SOME ASPECTS OF THE LAW OF EXPROPRIATION IN CANADA AND AUSTRALIA

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I. INTRODUCTION

Mr. Justice Thorson, a judge of considerable distinction in the sphere of land expropriation, said in *Grayson v. The Queen*: "Canada has the most arbitrary system of expropriation of land in the whole of the civilized world."[1] Australians reading this dictum may perhaps be forgiven for thinking that either the distinguished judge never visited Australia or, alternatively, he did not regard Australia as part of the civilized world. Since he made his remark, Canada has in fact taken steps to improve its statutes in at least two jurisdictions.[2] Two of the six states in Australia effected new legislation in the 1960s,[3] but the remaining four and the Commonwealth, as the federal government is termed, continue to use statutes which are long out of date. New South Wales, in particular, retains a plethora of statutes and has never seen fit to draw all the loose ends together. Victoria's legislation has been revised in respect of the assessment of compensation but its procedural rules are based on early 19th century provisions; they creak badly in all joints.

II. RELEVANCE OF ENGLISH LAW

Canadian and Australian law are similar in that they both have their roots in English law. They both refer to old and current English decisions for guidance. Possibly the Australians do this more than the Canadians. For example, if one takes at random volume 3 of the Ontario Reports for 1971, of some 385 cases judicially considered, 295 were Canadian and 90 were English. By way of contrast the 1971 Victoria Reports showed that of 205 cases judicially considered 135 were Australian and 70 were English. Thus the ratio in Ontario was 3 to 1, but in Victoria 2 to 1. When it comes to

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[1] [1956-60] Can. Exch. 331, at 336 (1959).

[2] Expropriation Act, CAN. REV. STAT. c. E-19 (1970); The Expropriations Act, ONT. REV. STAT. c. 154 (1970).

[3] Acquisition of Land Amendment Act 1969, (Queensland No. 33); and Land Acquisition Act 1969, (South Australia No. 93).

consideration of specialist legislation, such as the Ontario Labour Relations Act 1960, the English cases are of no relevance; the same is true of Australia. But in the sphere of case law subjects like trusts and negligence both seek the assistance of the English authorities. The areas where both the Canadian and Australian courts seek guidance from the reported English decisions is roughly the same. The tendency in expropriation law is to ignore all but a few of the older English cases and to rely on the substantial body of local precedent.

III. No Unity of Canadian, Australian and English Expropriation Law

Broadly speaking, neither the Canadian nor the Australian courts refer to each others' decisions as a matter of regular practice. Nor do they often refer to decisions of the courts of the United States. It is true that in the volume of the Ontario Reports examined at random two United States cases in relation to insurance were referred to as well as one Queensland and one Irish case. In the Victorian Reports eight New Zealand cases and one United States case were referred to. Nevertheless, as a broad generalisation, it is true to say that there has been little cross-fertilization of judicial thought between Canada and Australia. This is particularly true of the law of expropriation.

Canada and Australia share many similar features. They are both big countries. They were both settler countries. They both have problems in central and provincial government relationships, or to use the Australian idiom – in Commonwealth and state relationships. A practitioner in a Canadian province would have little difficulty in practising law in an Australian state. Both countries have a similar court structure. In Australia, each state has a Supreme Court, with a right of appeal either to the High Court of Australia (on a Commonwealth or state subject) or to the Privy Council (on a state subject only). For reasons of expense and convenience most appeals are heard by the High Court. Nevertheless, some cases by-pass the High Court and are heard by the Judicial Committee in London. There is no indication at the present time that the states will sever this link with the mother country. In respect of expropriation most of the important post-war decisions have emanated from the High Court, the equivalent of the Supreme Court of Canada, rather than from the Privy Council.

IV. Resumption

The term "expropriation" is in fact unknown to Australian law. Amongst practitioners it is better known as "resumption". The term "resumption" has it origin in reservation clauses in the Crown grants made in the early part of the nineteenth century. The Crown was empowered to take back without payment of compensation either a tenth or a twentieth of the total

land granted for the purpose of public ways, canals, railroads, or other public works. The precise form varied from state to state but the cautious foresight in including such clauses delayed the need for comprehensive legislation governing the subject. Fortunately for Australia the Lands Clauses Consolidation Act 1845 (United Kingdom) was never widely transplanted en bloc. Unfortunately, however, many of its hideous provisions were enacted in one form or another in each of the six states. But from an early date each state went its own way and the result is that each state has its own "expropriation" Act but no two have the same or similar Act; even the names given to 'expropriation' statutes differ. For example, the basic Act in Western Australia is the Public Works Act 1902 as amended approximately once every quinquennium. This state is indebted to New Zealand which had an act of the same name on which Western Australia modelled its Act. Unlike Canada, Australia does not possess a series of law reports devoted solely to land compensation cases.

V. Reservation Clauses in Crown Grants

Expropriation is occasionally achieved by means of the reservation clauses even to-day. In *R.A. McCartney Manufacturing Pty. Ltd. v. The Minister*,[4] a reservation clause in a grant made in 1889 empowered the Crown to take a proportion of the land for public purposes and the Crown resumed the land on behalf of a local authority. Mr. Justice Else-Mitchell said:

> Lest it be thought that this is a harsh result, it should not be overlooked that the grant of an estate in fee simple in land does not give the grantee or his successors an absolute title against the Crown and, in particular, that that estate is always subject to whatever conditions may be specified in the original grant.[5]

The net result was that the land owner was entitled to no compensation for the part of his land which was resumed.

VI. Just Compensation

At the time when Canadian and Australian law each began to establish a separate identity from English law by means of enacting their own legislation and developing their own common law interpretation of those statutes, two basic premises were firmly rooted. First, land should only be expropriated for public purposes; and secondly, a fair purchase price should be paid as compensation for the loss of the land.[6] Both Canadian and Australian legislation and judicial decisions accept this basic premise. Section 51(xxxi) of the Commonwealth Constitution of Australia, 1900, provides that Parliament shall have power to make laws with respect to the acquisition of property on just terms from any state or person for any purpose

[4] [1968] 1 N.S.W. 358 (Land & Valuation Ct.).

[5] *Id.* at 360.

