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TITLE LIMITS IN WESTERN CANADA
CONSTRUCTION RIGHTS AND THE ACQUISITION OF LAND

by

© FRANCIS CARADOC ROSE PRICE

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled PIPE LINES IN NORTH CANADA - CONSTRUCTION PERMITS AND THE ..... submitted by [illegible] PRICE ..... in partial fulfilment of the requirements for the degree of Master of LAWS.

Supervisor

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ABSTRACT

Construction of a pipe line cannot simply commence at the whim of the relevant pipe line company. Instead a great deal of forward planning has to be carried out and a number of problems have to be solved. This thesis is concerned with the problems which arise in the period before construction and in particular those problems involved in the obtaining of permission to construct the pipe line, and in the acquiring of land or an interest therein for the pipe line right-of-way. Other problems discussed relate to the various types of pipe lines which are affected by different legislative provisions, to the classification of the pipe line company's right-of-way as an interest in land and the protection of that interest by registration thereof, and to the differences between a voluntary grant of the right-of-way and an expropriation order. This thesis presents a comparison of the relevant legislation in the four western Provinces, and shows the differences, often substantial, in the procedural and regulatory provisions of the four Provinces. The different data required by each of the Provinces when a company applies for a construction permit is compared, and the validity of objections to the permit procedure is examined. Finally the thesis considers the provisions of the provincial statutes relating to expropriation. Alberta and

Manitoba have both adopted a new approach to expropriation and compensation. The new system will be examined to evaluate its success in overcoming the problems which arose under the old legislation, and to see whether the new legislation has itself brought new problems which require solutions.

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The Law is stated as available to me on 30th June, 1975.

F.C.R.P.

Note: The Pipeline Act, 1975, being Bill No. 29 of the Legislative Assembly of Alberta received Royal Assent on June 25th, 1975. The new Act is to come into force on date to be fixed by Proclamation. As at 30th July, 1975 no Proclamation has been made.

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I. INTRODUCTION

A. SCOPE OF THE THESIS

Before the first oil or gas can flow through a pipe line,[1] a great deal of forward planning and work has to be done. It is not simply a matter of constructing a pipe line, pressing a button and watching the substances flow. Indeed the procedure before construction even begins may present more problems and take a longer time than the construction itself. It is with the problems which arise in this period before construction that this thesis is primarily concerned.

Throughout any discussion of the regulation of pipe line plans and operations, one must remember the different interests that have to be balanced against each other - the interests of the pipe line company, the interests of the individual owner whose land is or will be affected, and the interests of the community as a whole. All these are important elements to be considered in determining how the costs and benefits of pipe line

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1. The spelling of "pipe line" varies with the legislation of every jurisdiction. The relevant legislation in Alberta and Manitoba is The Pipe Line Act, in British Columbia it is The Pipe-Lines Act, in Saskatchewan it is The Pipe Lines Act, and the federal legislation refers to "pipeline" as a single word. In this thesis, the spelling adopted by Alberta and Manitoba, viz., "pipe line", is employed, except where reference is made to a particular province's legislation, when the spelling favoured by that province is used.

operations are to be shared and in determining the nature of the legislation and other regulatory measures which will effect this proper sharing.

Chapter I outlines the scope of the thesis and identifies the type of pipe line with which the thesis is concerned. Flow lines and service lines, which are owned by the producer or producers within a given field,[2] are treated differently by provincial legislation from those pipe lines used to carry oil or gas long distances from the producers to the consumers or refineries. It is with these latter pipe lines, transmission or trunk lines as they are called,[3] that this thesis is concerned. Gathering lines create further problems since it is sometimes not clear whether they are to be treated as flow lines or as transmission lines. Finally in Chapter I, the interprovincial and international pipe lines owned by companies which are necessarily federally incorporated receive brief treatment. These pipe lines are not affected by provincial legislation

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2. Flow lines are used to transport the oil (or gas) from the well-head to the separator, tank or tank battery, dehydrator, scrubbing plant and similar installations. Service lines (often included in the legislative definitions of flow line - see Alta., s.2(3)) conduct oil, gas or water to disposal points or to points where the substances can be used in the producing operations of a well.

3. Williams and Meyers, Manual of Oil and Gas Terms, (3d ed.), 1971, pp. 475 and 477. In this thesis the term "pipe line" will be used to mean a transmission line, and the term "transmission line" will only be used where a distinction has to be made between transmission lines and other types of line.

nor controlled by provincial authorities, and it is not proposed to examine them in any detail.

Chapter II examines the requirement in all four of the western provinces that a permit or certificate be obtained before pipe line construction may begin. It can be seen that the conditions which must be met and the data which must be provided differ from province to province. In some cases these differences result in the omission of beneficial provisions and a lack of information to the landowner affected by the proposed pipe line. The major objection to the permit procedure is the arbitrary manner in which it is carried out. Chapter II also examines the validity of this objection in the light of the essentially political nature of the decision to grant or refuse a permit.

Once the construction permit is granted, the landowner's rights, until recently, have been restricted to a right to compensation for the land taken. Chapter III examines the judicial decisions on the landowner's right to object to the location of the pipe line and the important effect of recent legislation in Alberta on this right. Different legislation in the other three western provinces gives varying degrees of protection to the landowner's rights in those provinces, and a comparison of this legislation is made.

Even before the permit has been granted the pipe line company may negotiate with landowners along the

proposed route and may purchase the rights-of-way that will be required. Should expropriation of a right-of-way be required, the company is not allowed to commence expropriation proceedings until a construction permit has been granted. Not only are the procedures followed in obtaining a voluntary grant entirely different from those followed when expropriating, but there are several different consequences which may ensue depending on the method used to acquire the right-of-way. These different consequences are examined in Chapter IV. In addition, where the right-of-way is acquired without resort to expropriation, the protection of that interest under The Land Titles Act may in certain cases depend on the legal nature of a pipe line right-of-way. Whether a pipe line right-of-way is a recognized interest in land is still open to some doubt in Alberta and Saskatchewan, and Chapter IV examines the legal nature of such a right.

At this point of the thesis it will be assumed that a voluntary sale of the right-of-way cannot be negotiated and that expropriation is required. The relevant Acts in Western Canada show a variety of approaches to expropriation. Alberta and Manitoba have recently enacted completely new legislation which introduced new procedures to be followed and new concepts of compensation. British Columbia, on the other hand, has antiquated expropriation provisions which afford little protection to the landowner and are of still less use in determining the

principles on which compensation is to be based. The legislation in Saskatchewan falls somewhere in between the two extremes, as it has some new-style provisions superimposed on legislation that was similar to that of British Columbia.

In considering the expropriation legislation, attention is directed to two separate aspects: first, the expropriation itself (Chapter V) and, secondly, the compensation for the land taken (Chapter VI). Because of the fundamental differences between the old and new approaches to expropriation, comparison in any detail would be meaningless. Instead the approaches are examined separately and major differences between the approaches are drawn from this examination. As well as discussing the marked effect that the new legislation has had on expropriation principles and procedures, special attention is paid to the problems that have occured under similar legislation in other provinces and to the anticipated success (or failure) of the legislation of the four western provinces in overcoming such problems.

Chapter V, dealing with the expropriation itself, looks at the advantages to the landowner of the new legislation, especially in relation to the notice given to him concerning a proposed expropriation, his opportunity to object to the expropriation and to request an inquiry into the proposed scheme and his ability to retain possession of the land until the expropriation is officially

approved. Chapter VI discusses the new principles of compensation, the guidelines established for the assessment of the compensation payable and the additional payments by the pipe line companies in the form of costs, legal and other fees, and interest.

Finally, Chapter VII considers the whole subject of pipe lines in terms of the success or failure of the legislation in its attempt to balance the conflicting needs of the pipe line companies, the individual landowners and the community at large. The major problems encountered in the course of the thesis are summarized and consideration is given to proposals and possible solutions to these problems.

B. DEFINITION OF PIPE LINE

1. Flow Lines and Service Lines

Section 2 (21) of The Pipe Line Act of Alberta[4] reads as follows:

> "Pipe line" means a flow line, gas line, oil line, mineral line or secondary line or a distribution line or private line within the meaning of Part 4;[5]

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4. R.S.A. 1970, c. 275.

5. It should be noted that each type of line includes installations connected therewith. The Acts of the other Provinces also include connected installations.

With so many different types of pipe line existing, it is important to identify those types of pipe line, viz., those included in the term "transmission line", with which this thesis is concerned. Flow lines, distribution lines and private lines will be dealt with briefly but only to show that they are for the most part treated separately from transmission lines by the provincial statutes.

In Alberta, s. 5 of The Pipe Line Act prohibits the construction of a gas line, oil line or secondary line unless the company is the holder of a permit. Section 39 makes this requirement applicable to a distribution line and a private line (as defined in s. 38). Only a flow line is exempted from the provisions of The Pipe Line Act and this exemption is effected in a circuitous manner by s.10(4) and s. 13 of the Act. Section 10(4) states that a company proposing to construct a flow line is deemed a permittee, while s. 13 states that the deemed permittee of a flow line is deemed to be the holder of a licence.[6] According to

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6. Section 2(3) of The Pipe Line Act defines "flow line" as follows:
"flow line" means a pipe for
(i) the transmission of oil from a well to a tank or tank battery, or
(ii) the transmission of water obtained from oil or gas for disposal to other than an underground formation, or
(iii) the transmission of gas or water to be used in the drilling or operating of one well,
and includes installations in connection therewith;
Since the operator of the flow line will have already obtained a licence for the well under the Oil and Gas Conservation Act, R.S.A. 1970, c.267, a further permit or licence under The Pipe Line Act would be superfluous. Accordingly the operator is deemed to be a holder of a permit and licence.

ss. 41(d) and 42(1), expropriation and compensation procedures for all lines except flow lines are governed by The Expropriation Act.[7] Where land has to be expropriated for a flow line, the company has a choice of expropriation procedures. It can either follow s. 41(b) of The Pipe Line Act and apply to the Surface Rights Board for a right of entry order under The Surface Rights Act,[8] or it can follow s. 41(d) or s. 42(1) and apply to expropriate the interest under The Expropriation Act. The comparative speed of the procedure under The Surface Rights Act will almost invariably dictate that proceedings be taken under that Act wherever possible.[9]

In British Columbia, the legislation is somewhat confusing. Section 2 of The Pipe-lines Act[10] defines separately the words "pipe-line", "company pipe-line" and "flow-line".[11] From these separate definitions one must

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7. S.A. 1974, c.27.

8. S.A. 1972, c.91.

9. Where a proposed flow line is on land that is owned by someone other than the owner of the land on which the well is situated, The Surface Rights Board prefers expropriation proceedings to be undertaken. Where the proposed flow line is on the property on which the well is located an application for a right-of-entry order is preferred.

10. R.S.B.C. 1960, c.284.

11. Section 2 (1) of The Pipe-lines Act defines the various types of pipe line as follows:
"company pipe-line" or "line" means a pipe-line for the transportation of oil, gas, solids, or water that a company under this Act is authorized to construct or operate, and includes all ... works

presumably infer that company pipe-lines (transmission lines) are to be treated differently from flow-lines. However, the definition of "pipe-line" includes both company pipe-lines and flow-lines, and the subsequent indiscriminate usage of "pipe-line" and "company pipe-line" causes further interpretation problems.[12] Section 17 of The Pipe-lines Act provides for the appropriation of land required for a pipe-line, and, under s. 17(3), compensation is to be assessed according to the relevant provisions of The Railway Act.[13] Flow-lines, however, are treated separately by s. 17(4)

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continues from last page

connected therewith;

"flow-line" means a pipe-line serving to interconnect wellheads with separators, treaters, dehydrators, field storage tanks, or field storage batteries;

"pipe-line" means a continuous conduit between two geographical locations through which oil or gas or solids is transported under pressure, and includes a company pipe-line, all gathering and flow-lines used in oil and gas fields for the transmission of oil and gas, all water injection pipe-lines or other pipe-lines used to transmit water at working-pressures in excess of five hundred pounds per square inch in oil and gas fields, all transmission-lines used to transmit gas at working-pressures in excess of one hundred pounds per square inch, gauge, from a company pipe-line to the distribution system of a public utility or a gas utility, but shall not include piping used in a gas distribution-main as defined in the Gas Act:

12. Compare s. 10(1) with s. 10(2), s. 12(1) and (6) with s. 12(2), and note s. 23 (1) and (2).

13. R.S.B.C. 1960, c. 329.

which states:

> Part III of The Petroleum and Natural Gas Act, 1965,[14] in so far as its provisions are not inconsistent with this Act, applies to flow-lines and necessary works and undertakings connected therewith.

Section 19(4) of The Petroleum and Natural Gas Act provides the factors to be taken into consideration by the Mediation and Arbitration Board when determining the amount to be paid to an owner whose lands are entered and used for the development and production of oil or gas. Different considerations apply in respect of these operations and they are properly dealt with in a separate Act. Accordingly, while The Pipe-lines Act does not make any express differentiation between company pipe-lines and flow-lines, one is left to infer from ss. 17(3) and (4) and from s.2 that flow-lines are to be treated separately from company pipe-lines.

In Manitoba, The Pipe Line Act[15] and The Gas Pipe Line Act[16] deal with pipe lines for oil and gas respectively. Section 2 of The Pipe Line Act expressly excludes flow lines from the definition of pipe line, so that a permit is not required for construction or operation of flow lines. The Gas Pipe Line Act differentiates

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14. S.B.C. 1965, c. 33. The Petroleum and Natural Gas Act Amendment Act, S.B.C. 1974, c. 61, repealed Part III and substituted a new Part III, effective 1st July 1974. Flow-lines are no longer expressly mentioned, but seem to be included in the purposes for which the use of the land may be granted: see for instance s. 18(1).

15. R.S.M. 1970, c. P70.

16. R.S.M. 1970, c. G50.

between gas pipe lines and gas transmission lines,[17] and sets out different application procedures for each. The definition of a gas pipe line seems to include pipe line used in connection with drilling and production operations and where applicable, pipe line which is part of a distribution system. These lines are not subject to the same requirements under Part II as gas transmission lines.

Saskatchewan's Pipe Lines Act[18] exempts flow lines, service lines and gathering lines from the application of the Act.[19] Before 1968, a company requiring an easement for one of these lines had no power to expropriate the land in the absence of the owner's permission, but had to apply to the Minister of Mineral Resources for an order declaring that Part II of The Pipe Lines Act applied in that particular case. This problem has now been overcome, as far as flow lines and service lines are concerned, by Part IV of The Surface Rights Acquisition and Compensation Act.[20] Although there is no clear statement in The Pipe

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17. See s.2, Gas Pipe Line Act. Gas transmission lines are gas pipe lines which have been specially designated by the Public Utilities Board under s. 13. Section 13 thus permits control by the Minister of Public Utilities and the Public Utilities Board of the construction and operation of transmission lines, while flow lines, service lines or distribution lines which are not designated under s. 13 are not subject to all the requirements of Part II of the Act.

18. R.S.S. 1965, c. 413.

19. Ibid., s. 26(1).

20. S.S. 1968, c. 73.

Lines Act to the effect that flow lines and service lines come under The Surface Rights Acquisition and Compensation Act, this was obviously the intention of the legislature. A brief perusal of The Surface Rights Acquisition and Compensation Act confirms that fact, and, since the provisions of the latter statute prevail in the case of conflict with The Pipe Lines Act,[21] the vagueness of The Pipe Lines Act is of little concern at this point, but will be examined below.[22] As far as flow lines and service lines are concerned, The Surface Rights Acquisition and Compensation Act provides a complete procedure for the expropriation of the required interest and the assessment of compensation.

