority.

The Highways Protection and Consequential Amendments Act, S.M. 1992, c. 38 apparently amends s. 25:

44(1) ***The Expropriation Act*** *is amended by this section.*
44(2) *Section 25 is amended*

*(a) in subsection (1) by striking out "*An Authority*" and substituting "*Subject to subsections (2), (2.1) and (2.2), an authority*"; and*

(b) by repealing subsection 25(2) and substituting the following:

Restriction on compensation under other Acts

25(2) Where an authority expropriates land or in the exercise of its lawful powers causes the injurious affection of land, no compensation is payable under this Act

(a) in any circumstances in which *The Highways Protection Act* or *The Highways and Transportation Department Act* expressly provides that a person is not entitled to compensation or that no compensation is payable; or

(b) in respect of

(i) a means of access that is constructed, maintained, modified or expanded,

(ii) a development that is constructed, erected, made drilled, installed, placed, maintained, modified or expanded,

(iii) a tree, hedge or shrub that is planted, placed or maintained, or

(iv) a sign that is erected, placed, maintained, modified or expanded;

in contravention of *The Highways Protection Act*.

Compensation for accesses

25(2.1) Any compensation that is payable under this Act in respect of a means of access to a limited access highway under *The Highways Protection Act* is subject to subsections 11(3) to (6) of that Act.

Compensation subject to permit

25(2.2) Any compensation payable under this Act in respect of a sign for which a permit is issued under *The Highways Protection Act* is subject to the terms and condition of that permit.

These amendments have not been proclaimed. The Commission was urged to recommend their proclamation. Suffice it to say, the Commission is not inclined to become involved. That said, current s. 25(1) might be repealed, being redundant to s. 26 (1)(c), and current s. 25(2) might be better located in the proximity of ss. 30 and 31, leaving current s. 25(3) as s. 25.

3. Section 4(4) of Schedule A of the Act provides for an owner to be reimbursed for reasonable costs to prepare an objection and participate in a hearing. Any dispute respecting these costs is to be determined by the taxing officer of the Court of Queen's Bench, s. 4(5). It was suggested that it "would be more efficient if the inquiry officer determined the legal costs payable". The Commission agrees. It was also pointed out that by s. 8 of Schedule A an inquiry officer must deliver a report to the confirming authority within 30 days. Although no section of Schedule A provides for an inquiry officer obtaining an extension, it was asserted that an inquiry officer can do so only by application to the Court of Queen's Bench. It was suggested that Schedule A should provide for an extension application to be made by an inquiry officer to the Deputy Minister of Justice. The Commission agrees.

Recommendation #10

(a) The Commission recommends that s. 4(5) of Schedule A of The Expropriation Act be amended by deleting "taxing officer of the court" and substituting therefor "inquiry officer".

(b) The Commission recommends making s. 8 of Schedule A of The Expropriation Act s. 8(1) and adding a subsection (2) providing for an inquiry officer to obtain an extension from the Deputy Minister of Justice.

4. Section 44(1) of the Act provides for an appeal to the Court of Appeal of the "amount certified as compensation payable" by the LVAC. Section 44(2) provides:

Powers of Court of Appeal

44(2) An appeal under subsection (1) may be made on questions of law or fact or mixed law and fact, and The Court of Appeal may

(a) refer any matter back to the commission for determination; or

(b) make any determination that the commission has the power to make.

Section 44 does not speak to the standard of review to be undertaken by the Court. Initially, the Court dealt with LVAC appeals in the same manner as appeals of a Court of Queen's Bench judgment. It was suggested that "over time the Court…has…adopted the standard of review developed through case law in judicial review cases …[resulting in] the Court…[becoming]

increasingly reluctant to review and overturn factual findings of the LVAC". It was suggested that the Commission recommend legislation of the standard of review as s. 37 of the *Expropriation Act*[49] of Alberta provides:

> Appeal
>
> 37(1) An appeal lies to the Court of Appeal from any determination or order of the Board except when it is carrying out the functions of an inquiry officer under Part l.
>
> (2) An appeal under subsection (1) may be made on questions of law or fact, or both, and the Court of Appeal
>
> (a) may refer any matter back to the Board, or
>
> (b) may make any decision or order that the Board has power to make,
>
> and may exercise the same powers that it exercises on an appeal from the Court of Queen's Bench sitting without a jury, and the rules and practice applicable to appeals to the Court of Appeal apply.

The Commission simply records this submission and makes no recommendation.

[49] *Supra* note 14.

CHAPTER 7: LIST OF RECOMMENDATIONS

Recommendation #1

The Commission recommends the deletion of the proscriptive wording in sections 30(1)(b) and (c) and 31(1) to damages being awarded for damage as a result of the construction of the works for which an expropriation has been instituted, so that construction damage is compensable. (p. 5)

Recommendation #2

The Commission recommends the deletion from section 30(1)(b) of the words "upon the part of the land expropriated" and the substitution of wording found in comparable sections in the British Columbia, Alberta, Prince Edward Island, and Yukon Acts. (p. 6)

Recommendation #3

The Commission recommends the deletion of wording in s. 30(1)(c) that proscribes damages being awarded for damage as a result of the use of the works for which an expropriation has been instituted, so that damage resulting from use is compensable. (p. 7)

Recommendation #4

The Commission recommends the deletion of the word "court" in section 31(2) and the substitution of the word "commission". (p. 9)

Recommendation #5

The Commission recommends the addition to section 28(1) a sub-section:

> (e) costs, expenses, and losses, which arise out of or are incidental to the authority or contactor(s) constructing the public works trespassing on an owner's land including an owner from whom no land has been expropriated. (p. 10)

Recommendation #6

The Commission recommends that section 15(1) be amended to read:

a. Application to commission to determine compensation

15(1) After an offer of compensation is served under section 16, the authority or an owner of the land may, subject to section 37 (time limits), apply to the commission, in accordance with the rules of the commission, for the determination of compensation payable by the authority to the owner for:

i. the expropriation,
ii. s. 16(c) costs, as submitted on an interim basis, and
iii. s. 15(6) costs, as submitted on an interim basis

b. The Commission recommends that a further sub-section be added providing for an expropriating authority to pay section 16(c) and section 15(6) bills promptly and in full, conditional on their reasonableness being determined, with other such costs claimed at the conclusion of an LVAC hearing, such claims being subject to a set-off of an over-payment against the due compensation payable pursuant to section 26, other costs payable pursuant to section 15(6) and, if necessary, reimbursement of the expropriating authority by the landowner. (p. 20)

Recommendation #7

The Commission recommends that the words "including a legal cost incurred pursuant to section 15(7)" be added to s. 15(6). (p. 21)

Recommendation #8

The Commission recommends that section 44(1) be amended to include an amount determined payable by the LVAC pursuant to section 15(7). (p.22)

Recommendation #9

The Commission recommends adding to the wording of section 50(1) after the word "land", each time it occurs in the section, the words "residence of the owner, buildings, structures, and fixtures". (p. 23)

Recommendation #10

(a) The Commission recommends that section 4(5) of Schedule A of *The Expropriation Act* be amended by deleting "taxing officer of the court" and substituting therefor "inquiry officer".

(b) The Commission recommends making section 8 of Schedule A of *The Expropriation Act* section 8(1) and adding a subsection (2) providing for an inquiry officer to obtain an extension from the Deputy Minister of Justice. (p. 26)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 15th day of May, 2019.

Cameron Harvey, President

Myrna Phillips, Commissioner

Michelle Gallant, Commissioner

Jacqueline Collins, Commissioner

Sacha Paul, Commissioner