[6] See Mann, *Outline of a History of Expropriation*, 75 L.Q.R. 188 (1959); McNulty, *The Power of "Compulsory Purchase" Under the Law of England*, 21 Yale L.J. 639 (1912).

in respect of which the Parliament has power to make laws. The section was of considerable importance during the war when land was expropriated for ex-servicemen. For example, in *P.J. Magennis Pty. Ltd. v. The Commonwealth*[7] the High Court held that the War Service Settlement Agreement Act 1945 (Commonwealth) was a law with respect to the acquisition of property and as it did not provide for just terms it was invalid. The Act provided that land was to be valued as at 1942 and not at the date on which it was expropriated (1948); it was not just to pay compensation for land at less than its current value. Although there is no such consitutional limitation on the part of the states to enact legislation to expropriate land on "unjust terms" the fact is that none has attempted to do so since the end of the second world war.

VII. The 1914 Privy Council Cases

In respect of the valuation of the dispossessed owner's land both Canada and Australia attach considerable importance to two Privy Council decisions made in 1914. The Canadian courts frequently refer to Lord Dunedin's judgment in *Cedars Rapids Manufacturing & Power Co. v Lacoste*[8] whilst the Australian courts refer to Lord Moulton's judgment in *Pastoral Finance Ass'n v. The Minister*.[9] In the former case, the passage that has been referred to on many occasions reads as follows:

> (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.[10]

In the latter case, the passage which is cited with regular frequency in the Australian courts is: "Probably the most practical form in which the matter can be put is that they [the claimants] were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it."[11]

Neither judgment is inconsistent with the other. Lord Moulton had the advantage of Lord Dunedin's judgment and the difference in emphasis is due to the fact that the issues at stake were slightly different. The Canadian courts to-day prefer to regard Mr. Justice Rand's celebrated judgment in *Diggon-Hibben, Ltd. v. The King*[12] as their basic principle where he lays down the test that the price to be paid to the dispossessed owner

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[7] 80 Commw. L.R. 382 (Aust. High Ct. 1949). The Australian provision has often been contrasted with the United States Constitution. The Australian provision is a legislative power which governs the content of legislation; the United States provision is a restriction upon the executive and a direction to the judiciary.

[8] [1914] A.C. 569 (P.C.).

[9] [1914] A.C. 1083 (P.C.).

[10] *Supra* note 8, at 576.

[11] *Supra* note 9, at 1088.

[12] [1949] Sup. Ct. 712.

is the amount which he as a prudent man would be willing to pay for the land rather than be ejected from it. In *Irving Oil Co. v. The King*[13] Chief Justice Rinfred and Mr. Justice Kerwin said that they thought the prudent man test in *Pastoral Finance*, was not a preferable way of expressing the matter for the purpose of a case where a residence, long-occupied by the owner, had been expropriated. In *The King v. Thomas Lawson & Sons Ltd.*,[14] President Thorson thought that the market value sufficed, but this view was disapproved in *Woods Manufacturing Co. v. The King*[15] by the Supreme Court which recognised that the land may be capable of being used in such a way that its selling price in the open market would be no adequate compensation to him for the loss of the opportunity to use the land, say, for some profitable business.

VIII. Special Value to the Owner

The Australian courts have perhaps gone further than the Canadian courts in developing the concept of special value. Broadly speaking, the courts require two values to be established: the market value, and the special value to the owner. The market value is established by the willing seller/prudent buyer test. The special value is the value to the owner over and above its market value. In a long line of cases perhaps Chief Justice Bray's judgment in the Supreme Court of South Australia in *Arkaba Holdings Ltd. v. Commissioner of Highways*[16] is the most scholarly. Reviewing the authorities, he said: "this special value must in my view, arise from some attribute of the land, some use made or to be made of it or advantage derived or to be derived from it, which is peculiar to the claimant and would not exist in the case of the abstract hypothetical purchaser."[17] He gave as examples a house used for a doctor's consulting room, and agricultural land worked in conjunction with a neighbouring residence or farm buildings. In *Chapman v. Minister*,[18] the New South Wales Court of Appeal thought that expenditure on the plans for subdivision and expenditure on incorporating a company for the purpose of the disposal of the land gave special value to the land in the hands of the claimant company. It is a subject on which the onus is upon the claimant to establish that the land has a special value to him.

In England the expenditure in *Chapman* would probably have been classified under the heading of disturbance under the rule in *Horn v. Sunderland Corp.*[19] Part of the difficulty in Australia is that some of the expropriation Acts make provision for a separate claim to be made in respect of

[13] [1946] Sup. Ct. 551.
[14] [1948] Can. Exch. 44 (1947).
[15] [1951] Sup. Ct. 504.
[16] [1970] S. Aust. 94 (Sup. Ct. 1969).
[17] *Id.* at 100.
[18] [1966] 2 N.S.W. 65.
[19] [1941] 2 K.B. 26 (C.A.); discussed by Morden, 47 Can. B. Rev. 278 (1969).

disturbance whereas others make no reference to the subject. In *The Commonwealth v. Milledge*,[20] the High Court of Australia held that where a statute does not make express provision for disturbance as a separate head it should not be treated as a separate subject of compensation. In short, it had to be taken into account in establishing the value of the land to the dispossessed owner. While this may be logically a sensible way of interpreting a deficient Act, it does place appraisers in some difficulty. Appraisers are experts in establishing the market value of the land; it may call for a different kind of expertise to establish the special value of the land to the owner in respect of a complex business. The services of an accountant may be more apposite. The Expropriation Act 1969-70 of Canada[21] gives very little guidance on the subject of market value, special value and disturbance. The Expropriation Act 1968-69 of Ontario is a little more explicit on the subject of disturbance, to which, in section 18, it gives a fairly restricted scope. Section 13(2) clearly eliminates any concept of special value to the owner. It places the emphasis on market value which is defined in section 14 in terms of the willing seller willing buyer on the open market. In *Judson v. Governors of the University of Toronto*,[22] the Supreme Court of Canada examined the subject but it did not conclude that sections 13 and 14 amounted to a rejection of the *Diggon-Hibben* test. Nevertheless, it is perhaps possible to argue that the difficulties which a business, using the expropriated land for a special purpose, encounters is taken care of by section 19 and this obviates any necessity for attributing any special value to the land. One wonders how the Ontario courts would resolve the facts which occurred in *Jovist Pty. Ltd. v. Campbelltown City Council*.[23] In November, 1960, the claimant company bought 27 perches of land near a railway station zoned for business and commercial purposes for AS14,050. In 1965 the company sought permission to erect shops. Permission was refused because the local authority was considering expropriating the land, along with other land, for the provision of a bus terminal. At the same time an order was made forbidding all development on the subject and neighbouring land. The land remained vacant and unused and no lawful use could be made of it. This was the position when the land was expropriated in November 1968. Clearly the land had very little market value. The company was not operating a business on the land and section 19 would not be applicable. The *Diggon-Hibben* test would take care of the difficulty but then it is not wholly clear to this writer whether the Ontario Act overrules it, modifies it or leaves it unscathed.