2. Gathering Lines

In Alberta, British Columbia and Saskatchewan, gathering lines (or secondary lines as they are called in the Alberta Pipe Line Act) are distinguished from other types of flow line. Basically, their purpose is to collect oil or gas within a given field or area. Are they to be treated in the same manner as flow lines or are they to be considered as transmission lines ? This question arose in Saskatchewan in Producers Pipeline v. Vilcu,[23] where

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21. Surface Rights Acquisition and Compensation Act, s.5.

22. See Chapters IV, V, and VI.

23. [1971] 2 W.W.R. 366.

counsel for the landowner raised a preliminary objection that the pipe line that had been laid was a gathering line rather than a transmission line, and that accordingly The Surface Rights Acquisition and Compensation Act (which at the time of trial (1968) was passing through the Saskatchewan legislature), and not The Pipe Lines Act, was properly applicable in respect of compensation. Rutherford, D.C.J. looked at the definition of "flow line" in The Surface Rights Acquisition and Compensation Act[24]:

> "Flow line" means a pipe or conduit of pipes used for the transportation, gathering, or conduct of a mineral from a well head to a separator, treater, dehydrator, tank or tank battery or surface reservoir.

His Honour was of the opinion that gathering lines were included in this definition and were therefore subject to The Surface Rights Acquisition and Compensation Act.[25] With the greatest respect for His Honour's opinion, it is submitted that the "pipe ... used ... for the ... gathering ..." referred to in s.2(d) of The Surface Rights Acquisition and Compensation Act is not the same type of pipe line as a "gathering line" as defined by The Pipe Lines Act[26] to mean "a pipe line used for the collection of oil or gas within a field as defined in The Oil and Gas Conservation Act". Williams and Meyers[27] define "flow lines" as "pipe

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24. S.S. 1968, c.73, s.2(c).

25. [1971] 2 W.W.R. 366, 368.

26. R.S.S. 1965, c.413, s.2(d).

27. Manual of Oil and Gas Terms, 3d ed., (1971), 177.

lines from a flowing well to a storage tank" and cite the example of s.2(c) of The Surface Rights Acquisition and Compensation Act. This term does not include "gathering lines" which are defined by the learned authors as "pipes used to transport oil or gas from the lease to the main pipe line in the area".[28]

If, as is submitted, gathering lines, as defined by s.2(d) of The Pipe Lines Act, are not included in the definition of flow lines in s.2(c) of The Surface Rights Acquisition and Compensation Act, then s.26(1) of The Pipe Lines Act is still applicable to gathering lines. Section 26 (1) states:

> This Act [except certain sections that are not relevant] does not apply with respect to flow lines, service lines, and gathering lines and real property required therefor.

The result of this section is that a company that finds it cannot negotiate the purchase of land for its gathering line cannot expropriate the interest since the expropriation provisions of the Act do not apply. The only solution is for the company to apply to the Minister of Mineral Resources under s.26 (2) for an order declaring that Part II of the Act (giving power to expropriate) shall apply to the company. This sub-section received heavy criticism from Judge J.E. Friesen in his Royal Commission Report on Surface Rights and Pipeline Easements:

> To grant power to a public official to determine when a portion of a statute

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28. Ibid., at 197.

> should cease to apply to a given set of circumstances, or when that statute should be held to apply or be ordered to apply, places the owner in a position of uncertainty and confusion.[29]

It is most regrettable that the intention of the legislature, viz, to bring gathering lines under The Surface Rights Acquisition and Compensation Act,[30] does not appear to have been put into effect by reason simply of poor draftmanship.

It seems however that the practice in Saskatchewan is to treat gathering lines as flow lines and to submit to the jurisdiction of the Board of Arbitration under The Surface Rights Acquisition and Compensation Act. It remains to be seen whether the validity of this practice will be challenged. As the legislation stands at present, a gathering line is neither a flow line and subject to the Surface Rights Acquisition and Compensation Act, nor a transmission line which must conform to the provisions of The Pipe Lines Act [redacted] to the obtaining of a construction permit. Judge [redacted] commented on this state of affairs:[31]

> There are no [redacted]ations respecting such lines

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29. Report of the [redacted]al Commission on Surface Rights and Pipeline Easem[redacted]ts, c.7 at p. 8.

30. See for instance the Official Report on Debates and Proceedings of The Saskatchewan Legislative Assembly, 1972, at pp. 891, 893.

31. Report of the Royal Commission on Surface Rights and Pipeline Easements, c. 5 at p.5.

> and the owners are left to make the best arrangement they can, and if they fail, the operator applies for and usually obtains an order bringing them within the Act and he then enters and constructs them where he pleases, and abandons them as he sees fit.

Either the inclusion of gathering lines in The Surface Rights Acquisition and Compensation Act or the classifying of them as transmission lines would solve this problem and provide supervision of the proposed line and the land to be taken therefor.

In Alberta, a "secondary line" is by definition not a flow line,[32] and a company proposing to build one must follow the same procedure as must be followed for a gas or oil (transmission)line. Accordingly, the use of the term "pipe line" or "transmission line" when referring to pipe lines in Alberta will include a secondary line.

In British Columbia the definition of "flow-line", which is very similar to the definition in s.2(c) of The Surface Rights Acquisition and Compensation Act of Saskatchewan does not include gathering lines. In addition, the definition of "pipe-line",[33] which distinguishes between a company pipe-line and a gathering line, seems to indicate that a gathering line is not a company pipe-line. Once again the situation occurs where the gathering line is neither a flow line, subject to the right of entry and compensation provisions of Part III of The Petroleum and

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32. Pipe Line Act, s.2(26).

33. See n. 11, supra.

Natural Gas Act nor a company pipe-line subject to the control and administration of the Minister of Transport and Communications.

Having outlined the different statutory approaches to flow lines and gathering lines, it is proposed to leave these special purpose pipe lines and to concentrate on transmission lines which are simply used for the transportation of oil, gas and other associated products.

3. Pipe Lines owned by Federal Companies

Section 2 of The National Energy Board Act[34] defines "pipeline" as "a line for the transmission of gas or oil connecting a province with any other or others of the provinces, or extending beyond the limits of a province ...." Accordingly, once a pipe line is contemplated that will extend beyond the boundary of a single province, the construction and operation of that pipe line come under the control of the National Energy Board.

A preliminary requirement is established by s. 25 of the Act. Only a company (as defined in s. 2) may construct or operate an interprovincial or international pipe line. Section 2 defines "company" as "a person having authority under a Special Act to construct or operate pipelines". This authority under a Special Act was usually obtained, in accordance with s.2 of The National Energy

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34. R.S.C. 1970, c.N-6, as amended by R.S.C. 1970, c.10(1st Supp.), c.27 (1st Supp.), c.10 (2nd Supp.), S.C. 1973-74, c. 52.

Board Act, by means of an Act of the Federal Parliament that authorized "a person named in the Act to construct or operate a pipe line or that is enacted with special reference to a pipe line that a person is by such an Act authorized to construct or operate". Nowadays, for political reasons, it is becoming more common for a company to be incorporated pursuant to letters patent under s. 5.1 of The Canada Corporations Act,[35] and such letters patent constitute the requisite "authority under a Special Act".[36]

However numerous further requirements must be met before this company can begin construction of its proposed pipe line. Under s. 27, no construction may be commenced until a certificate of public convenience and necessity has been granted by the National Energy Board. Once this certificate has been issued the company must submit to the Board for its approval a plan, profile and book of reference of the pipe line and must file the approved documents in the Land Titles Offices of the districts through which the pipe line will pass. Furthermore, under s. 26, the company cannot operate the pipe line until the Board has given leave to open the line under s. 38.

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35. R.S.C. 1970, c.C-2, as amended by R.S.C. 1970, c.10 (1st Supp.), s.3.

36. One example of such a company is Wascana Pipe Lines Ltd. which applied in April 1972 for permission to construct a pipe line. The National Energy Board commented that the application by a private company was unusual but quite proper since Wascana was a company within the meaning of the Act.

Finally, if the pipe line is to be used in the export or import of oil or gas or associated substances, an export or import licence must be obtained from the Board.[37]

Federal legislation not only controls the construction and operation of interprovincial or international pipe lines, but also controls the expropriation of land for these pipe lines and the compensation to be paid for the rights-of-way that are taken. Section 73 and 74 of The National Energy Board Act state the extent of land that may be expropriated, and s. 75 incorporates the expropriation provisions of The Railway Act[38] which provides the procedure to be followed and the manner in which the compensation is to be assessed. The Federal Railway Act bears strong similarity to The Railway Act of British Columbia,[39] and both Acts fail to provide any guidelines to assist the arbitrator in determining compensation.[40] However, as to compensation payable in respect of mines and minerals affected by the pipe line right-of-way, the decision of Crow's Nest Pass Coal Co. v. Alberta Natural Gas[41] has restricted the jurisdiction of the National Energy

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37. National Energy Board Act, s.81.

38. R.S.C. 1970, c. R-2, ss.145-184 and 186.

39. R.S.B.C. 1960, c.329.

40. Compare s.161(2) of the federal Railway Act with s.56(1) of the British Columbia Railway Act. Both Acts simply state that compensation shall be determined in such a way as the arbitrator deems best.

41. [1963] S.C.R. 257.

Board over the determination of compensation to those mines and minerals lying within 40 yards of the pipe line in accordance with s.70 (1) of The National Energy Board Act.[42]

For reasons of space this thesis will not examine further the federal legislation relating to construction of pipe lines and expropriation of land, but will confine itself to provincial legislation in the four western provinces and the effect of that legislation on intraprovincial pipe lines.

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42. See also Dome Petroleums Ltd. v. Swan Swanson Holdings Ltd. [1971] 2 W.W.R. 506, 512, as to the inability of provincial legislation to authorize an expropriation which will affect a right-of-way owned by a federally incorporated company.

II. CONSTRUCTION PERMITS

In all four western provinces, a pipe line company must obtain a construction permit or certificate before it can begin construction of any part of a pipe line. Table 1 (overleaf) makes a comparative analysis of the statutory and regulatory provisions in Alberta, British Columbia, Manitoba and Saskatchewan. Much of the legislation is similar and sometimes identical in all four provinces, and comment is not required on many of the provisions. Some of the sections, however, do warrant closer examination. These have been numbered in Table 1 and will be separately discussed below.

A. THE PERMIT PROCEDURE - POINTS 1 TO 9 IN TABLE 1

1. Manitoba Statutes

It should be noted that Manitoba not only has separate Acts dealing with oil (The Pipe Line Act, R.S.M. 1970 c.P 70) and with gas (The Gas Pipe Line Act, R.S.M. 1970 c.G 50), but also differentiates between gas pipe lines as defined in s. 2(1)(d) and gas transmission lines as designated by the Public Utilities Board under s. 13. Totally different procedures and methods of authorization of construction and operation of the pipe lines are adopted depending on the designation of the pipe line by the Board. For the purposes of comparison with The Pipe Line Act and

TABLE 1

	ALBERTA	BRITISH COLUMBIA	MANITOBA (OIL)	MANITOBA (GAS)[1]	SASKATCHEWAN
Relevant Statute	Pipe Line Act R.S.A.1970,c.275	Pipe-lines Act RSBC 1960,c.284	Pipe Line Act R.S.M.1970,c.P70	Gas Pipe Line Act R.S.M.1970,c.G50	Pipe Lines Act R.S.S.1965,c.413
Amendments	S.A. 1971,c.30; S.A. 1972,c.91	S.B.C.1961,c.46; 1965,c.35; 1967, c.33; 1972,c.43; 1973;c.112	-	S.M. 1971,c.82	S.S. 1972, c.89
Regulations	Alta.Reg.198/58	B.C.Reg.451/59	- [2]	Man.Reg.210/72; 134/73	O.C. 1184/55
Amendments to Regs.		96/63; 225/68; 105/69			O.C. 1735/63
Controlling Authority	Energy Resources Conservation Bd.	Minister designated (Transport & Communications)	Minister of Mines & Natural Resources	Minister of Mines & Natural Resources	Minister of Mineral Resources
Permit required for Construction	s. 5(1)	s.11(a)[certificate]	s. 5	s. 14	s. 7
Contents of Application	s.6; Forms A & B	s.13(1); R.2(1)	s.6	s.15	s.9(1); R.4
Plans, profiles & book of reference	-	s.11(b);s.13;R.4	-	-	R. 18
Copies of Application to other Ministers [4]	-	s.12(3)	s.6(3)	s.15(3)	s.9(3)
Notice of Application [5]	s.7	R.3(3), R.3(4)	s.7	s.16	s.10
Circumstances which Minister shall consider [6]	-	s.12(4)	s.8	s.17	s.11
Advice available to controlling authority [7]	s.9(1)	s.12(4)(a),(b),(c)	s.9	s.18	s.12
Hearings by Board	-	-	-	-	s.36 [8]
Need for Cabinet approval of permit	-	s.5	s.10	s.19	-
Granting Refusal of Permit	s.1	[9]	s.10(2)	s.19(2)	s.13(1)
Decision of authority final	s.10	[9]	s.10(2)	s.19(2)	s.13(2)
Pipe Line Crossings of Highways [10]	ss.23,24,25	s.31 & 6, R.8	ss.13,16(3)	ss.24,27(6)	s.16; R.4(2)(h)
Need for Ministerial Approval	s.24: Minister of Hwys & Transport	s.31: Minister of Transport & Communications	s 13: Minister of Highways	s.24(1): Minister of Highways	s.16: Minister of Hwys & Transport
Other Approval	s.25 Local Authority	-	-	-	R.4(2)(b):Relevant Municipality
Other obstructions or conflicting land uses	s.26 Irrigation s.27 River/Stream s.30 Mines R.7, Pipe Lines	s.31 s.28 Mines	-	Man.Reg.210/72	-
Activities allowed prior to permit:- 1.Entry for Survey [11]	s 5(2)(a);R.3	s 12(2)	s.6(4)	s.15(4)	s.8
2.Purchase of Land [12]	s.5(2)(b); s.41	s.12(2)	s.6(4)	s.15(4)	s.8
Amendments to Permit - by Authority	s.9(2)	ss.12(6), 14	s.12	s.23	s.15
- on Co.'s application	ss.11,12; R.4 [13]	ss.15,16	s.11	s.22	ss.14,27; R.5
Licence-granting of [14]	ss.14,15	s.37 [Leave of Minister]	s.19(1),[s.19(3)]	s.20(1)	s.22 [Operating Permit]
-prerequisites	s.14(2)	[s.38]	s.19(2);[NB-19(3)]	s.21(1)	s.23
-Application for	s.14(5); Form C	-	s.19(2)	-	s.22(2); R.6

N.B.: The symbol 'R' refers to the regulations, while the symbol 's' denotes the relevant section of the Act.

the relevant Acts of the other Provinces, this thesis will only consider the procedures and authorization under The Gas Pipe Line Act required in the case of the gas transmission lines.

2. Manitoba Regulations Relating to Oil

To date, there have been no regulations relating to oil made under s. 32(1) of the Manitoba Pipe Line Act. This has left gaps in the legislation where rights are stated to be subject to the regulations (see ss. 6(1), 6(4), 13(2) or 20(2)). In some sections, such as s. 7(a) or s. 19(2), the Minister's requirements may be substituted for those of any regulations, so no problem arises. In fact, in view of the modest provincial supply of oil, the omissions are not of crucial importance, but are merely small gaps in legislation, which is otherwise probably the most comprehensive in any of the four western provinces.

3. Contents of Application for Construction Permit

In Alberta, an applicant is required to provide the Board with information on the general route proposed for the pipe line (Form A), with the technical and safety information on the design and operating capacity of the proposed pipe line, in accordance with the relevant specification sheet in Form B of the Schedule to the Act, and

with information on proposed link-ups with other pipe lines and the location and capacity of proposed installations (s. 6(2)).

In Manitoba, both Acts require only a minimal amount of information relating to the route, size and capacity of the proposed line and the location of proposed installations.