IX. Disturbance; Solatium

Disturbance is often associated with the award of a solatium. This particular subject raged in Canada until resolved by nine judges of the

[20] 90 Commw. L.R. 157 (High Ct. 1953).

[21] Can. Rev. Stat. c. E-19 (1970); see Safian, *Bill C200: Federal Expropriation Bill*, 34 Sask. L. Rev. 299 (1969).

[22] 23 D.L.R.3d 80 (Sup. Ct. 1971).

[23] 19 L.G.R.A. 134 (N.S.W. Land & Valuation Ct. 1970).

Supreme Court[24] in *Drew v. The Queen*[25] where it was held that once value to the owner has been assessed within the rule in *Woods Manufacturing Co. v. The King*[26] it represents full compensation and the owner is not entitled to an additional amount for compulsory taking. Interestingly, section 18(1) of the Expropriations Act 1968-69 (Ontario) permits the court to award a solatium of up to five per cent of the compensation payable. The Expropriation Act 1969-70 of Canada is silent on the matter. Section 63(c), Public Works Act 1902 of Western Australia permits an award of up to ten per cent on the compensation payable and as a general rule the courts do award this sum. But the position is not clear in other Australian jurisdictions. In *Leslie v. The Board of Land & Works*[27] the Supreme Court of Victoria held that a reasonable percentage could be awarded in the absence of express statutory provision. But *In re Wilson & the State Elec. Comm. of Victoria*[28] the same court held that there was no power either under the enabling act or under the procedural act to allow a further amount either by way of percentage or otherwise for compulsory taking. There is a dictum of Mr. Justice Barber, a judge who specialises in land valuation cases, in *Melbourne Saw Manufacturing Co. v. Melbourne & Metropolitan Bd. of Works*[29] which suggests that he has not ruled out the possibility of the award of a solatium under the Valuation of Land Act 1960 where the taking is compulsory. A decision of the Nova Scotia Supreme Court Appeal Division in *Re Conn & Martel Ltd. and City of Halifax*[30] is, therefore, of interest to Australian jurisdictions where compensation for business disturbance was held to be best appraised as a percentage of the market value of the expropriated property and eight per cent was regarded as an adequate allowance.

X. Natural Justice

The two most important aspects of the law of expropriation from the point of view of the rights of the individual are: first, his right to contest the actual decision by the authority to take his land; and secondly, the award of compensation. In regard to the making of the decision to expropriate, the fundamental question is whether the land owner has the right to be heard before an irrevocable decision is made to expropriate. It was an issue very much in the minds of the McRuer Commission.[31] Section 6 of the Expropriation Act 1968-69 (Ontario) gives a statutory right to a land

[24] There are only seven judges in the High Court of Australia and the Court seldom sits with more than five on any important point of law.

[25] 29 D.L.R.2d 114 (Sup. Ct. 1961).

[26] [1951] Sup. Ct. 504.

[27] 2 Vict. L.R. 21 (1876).

[28] [1921] Vict. L.R. 459 (Sup. Ct.).

[29] [1970] Victo. 394 (Sup. Ct. 1969).

[30] 13 D.L.R.3d 162 (N.S. 1970).

[31] 3 Royal Comm'n Inquiry into Civil Rights, Report No. 1 (Ont. 1968); summarized by Weir, *Civil Rights in Expropriation*, 46 Can. B. Rev. 591 (1968).

owner, who is served with a notice of intention to expropriate, to be heard. No state in Australia has conducted a survey of human rights along the lines of the McRuer Commission but in respect of expropriation the South Australian Parliament did appoint a committee to investigate the subject; as a result of which it enacted the Land Acquisition Act of 1969. Section 12 of that Act gives a similar right to land owners who are threatened with the imminent loss of their land. But there remain a number of jurisdictions which do not admit this statutory right and one suspects that in respect of those jurisdictions the Australian courts would come to the same conclusion as the Canadian Supreme Court in *Calgary Power Ltd. v. Copithorne*,[32] and not be prepared to imply a right. And again, in *Meeson v. Etobicoke Bd. of Educ.*,[33] where the Ontario Court of Appeal refused to imply a right in the Schools Administration Act 1960 to hold a meeting of ratepayers affected by a decision to expropriate their land, it is probable that the Australian courts would reach a similar conclusion. In *Amstad v. Brisbane City Council (No. 2)*[34] Mr. Justice Campbell held that in determining whether certain lands were required by the city, the city council is not acting in a judicial or quasi-judicial manner as to require it to observe the principle of natural justice. The element of prejudice, upon which the rule of natural justice is based, was, in the opinion of the judge, taken away by the substitution of a right of compensation for the loss of property acquired under the statutory power. The importance of the case has since been diminished by the introduction of a statutory right to be heard under the Acquisition of Land Act 1967 of Queensland. Presumably in the course of time a statutory right to object will be instituted in all jurisdictions, but it is a depressing commentary on the courts in both Canada and Australia that they have not been prepared to imply such a right. Where there is a duty to give a land owner a hearing his rights are admirably described by Mr. Justice Henry in *Perpetual Trustee v. Dunedin City*.[35]

XI. Negotiating Compensation

Neither Australian nor Canadian law has regarded expropriation law in the same terms as English law does. English law has termed the subject "compulsory purchases" and for years regarded the taking of land for public purposes as a form of contract in which one term only is not determined by the process of bargaining, namely the decision that the seller must sell and the buyer must buy.[36] The English courts have therefore spoken in terms of the "purchase price" rather than the amount of compensation to be

[32] [1959] Sup. Ct. 24.

[33] 61 D.L.R.2d 650 (Ont. 1967).

[34] [1968] Queensl. 343 (Sup. Ct. 1967).

[35] [1968] N.Z.L.R. 19 (Sup. Ct. 1967).

[36] Marquis of Salisbury v. Great Northern Ry. Co., 117 E.R. 1503 (Q.B. 1852); Tiverton and North Devon Ry. Co. v. Loosemore, 9 App. Cas. 480 (H.L. 1884).

awarded for the loss of the land.[37] A side effect of this approach has been the emphasis on the parties, the expropriating authority and the dispossessed land owner, settling their own price, and other terms, such as the date of entry. One is left to speculate whether either the English or the Australian courts would reach a similar conclusion as the New Brunswick Supreme Court, Appeal Division, did in *Re Budovitch v. The Queen*.[38] In this case the Expropriation Act[39] provided that in the absence of an agreement compensation should be determined by arbitration. At the compensation hearing the opposing counsel agreed with each other that compensation would be allowed for certain expenses of a limited company of which the business partners were the sole shareholders. It was held that notwithstanding the agreement between counsel, the partners were not entitled to compensation for these expenses. There was no statutory authority for the award of such compensation. In other words, where a statute makes comprehensive provision for the principles governing the award of compensation it might follow from this case that the expropriating authority and the land owner cannot agree by themselves that compensation should be awarded for other non-compensable items. Perhaps the case does not go as far as this, but it is an indication of how far the law has moved from the concept of a freely negotiated price between the two parties. In this connection one likes section 27 of the Expropriations Act 1968-69 (Ontario) which establishes a board of negotiation to assist in settling the sum of compensation prior to arbitration. The only reservation is the effect it may have in delaying settlement of the compensation, coupled with a fear that it may tend to become unduly "legalistic" in its approach.

XII. Single Assessment

One of the key issues in the law of expropriation is whether a compensation court makes a single assessment of compensation to be shared among all the persons claiming an interest in the land, or whether it makes separate assessments in respect of each claim by each person with an interest in the land. In condemnation proceedings in the United States one award is made for the entire value of the land and the distribution of the award between the owners of separate interests is a matter wholly between them.[40] The rule has been criticised.[41] The fact is that the sum of the value of different interests in land may well exceed the value of the land as a whole if valued as unencumbered and held in fee simple. A lessee's interest alone

[37] The position in the United States governing the concept of eminent domain is considered by Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942), and by Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[38] 7 D.L.R.3d 141 (N.B. 1969).

[39] N.B. REV. STAT. c. 77 (1952).

[40] Scully v. United States, 409 F.2d 1061 (10th Cir. 1969).

[41] See Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, at 490 (1962).

may render the lessor's interest to almost a token sum. If held in fee simple the market value of the land might be 10,000 dollars, but under the terms of the lease the value of that lease to the lessee might amount to 8,000 dollars and the lessor's to 3,000 dollars. Moreover, there are a wide range of other possible interests in the land. Sub-lessees and mortgagees are two obvious examples.

Perhaps the most important contribution made by the High Court of Australia during the 1960s to the law of expropriation is *Rosenbaum v. The Minister for Public Works.*[42] The Court held that each person having an estate or interest in the land, including a termor or tenant, has a separate and independent claim to compensation for the value of that interest which is taken from him by the expropriation of the land. Each person should, as to his own interest, be regarded as an owner. Owner does not simply refer to the person in whose name the fee simple is registered: it refers to each person who has an interest in the land.

Some of the consequences of this decision are examined in *Ex parte The Minister for Educ. v. Henry Lawson Dev. Pty. Ltd.*[43] The facts in this case were that five acres of land were expropriated in an outer suburb of Sydney, which the owner was in the course of subdividing for sale. The competing interests included (a) a claim from the local council for unpaid rates, (b) a claim from mortgagees in respect of two mortgages, (c) a claim from the registered proprietor, and (d) a claim from nineteen purchasers, subject to the mortgages, for subdivided lots. The expropriation occurred in the midst of complex financing arrangements. The Public Works Act 1912 of New South Wales, which contained both the power to expropriate and the procedure to be followed in determining compensation, contained no provisions for the resolving of conflicts between claimants asserting adverse claims as to their entitlement for compensation. Mr. Justice Helsham gave a declaration in equity to enable all the parties to be joined and determined their questions of title and the amounts to which they were entitled. The expropriating authority had in fact paid a sum into court in accordance with the provisions of the Public Works Act 1912, namely the market value of the unencumbered fee simple. The parties accepted the valuation and the court's task was to allocate a given sum amongst the claimants. It remains to be seen when, say, four persons with an interest in the land claim separately and the total sums claimed amount to a sum greater than the land's fee simple market value. It does not seem that the Canadian Supreme Court has had the opportunity to consider this issue. The modern expropriation statutes make provision for separate claims; for example, section 16, Expropriations Act 1968-69 (Ontario) states that separate interests are to be valued separately. Section 26, Expropriation Act (Canada) likewise contemplates separate claims from persons with separate interests. But it has yet to be established whether the sum total of the claims of the different persons with an interest in the expropriated land can exceed

[42] 114 Commw. L.R. 424 (Aust. High Ct. 1965).

[43] 91 W.N. (N.S.W.) 624 (Sup. Ct. 1970).

a single valuation of the property as a whole. It is difficult to believe that substantial justice can be done to the valuation of separate interests if this limitation is placed on the award of compensation.

XIII. Payment of Compensation Prior to Entry

Both provisions raise the question of whether the expropriating authority is entitled to enter on the expropriated land before payment of compensation has been effected. Broadly speaking, the majority of expropriation acts do not seem to prevent the authority taking such action. Certainly in respect of section 4 of the Lands Compensation Act 1958 of Victoria Mr. Justice Hudson held in *Roberts v. Board of Land & Works*[44] that the authority was entitled to take possession and appropriate the land for the execution of the work prior to the determination and payment of the compensation. It is a curious omission from most expropriation acts in both Canada and Australia that they are vague or imprecise as to how long after the land vests in the expropriating authority the occupier can remain in effective occupation. He has no legal title and if he has some degree of equitable title it would seem to depend entirely on the good offices of the authority. Again, it is surprising that the issue does not seem to have found its way to the superior courts. In the United States the predominant view is that in the absence of a statutory requirement, compensation need not be paid or even finally determined in advance of the entry onto the land provided the owner is not put to risk or unreasonable delay as to his compensation.[45] There is a strong case for arguing that entry by the authority onto land should invariably be preceded by the payment of a substantial portion of the compensation. Both the South Australian and Queensland provisions alleviate the position to a considerable extent but they may not go far enough.

XIV. Delays in Payment of Compensation

When expropriation Bills have come before the legislatures of Australia for debate one of the recurrent themes is an allegation that the expropriating authority is slow to pay the compensation. A further complaint is that compensation is not paid until after the land owner has been required to move. Frequently he needs the money to enable him to move and he may be placed in a position of considerable embarrassment. The Land Acquisition Act of 1969 of South Australia is therefore a notable milestone in attempting to eliminate such delays. Section 19 of the Act requires that the acquiring authority must append to a copy of a notice of acquisition an offer in writing stating the total amount of compensation which the authority proposes to pay in respect of the acquired land. Regardless of whether the land owner accepts the offer the authority must, by section 20,

[44] [1965] Vict. 265 (Sup. Ct. 1963).