Section 9(1) of the Saskatchewan Pipe Lines Act is in almost identical terms to the Manitoba sections. Regulation 4 does require further information, but it is not clear how specific such information must be. Regulation 4(2)(d) requires that the plan of the pipe line shall clearly indicate "the location of the pipe line in its entirety and such legal boundaries as are necessary to properly locate the proposed construction". One is left wondering how precise such location will be, especially in the light of R. 4(2)(c), which gives as the scale one-half inch to one mile. Note, however, R. 18 which gives the Department of Mineral Resources the right to require a book of reference.[43]

The British Columbia Pipe-lines Act, under s. 11, requires not only a certificate from the Minister

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43. Regulation 2(3) defines "Book of reference" as

> ... a legend of symbols or a legend of explanatory notes, necessary for the full interpretation of a plan or plans.

It is doubtful whether such a book of reference will make the location any more precise.

granting leave to construct, but also approval of the plan, profile and book of reference.[44] The map accompanying the application for a certificate is one merely showing the general location of the pipe line, but s. 13 relating to the plan, profile and book of reference requires that the pipe line route be shown "in detail", as well as any highway structures, bridges or works within one thousand feet of the proposed right-of-way. Section 13(2) sets the scale of the plans and profile at one thousand feet to one inch (about ten times as large a scale as that required by R. 4(2)(c) of the Saskatchewan Pipe Lines Regulations). Finally, s. 13(1)(d) provides that the book of reference shall describe the portion of land to be taken in each parcel of land that will be crossed, and shall give specific particulars of the land to be taken (area, width, length and the names of the owners and occupiers, where possible). The requirements of and objections to the proposed route of the pipe line will be further discussed under "Objections".[45]

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44. In contrast to Saskatchewan, British Columbia requires the company to submit a book of reference which contains information of much greater assistance in pinpointing the location of the proposed pipe line. The book of reference must conform with s. 13(1)(d):

> The book of reference shall describe the portion of land proposed to be taken in each parcel of land to be traversed, giving particulars of the parcels and the area, length and width of the portion of each parcel to be taken, and the names of the owners and occupiers so far as they can be ascertained.

45. Infra., p. 30.

4. Copies of the Application to other Ministers

All the provinces except Alberta require a duplicate copy of all the application materials to be sent to the Minister of Highways. British Columbia also requires copies to the Minister of Lands and Forests and Minister of Municipal Affairs. In all the provinces, however, the Minister of Highways must approve any proposed pipe line right-of-way which crosses or comes within the vicinity of a highway.[46]

5. Notice of the Application

In Alberta, Manitoba and Saskatchewan the provisions of the relevant pipe line Acts for notice of application for a construction permit are all permissive. The relevant Minister, or the Energy Resources Conservation Board in Alberta can (and does) consider applications without such notice, although if the proposed line will traverse a residential area or extend for many miles in length, a notice published in the newspapers will be required. Occasionally, the company will already have acquired most of the land for the right-of-way by negotiation, and notice may not be necessary.

In British Columbia, on the other hand, notice

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46. Alta., s. 24; B.C., s. 31; Man. (Oil), s.13(1); Man. (Gas), s.24(1); Sask., s.16. See also Point 10, p.41 infra.

is mandatory (see Regulation 3(3) and 3(4)). An application must be accompanied by proof of publication of notice in the Gazette, and notice of intention must be published in a newspaper in each relevant locality for at least one week, not less than a week before the date of the application. Whether these requirements overcome the objections discussed below remains to be seen.

6. Circumstances which the Minister is to Consider

The relevant sections in each of the Saskatchewan and Manitoba (Oil and Gas) Acts are identical one to another. They state that the Minister shall take into account all the relevant circumstances including (a) the financial responsibility of the applicant; (b) any public interest that, in the opinion of the Minister, may be affected by the granting or refusal of the application; and (c) the needs and general good of the residents of the province as a whole. In addition, in each Act the subsequent section provides for a public hearing at the Minister's discretion, prior to the granting of the permit. An individual can apply to the Minister to order the Conservation Board to hold such a hearing.

British Columbia's Act does not have this second section, but s. 12(4) includes, in addition to considerations (a), (b) and (c) above, "the objection of an interested party" in the list of considerations the

Minister takes into account.[47]

Alberta's previous Pipe Line Act[48] did contain provisions almost identical to the present B.C. section. This Act was repealed by The Pipe Line Act of 1958.[49] The new s. 8(1) provided that the Minister could have regard to the objections of an interested party and to the public interest in the case of a gas line, but, in the case of an oil line, it would seem that the only objections that were to be considered were the objections of the Oil and Gas Conservation Board. This subsection was deleted and replaced in 1964, and since that date there has existed no formal process whereby affected landowners can raise objections to the need for the pipe line.

7. Advice Available

In British Columbia, the Minister of Transport and Communications must have regard to the recommendations of the Ministers of Land, Municipal Affairs and Highways (s. 12(4)(a), (b), (c)). In Manitoba and Saskatchewan, the Minister can order the Conservation Board to held a public hearing and to make recommendations to him. In

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47. Whether a party is "interested" is a decision made by the Minister (s. 12(5)).

48. S.A. 1952, c. 67.

49. S.A. 1958, c. 58.

Alberta, s. 9(1) states that the E.R.C.B. may refer any matter to the Gas Utilities Board and may have regard to any advice that the Board gives. However this section appears to have been introduced ini[illegible] to cover a possible loophole since it was feared that s[illegible]ations before the former Oil and Gas Conservation Bo[illegible]d properly be heard by the Gas Utilities Board. [illegible]nce [illegible]mation of the E.R.C.B., however, there have be[illegible]no [illegible]rences to the Gas Utilities Board, and in fact the [illegible]chn[illegible]al facilities of the E.R.C.B. are such that the Gas U[illegible]s Board is more likely to refer a matter to the E.R.C.B.

8. Saskatch[illegible]n - Section 36

Saskatchewan [illegible] an additional provision, s. 36, under the general provision[illegible] of the Act, which adds to s. 12 (see 7 above) in that it gives an interested person the right to apply to the Mi[illegible]ter (in writing) requesting a public hearing, whereupo[illegible] Minister shall order the Conservation Board to hold such a hearing, unless he considers the application to be frivolous or vexatious.

9. Finality of The Decision

The Acts of all the western provinces (except B.C.) contain sections giving the Minister or Board (or in Manitoba, the Lieutenant Governor in Council) the discretionary power to grant or refuse the permit. In the B.C. legislation there is no such section, but the

Minister's power to grant a certificate must be implied from the numerous sections referring to his granting of the certificate.. However, no mention is made of the finality of his decision, and one is left to wonder what appeal, if any, there is against a decision of the Minister. It is, however, difficult to envisage any successful appeal being launched (unless there was a blatant abuse of the discretion) especially in light of s.5, which requires Cabinet approval of all certificates signed by the Minister.

B. OBJECTIONS TO THE PERMIT PROCEDURE

The main objection to the granting of a permit by the Board is the arbitrary manner in which it is carried out. The Board may or may not require a notice in the newspapers advertising the application, and even if such notice is required it may well not come to the attention of the affected landowner. Indeed, even if the landowner is made aware of the advertisement, he may sometimes be unable to determine whether the route will cross his land or the land of his neighbour because of the width of the route as drawn on the map. If he does not receive notice, the first he may know of a proposed pipe line may be when the company's landman, armed with a permit from the E.R.C.B., approaches him to sign an easement over the land required. If he does find out about the project by word of mouth or from the newspapers, he may still find it impossible to provide the Board with any forceful arguments as to why the

route should be changed, when the precise location of the line has not been finalized, so that he may not be able to show whether his land will be affected at all.

1. Applicability of the Rules Relating to Natural Justice

Does the landowner, whose property is likely to be affected by a proposed pipe line have a right to be heard ? In other words, is the E.R.C.B. bound to comply with the rules of natural justice in granting a pipe line permit ? The Privy Council in Nakkuda Ali v. Jayaratne[50] stated that a body has to proceed in accordance with the rules of natural justice only if it possesses the following characteristics: (1) It must have legal authority to determine questions affecting the rights of subjects, and (2) it must have the duty to act judicially.[51]

Taking this second characteristic first, in Nakkuda Ali it was held that the decision of the Controller of Textiles in Ceylon to cancel a dealer's licence was an executive decision, since the only requirement of the relevant statute was that the Controller should have reasonable grounds, based on actual facts known to him, that the dealer was unfit to retain the licence. In making the

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50. [1951] A.C. 66.

51. Ibid., per Lord Radcliffe at 77, citing R. v. Legislative Committee of the Church Assembly [1928] 1 K.B. 411, 425.

decision the Controller was not required to act judicially. When the E.R.C.B. makes a decision to grant or refuse a construction permit, is the Board acting in a judicial or administrative capacity ? In Calgary Power Co. v. Copithorne,[52] the Supreme Court of Canada followed Nakkuda Ali in affirming that the test to be applied was whether the person making the decision was under a duty to act judicially or whether that person was only acting in an administrative capacity. The Court held that the Minister's decision to grant an order authorizing Calgary Power to effect the necessary expropriation was not a judicial one, but an administrative one. Martland, J. (for the Court) stated:[53]

> There is a vast difference between a Minister of the Crown exercising an authority vested in him by the Legislature to which he is answerable, and the position of some administrative Board called upon to decide a dispute between parties in particular circumstances as a result of which the Board concerned is for the time being fulfilling a judicial or quasi-judicial function.

This thesis is not the place for an extended discussion of the merits or demerits of the decision of Nakkuda Ali, in the light of Lord Reid's comments in the subsequent House of Lords decision in Ridge v. Baldwin.[54] Unlike the Australian Courts, which have expressly refused

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52. [1959] S.C.R. 24.

53. Ibid., at 33-4.

54. [1964] A.C. 40, 78-9.

to follow Nakkuda Ali,[55] the Canadian Courts have, until very recently, shown no consistent approach.[56] In two very recent decisions, Howarth v. National Parole Board (Supreme Court of Canada)[57] and Edwards and Wolfender v. Alberta Association of Architects (Alberta Supreme Court, Trial Division),[58] the judgment of Martland, J. in Copithorne was quoted with approval. McDonald, J. in the Edwards case noted that Copithorne is inconsistent with Ridge v. Baldwin, and stated that "in Canada the result of Howarth v. National Parole Board adopting as it does ... Calgary Power v. Copithorne ... appears to preclude Canadian judges from following Ridge v. Baldwin."[59]

If Nakkuda Ali and Copithorne remain good law in Canada today, then it is submitted that the landowner has no right to insist that the Board proceed in accordance with the rules of natural justice. However, if the broader "functional" approach of Lord Reid in Ridge v. Baldwin were to be adopted, would this in any way assist an affected

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55. Banks v. Transport Regulation Board (1968) 42 A.L.J.R. 64, 68 per Barwick, C.J.

56. Compare the reasoning of the Saskatchewan Court of Appeal in White v. Board of Trustees of Estevan Institute (1970) 75 W.W.R. 568, where Nakkuda Ali was given direct application, with the reasoning of Verchere, J. in Hoeboff v. City of Vancouver (1968) 63 W.W.R. 129, where his Lordship distinguished Nakkuda Ali and Copithorne and referred to Lord Reid's comments in Ridge v. Baldwin.

57. (1974) 18 C.C.C. (2d) 385.

58. [1975] 3 W.W.R. 38.

59. Ibid., at 59.

landowner in making his case heard ? Instead of classifying the decision of the relevant tribunal as "administrative" or "judicial", Lord Reid's approach was to examine whether the tribunal's decision is one "affecting the rights of subjects" and then to examine the nature of the duties imposed on the tribunal. It is the effect that the tribunal's decision will have on a party that will determine the existence or otherwise of a duty to afford that party a hearing.

Even if the approach of Lord Reid in Ridge v. Baldwin is at some later date adopted in Canada, the rights of a landowner to notice of the hearing and to be heard at that hearing still depend on the answer given to the question, "Are this person's rights directly affected by this decision ?". If the answer is in the negative, then whichever approach is adopted, whether it be the approach of the Privy Council in Nakkuda Ali or the approach of Lord Reid in Ridge v. Baldwin, the landowner will have no right to a hearing. If the answer is in the affirmative, then, following Lord Reid's approach, the landowner may have a right to be heard.

It is at this point that the relevant legislation warrants examination.[60] As explained above, to have a right to notice at common law, a person must be directly affected by the proposed decisions, and this principle

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60. Alberta's legislation will be used for the purposes of discussion. The legislation of the other provinces will be referred to in subsequent footnotes.

received legislative sanction in s.29(2) of The Energy Resources Conservation Act.[61]

> 29(2) ....., where it appears to the Board that its decision upon any application may directly and adversely affect the rights of any person, the Board shall give the person:
> (a) notice of the application,....[62]

Section 7(1) of The Pipe Line Act reads as follows:[63]

> 7(1) The Board may order an applicant to publish a notice with respect to the proposed route of the pipe line in such newspapers and in such form as the Board may prescribe.

As can be seen, this subsection gives the Board a discretion either to direct an applicant company to advertise the proposed route of the pipe line or to grant the permit without advertisement. What effect do the two sections have upon each other ? It may be argued that The Pipe Line Act, being an Act passed to deal with the special problems involved in pipe line construction and operation, should

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61. S.A. 1971, c. 30. There is no equivalent provision in any of the other western Provinces, since in all the other Provinces the administration of the Act is undertaken by the Minister. Nevertheless the same common law rules relating to natural justice apply, although in light of the Conthorne case, it seems even less likely that a Minister will be held to act in a judicial capacity than will the E.R.C.B.

62. In addition to notice, the Board has to give the person whose rights are directly affected an opportunity to learn all the relevant facts relating to the application and to present evidence concerning those facts. As well, the person must be given an opportunity to make his representations by way of argument before the Board and where necessary to conduct cross-examination of the applicant.

63. B.C. Regs. 3(3), 3(4); Man. (oil) s. 7, (Gas) s. 16; Sask. s. 10.

take precedence over the more general provisions of the Energy Resources Conservation Act,[64] dealing with the establishing of the E.R.C.B.. However The Pipe Line Act defines "Board" as used in that Act:[65]

> "Board" means The Energy Resources Conservation Board under The Energy Resources Conservation Act.

Clearly the Board must act in accordance with the directions given it by The Energy Resources Conservation Act, among them the direction in s.29(2). If a landowner can show that he may be "directly and adversely affected" by a decision of the Board within the terms of s.29(2), then he is entitled to personal service of notice and not merely the general notice afforded by newspaper advertisement, which may or may not be required by the Board under s.7 of The Pipe Line Act.

The result is that the right to notice depends, at common law and according to the relevant legislation, on whether the rights of the landowner are "directly and adversely" affected by a decision of the E.R.C.B. to grant a permit. On the one hand, the permit is the first step in a procedure that may finally take away the right to full enjoyment of some portion of the landowner's property. It is the document which allows the company to avail itself of the procedures of The Expropriation Act. Accordingly, the granting of the permit will affect the rights of the

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64. S.A. 1971, c. 30.

65. R.S.A. 1970, c.275, s.2(1).

people owning land in the path of the proposed pipe line, since these people can no longer enjoy their land without the fear of expropriation of a part thereof for a pipe line. On the other hand, it can be said that the permit does not affect the rights of the landowner, but only the rights of the company, which is enabled by the permit to do things (expropriate) that it could not previously do. It is the expropriation order, given by the Surface Rights Board under The Expropriation Act, which affects the rights of the landowner. Without the expropriation order, there is no "right" of the company (in the absence, of course, of agreement) to interfere with the interests of the landowner. In Randolph v. R.,[66] Jackett, P. of the Exchequer Court differentiated between "decisions that are primarily of an administrative or executive nature in the sense that they are arbitrary because they are made having regard primarily to public policy or expediency considerations" and "decisions as to individual rights arrived at by ascertaining facts and applying some rule or principle of the law to them". In the case of the first type of decision, there is no common law right to be heard, while in the case of the second type there is. It is submitted that this reasoning is particularly relevant to pipe line applications. The granting of the permit is an executive decision based on public policy: as such it does not involve a hearing of objections. The expropriation of a right-of-way, however,

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66. [1966] Ex. C.R. 157, 164.

is a decision directly affecting individual rights: accordingly, the rules of natural justice apply.

However, while it appears to this writer that the landowner is not "directly and adversely" affected by the decision of the Board, it is not the opinion of this writer that is important. Section 29(2) includes the words "where it appears to the Board", so that if the Board believes that its decision will directly affect landowners in the path of a proposed pipe line, it must under s.29 (2) give notice to the affected owners.[67] The practice of the Board is to require an applicant to indicate the rights-of-way that have already been negotiated, and these rights-of-way are accepted as evidence of due notice to the landowners who have signed the agreements. Where the applicant company cannot show a negotiated right-of-way for a particular parcel of land, the Board will give notice to the owner of that parcel. If there are only a few landowners who have not agreed to give a right-of-way over their property, the Board will usually only send notice by way of letter. Where many owners have not yet agreed to a right-of-way, advertisements will usually be placed in local newspaper(s) as well as notice given by registered mail. As a result of

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67. If s. 29(2) is applicable in relation to a particular hearing, it appears that notice must not only be given but it must be received. A similar situation arose in Ontario in the case of Re Ontario Natural Gas Co. and La Rocque (1959) 18 D.L.R. (2d) 73, where McLennan, J. held (at p.76) that the Ontario Fuel Board did not have jurisdiction to make an order unless the person affected had received notice of the application.

this policy of the Board, landowners do frequently appear at the hearings, either in person or represented by counsel. However, how effective are the objections that they make ?

With regard to the public necessity for the pipe line, it was noted under point 6[68] that there is no formal process in Alberta whereby the public necessity can be queried. Even where newspaper advertisement is required, objections usually relate only to the question of the route not of the project itself. However it has been the practice of the E.R.C.B., where it has received objections to the project itself from numerous sources, to hold hearings on the public necessity of the whole project. While the economic viability of a proposed pipe line is a very important factor in the decision of the E.R.C.B. (or of the relevant Minister in the other provinces), there are occasions on which the effect of the pipe line on local interests is such that the project itself has been abandoned or modified.[68a]

One obstacle to effective objection to the proposed route is the uncertainty as to the exact location of the route. The E.R.C.B., in granting a permit, will approve an accompanying map of the route. If the pipe line extends for any great distance, the scale of the map may be such that the red line marking the route gives the company an area as wide as 1000 feet in which to place their pipe line. Since the legal survey is not usually conducted until after a permit has been granted, the precise location

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68. Supra., p. 28.

68a. Application by Imperial Oil, E.R.C.B. Decision 74-10.

of the proposed right-of-way is unknown and accordingly it is remarkably difficult to object to the route or suggest alternatives.

The major problem is that each landowner may have his own theory as to the route that the pipe line should take and only an incurable optimist would believe that it would be possible for all the landowners and the company to agree on the route a long pipe line should take. The benefit to the landowner of having the route moved to a different portion of his land must be weighed against the economic impracticability of the project if the proposed pipe line is to zig-zag across the province in an effort to satisfy all the affected landowners.[69]

In conclusion, it seems that the landowner is unlikely to be able to change the route of the pipe line and even less likely to succeed in showing that the pipe line is not required by public necessity. Indeed, once the permit has been granted and only the question of expropriation remains, the Surface Rights Board has no power to alter the route approved by the E.R.C.B.[70] John H. Currie, in an article entitled "Compensation for Oil and Gas Surface Rights in Alberta",[71] examines the dilemma caused by the conflicting interests of the pipe line companies and the

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69. See the comments on this point by Clement, J.A. in Dome Petroleum v. Swan Swanson (No. 2) [1971] 2 W.W.R. 506, 512.

70. As to whether the Surface Rights Board can change the location within the route, infra., pp. 53-60.

71. (1971-72) 36 Sask. L. Rev. 350, 364-6.

landowners. He concludes that, although justice and "civil liberty" would seem to demand a process whereby the landowner can resist the traverse of his property, the delay and economic impracticability involved in allowing the landowner such a process (over and above adequate compensation) would not be in the public interest in a country where such an important economic role is played by the Oil and Gas Industry of which the pipe line companies are a vital part.[72]

C. THE PERMIT PROCEDURE - OTHER PROBLEMS - POINT 10

10. Conflicting Land Uses

The planning of a pipe line route would be immeasurably simpler if pipe line companies did not have to contend with the varied uses to which the land is already being put. A typical example of the problems confronting a pipe line company is contained in the following excerpt from a report on a pipe line looping operation in B.C. :[73]

> The project involved looping the main Vancouver supply line on Lulu Island between the two arms of the Fraser River. This is an area of very high water table. Elevation is only a few

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72. See Chapter VII where an assessment of this conclusion is made in the light of Chapters I to VI of this thesis.

73. Oilweek, November 4, 1974, p. 27.

feet above sea level and much of the terrain is marshy. It is intensively cultivated and fairly thickly settled with small grain farms, market gardens and dairy farms. It is crisscrossed by many fences, drainage canals and roads, and right-of-way is very tight in many places due to buildings and other obstructions.

Among the obstacles were one single track railway, five paved roads including the four-lane New Westminster Highway, several canals and drainage ditches and numerous utility and water lines. The main highway had to be bored and cased for a 100 foot distance. This required meticulous care because there was heavy traffic almost all times of day and night.

Special features on the ground included two greenhouse complexes, a potato field, a strawberry field, a cranberry bog and several feed grain plots of barley and hay. In one place the right-of-way went through a narrow space between two houses right after crossing a canal and a road. Topsoil had to be conserved for the entire 22,000 feet.

a. Highways

All the provinces have provisions relating to the crossing of highways. In Alberta, there is a distinction drawn between "highways" and "roads".[74] When a company plans to cross a highway with its pipe line it must obtain

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74. "Highway" as defined in s. 2(6) of The Pipe Line Act, means a primary highway, as designated by the Minister of Highways and Transport by order under s. 4(1) Public Highways Development Act, R.S.A. 1970, c. 295. "Road" is defined by s. 2(24) of The Pipe Line Act as any public road or road allowance other than a highway.

the approval of the Minister of Highways and Transport (s. 24(1)), and the application for such approval has to include a plan and profile of the portion of the highway affected. Where the company proposes to cross a road, the approval of the local authority must be obtained. If the local authority withholds its approval unreasonably, the pipe line company can apply to E.R.C.B. for approval. In Saskatchewan, where a pipe line crosses a provincial highway, additional information is required by the Minister of Highways and Transport under R.4(2)(h) of the Regulations. Saskatchewan and Manitoba require written consent of the Minister, not only if the pipe line is planned to cross the highway, but also planned to come within 100 feet of a road or 300 feet of a provincial highway. In Alberta, the distance is 100 feet for both a road and a highway. In B.C., s. 31 only makes mention of "crossing" a highway, but R.8 of the Regulations provides a whole list of specifications which apply to a pipe line crossing a highway.

b. Rivers and Streams

Alberta's Act is the only pipe line Act which makes reference to pipe line crossings of rivers and streams. Section 27 of The Pipe Line Act states that, despite s.4(1) of The Public Lands Act,[75] a company which is

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75. R.S.A. 1970, c.297. Section 4(1) declares the title to the beds and shores of all rivers, streams, watercourses, lakes and other bodies of water to be vested in the Crown in right of Alberta.

authorized to construct a pipe line has the right to do so across Crown land comprising the bed or shore of a river, stream, etc., which land is not specifically reserved or excepted on the certificate of title of the freehold owners to the remainder of the land. Usually, however, the certificate of title will provide that the landowner owns "all that portion of (a given) quarter section not covered by (a given) lake....", and the pipe line company will have to obtain ministerial approval for its pipe line crossing. Section 27 will however cover those small bodies of water which because of their size or temporary nature were overlooked when reservations were made on the title to the land.

c. Mines

Alberta (s. 30) and B.C. (s. 28) have provisions requiring permission before the company can construct a pipe line which may interfere with a mine or quarry, which is presently being worked. The B.C. Act also includes mines for the opening of which preparations are being made.

d. Existing Pipe Lines

In Alberta, if a company plans to lay pipe over or under the pipe of an existing pipe line, it must obtain permission from the permittee or licensee of that pipe line (or the Superintendent of Pipe Lines if permission is

unreasonably withheld): R.7 of the Regulations.

In B.C., Regulation 8 applies to the crossing of one pipe line by another.

In Manitoba, Regulations under The Gas Pipe Line Act (Man. Reg. 210/72) require notice to be given to owners of gas pipe lines or distribution systems in the event of excavation in the vicinity of existing lines or distribution systems, which includes the laying of pipe lines.

e. Irrigation Ditches

S. 26 of the Alberta Act requires permission from the owner of the irrigation canal or ditch (or the E.R.C.B., if the owner unreasonably withholds his permission), which seems more logical than s. 31 of the B.C. Act, which requires the permission of the Minister of Commercial Transport.

Somewhere, in at least one of the provincial Pipe Line Acts, there can be found some provision relating to almost all the potential conflicts of land uses. The problem is that no one provincial Act includes all these potential conflicts within the scope of its provisions. It would be appropriate for The Pipe Line Act of each province to contain the guidelines and requirements to deal with each situation involving conflicting land uses

that might arise, so that companies can plan the route of the pipe line with greater certainty as to the procedures to be followed.

D. ACTIVITIES OF COMPANY BEFORE PERMIT ISSUED - POINTS 11 AND 12

11. Right of Entry for Surveys

The right of entry for surveys and other examinations of the land is a valuable right of the company, especially where the pipe line extends for some distance. None of the Acts provide for the payment of any compensation to the owners or occupants of the land surveyed and most of them, in fact, do not even require the prior permission of the owner or occupant.

Can the owner or occupant refuse to allow the company's surveyors on his lands ? In Alberta, the company does not require permission from either the E.R.C.B. or the owner in order to enter lands for the purpose of surveying.[76] Section 73 of The Surveys Act[77] supports this right of entry by the surveying personnel onto private land, and s. 94(2) of the same Act makes it an offence for anyone

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76. Pipe Line Act, s. 5(2)(a). Although if the company intends to expropriate the land it must, by s. 61(1) of The Expropriation Act, S.A. 1974 c. 27, make a reasonable effort to give notice to the occupant, even though the expropriation may not have yet been commenced.

77. R.S.A. 1970, c. 358.

to hinder or obstruct them in the performance of their surveying duties. The other western provinces have similar provision in their legislation relating to surveys.[78] Accordingly, the only restrictions are those found in the particular pipe line Act. The Saskatchewan and Manitoba Acts require the consent of the minister; the permission of the owner or occupant is not necessary. The B.C. Pipe-lines Act is the only Act which requires permission of the occupant. Section 12 (2)(b) prevents a company from going on land which is in orchard or actually under cultivation until it has obtained written permission from the occupant or has deposited with the Minister a sum which the Minister deems adequate to compensate for any damage that may be caused.

On what parts of the land can the company's surveyors go ? All the Acts refer to entry being permitted "upon lands lying in the proposed route of the pipe line". This may still be a large area, for, as explained above, the route at this stage will be very vaguely defined.[79] Nevertheless, it is submitted that this provision does prevent the pipe line company from wandering at will all over the property.

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78. See Land Act, S.B.C. 1970 c. 17; Official Surveys Act, R.S.B.C. 1960 c. 269; Surveys Act, R.S.M. 1970 c. S 240; Land Surveys Act, R.S.S. 1965 c. 120.

79. See s. 12(2) of The Pipe-lines Act (B.C.) where the company is to file a map with a scale of 8 miles: 1 inch. On this scale a normal pencil line will probably be 1000 feet wide!

Finally, are there any restrictions on what can be done on the land ? The Alberta Pipe Line Regulations, R.3, prohibit the use of vehicles on the land, and forbid the cutting of trees or removal of fences unless the prior consent of the owner or occupant is obtained. No provision is made by the pipe line legislation of any other province, but all the Acts relating to surveys have provision to forbid the causing of any physical damage to the property.[80] However, if the company plans to expropriate the land, even though it may not have begun expropriation proceedings by filing its notice of intention, s. 61(5) of The Expropriation Act[81] makes the provisions of that Act applicable. Section 61(2) gives the pipe line company the right to cut down trees and brush that obstruct the running of survey lines. No permission appears to be required, although by s. 61(3) compensation is to be paid to the occupant.

Of course, in practice, the pipe line company will generally approach the landowner and formally ask permission to make a survey. However, the above discussion shows the wide powers of the company, which can be exercised if the landowner refuses to be co-operative (as some might when they are told of the reasons for the survey).

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80. See Surveys Act, R.S.A. 1970 c. 358, s. 73, for an example.

81. S.A. 1974 c. 27.

12. Acquisition of Land

Section 5(2)(b) of The Alberta Pipe Line Act expressly gives the pipe line company the power to negotiate for the acquisition of interests in lands that may be required for the pipe line. It seems an unnecessary provision in that there is no reason why a pipe line company cannot purchase land in the market like anyone else. The draftsman presumably inserted paragraph (b) to ensure that s. 5(1), "prohibiting the undertaking of any operation preparatory to the construction" of the pipe line, did not prohibit the purchase of the required land. None of the other provincial Acts contain a reference to "operations preparatory to construction", so a similar problem does not arise. The purchasing of rights-of-way before the permit is granted has attached to it, of course, the risk of the permit being refused or altered in such a way that rights-of-way previously purchased are no longer within the route. Nevertheless, it is a fact that companies will often have obtained pipe line easements over a large portion of the proposed route before a construction permit has been granted.[82] Indeed, in cases where the rights-of-way

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82. Certainly before 1972 it was a risk that most pipe line companies were prepared to take. Until that time, application to the Minister for a construction permit almost always resulted in the permit being granted as applied for. With introduction of The Energy Resources Conservation Act and the transferring of control over permits to the E.R.C.B., the practice of purchasing rights-of-way in advance has declined. In light of the

over the majority of the route have been granted, the E.R.C.B. in Alberta will often not require newspaper advertisement under s. 7.

E. AFTER THE GRANTING OF THE PERMIT - POINTS 13 AND 14

13. Amendment to Permit

As can be seen from Table 1, amendments can be made by the authority administering the Act or on the application of the company. One provision of interest is Regulation 4 of The Alberta Pipe Line Regulations, which states:

> (1) During the construction of a pipe line, a permittee may construct an installation in connection with the pipe line that was not referred to in the application for his permit without applying for and obtaining an amendment to his permit.
> (2) Where an installation is constructed under sub-section (1), the permittee shall forward the details relevant thereto to the Department.

When the definition of "installation" (s. 2(8) of the Act) is considered, the range of equipment that can be added to the pipe line is extensive.

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Board's willingness to hear the landowner's objections, it is now more common to find a company apply for a permit as the first step, so that if there is opposition to the planned pipe line, it will be discovered at the earliest opportunity.

In fact, the Regulation merely echoes the provision found in most pipe line easements granting the pipe line company the right to place on the land a whole range of equipment connected with the pipe line. Should the company abuse the rights given under R.4, the E.R.C.B. still has the final sanction of refusal to grant an operating licence under s. 14.

14. The Operating Licence

The final step in the procedure before the pipe line is put into commercial use is the obtaining of an operating licence, or leave to commence operations. The various provincial statutes provide for testing of the line to the satisfaction of some authority (the Superintendent of Pipelines or an inspector in Alberta: s. 14(2)), and for an application for the licence containing all the information concerning construction, capacity, location, and so on. In the final analysis, however, the granting of the licence is still discretionary and may be accompanied by various conditions. The Pipe Line Act of Manitoba is the only exception. Section 19(3) of that Act provides:

> If the applicant has complied in all respects with the construction permit including the conditions, if any, attached thereto, and with this Act and the regulations, the Minister shall issue the operating licence. (emphasis added).