[45] Dohang v. Rogers, 281 U.S. 362 (1930), 68 A.L.R. 434 (1930); Hays v. Port of Seattle, 251 U.S. 233 (1919).

pay the stated sum into court. This sum may be invested at the court's discretion. If the land owner accepts the offer the money is paid to the owner. If he does not acquiesce in the offer the claimant may serve notice of a counter-claim. Should he fail to take any action he is deemed after the expiration of sixty days to have accepted the authority's offer. On the other, if he submits a counter-claim, the authority has likewise a period of sixty days by section 22 to consider the counter-claim and may admit or dispute it. The same section permits of negotiation by implication between the two parties. A disputed claim is settled by a court of law.

The Acquisition of Land Act 1967 of Queensland also takes into account the predicament of the land owner who is held up for a long period whilst the quantum of compensation is settled. Section 23 of the Act permits a claimant to apply at any time after he submits his claim, to the authority to make him an advance not exceeding the amount which the authority has offered him or an amount equal to its estimate of the amount of compensation payable to the claimant. Payment does not, of course, prejudice his claim for a larger sum. The expropriating authority is not hindered by delays in settling the amount of compensation, but can proceed with the entry onto the land.

XV. Injurious Affection

According to Lord Justice Harman in *Edwards v. Minister of Transport* injurious affection "is a piece of jargon having a respectable pedigree and prolific of litigation in our courts for a century or more."[46] Every Canadian and Australian expropriation lawyer would agree. Interestingly, section 1(e) of the Expropriation Act 1968-69 (Ontario) defines injurious affection. In *Edwards*, the claimant was the owner of rural land and a new road was built on part of that land. It was held that where damage arises partly on the claimant's land and partly off it, the claimant is only entitled to the damage which he can attribute to the activities on what was formerly his own land but cannot claim the whole of the damage caused by the whole road. Section 1(*e*) of the Ontario Act abolishes a distinction in Australian law which is made between severance damage and injurious affection. Severance damage is the amount by which the actural severance diminishes the value of the retained land. Injurious affection is the amount by which the proposed use to which the expropriated part will be put by the acquiring authority diminishes the value of the retained land. Section 1(*e*) defines injurious affection, *inter alia*, as the reduction in market value caused to be retained land by the acquisition (*i.e.* severance), or by the construction of the works thereon or by the use of the works thereon or any combination of them. In *Edwards* the court was concerned only with the proposed use to which the expropriated part of the land would in the future be used. It

[46] [1964] 2 Q.B. 134, at 144; see Todd, *The Mystique of Injurious Affection in the Law of Expropriation*, 3 U.B.C.L. Rev. 127 (1967); Tate, *Legal Criteria of Damages and Benefits —The Measurement of Taking Caused Damages to Untaken Property*, 31 La. L. Rev. 431 (1971).

was not concerned with actual user. In *Town of Carman v. Johnson*,[47] the Manitoba Court of Appeal was concerned with a similar problem, namely the damage caused by the future presence of the proposed sewage disposal lagoon to the value of the retained land of the owner. It cannot, of course, at common law be claimed by an owner, where none of his land is expropriated. But section 1(*e*) now permits a claim by an owner of land which is not expropriated for the reduction in the market value of contiguous land resulting from the actual construction and not from the proposed use of the works by the authority. This, of course, would mean that in *Edwards* the claimant would be entitled to the damage caused to his retained land (a) by the road on the expropriated part, and (b) by the road contiguous to his land, but not by the road which passes close to his land but not contiguous to it. The Land Acquisition Act 1969 of South Australia makes no attempt to redefine injurious affection and severance damage. It continues to rely on the common law definitions. Much as one applauds the widening of the concept of injurious affection to include a wide spectrum of claims from persons who are adversely affected by public works, regardless of whether their land is actually taken, common law purists will regret that the Ontario legislature saw fit to use the common law terminology. It might have been preferable to have renamed it as, say, "adverse affection", to signify a departure from an expression which has caused so much difficulty.

XVI. Arbitration Settlement

By and large Canadian jurisdictions prefer to settle disputed claims to compensation by means of arbitration. Australian jurisdictions now show a clear preference for the settlement of disputed claims by courts of law. In the nineteenth century the trend was in favour of arbitration but this method is only available to a limited extent in Tasmania and New South Wales and it is not the usual way in which claims are settled in both those states.[48] In both Canada and Australia compensation is sometimes determined by administrative tribunal or board. For example, in Victoria claims under 10,000 dollars are determined by a Valuation Board of Review which consists of a chairman (a barrister or a solicitor or a person having valuation experience) and two members from a panel of persons who are qualified valuers. Claims over the value of 10,000 dollars are determined by the Supreme Court.[49] The merits of arbitration vis-a-vis the court process have been argued cogently elsewhere. The Australian thinking would appear to be that compensation should be determined in the main by well-defined legal principles and that this can be best undertaken by a court of law.

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[47] 38 D.L.R.2d 752 (Man. 1963).

[48] Lands Resumption Act 1957, *as amended* by Statute Law Revision Act 1958 (Tasmania); and Public Works Act, 1912 (New South Wales No. 45).

[49] Valuation of Land (Appeals) Act 1965, No. 7276 Acts of Parliament, Victoria; Valuation of Land Act 1960, No. 6653, Acts of Parliament, Victoria.