It seems that in Manitoba, once all the conditions are satisfied, a permittee of an oil pipe line can demand a

licence from the Minister as of right.[83]

83. Note however that The Gas Pipe Line Act which follows The Pipe Line Act very closely in most other respects, has no provision similar to s. 19(3).

III. THE RIGHT TO OBJECT AFTER THE GRANTING OF THE PERMIT

A. JURISDICTION OF THE SURFACE RIGHTS BOARD IN ALBERTA

Once a valid permit has been issued, the company is in the position where it can apply to the Surface Rights Board for an expropriation order to obtain a right-of-way over any land regarding which it cannot negotiate the grant of a pipe line easement.

Before discussing the power of expropriation, it is proposed to examine what rights, if any, the landowner has, at this second stage of the procedure, to alter the location of the pipe line on his land, or the amount of land which is to be taken. The right of the landowner to have his objection heard depends on the jurisdiction of the Board to entertain his objection. The jurisdiction of the Surface Rights Board (previously the Board of Arbitration and before that Public Utilities Board) can best be examined from three separate points in time: Before the decisions in the Dome Petroleum v. Swan Swanson cases,[84] after the second of the Dome Petroleum cases, and finally after the proclamation of the 1974 Expropriation Act (9th July 1974).

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84. Dome Petroleums Ltd. v. Swan Swanson Holdings Ltd. (No. 1) (1970) 72 W.W.R. 6; (No. 2) [1971] 2 W.W.R. 506.

1. Before the Dome Petroleum decisions

The Public Utilities Board dealt with the question of its jurisdiction in Peace River Oil Pipe Line Company Limited v. Shulman,[85] and held that it did not have jurisdiction to determine either the location of the pipe line or the width of the right-of-way. Its decision was made on the basis of s. 32 and s. 45 of The Expropriation Procedures Act 1961.[86] The first of these sections was held to give to the Minister exclusive authority to decide the location and the extent of the right-of-way, while s. 45 was held "to dispel any doubt that there may be about the Board's jurisdiction". It provided that:

> No person may in any proceedings under this Act dispute the right of an expropriating authority to have recourse to expropriation or question whether the land or estate or interest therein to be expropriated is necessary or essential for the public work or the works, as the case may be, for which it is to be acquired.

As a result of this decision the pipe line companies could choose the location and width of the right-of-way and so long as they remained within the route permitted by the Minister, the Public Utilities Board would automatically approve their application.

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85. Unreported, P.U.B., No. 28 795, August 9, 1968.

86. S.A. 1961 c. 30.

2. Effects of the Dome Petroleum decisions

a. Dome Petroleum No. 1

The question of jurisdiction arose once again in Dome Petroleum Ltd. v. Swan Swanson Holdings Ltd. where Swanson Holdings were complaining that Dome's pipe line should be built within one of the rights-of-way over the land already granted to other pipe line companies, and that, even if this was not possible, the width of the right-of-way proposed was excessive and should be reduced. The Public Utilities Board and Sinclair, J. held that the Board had no jurisdiction to hear the matter, but an appeal to the Appellate Division was allowed by a two to one majority.[87] Allen, J.A. delivering the majority judgment held that s.45 did not prevent the Public Utilities Board from determining the width of the right-of-way, and that the Board was not to act merely as a rubber stamp in respect of the company's application. His Lordship's reasons have been carefully analyzed elsewhere,[88] and further examination of them is not proposed here. More important are the restrictions placed upon the decision in Dome Petroleum No. 1 by subsequent cases.

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87. Allen and MacDonald, JJ.A., Johnson J.A. dissenting.

88. See the Comment by D.B. Kirkham, (1970) 8 Alta. L. Rev. 439.

b. Dome Petroleum No. 2

Six months after Dome Petroleum No. 1, Kirby, J., in Imperial Oil Ltd. v. Horne[89] construed the majority decision in Dome Petroleum No. 1 to be limited to the question of jurisdiction of the Public Utilities Board in relation to the width of right-of-way claimed. His Lordship ruled that the decision in the Dome case had not included a determination on the question of the jurisdiction of the Board to order relocation of the right-of-way within the approved route,[90] and he further held that the Board did not have jurisdiction to consider such a matter.

Seven months after the Horne decision, the parties in Dome No. 1 came once more before the Appellate Division. The majority of the Court came to the same conclusion as Kirby, J. in the Horne case. Clement, J.A., for himself and Smith, C.J.A., held that the Board did not have jurisdiction to deal with any land that was not the subject matter of an application before it, even if it came within the route approved by the Minister. His Lordship examined the procedure under s.36 of The Expropriation Procedure Act,[91] whereby an interim order of expropriation could be granted on application by the company (usually ex parte) and on payment to the Board of a deposit.

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89. (1970) 75 W.W.R. 361.

90. Although Allen J.A. had referred to "location" of the right-of-way: (1970) 72 W.W.R. 6, 16.

91. R.S.A. 1970, c.130.

He held that s.36 (1)(b) prevented the Board from considering anything more than the company's need for the immediate exercise of its rights over the land for which it has applied. His Lordship continued that, where the Board had granted an interim order, it was not practical to propose that in making the final order under s.35 the Board should be able to consider changing the location of the pipe line. The only issue to be resolved was one of the compensation payable. In reply to an argument that alternative locations should be considered at the interim order hearing, his Lordship stated,[92]

> The Board cannot make an expropriation for land that the permittee has not applied for, but it is said that the Board could, when the circumstances warrant it, deny the application and in effect require the applicant to re-apply for an interest in some other land, the expropriation of which would be less inimical to the landowner without unduly affecting the applicant. In my opinion the Board is not given jurisdiction to consider or weigh the interests of the landowner in relation to the desire of the applicant to expropriate specific land.[93]

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92. [1971] 2 W.W.R. 506, 511.

93. The only possible exception that his Lordship was prepared to consider (in a case where the facts required its consideration) was the case where the location selected was patently unreasonable. His Lordship said (at p. 513),

> I should observe that there may be cases in which the right-of-way location selected by an applicant is so unreasonable in the circumstances and the interests of the landowner are so unnecessarily and harshly affected, that a question may arise as to

McDermid, J.A., dissenting, pointed out[94] that in practice the Minister does not direct his mind to the exact location of the pipe line but approves what is merely a general route within which the company must lay its pipe line. His Lordship continued by giving examples of the potential abuse by a company of an unfettered right to place the pipe lines anywhere within the route, and concluded that the Board did have the jurisdiction to alter the location of pipe line, as long as it provided an alternative location within the approved route.

As can be seen the law as stated by the two Dome Petroleum cases is far from clear. It remains to be seen whether the reasoning in the decisions still applies in the light of the new Expropriation Act.

3. The Expropriation Act 1974

Reasoning along the lines of that of the Public Utilities Board in the Peace River case,[95] based as it was on s.45 of The Expropriation Procedure Act, is a thing of the past. Section 45 no longer exists, and in its

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> whether the power of expropriation is being exercised in good faith. Such a case could attract the application of other principles and I reserve consideration of it for an occasion on which it arises.

94. Ibid., at 515.

95. Supra., p. 54.

place s. 6 of The Expropriation Act provides:

> (1) No person may in any proceedings under this Act dispute the right of an expropriating authority to have recourse to expropriation.
> (2) In any proceedings under this Act the owner may question whether the taking of the land, or the estate or interest therein is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

Is the reasoning of Clement, J.A. in Dome No.2 still applicable in light of the new Act ? It is submitted that it is not, for two reasons. First, the procedure no longer exists whereby interim orders can be granted.[96] Section 6 of The Expropriation Act and the whole procedure under the Act whereby the owner may object (s.10) and an inquiry will be held (s.14) have altered the jurisdiction of what is now the Surface Rights Board. When the Board, in its role as an inquiry officer under s.14, examines whether the intended expropriation is "fair, sound and reasonably necessary", it is submitted that it may grant a certificate of approval for a right-of-way within the general route approved by the E.R.C.B.[96a] Secondly, the conclusions of Clement, J.A., that the Board did not have jurisdiction to "weigh the interests of the landowners in relation to the desire of the applicant to expropriate specific land", would seem to be no longer tenable in light of the

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96. Section 13 of The Expropriation Act, 1974, requiring as it does Cabinet approval, in no way replaces the interim order procedure.

96a: Assuming expropriation is warranted, the S.R.B. will permit expropriation of the right-of-way on the lands already affected by the E.R.C.B. permit. However if the company wishes to expropriate land on a quarter section not mentioned in the permit, the S.R.B. will require an amendment to the permit before it will issue a certificate of approval.

provisions of s. 6 and s. 14, relating to inquiries, especially s. 14(9)(c), which allows the Board, as inquiry officer, to hear evidence and argument from each party to the inquiry.

It is submitted that, as a result of The Expropriation Act, landowners have a right to object not only to the width of the right-of-way, but also to the location of the pipe line within the approved route. It is not suggested that the new Act will enable landowners to hold pipe line companies to ransom by objecting to the location of the pipe line. It is anticipated that in the majority of cases the intended expropriation of the particular location selected will be found to be "reasonably necessary" since the economic viability of the pipe line will rarely permit more than a minor shift in the location of the pipe line.

B. RIGHT TO OBJECT IN BRITISH COLUMBIA AND MANITOBA

In B.C. a company must submit to the Minister a book of reference before it can begin construction. The book of reference has to conform with s. 13(1)(d):

> 13(1)(d). The book of reference shall describe the portion of land proposed to be taken in each parcel of land to be traversed, giving particulars of the parcels and the area, length and width of the portion of each parcel to be taken, and the names of the owners and occupiers so far as they can be ascertained.

Section 14 and 15 deal with the powers of the Minister to

order relocation, and Section 21 restricts the right-of-way taken to a maximum of 60 feet, although the Minister can approve a wider area. Line location in B.C. is dealt with by ministerial approval. The Railway Act[97] is used to assess compensation payable but contains no provisions whereby an owner can object to the location of the right-of-way. He can do this under s. 12(4)(e) of The Pipe-lines Act, which provides that the Minister is to take into account the objections of an interested party.[98] However, s. 12(4)(e) only deals with objections made prior to the granting of the construction certificate. Once the certificate has been granted, relocation can only be ordered by the Minister in accordance with ss. 14 and 15. Section 14 only allows the minister to order relocation if he is of the opinion that "the relocation is necessary to facilitate the construction, reconstruction or relocation of a highway or any other work affecting the public interest...". Section 15 only provides for relocation on the application of the company or on the recommendation of certain other Ministers. Neither section makes any provision for relocation following objections by the landowner. The aggrieved landowner must make his objections known to the Minister before the construction certificate is issued.

In Manitoba there appear to be different procedures depending on the type of pipe line proposed.

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97. R.S.B.C. 1960, c. 329.

98. Supra, n. 47.

Companies constructing oil pipe lines may enter on the land and construct the pipe line before an agreement or order concerning compensation is reached or made (s.16(1) Pipe Line Act). However, s. 27(1) of The Gas Pipe Line Act requires an order from the Public Utilities Board and payment of compensation before entry onto the land. Both Acts set a limit of 60 feet on the width of right-of-way (s. 16(3) Pipe Line Act; s. 27(4) Gas Pipe Line Act), subject to the Minister's power to grant a larger area (s. 16(4); s. 27(5)). Section 12 of The Pipe Line Act and s. 23 of The Gas Pipe Line Act are in similar terms to s. 14 of The Pipe-lines Act of British Columbia and allow relocation only where the Minister thinks it necessary to facilitate highway construction. However, s. 6(2) of Schedule A to The Expropriation Act of Manitoba states the duties of the inquiry officer in a similar manner to s. 14(2) of the Alberta Expropriation Act. The inquiry officer is to "inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority". Since The Expropriation Act prevails in the case of any conflict with The Pipe Line Act or The Gas Pipe Line Act, it is submitted that s. 6(2) of Schedule A is in no way restricted by s. 12 of The Pipe Line Act or s. 23 of The Gas Pipe Line Act, and that landowners have a right to object at the inquiry proceedings to the location of the pipe line, as long as proposed alternative locations are still within the route approved by the Minister.

C. SASKATCHEWAN

1. The Power to Object

The obscurity which surrounds the legislation relating to gathering lines has already been the subject of comment.[99] The conslusion previously drawn was that gathering lines are still, according to the legislation even if not in practice, subject to s.26(2) of The Pipe Lines Act. Hence the pipe line company that has to expropriate land for a gathering line must obtain an order from the Minister of Mineral Resources declaring Part II of The Pipe Lines Act to apply.

Assuming this order to be granted then gathering lines like pipe lines are subject to sections 18 and 19 of The Pipe Lines Act. In Saskatchewan, s.18(3) of The Pipe Lines Act gives the holder of a construction permit[1] the right to enter upon the land and to construct its pipe line, even though the owner of the land refuses to give his consent. In the case of such refusal the permittee must proceed to the expropriation within 60 days after entering upon the land.

At this point, the legislation and practice vary sharply. Section 19(1) of The Pipe Lines Act

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99. Chapter I, p. 12.

1. In the case of a gathering line the company is deemed to be a permittee: s. 26(2).

incorporates The Expropriation Act[2] for the purposes of expropriation under The Pipe Lines Act. The Expropriation Act contains no provisions affording the landowner an opportunity to object to the location of the pipe line on his land, so that until 1968 the only avenue of approach the landowner had was to apply to the Minister of Mineral Resources under s. 36 of The Pipe Lines Act requesting a public hearing into the location of the pipe line.[3] In 1968, The Expropriation Procedure Act[4] came into force and on its face would seem to apply to expropriations by pipe line companies of land required for pipe lines and gathering lines. This Act deals with "expropriations" by an "expropriating authority" for the purpose of a "public improvement". As those terms are defined in s. 2 of the Act, they certainly include a pipe line company taking land for the purpose of constructing a pipe line. "Expropriate" means "the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers", and "expropriating authority" means "the Crown or an association or person empowered to acquire land by expropriation". A pipe line company in expropriating land for a pipe line is merely exercising the statutory powers

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2. R.S.S. 1965, c.56.

3. From the information available, it appears that this section has never been used for this purpose.

4. Expropriation of land for flow lines and service lines is clearly regulated by The Surface Rights Acquisition and Compensation Act (Part IV) and is in no way affected by The Expropriation Procedure Act - see s.3(3) of The Expropriation Procedure Act.

conferred on it by Part II of The Pipe Lines Act, and accordingly comes squarely under The Expropriation Procedure Act. Finally, the term "public improvement", which means "anything for the purpose of which an authority may expropriate land", clearly includes the construction of a pipe line.

Expropriation of land for pipe lines (and gathering lines) appears to fall squarely within the provisions of The Expropriation Procedure Act, and since that Act prevails in the case of conflict with all other Acts, except those mentioned in s.3(3), it prevails over The Pipe Lines Act and The Expropriation Act where the provisions of those Acts conflict with it.[5] In considering the objections that a landowner has power to make there is no conflict, since The Expropriation Act makes no provision for objections. Therefore s.7(1) of The Expropriation Procedure Act would seem to apply. Section 7(1) provides:

> Where land is or is to be expropriated for the purpose of a public improvement any owner of the land may apply in writing to the Board [the Public and Private Rights Board] for a review by the Board of the route, situation or design of the public improvement or the proposed public improvement. (emphasis added)

However, in seeking to obtain further information about The Public and Private Rights Board, it was discovered that the practice in Saskatchewan is entirely

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5. This problem is examined fully in Chapter V where the first conflict, viz., which procedure is to be adopted, is discussed.

different from that outlined above. The Public and Private Rights Board acts only on disputes between landowners and Provincial Government agencies and has nothing to do with expropriations by private pipe line companies. Since 1972 the control of expropriations for all pipe lines[6] has been exercised by the Board of Arbitration established under s.8 of The Surface Rights Acquisition and Compensation Act. Objections to the location of the pipe line can be lodged with the Board under s. 37 of the Act, and ss. 26 and 27 provide the procedure for the objection and the hearing.