The process of arbitration suggests that the principles of law are subservient to the primary aim of reaching a just solution. One wonders, however, whether the control exercised by the superior courts in Canada over arbitral proceedings is not in fact virtually identical to the control exercised over inferior courts. Take, for example, the Supreme Court's judgment in *Municipality of Metropolitan Toronto v. Loblaw Groceterias Co.*[50] where twenty-five acres of land had been expropriated in the centre of an older portion of the City of Toronto on which the claimant company had planned a shopping plaza. In determining the value of the land there were, according to the evidence, two possible approaches: the comparative method, which involves a consideration of actual sales in the neighbourhood of similar land, and the residual method, which, in short, means valuing the land in terms of its potential for development as a shopping centre. The latter method of valuation gave the land a much greater value. The arbitrators preferred the comparative method but the Court of Appeal for Ontario preferred the residual method. The Supreme Court also preferred the residual method but did not like the Court of Appeal's application of the method and varied the award from 1,300,000 dollars to 832,300 dollars. The figures indicate the importance of the subject. The Supreme Court was, in effect, directing arbitrators on how, in future, land should be valued in such circumstances. Arbitrators, in this instance a county court judge, were in fact being instructed on which method of valuation to adopt and how to apply it. There can be no quarrel with this. The formidable sums of money at stake when land in cities is expropriated demands that the valuation be determined according to known, established principles. It is true that England prefers to resolve these matters in its land tribunals, but principles of law can best evolve through their application in inferior courts under the proper appellate control of the superior courts. They can be applied with greater certainty through courts of law than through arbitral bodies. The precise control which appellate courts are prepared to exercise over arbitral proceedings have often been the subject of discussion in the courts. In *University of Toronto v. Zeta Psi Elders Ass'n of Toronto*[51] Mr. Justice Spence, in a divided Court, spoke of the need to determine whether the arbitrator had proceeded on some incorrect principle or overlooked or misapprehended some material evidence of fact. In other words, its authority to review arbitral proceedings is similar to that of a superior court over an inferior court. Such cases as *Re Jupiter Estates Ltd. & Greater Victoria School Trustees*[52] leave the impression that the question of appellant jurisdiction to correct errors of law by arbitrators is not a mere academic problem.

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[50] 21 D.L.R.3d 551 (Sup. Ct. 1971).

[51] 2 D.L.R.3d 625 (Sup. Ct. 1969).

[52] 56 D.L.R.2d 414 (B.C. 1965).

XVII. RELOCATION

Section 18 of the Expropriations Act 1968-69 of Ontario takes into account to a limited extent the problem of relocation under the heading of disturbance. The Australian courts have followed English precedent[53] in limiting the principle of reinstatement to the valuation of property in situations where there is no ready market for the land and where the owner manifests a genuine desire to relocate himself elsewhere. It is a subject which received considerable attention in *Birmingham City Corp. v. West Midland Baptist (Trust) Ass'n*[54] both in the House of Lords and in the Court of Appeal, in respect of the relocation of a church. The leading authority in Australia, *The Minister of State for Army v. Parbury Henty & Co. Pty. Ltd.*,[55] is in accordance with the English principles. The plight of the unfortunate claimant in *D'Amico v. Shire of Swan-Guildford*[56] illustrates the narrowness of the principle. In this case an Italian migrant bought a quarter-acre block of land in 1963 for 2,800 dollars. At that time the land contained a brick building with a corrugated iron roof which had been condemned as unfit for habitation. The migrant renovated and extended the house and although it retained an unpromising appearance it was habitable. The land was expropriated and valued at 7,500 dollars. To this was added 10% solatium (permitted by statute). But the migrant contended that to purchase a similar old house and renovate it in similar fashion would cost about 11,000 dollars. But on a strict interpretation of the statutory provisions, the Supreme Court of Western Australia rejected this contention. If the court had adopted the *Diggon-Hibben* test[57] the migrant might have received a sum which would have enabled him to relocate himself in a similar manner. The *Diggon-Hibben* test is; what would the occupier in these circumstances reasonably pay for the property rather than be ejected from it? In a dissenting judgment Mr. Justice Cartwright said in *Frei v. The Queen*:

> It seems to me that the answer to this question is that he would pay such amount as he would have to pay to obtain a comparable property in the same locality and in addition thereto such amount as would cover the loss which he would inevitably suffer during the period necessary to bring the new property into a state of productivity equal to that of the old.[58]

Such a proposition makes good sense, but has not, alas, found acceptance.

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[53] See Barnsley, *Equivalent Reinstatement as the Basis of Compensation for Compulsory Acquisition*, 26 Convey. (n.s.) 425 (1962); Millspaugh, *Problems and Opportunities of Relocation*, 26 LAW & CONTEMP. PROB. 6 (1961).

[54] [1970] A.C. 874 (H.L. 1969); the case was concerned with the date of acquisition and in this respect has little significance in Canada or Australia where there are statutory provisions establishing the date on which compensation is to be assessed.

[55] 70 Commw. L.R. 459 (Aust. High Ct. 1945).

[56] [1969] West. Austl. 183.

[57] [1949] Sup. Ct. 712, [1949] 4 D.L.R. 785.

[58] [1956] Sup. Ct. 462, at 467, 3 D.L.R.2d 305, at 309.

Valuation of property is difficult. Expert appraisers can submit wide-ranging estimates. There are many occasions when the problem is better solved in terms of what it would cost to purchase a similar property in like condition to that expropriated. One would dearly like the Australian courts to move in this direction but at the present time there is no indication that the courts will give the principle a wider application. Section 25(*i*) of the Land Acquisition Act 1969 of South Australia simply reflects the common law position, *i.e.* where there is no ready market for the land. In the days when the wide open spaces of Canada and Australia were there for the mere asking the principle of relocation was unimportant. But with the bulk of the population now crammed into teeming cities the problem is very different. Relocation difficulties are very real.[59]

XVIII. Communal Native Title

To those with a historical pang of conscience at the position of the Indians' title to land in Canada and the position of the Aborigines in Australia, there are those who would argue that the decision in *Calder v. Attorney-General of British Columbia*[60] unduly influenced the decision in *Milirrpum v. Nabalco Pty. Ltd.*[61] In *Calder*, the view was taken that in the absence of treaty Indian tribes have no communal title except as can be shown by prerogative or legislative act. A claim for expropriation compensation is of course dependent upon the claimant establishing a good title to his land. In *Milirrpum*, a number of Aborigines claimed that their interests in certain land had been unlawfully invaded by the Government and that mining leases granted to the defendant company were invalid. They contended that they had a communal native title to their land which persisted and must be respected by the Crown and its colonising subjects unless and until they were validly terminated. Mr. Justice Blackburn rejected this contention. In effect, the claim sought to challenge the basis upon which legislation had been enacted, generally a hopeless proposition. Nevertheless, in expropriation law the two cases are of significance in underlying the fact that to establish a claim for compensation, the claimant must establish a title to his land and communal native title is probably insufficient. *Milirrpum* is one of the very few occasions on which an Australian court sought the assistance of a Canadian court in relation to such issues. Not everyone in Australia will wish to pay tribute to this gift because there can be no doubt that if *Calder* had been decided differently, *Milirrpum* might also have led to a markedly different outcome.

XIX. Evidence of Comparative Sales after Expropriation

As in Australia, the method of valuation of land by means of the comparative method is the one that the courts like. On the question

[59] *E.g., Re* Gray Coach Lines Ltd. and City of Hamilton, [1971] 2 Ont. 689.

[60] 13 D.L.R. 3d 64 (B.C. 1970).

[61] 17 F.L.R. 141 (N.T. Sup. Ct. 1971).

of whether evidence of sales of comparative land which occur after the date of the expropriation may be submitted, the Supreme Court held in *Tabco Timber Ltd. v. The Queen*[62] that such sales may be admitted. In *Woollams v. The Minister*[63] it was held in New South Wales that there is no principle of law which requires the court to reject completely the evidence of sales to the authority in the same area shortly before and shortly after the relevant date, even if such evidence should be regarded with caution. This accords with the sentiments expressed in *Re McCain and City of Saint John*[64] where it held that such evidence is relevant provided the sale is free from extraneous factors and made before prices change materially as the result of the expropriation. Some of the earlier Australian cases did not admit such evidence, but in *March v. City of Frankston*[65] the emphasis was put on the need to examine the particular circumstances surrounding each particular case. Clearly there is judicial accord in both nations on this aspect of valuation.

XX. Legal and Valuation Expenses

When he receives a notice of intention to expropriate the land owner is likely to realise that he has little chance of arguing with the actual decision to expropriate. His primary concern is generally with the payment of compensation. He may have his own ideas on the value of the property but it is probable that he does not possess the qualifications to make an expert appraisal of the land's value. Almost certainly he will need to have it valued, either to make a claim himself, or to know whether to accept the expropriating authority's offer. Again, it is unlikely that he will be familiar with the actual procedure that will be followed. A normal notice of intention to expropriate may make simple reading to a lawyer but it can cause mystification to many laymen. In short, he needs to consult a lawyer on his legal rights and on the procedure which he should adopt. The majority of expropriation statutes do not make it possible for the claimant to claim legal and valuation expenses in connection with the preparation of a claim. The subject is not, for example, expressly provided for in the Expropriations Act 1968-69 (Ontario) or in the Land Acquisition Act 1969 (South Australia).

The English Court of Appeal admits of such expenses. In *Judge Lee v. Minister of Transport*,[66] it was held to be a direct and natural outlay consequent upon the compulsory acquisition. However, a less liberal line has been taken by the Australian courts. In *Duncan v. Minister for Education*[67] Mr. Justice Barber held that the costs of valuation and legal costs incurred by a claimant in response to a notice of intention to expropriate are not to be

[62] 15 D.L.R.3d 748 (Sup. Ct. 1970).
[63] 75 W.N. (N.S.W.) 103 (Land and Valuation Ct. 1957).
[64] 47 D.L.R.2d 164 (N.B. 1964).
[65] [1969] Vict. 350 (Sup. Ct. 1968).
[66] [1966] 1 Q.B. 111 (C.A. 1965).
[67] [1969] Vict. 362 (Sup. Ct. 1968).

treated as part of the compensation payable as part of the claimant's costs. The Supreme Court of Canada does not seem to have had the opportunity to consider this issue in recent years, but Chief Justice Ilsley in *Re City of Halifax and Paton*[68] thought that the fee of the expropriated owner's valuator could not be added to the compensation awarded but is rather a matter of taxation of costs. Yet, it is not truly part of the expenses in preparation for litigation. The English view is more accurate and there is a case for arguing that express provisions should be made in the expropriation statutes.

XXI. Notices

The contents of notices of expropriation or intention to expropriate are generally left to the good sense of the expropriating authority. Not many statutes prescribe the use of a statutory form; nor do they often state what a notice must contain. An exception is section 7 of the Acquisition of Land Act 1967 (Queensland) which lists the information to be included as:

(a) the particular purpose for the land to be taken is required;

(b) a description of the land to be taken;

(c) the person to whom the notice is directed;

(d) his right to make an objection to the taking within 30 days;

(e) his duty to state the grounds for his objection in writing;

(f) his duty to state whether he desires to be heard in support of his written objection; and

(g) a statement that the authority is willing to negotiate the terms of an agreement to acquire.

The section does not, perhaps go far enough, but it is possible to go to the opposite extreme and cram the notice with too much information. Perhaps some indication ought to be given of the financial ability of the expropriating authority to pay and in the case of a local authority details of the resolution of the council or committee of the council which led to the decision to expropriate. This point is made in an interesting review of the Indian Land Acquisition Act 1894 by Dr. Setalvad.[69] Indeed, some of the defects which he lists in respect of that famous statute, which has survived twenty-five years of independence from British rule, are applicable to statutes in Canada and Australia.

XXII. Expropriation by Private Persons

Canada has gone further in devolving the right to expropriate land to private or quasi-private entitles than Australia. It would seem that a

[68] 25 D.L.R.2d 103 (N.S. Sup Ct 1960)

[69] *A Study into Certain Aspects of the Land Acquisition Act, 1894* 13 J I L I 1, at 14 (1971).

number of universities have the right to expropriate in Canada;[70] they do not in Australia. Likewise, a number of pipeline companies have been given the right to expropriate in Canada.[71] This is unknown in Australia, and with the present emphasis on the need for conservation of the environment it is difficult to imagine a state government devolving this power to a privately-owned body.

XXIII. Parliamentary Responsibility

One of the innovations introduced by section 12 of the Lands Acquisition Act 1955 of the Commonwealth has not so far caught on in other jurisdictions. Under this section all notices of expropriation have to be laid on the table of both the House of Representatives and the Senate. Either House of the Parliament has power to pass a resolution that the notice shall be void and of no effect. It does not require a resolution of both Houses; a resolution of either suffices to quash an order of expropriation. This admirable provision places responsiblity clearly upon the legislature to ensure that excessive expropriation is brought to the notice of the political forum. It means that any aggrieved person can bring the matter to the attention of his Member of Parliament and in extreme cases he can move a resolution nullifying the notice. At the same time one has misgiving at every notice being tabled. It may become a mere formality. It is inappropriate that a national legislature should have to be informed of every few feet that may be expropriated for the extension of a building. However, Commonwealth expropriations tend to be for substantial projects and minor expropriations, for example - road widening purposes, are not the responsibility of the Commonwealth.

The section draws attention to a major defect in many of the expropriation statutes, namely the lack of overall examination of the whole field of expropriation. Each year substantial areas of land are expropriated for a wide range of government purposes. Such evidence as is available suggests that it is increasing rather than diminishing. Yet there is seldom overall control or responsiblity for the far-reaching implications of this trend. A single government department may exercise responsibility for the mechanics of expropriating land but there is seldom a systematic series of reports to the legislature requiring scrutiny and debate. With attention devoted to the whole concept of ecology and the environment, there would seem to be a need for all expropriations to be brought under the control and supervision of the department responsible for the environment.