2. Jurisdiction of the Board of Arbitration

That The Surface Rights Acquisition and Compensation Act applies in the case of flow lines and service lines is not open to doubt, but it is submitted that the Board of Arbitration is acting ultra vires in assuming jurisdiction over all intra-provincial private pipe lines.

It is claimed that this jurisdiction was given to the Board of Arbitration by an Act to amend The Surface Rights Acquisition and Compensation Act[7] and an Act to amend The Pipe Lines Act[8] which were introduced into the

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6. Excluding expropriations by federally incorporated companies which are controlled by The National Energy Board.

7. S.S. 1972, c.127.

8. S.S. 1972, c.89.

Legislature as Bills 27 and 28 respectively. Taking Bill No. 28 first, its sole provision inserted into s.26(2) of The Pipe Lines Act, after the opening clause "Not ithstanding subsections (1)", the words "but subject to The Surface Rights Acquisition and Compensation Act, 1968". The Attorney General in moving second reading of this Bill said,

> This amendment is very short and simply brings certain types of pipe lines, the flow lines and gathering lines basically, under the provisions of The Surface Rights Acquisition and Compensation Act.[9]

With the greatest respect, it is submitted that the amendment contained in Bill No. 28 achieves nothing at all. In relation to flow lines and service lines the amendment is superfluous since these lines have been under the provisions of The Surface Rights Acquisition and Compensation Act since its coming into force, while gathering lines, as was submitted in Chapter I, have not been included in The Surface Rights Acquisition and Compensation Act by virture of poor draftsmanship. Given the provisions of The Surface Rights Acquisition and Compensation Act as discussed in Chapter I, it is submitted that the words of Bill No. 28 are quite insufficient to place gathering lines under that Act.

However when one turns to examine the contents of Bill No. 27, the only section of any relevance was s.9,

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9. Report on Debates and Proceedings of the Legislative Assembly of Saskatchewan, 1972, at p. 893.

which provided,

> Where, prior to the coming into force of this Act, an operator has pursuant to an order of the Minister of Mineral Resources under subsection (2) of section 26 of The Pipe Lines Act, acquired a right of entry upon land or any other interest in land for the purposes of constructing flow lines, water lines, or other facilities, and the compensation to be paid therefor by the operator to the owner or occupant as the case may be has not been determined by the board or under The Expropriation Act or The Expropriation Procedure Act, 1968, the owner or occupant may within six months after this Act comes into force apply to the board to determine the compensation to be paid to him and sections 37 to 42 and section 44 of The Surface Rights Acquisition and Compensation Act, 1968, apply *mutatis mutandis*.

In 1973, this section was replaced by s.10 of An Act to amend The Surface Rights Acquisition and Compensation Act 1973[10] which provided,

> Where, prior to the 30th day of March, 1972, an operator has pursuant to an order of the Minister of Mineral Resources under subsection (2) of section 26 of The Pipe Lines Act, acquired a right of entry upon land for the purposes of constructing pipe lines, gathering lines, water lines, or other facilities, and the compensation to be paid therefor has not been agreed upon by the owner or occupant and the operator, or determined by the board or under The Expropriation Act or The Expropriation Procedure Act, 1968, the owner or occupant may within one year after this section comes into force apply to the board to determine the compensation to be paid to him and sections 39 to 42 and section 44 of The Surface Rights Acquisition and Compensation Act, 1968, apply *mutatis mutandis*.

This section by its very wording can have no relevance to

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10. S.S. 1973, c.109.

pipe lines. Its application is restricted to those lines for which an order of the Minister under s.26(2) of The Pipe Lines Act is required, and does not include pipe lines. Even though the 1973 Act refers to "pipe lines" rather than "flow lines" its application is still restricted to those lines belonging to an "operator". "Operator" is defined in s.2(g) of The Surface Rights Acquisition and Compensation Act as "... a company... that has the right to a mineral or the right to drill or produce or recover a mineral", which cannot include a company that merely transports the oil or gas in its pipe line, charging a fee for so doing.[11]

So far as gathering lines are concerned this section may have had some application. Where an operator owned the gathering line and where he had obtained the right of entry pursuant to an order under s.26(2) of The Pipe Lines Act, then the owner or occupant of the land could have applied to the Board of Arbitration to determine compensation in accordance with the relevant provisions of The Surface Rights Acquisition and Compensation Act. However, since the period within which application to the Board had to be made was limited by s. 10 itself to one year from 1st July, 1973, the power to make the application ceased on 1st July, 1974, and has not been revived since.

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11. See also the definition of "surface rights" (s.2(m)) which fails to include land required by a company for a pipe line that is not connected with the producing operations of a mineral.

Even if the section as it stood were to be revived it would still have no application to gathering lines the land for which was expropriated after 30th March, 1972, and for which, as submitted in Chapter I, an order of the Minister under s.26(2) would seem still to be necessary.

3. Potential Results of this Error of Jurisdiction

In the final analysis, it is respectfully submitted that the Board of Arbitration has erred in assuming jurisdiction over pipe lines and gathering lines. Neither type of line is subject to The Surface Rights Acquisition and Compensation Act and no amendment to that Act or to The Pipe Lines Act has changed that fact. Various results flow from this. The first is that an objection to the location of the pipe line is correctly made under s.7(1) of The Expropriation Procedure Act and not s.37 of The Surface Rights Acquisition and Compensation Act and should be made, not to the Board of Arbitration, but to the Public and Private Rights Board. If the legislation is not amended, a landowner may seriously delay a pipe line company by applying to the Courts for an order of mandamus to force the Public and Private Rights Board to review the situation of the pipe line in accordance with s.7(1) of The Expropriation Procedure Act, coupled with an injunction to prevent construction until the Public and

Private Rights Board has made its review.[12] Even if the landowner does not actually adopt this plan of action, he may very well threaten to cause this delay in an attempt to force the pipe line company to settle at a higher figure.

The second result is that procedure for expropriation varies substantially between The Expropriation Procedure Act[13] and The Surface Rights Acquisition and Compensation Act. Since the introduction of The Surface Rights Acquisition and Compensation Act a major complaint from the oil and gas companies, whether justified or not, has been that the awards of the Board of Arbitration have been too generous to the landowners. One would imagine that they would much prefer to return to the District Court where the awards in the past are alleged to have been lower. These differences will be further examined in Chapter V.

Finally, the compensation provisions themselves are different and the guidelines for assessment of compensation vary. These differences will be examined in Chapter VI.

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12. The injunction, being a discretionary remedy, may or may not be granted. Perhaps one of the strongest arguments in favour of the granting of the injunction is to show the probable consequences of refusing to grant it. If the construction goes ahead, is it "practical to propose" (to use the words of Clement, J.A. in Dome Petroleums Ltd. v. Swan Swanson Holdings Ltd., [1971] 2 W.W.R. 506, 511) that the Public and Private Rights Board, even if it is ordered to hear the landowner's objections, will order the pipe line to be pulled out of the ground and relocated ? If the injunction were not granted, the order of mandamus would be of little practical value.

13. For reasons discussed in Chapter V, it is submitted that The Expropriation Procedure Act and not The Expropriation Act is the appropriate statute.

IV. GRANT OR EXPROPRIATION ?

A. GRANT - CLASSIFICATION AND PROTECTION

1. Nature of the Interest

What is the nature of the interest which a company seeks to obtain when it plans to lay its pipe line across the lands of another person ? Ask any landman, and he will probably show you the document used to grant the interest, a document entitled "Easement". However, it is trite law that the mere fact of calling a document an "easement" will not alter the real character of the interest in law.[14] To the question, "What is the true nature of the interest granted under a pipe line right-of-way ?", three different answers appear to have been given. A pipe line right-of-way has been variously treated as (a) an easement in gross, (b) a true easement, and (c) a corporeal hereditament. A true easement and a corporeal hereditament are both recognized at common law as interests in land, but an easement in gross has never amounted to anything more than a personal contract between the grantor and grantee. Classifying the right-of-way as an interest in land may be essential when seeking protection from the provincial legislation relating to land registration. The methods of protection of the grantee's interest will be examined below.

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14. In re Interprovincial Pipe Line (1951) 1 W.W.R. (N.S.) 479, 486, per Procter, J.A.

a. An Easement in Gross

An easement in gross has traditionally been defined in terms of its failure to meet the requirements of a true easement. Thus Lord Cairns, in Rangeley v. Midland Railway Co.[15], said:

> There can be no easement properly so called unless there be both a dominant and a servient tenement.... There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement.

A pipe line carrying oil or gas across another person's land is seen by some as conveying no benefit on nor having any connection with any piece of land,[16] and the legislatures in both British Columbia and Manitoba[17] seem to feel it necessary to declare expressly that pipe line rights-of-way are interests in land notwithstanding that the benefit of the right-of-way is not appurtenant to or annexed to any land of the grantee.[18]

At common law a right which was not appurtenant to any land of the grantee was termed an easement in gross.

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15. (1868) 3 Ch. App. 306, 310-311.

16. See Collins, Land Titles in Saskatchewan, (1966) (Regina), 119, quoting at length from a former Master of Titles to all Saskatchewan registrars. See also Gale on Easements (14th ed. 1972) at p. 5.

17. Land Registry Act, R.S.B.C. 1960 c. 208, s. 24(1); Real Property Act, R.S.M. 1970 c. R. 30, s. 106(1).

18. See below (p. 82) as to the effect of The Land Titles Act of both Alberta and Saskatchewan on the same point.

The grant of such a right has never been recognized by the courts in England or Canada as anything more than a personal contract between grantor and grantee. Dr. A.J. McClean, in an article entitled "The Nature of an Easement",[19] examines the old English cases,[20] which, he claims, provide a very flimsy basis for the courts' refusal to recognize easements in gross as interests in land. However, even Dr. McClean is forced to admit that modern law, both English[21] and Canadian,[22] is now settled, and that changes if required must be by legislation.[23]

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19. (1966) 5 West Ont. L. Rev. 32.

20. Ackroyd v. Smith (1850) 10 C.B. 164; Rangeley v. Midland Railway Co. (1868) 3 Ch. App. 306; Hawkins v. Rutter [1892] 1 Q.B. 668.

21. Re Slavin's Indenture [1938] 2 All E.R. 498; Re Ellenborough Park [1956] Ch. 131.

22. There is a wealth of Canadian decisions and dicta to the effect that an easement must have dominant tenement to exist as an interest in land. See Miller v. Tipling (1918) 43 D.L.R. 469, 483; also, Pitman v. Nickerson (1891) 40 N.S.R. 20, 22; Prittie v. Toronto (1892) 19 O.A.R. 503, 517-8; McDonald v. McDougall (1897) 30 N.S.R. 298, 306-7; Furdon v. Robinson (1899) 30 S.C.R. 64, 72; Hayes v. Hayes (1901) 40 N.S.R. 320, 323; Ogilvie v. Cromwell (1904) 40 N.S.R. 501, 502; Watson v. Jackson (1914) 31 O.L.R. 481, 494; Naegele v. Oke (1916) 31 D.L.R. 501, 506; Conn Zostantos [1950] O.W.N. 277, 278; B.C. Telephone Co. v. West Vancouver (1953) 9 W.W.R. (N.S.) 468, 473; Re Toscano & Dorion (1965) 51 D.L.R. (2d) 298, 302.

23. By way of comparison, the courts in the United States have not only recognized easements in gross as interests in land, but have also allowed them to be freely alienated.

b. A true easement

In Re Ellenborough Park,[24] the English Court of Appeal agreed that the following four characteristics are essential to an easement:

1. There must be a dominant and a servient tenement;
2. An easement must accommodate the dominant tenement;
3. Dominant and servient owners must be different persons;
4. A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

Despite the hopes expressed by one writer[25] that Canadian courts will not feel bound to follow the Ellenborough decision without question, it appears that the case has been accepted by the courts in Canada.[26]

In an effort to classify a pipe line right-of-way as an easement, one must be able to attribute to it all four of the characteristics outlined above. The third requirement, that of different owners presents no problems, but the remaining three characteristics present problems which require some argument and which may prove insoluble. First of all there must be a dominant tenement. Is it the well site, the pumping station, the refinery or some

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24. Re Ellenborough Park, Re Davies decd., Powell v. Maddison [1956] Ch. 131.

25. McClean, supra, n.19, at 61.

26. Temma Realty Co. v. Ress Enterprises Ltd. [1967] 2 O.R. 613; Dukhart v. Surrey [1974] 2 W.W.R. 402.

later point along the processing or distribution line ? The land on which a pumping station, owned by the pipe line company, is situated could perhaps qualify as a dominant tenement, and the lands through which the pipe line runs to that pumping station would qualify as the servient tenements. Lord Evershed's first requirement would accordingly be satisfied. However, his Lordship's second requirement was that the right should "accomodate and serve the dominant tenement and be reasonably necessary for the better enjoyment of that tenement".[27] While it is possible to say that a pipe line is "reasonable necessary for the better enjoyment of" land on which a pumping station is situated, it is ignoring the practical realities of the situation to say that a pipe line "accomodates and serves" a pumping station. In practice it is the pumping station that accomodates and serves the pipe line, maintaining the pressure to ensure the continued flow of pipe line products.

However, if the party arguing that the pipe line right-of-way is an easement is to succeed in his argument, he must show that one of the vital characteristics of an easement is not that it "serves" the dominant tenement, but that it has a "necessary connexion" with the dominant tenement. Some support for this argument might be gathered from the reference by Lord Evershed to "necessary connexion" or "nexus" at various points in his Lordship's judgment. However when his Lordship came to

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27. [1956] Ch. 131, 170.

pose the question to be answered in the case then before the Court of Appeal he did so in these terms:

> Can it be said, then, of the right of full enjoyment of the park in question which ... was, in our view, intended to be annexed to the property conveyed to Mr. Porter, that it accomodated and served that property ?

It is submitted that this latter test is the one to be applied. To attempt to extract from the judgment in Re Ellenborough Park a test that can be applied to make pipe line rights-of-way easements is presumptuous, when that case did not involve pipe lines and the judges did not turn their minds to the problems raised above. All that can be said at present is that the problem of a right-of-way which is "accomodated and served" by another piece of land has not been raised for judicial determination. It remains very doubtful whether the common law as it presently stands will treat such a right as an easement.[28]

As far as well sites or refineries are concerned, a pipe line right-of-way would seem to "accomodate" or "serve" the land on which they are situated. In the case of the well site, the pipe line is necessary to remove the oil or gas once produced, while the refinery cannot function without the products, brought by the pipe line, which it was established to refine. However, use of the well site or refinery as the dominant tenement may present

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28. This view is supported by the Institute of Law Research and Reform in Alberta. See their Report No. 12 on Expropriation, (1973), p. 110.

practical problems of remoteness (does a pipe line right-of-way in Ontario still "accomodate and serve" a well site in Alberta from where the gas which it carries originated ?) In addition, where the lessee of the land on which the well is situated, the owner of the land on which the refinery is built and the pipe line owner who has purchased the right-of-way are all different persons, it would seem that neither the well site nor the refinery can be the dominant tenement. In Alfred E. Beckett Ltd. v. Lyons, Winn L.J. stated,[29]

> I think it is an essential element of any easement that it is annexed to land and that no person can possess an easement otherwise than in respect of and in amplification of his enjoyment of some estate or interest in a piece of land. (emphasis added)

It is clear that the owner of the dominant tenement and the owner of the easement benefitting it must be the same person. Accordingly well sites and refineries will usually be ineligible as dominant tenements.

In Re Ellenborough Park,[30] Lord Evershed M.R. explained the fourth condition to mean inter alia that the grant of an easement cannot involve the sharing or usurping of the servient tenement owner's proprietary rights. This condition seems to provide yet another obstacle to the classification of a pipe line right-of-way as an easement.

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29. [1967] Ch. 449, 483.

30. [1956] Ch. 131, 176.

However, it is pointed out in Gale on Easements[31] that underground pipes seem traditionally to have been excepted from the strict requirements of this fourth condition:

> Of the servient tenement so constituted the servient tenement owner is very nearly (and certainly of the space occupied by the pipe) deprived of possession; yet the validity of an easement of this kind is undoubted.[32]

However the little authority there is in Canada on the point has given rise to the suspicion that the Courts will not treat pipe line rights-of-way as easements, but as something more than easements, some form of corporeal hereditaments.

c. A Corporeal Hereditament

In Re The Land Titles Act, Re Interprovincial Pipe Line Company,[33] Procter, J.A. for the Saskatchewan Court of Appeal felt that the grant by the Crown to Interprovincial of "the right, licence, liberty, privilege and easement" in the land in question for construction, operation, maintenance, etc. of one or more pipe lines, must include the right of the company to have the interest and use of the pipe lines and the space occupied by them

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31. 14th ed. 1972, 30.

32. Citing Schwann v. Cotton [1916] 2 Ch. 459, 474 per Warrington, L.J.

33. (1951) 1 W.W.R. (N.S.) 479.

remain undisturbed.[34] This amounted to an exclusion of the Crown (the grantor) from a part of the soil, and accordingly the true construction of the document was that it conveyed to the grantee "at least an estate in a portion of the substratum in which the pipe line was to be buried".[35] His Lordship cited various cases on tunnels and sewers by way of analogy.[36]

However the use of the maxim quicquid solo plantatur, solo cedit to support classification of the pipe line as an interest in land has not gone unchallenged. In Commissioner of Main Roads v. North Shore Gas Co.[37], the majority of the High Court of Australia rejected the reasoning of an earlier High Court decision, North Shore Gas Co. v. Commissioner for Stamp Duties (N.S.W.)[38], where it had been held that the pipes of a gas company, or the space occupied by the pipes, constituted an interest in land. In the later of the two cases the High Court pointed out that the maxim quicquid solo plantatur, solo cedit is primarily applied to determine the right of the owner of land to

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34. In fact in the document in question (as in all pipe line right-of-way grants) there was a clause prohibiting any form of disturbance of the subsoil by the grantor.

35. (1951) 1 W.W.R. (N.S.) 479, 488-9.

36. Metropolitan Ry. Co. v. Fowles [1893] A.C. 416; Toronto Corp. v. Consumers Gas Co. [1916] 2 A.C. 618; Kolodzi v. Detroit and Windsor Subway Co. [1931] S.C.R. 523.

37. (1967) 120 C.L.R. 118, 127.

38. (1940) 63 C.L.R. 52.

things affixed to or embedded in the soil. The presumption raised by the maxim is rebuttable, especially where a statute or an agreement empowers some person other than the owner to lay pipes in the soil and yet retain the ownership of the pipes once laid. In answer to the question, "Why should it be assumed that the exercise of a ... right to lay and maintain pipes ... operates to vest in the donee of the power an interest in land in which the pipes have been laid ?", their Honours concluded,

> It does seem to us to result from a lawyer's inherent tendency to assimilate such a right to some category known to the common law.[39]

As a result their Honours decided that the right to lay and maintain pipes constituted "a right to occupy some part of the land in a very limited and special way", but did not amount to an interest in land.

It may be possible to distinguish Commissioner of Main Roads v. North Shore Gas Co., as in that case the rights of the company were seriously affected by a statute which empowered the local municipality to require the location of the pipes to be altered as it saw fit. In contrast note the emphasis placed by Proctor, J.A. on the effective exclusion of the grantor from a part of the soil in the Interprovincial Pipeline case. However it should be pointed out that Windeyer, J. was the only member of the High Court of Australia to use this reasoning, and it

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39. (1967) 120 C.L.R. 118, 127.

remains a matter of speculation whether the reasoning of the other members of the Court[40] will influence decisions in future cases in Canada.

2. Protection of the Grantee's Rights

Apart from an academic desire for precise classification, what prompts this need to define the nature of the interest granted to a pipe line company ? It goes without saying that the pipe line company will want to protect its interest in the right-of-way under The Land Titles Act,[41] or its equivalent in other provinces. In Alberta, s. 71 of The Land Titles Act provides that a pipe line company may register the instrument granting a pipe line right-of-way and upon registration all the terms of the grant are binding on the grantee and grantor and on all their successors in title.[42]

However another method of protection which is widely used in Alberta is the filing of a caveat.[43] By s. 136

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40. Barwick, C.J., McTiernan, Kitto, Taylor, JJ..

41. R.S.A. 1970 c. 198.

42. Ibid., s. 71(2).

43. The caveat is the method of protection usually chosen, unless the pipe line company requires a large mortgage, in which case the mortgagee company may insist on registration under s.71. The most obvious advantage of the caveat is that no plan of survey has to be registered, so that the pipe line company is not committed to a certain location on the land to which the certificate of title relates.

of The Land Titles Act,[44] a person claiming an interest in land may cause to be filed a caveat protecting his interest. Accordingly a precise definition of the nature of the interest granted to a pipe line company is required to determine whether a pipe line right-of-way is an interest in land that can be protected by caveat.

If the grant is of a corporeal hereditament, then clearly this is "land" as defined in s. 2(11) of the Alberta Land Titles Act.[45] Similarly an easement falls within the definition of "land". Both these interests can therefore be protected by way of caveat.[46]

Finally, a pipe line right-of-way is an interest in land if the statute providing for its registration makes it so. Thus The Land Registry Act of British Columbia[47] makes a pipe line right-of-way a charge on the land in favour of the grantee. By s. 2(1) of the Act a charge on the land is clearly an interest in land, and can therefore be protected by caveat under s. 209.

Lewis and Thompson[48] state that a pipe line right-of-way in Alberta is an interest in land and cite in support Calgary Power Co. v. Copithorne.[49] However, in

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44. c.f. Land Titles Act, R.S.S. 1965 c. 115, s. 150.

45. R.S.S. 1965, c. 115, s. 2(j).

46. As to the filing of a caveat to protect a registrable easement see Rystephaniuk v. Prosken (1951) 3 W.W.R. 76.

47. R.S.B.C. 1960 c. 208, s. 24(1).

48. Canadian Oil and Gas, Vol. I, S. 51.

49. [1959] S.C.R. 24, per Martland, J. at 35-37.

that case Martland, J. referred to what are now ss.71(1) and 71(4) of The Land Titles Act as if these subsections themselves made a pipe line right-of-way an interest in land. It is respectfully submitted that if the right-of-way were not an interest in land quite apart from the Act (in other words if it were an easement in gross as discussed above), these subsections would not make such a right an interest in land. The subsections merely provide for the protection of rights by registration. They do not attempt to make such rights interests in land.[50] If the common law position were to be held that pipe line rights-of-way are easements in gross, The Land Titles Act would have to include specific words abrogating the common law and transforming these hitherto purely personal rights into interests in land. In Saskatchewan, The Public Utilities Easements Act[51] provides that a pipe line right-of-way may be registered. However s. 2(3) states that rights granted to a pipe line company are "in this Act termed easements". Nowhere are these rights created interests in land for the purposes of The Land Titles Act and in particular for the purposes of filing a caveat.

It is submitted that neither the Alberta nor the Saskatchewan Act has any effect on the nature of the

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50. Section 71(5) Land Titles Act (Alberta) provides for the registration of an instrument granting the right to use land as an airfield, which right is clearly an easement in gross (Gale on Easements, 14th ed., 1972, at 43) and not an interest in land. See also McClean (1966) 5 West. Ontario L. Rev. 32 at 40.

51. R.S.S. 1965 c. 124 s. 2(4).

interest granted to a pipe line company, which must be determined on common law principles quite apart from the Acts. While the decision in Re Interprovincial Pipe Line [52] seems to indicate classification of the interest as a corporeal hereditament, the matter is still open to some doubt. Until the question is firmly resolved, the filing of a caveat to protect the interest seems an unnecessary risk to take when another perfectly adequate procedure exists under s. 71 of the Alberta Land Titles Act or s. 2(4) of the Saskatchewan Public Utilities Easements Act.

3. Mortgages

Where the pipe line company requires capital to finance its investment it will often obtain it by means of a mortgage. The registration of this mortgage can cause some problems. If the right-of-way provides for rights of ingress and egress (and for practical purposes most rights-of-way do) then it will be registered against all the land on the relevant certificate of title. When the mortgage is registered, it is not apportioned between all the certificates of title to the lands through which it passes, but the full amount of the mortgage is registered against each certificate of title. On some farmers, who have achieved their life's ambition and paid off their own

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52. (1951) 1 W.W.R. 479.

mortgage, the effect of discovering a twenty million dollar mortgage registered on their title can best be described as electric. It should be clearly explained to them before or at the time of the registration that their land is not the security for the mortgage.

What is the actual security for the mortgage ? It is clearly not the land,[53] nor is it the physical pipe and equipment. Under s. 71(4) the mortgage must be of a right granted by the instrument registered under s. 71(1). The right is to lay pipe line and conduct operations and it is this right that provides the mortgagee with its security. On default by the mortgagor company, the mortgagee has the right to take over the pipe line operations or sell the same.

Unless the right-of-way is registered under s.71(1), the mortgage cannot be registered under s. 71(4), since s. 71(4) requires "an instrument registered under s. 71(1)". Certainly the mortgage company can file a caveat in protection of its interest, even where the pipe line right-of-way is itself protected by a caveat, but this is rarely done since the caveat can be more easily removed from the certificate of title (under s. 144, Land Titles Act) by notice and 60 days inactivity. As a result, the mortgage company will usually insist that the

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53. Although if the corporeal hereditament analysis of the pipe line company's interest is accepted, that part of the land which is the pipe line itself will be part of the security for the mortgage.

right-of-way be registered under s. 71 and not protected by caveat, and where the mortgage is a large one, this practice is invariably followed. In addition, the mortgage company will as a rule insist that the pipe line company obtain postponement of any other encumbrance or charge on the land in favour of the right-of-way.

Finally, at what stage can the mortgage be registered ? Under s. 71(4) the right-of-way must already be registered. Usually it is registered in the form of a general easement over the whole parcel authorizing the pipe line company to take a right-of-way of specified width the location of which is yet to be determined. Occasionally, the company requires a separate title to the right-of-way, and in these instances s. 78 (made applicable by s. 79) requires a plan to be filed, showing inter alia the area to be taken from each parcel of land. Normally a similar plan is also submitted where a previously registered general easement has been reduced to a specific right-of-way. Where there has been no such reduction, or where it has not been registered, the security for the mortgage will be the company's rights over the general easement that it presently holds.

B. GRANT OR EXPROPRIATION ORDER - THE DIFFERENCES

1. Time and Money

When the pipe line company has decided the

route that it proposes to follow, it must acquire the rights-of-way that it will need. It can either purchase the interests from the landowners or apply to the Surface Rights Board for an expropriation order. Invariably an attempt will be made to obtain a voluntary grant of the right-of-way. The process is much quicker than expropriation proceedings. Indeed the time difference will be further accentuated under the provisions of Alberta's and Manitoba's new expropriation legislation which will require a greater time to be allotted to the obtaining of expropriation orders, and accordingly a greater amount of forward planning. There is nothing to prevent a pipe line company from obtaining voluntary grants of rights-of-way during or before its application to the Board (or Minister) for a construction permit. However should the company decide to expropriate, it must wait until it has a construction permit before it can apply for an expropriation order.[54]

Voluntary grants are also cheaper than expropriations, not because the prices paid for the land differ with the method of acquisition, but because the costs which the landowner may claim on being expropriated may add a substantial amount to the total cost of expropriation. These costs which are allowed by the new Expropriation Acts will be discussed more fully in Chapter VI.

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54. This is a requirement of all the provincial pipe line Acts:
see Alta., ss. 42(1), 40(b); B.C. s. 16(1); Man. (Oil) s. 16(1), (Gas) s. 27(2); Sask. s. 18(1).

2. Expansion within the Right-of-way[55]

It is worth considering at this stage the difference between a grant and an expropriation order in relation to future expansion, either by replacement of pipes by others with a greater capacity, or by additional pipe line or looping. In all cases the company will have to apply to the E.R.C.B. (in Alberta) for an additional permit or an amendment to the present one. Form D of the Schedule to the Alberta Act notes at the end of the specification sheet that a form is required for each size of pipe installed and for each change in maximum operating pressure.

The modern pipe line right-of-way is as a rule drafted to give the company very wide powers. Under a typical granting clause, the landowner agrees to:

> Grant, Convey, Transfer and set over to and unto the Grantee, its successors and assigns, a right-of-way across, over, under, on and through the said lands to construct a pipe line or lines including all pipe or pipes, pumps, valves, drips, cleanout traps, meters, connections, cathodic protection apparatus, communications systems; poles and other equipment and appurtenances that the Grantee shall deem necessary, which notwithstanding any rule of law or equity shall at all times remain the property of the Grantee even though attached to the land, together with the right, licence, liberty and privilege to enter upon the said lands in order to conduct surveys, construct, operate, maintain, inspect, control, alter

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55. For a discussion of some of the problems that have arisen in this context in the U.S.A., see Ballew, Easements affecting the Oil and Gas Industry (1965) 16 Oil & Gas Inst. 271.

> improve, remove, reconstruct, replace and repair the said pipe line or lines and the said appurtenances thereto.

Even the legislative form of the grant of right of user in Manitoba (see the Schedule to both The Pipe Line Act and The Gas Pipe Line Act) gives such wide powers to the pipe line company.[56]

Where the company has been granted a right-of-way in terms similar to those above, it can construct its additional or replacement line as soon as it obtains the Board's approval, without requiring any further permission from the landowner. However where the right-of-way was obtained by means of an expropriation order, it is not clear whether the company must apply once more to the Surface Rights Board to obtain another expropriation order relating to the second line. In Home Oil Co. v. Bilben,[57] the Public Utilities Board held that since the compensation for a pipe line right-of-way was awarded on the basis of a complete taking (with no account taken of the residual value to the owner),[58] the company was not required to pay any additional compensation (subject to payment for damage caused) since the landowner had already been fully compensa- [redacted] However, in Pembina Pipe Line v. Karbach[59] the Board

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56. Although the meters, valves and other equipment must actually be necessary rather than "deemed" to be necessary by the pipe line company.

57. (1964) Unreported, P.U.B. See Lewis & Thompson Vol. I, Dig. 220.

58. Citing In re Valley Pipe Line Co. (1940) 3 W.W.R. 145.

59. Decision No. 71-8 of the Board of Arbitration, 28 October, 1971.

of Arbitration considered a previous expropriation order by the Public Utilities Board which had given Pembina the "full and free liberty" to "lay,... take up, relay, maintain and repair ... pipe lines for the purpose of conveying petroleum". Despite the reference to pipe lines in the plural, it was suggested by counsel (strangely enough, Pembina's counsel) and accepted by the Board that, notwithstanding the wording of the previous order, a further application had to be made to the Board. Compensation would, however, be merely nominal for this second "taking".

With respect, acceptance of such a decision will merely lead to a wasting of the time of all parties concerned. In Home Oil Co. v. Bilben[60] it was pointed out that the landowner had been fully compensated and that accordingly the company was "entitled to exercise those rights as set out in its 1957 orders concerning the first taking without paying additional compensation". It seems totally unnecessary to have a further expropriation application at which the Board will only award nominal compensation. A company which is so permitted by the terms of its (first) expropriation order, should be entitled to add pipe line, within its existing right of way, without any claim for further compensation except for damage caused to the land by the operations. However in practice the Surface Rights Board's certificate of approval is

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60. (1964) Unreported, P.U.B. Lewis & Thompson, Vol. I, Dig. 220.

restricted by the permit of the Energy Resources Conservation Board which only allows one pipe line. On an application for a second pipe line, the E.R.C.B. will require the company to "overlap" the rights-of-way.[61] The result of this policy is that the company is forced to go back to the landowner to acquire rights over the extra piece of land, or to expropriate if necessary.