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[70] *E.g.*, The University Expropriation Powers Act, 1965, Ont. Stat. 1965 c. 136.

[71] *E.g.*, Re Murphy Oil Co. and Dau, 7 D.L.R.3d 512 (Alta. 1969); The Pipe Line Act, 1958, Alta. Stat. 1958 c. 58.

XXIV. Rate of Interest

The award of interest on the sum of compensation is the subject of differing provisions in the expropriation statutes. In England, the practice is to alter the rate of interest by regulation as the rate of interest fluctuates in the money market.[72] Section 63(*e*) of the Public Works Act 1902 of Western Australia states that the rate of interest shall be the rate ruling as at the date of the expropriation in respect of overdraft accommodation granted by the Commonwealth Trading Bank. A number of the statutes prescribe a fixed rate, and it is possible to find an expropriation statute which does not provide for the payment of interest. The Public Works Act 1928 of New Zealand makes no provision for the payment of interest, but it seems that interest is awarded as a matter of practice.[73] Curiously, section 104(1)(*d*) of that Act makes provision for the payment of interest on the amount of compensation ascertained by the court in respect of any Maori land. On the whole, it makes better sense to allow for fluctuating rates of interest and Western Australia deserves to be emulated.

XXV. The Enhancement Principle

The Privy Council's decision in *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendant of Crown Lands*[74] has long been accepted in Australian law and each of the expropriation statutes[75] in both nations gives expression to the principle whereby any increase in value to the land which is entirely due to the scheme underlying the expropriation is to be discounted. The principle was approved in *Davy v. Leeds Corp.*[76] by the House of Lords. The English Court of Appeal discussed the subject further in *Wilson v. Liverpool City Council.*[77] Lord Denning said:

> A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded as at the time when the value is to be assessed.[78]

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[72] *See* The Acquisition of Land (Rate of Interest after Entry)(No. 2) Regulations, S.I. 1971/673 made under Land Compensation Act, 1961, 9 & 10 Eliz. 2, c. 33 & 32(1), which fixes the rate of interst at eight per cent.

[73] Marshall v. Commissioner of Taxes [1953] N.Z.L.R. 335 (Sup. Ct. 1952).

[74] [1947] A.C. 565 (P.C.) *applied in* The Queen v. Fraser, 23 D.L.R.2d 94 (Exch. Ct. 1960) by the Exchequer Court and discussed by Mr. Justice Judson in a dissenting judgment in Fraser v. The Queen, 40 D.L.R.2d 707 (Sup. Ct. 1963), at 718 and Mr. Justice Ritchie at 723. It was not directly considered in C.N.R. v. Palmer, [1965] 2 Can. Exch. 305 (1964) where enhancement was in issue. Nor was it considered in *Re* Eix and County of Waterloo, 37 D.L.R.2d 290 (Ont. 1962), by the Ontario Court of Appeal where it was held that where land is expropriated under the Highways Improvement Act, Ont. Rev. Stat. c. 171 (1970) it is wrong to reduce the compensation for such land by reason of advantages of the contemplated highway works for the owner's remaining land. *Pointe Gourde* seems to have received more attention in England than in either Canada or Australia.

[75] *E.g.*, Expropration [*sic*] Act, N.S. Rev. Stat. c. 91, § 11 (1954); *see* The Queen v. Wolfe, 46 Mar. Prov. 111.

[76] [1965] 1 All E.R. 753 (H.L.).

[77] [1971] 1 All E.R. 628 (C.A. 1970).

[78] *Id.* at 634.

The principle is easier of enunciation than application. It is a tortuous process attempting to value expropriated land on the basis of its value as if there had been no scheme. The scheme is a reality, whilst the absence of a scheme is a fiction. The House of Lords has now examined the problem further in *Rugby Joint Water Board v. Footfit.*[79] The issue in this case was whether the land should be valued as agricultural land or whether it should be valued as land suitable for use as a reservoir. Because the land had been zoned for the purpose of the scheme prior to the official announcement of the scheme, the House held that the land was to be valued at the higher rate, *i.e.* as land approved for use as a reservoir. Decisions of the House of Lords are treated with respect in both Canada and Australia but for practising lawyers there must be a period of uncertainty to see whether the decision will be followed outside England.

XXVI. Conclusions

Certain conclusions are possible from a survey of some aspects of the law of land expropriation in both Canada and Australia. First, both jurisdictions have retained the basic concepts of fair play to both the expropriating authority and the dispossessed owner which is inherent in English law. Secondly, the newer expropriation statutes which have been enacted in a number of jurisdictions within both countries reveal that the owner has had his position improved in that he is generally given the right to object. He is entitled to be heard. Some of the older statutes do not admit of this right. Thirdly, despite the lack of cross-reference by the courts of both nations on major points of principle, a comparison of the cases does not reveal a significant divergence. In other words the rights of a dispossessed owner to compensation in both nations is, in broad terms, similar. Fourthly, both nations reveal a lack of uniformity in legislation between provinces or between states. There are differences between the Expropriation Procedure Act 1961 of Alberta and the Expropriation Act 1969-70 of Canada, and even more difference between the Public Works Act 1912 of New South Wales and the Lands Resumption Act 1957 of Tasmania. Uniformity is unlikely to be achieved within either nation, and is therefore a remote and improbable hope for those who would like to preserve a uniform common law within the old British Empire. Lastly, a comparative study does reveal useful innovations and improvement which commend themselves for adoption elsewhere. No one has yet produced the ideal expropriation statute which compels its enactment in other jurisdictions. The new statutes are an improvement but a lot of hard work needs to be undertaken in producing a statute that will enable the government to operate smoothly and efficiently and at the same time ensure that the dispossessed land owner gets a fair deal.[80] Unforseen circumstances arise and expropriation law demands the existence of a code which will confer upon the court the right degree of freedom to prescribe a just solution.

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[79] [1972] 1 All E.R. 1057 (H.L.)

[80] See, for example, *Draft of Model Eminent Domain Code, Report of the Committee on Condemnation Law*, 2 Real Prop. Prob. & Tr. J. 365 (1967). Since this article was written the Land Compensation Bill 1972/73 of England has made its appearance. Clearly, its provisions will deserve study in both Canada and Australia.