3. Registration of the Right-of-way

Finally, two further differences between a grant and an expropriation order can be seen in the provisions relating to registration of the right-of-way under The Land Titles Act. As already noted, the instrument granting the right-of-way may be registered by the pipe line company under s. 71(1), and it will be endorsed on the owner's certificate of title. Where the right-of-way is expropriated the company may register the certificate of approval from the Surface Rights Board under s. 18 of The Expropriation Act. The first difference appears in the event of failure to register the respective interests. In the case of the voluntary grant, failure to register has no effect on the contractual relations between the parties and the

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61. Instead of granting a permit within the existing right of way, it is the practice of the E.R.C.B. to grant a permit for a new right-of-way of which a certain portion only is part of the right-of-way already taken. Since some additional land must be acquired, the reasoning in Home Oil v. Bilben is not applicable.

only danger is of a sale by the landowner to a bona fide purchaser without notice, which sale would cause the company to lose its interest in the land. In the case of failure to register the certificate of approval of the expropriation within 120 days, s. 19 of The Expropriation Act states that the expropriation shall be conclusively deemed to be abandoned, and any memorandum on the certificate of title of the notice of intention to expropriate will be cancelled.

The other difference arises in a situation where an error in the Land Titles Office has caused the cancellation or omission from the certificate of title of the memorandum of the right-of-way grant or expropriation order. Where this error is followed by transfers of the land (bona fide transactions to purchasers for value), does the new owner of the land hold clear of the interest of the pipe line company ? Section 64(1)(g) provides as follows:

> 64(1) The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention therein, subject to ...
> (g) any right of way or other easement granted or acquired under the provisions of any Act or law in force in the Province. (emphasis added)

Clearly an expropriation order once registered grants a right-of-way under the provisions of an Act in force in the Province, and the land across which the right-of-way lies will be subject to the right-of-way even if it is not endorsed on the certificate. However, where a

voluntary grant is concerned, the right-of-way has been granted under a contractual arrangement between the parties. Does the word "law" in s. 64(1)(g) include the common law in force in Alberta ? If it does, then a right-of-way which is omitted from the certificate of title will nevertheless be implied by virtue of s. 64(1)(g). However, if it does not, the land will not be subject to the right-of-way, if that right-of-way is not endorsed on the certificate of title.

The meaning of similar words was considered in various Lord's Day Observance cases in the 1920s and 1930s. In Cote v. Friesen[62] and in Re The Act to Amend The Lord's Day Act[63] the Manitoba Court of Appeal held that the word "law" in the phrase "any provincial Act or law now or hereafter in force" meant the common law. Although the Court's decision in Re The Act to Amend The Lord's Day Act was affirmed by the Privy Council,[64] their Lordships refused to deal with this point of interpretation on the grounds that it was not necessary for their decision. The courts in Saskatchewan refused to follow the decisions,[65] and in 1930 the Court of Appeal in Manitoba, in R. v. Thompson[66]

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62. (1921) 31 Man. L. R. 334.

63. [1923] 3 D.L.R. 495.

64. [1925] A.C. 384.

65. In re Jorgenson [1923] 2 W.W.R. 600; Demchenko v. Fricke [1926] 2 D.L.R. 1096.

66. [1931] 2 D.L.R. 282.

reversed its previous decisions in Cote v. Friesen and Re The Act to Amend The Lord's Day Act, and held that "law" meant something in an enactment and not the common law.

In In Re Jorgenson,[67] MacDonald, J. provided another argument against interpretation of "law" as the common law namely that "one cannot speak of the provisions of the common law, or say that anything is provided by the common law". His Lordship defined "provision"[68] and was of the opinion that the term could not be used with reference to the common law.

It is submitted that similar reasoning is applicable to s. 64(1)(g) of The Land Titles Act, so that the word "law" refers only to a statutory enactment. Accordingly a right-of-way which has been granted voluntarily cannot be implied under s. 64 in the event of its omission from the certificate of title.

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67. [1923] 2 W.W.R. 600.

68. "Provision": Each of the clauses or divisions of legal or formal statement, or such a statement itself, providing for some particular matter; also, a clause in such a statement which makes an express stipulation. (Shorter Oxford English Dictionary, 3d ed., at 1609).

V. EXPROPRIATION

The 1960s saw the first serious examination of expropriation procedures and compensation by any of the jurisdictions, provincial or federal, in Canada.[69] The first moves came from Ontario, which consolidated the various provisions relating to procedure into the Expropriations Procedure Act, 1962-3.[70] In 1964 the Report of the British Columbia Commission on Expropriation was published, and this was followed by the Ontario Report on the Basis for Compensation on Expropriation (1967) and the McRuer Report on Procedure (Ontario 1968). The result of the two latter Reports was The Expropriations Act of Ontario[71] which has provided the basis for Federal and Provincial expropriation legislation across Canada. Five of the other nine provinces[72] and the federal government[73] have followed Ontario's lead and their Acts are basically similar.

Alberta and Manitoba are among the provinces which have introduced the new-style expropriation

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69. See Todd, The Winds of Change and the Laws of Expropriation, (1961) 39 Can. Bar Rev. 542.

70. S.O. 1962-3, c. 43.

71. S.O. 1968-9, c. 36.

72. Manitoba - S.M. 1970, c. 78; New Brunswick - S.N.B. 1973, c. 6; Quebec - S.Q. 1973, c. 38; Nova Scotia - S.N.S. 1973, c. 7; Alberta - S.A. 1974, c. 27.

73. R.S.C. 1970, c. 16 (1st Supp.).

legislation. British Columbia, however, has still made no changes to its legislation, at least none that affect pipe lines, while Saskatchewan has reached a half-way stage where its legislation is composed of some new-style provisions superimposed on an old-style framework.

In British Columbia, the 1964 Report on Expropriation and a further study of expropriation by the Law Reform Commission in 1971 have not as yet brought any legislative change, with the exception of the amendment to The Petroleum and Natural Gas Act 1974,[74] which came into effect on 1st July. The amendment introduced new compensation provisions (s. 19(4)), but unfortunately these only apply to flow lines and service lines. As far as pipe line rights-of-way are concerned, the antiquated provisions of The Railway Act[75] and The Gas Utilities Act[76] apply.

In Manitoba, the old Expropriation Act[77] had set out different procedures to be followed and different methods of assessing compensation payable depending on whether the taking was by the Crown, a municipal corporation or a private company. The new Expropriation Act,[78] following the Ontario legislation, came into force on

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74. S.B.C. 1974, c. 61.

75. R.S.B.C. 1960, c. 329.

76. R.S.B.C. 1960, c. 164.

77. R.S.M. 1970, c. E190.

78. S.M. 1970, c. 78, as amended by S.M. 1971, c. 79, S.M. 1972, c. 29, and S.M. 1974, c. 59, s. 73.

1st January, 1971 and established one procedure to be followed by all expropriating authorities and one method of calculating the due compensation.

In Alberta, The Expropriation Procedure Act of 1961[79] had drawn together the various procedural provisions relating to expropriation, but it was not until 9th July, 1974, following a Report by the Institute of Law Research and Reform, that comprehensive provisions relating to both procedure and compensation came into existence. The resulting statute, The Expropriation Act,[80] followed the Ontario and Manitoba Acts to a large extent and like the Manitoba Act provided one method of expropriation for all expropriating authorities instead of the procedure under The Expropriation Act, which had differentiated between expropriations by the Crown, municipalities and private companies.

The situation in Saskatchewan is complicated by the fact that there are three different statutes, apart from The Pipe Lines Act, which could apply to expropriations by pipe line companies. It is necessary therefore to establish which Acts should be applied and which Acts by their very wording are not applicable to the pipe lines with which this thesis is concerned. In Saskatchewan, the Report of the Royal Commission on Surface Rights and

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79. R.S.A. 1970, c. 130.

80. S.A. 1974, c. 27.

Pipe Line Easements (The Friesen Report) resulted in The Surface Rights Acquisition and Compensation Act, 1968.[81] Judge Friesen in his Report recommended that the acquisition of easements for all types of pipe lines be regulated by one comprehensive statute.[82] However, as already discussed in Chapter III, The Surface Rights Acquisition and Compensation Act only applies to flow lines and service lines, and it has already been submitted that despite the accepted practice in Saskatchewan, pipe lines and gathering lines do not come under The Surface Rights Acquisition and Compensation Act. As the legislation stands at present, the expropriation of land for pipe lines is regulated by three separate statutes: The Pipe Lines Act,[83] The Expropriation Act,[84] and The Expropriation Procedure Act.[85] In this Chapter and in Chapter VI, the expropriation procedure and the assessment of compensation as they are provided for under these Acts will be examined, and the procedure and assessment under The Surface Rights Acquisition and Compensation Act discussed by way of comparison. The Expropriation Procedure Act came into effect on 1st December, 1968, and, by virtue of s. 3(1),

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81. S.S. 1968, c. 73.

82. Report of the Royal Commission on Surface Rights and Pipe Line Easements, ch. 7, at p. 10.

83. R.S.S. 1965, c. 413.

84. R.S.S. 1965, c. 56.

85. S.S. 1968, c. 21. It should be noted that The Expropriation Procedure Act does not (by virtue of s. 3(3)) apply to the Surface Rights Acquisition and Compensation Act, 1968.

the provisions of the Act govern in the case of conflict with the provisions of any other Act. As a result, The Expropriation Procedure Act applies to all pipe line expropriations even though The Pipe Lines Act only makes reference to The Expropriation Act. Confusing as it may be to have three statutes relevant to a single pipe line expropriation, it becomes far more confusing when the statutes are examined closely. Few difficulties arise when particular provisions of The Expropriation Act and The Expropriation Procedure Act are in obvious conflict - the latter provisions prevail. However, how great an effort must be made to read the two Acts together ? Must the provisions of The Expropriation Act which are not clearly overruled by provisions of The Expropriation Procedure Act be deemed to be still in full force and effect, or must The Expropriation Procedure Act be deemed to have repealed The Expropriation Act in toto ?

It is possible for a later statute to repeal an earlier one by implication, and legal text-books cite many cases by way of example.[86] However, Davey, J.A., in Re Quieting Titles Act; Re Lincoln Mining Syndicate Ltd. v. R.[87]

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86. See Maxwell on The Interpretation of Statutes, (12th ed., 1969, by P. St. J. Langan) at pp. 193-6. For a thorough judicial examination, see the judgment of Chief Commissioner Killan in Grand Trunk Ry. Co. v. Robertson (1908) 39 S.C.R. 506, 518-521. The Chief Commissioner's reasons were adopted by the Supreme Court of Canada (1908) 39 S.C.R. 506, 531-534 and upheld on appeal to the Privy Council [1909] A.C. 525.

87. (1958) 26 W.W.R. 145, 150 (B.C. C.A.).

quoted from Beal's Cardinal Rules of Legal Interpretation,

> Repeal by implication is never to be favoured; and when the repeal is not express, the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand together.
>
> Every affirmative statute is a repeal by implication of a precedent affirmative statute so far as it is inconsistent or repugnant thereto, and no further.

The argument in support of an implied repeal of The Expropriation Act is as follows. Section 3(3) of The Expropriation Procedure Act lists certain statutes and expropriations to which The Expropriation Procedure Act does not apply. The Act must be presumed to apply to all other provincial legislation including The Pipe Lines Act and the three statutes which The Expropriation Act was originally enacted to deal with.[88] The Expropriation Procedure Act prescribes a whole new system of expropriation and it is logical to assume that this new system will replace the previous system under The Expropriation Act.

However, logic has not always been the determining factor in judicial decisions on the implied repeal of previous legislation, and judges have gone to some lengths to construe the earlier and later statutes in such a way that effect can be given to both.[89] To take an example of a situation where effect could, if necessary, be given to both statutes: sections 27 and 28 of The

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88. The Water Power Act, R.S.S. 1965, c. 52; The Water Rights Act, R.S.S. 1965, c. 51; The Conservation and Development Act, R.S.S. 1965, c. 221.

89. See Re Lincoln Mining Syndicate Ltd. v. R. (1958) 26 W.W.R. 145 and the cases cited in Maxwell, op.cit. at pp. 191-193.

Expropriation Act permit the pipe line company to apply for a warrant for immediate possession to enable it to go on the land before the final settlement of compensation.[90] The Expropriation Procedure Act does not abrogate this right, although s. 9(1), requiring notice before entry onto the land for survey and other purposes, presumably applies a fortiori to cases where the company takes possession for construction purposes. In fact s. 11(2) of The Expropriation Procedure Act makes express provision for the situation where the expropriation authority is allowed to take possession of the land before title thereto is vested in it. Accordingly the right to immediate possession may well have "survived" The Expropriation Procedure Act.

It is submitted that the more logical view is to accept The Expropriation Procedure Act as providing a new system of expropriation which supersedes the previous system in its entirety, and that the failure to repeal The Expropriation Act was an omission on the part of the Saskatchewan Legislature. However, the courts have shown great resistance to similar submissions, and this writer cannot presume to predict the decision of the courts should this matter come to trial.

The two approaches to expropriation that are evidenced by the legislation of Alberta and Manitoba on the one hand, and by the legislation of British Columbia and

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90. See also The Pipe Lines Act (Sask.), s. 18(3).

Saskatchewan on the other, are so fundamentally different that comparison in any detail would be meaningless. Instead what is proposed is to examine separately each approach comparing the provinces which have adopted the particular approach, and then to draw from this examination the major differences between the two approaches. The problems that have arisen or are likely to arise under the Alberta and Manitoba Acts will be examined in greater detail than many of those arising under the British Columbia or Saskatchewan Acts since it is anticipated that these latter two provinces will before long enact new expropriation legislation, in which case comments relating to Alberta and Manitoba may become relevant to the other two western Provinces.

Finally in examining the expropriation legislation it is proposed to deal with the two aspects of expropriation: Procedure and Compensation.

A. PROCEDURE FOR EXPROPRIATION IN ALBERTA AND MANITOBA

1. Notice of Intention

a. Alberta

Probably the major difference from The Expropriation Procedure Act 1961 is that, under the new Act,

parties with a registered interest in the land will always have a notice of the intended expropriation. The first step in the procedure is the Notice of Intention to Expropriate, filed by the company in the Land Titles Office (s. 8(1)),[91] and served on every registered or known owner or an interest in the land (s. 8(2))[91a] and on the Surface Rights Board (s. 8(3)). The Notice of Intention is also to be published twice in the newspapers (s. 8(4)). The form which the Notice of Intention to Expropriate is to take is set out in Form 1 of The Expropriation Forms Regulations.[92]

Section 8 and Form 1 are both silent as to the amount of land to be covered by a Notice of Intention to Expropriate. Can one notice be filed covering all the required rights-of-way for the proposed route, or should there be a separate Notice for the land to be taken from each separate parcel ? The Surface Rights Board prefers that there be a separate Notice of Intention for each title.[93] This will benefit the companies in two ways. First, the company will be able to deal more easily with the acquiring of land where some owners object under s. 10 and

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91. Sections referred to in the text will be sections from the Expropriation Act of the particular province under discussion, unless the contrary is stated.

91a. As to the means of service, see s. 65.

92. Alta. Reg. 1/75.

93. Paper presented by Mr. B.E. Langridge, Chairman of the Surface Rights Board, at the seminar on Expropriation, Edmonton, 5th December, 1974.

some do not. Secondly, in the event of a settlement between the parties before the expropriation proceedings have been completed by the Board, the company can abandon the expropriation with regard to certain parcels of land on an individual basis. However this requirement of individual Notices of Intention will cause the company added expense, and if the same requirement is made in respect of newspaper advertisement under s. 8(4), the added expense could be substantial. Section 8(4) begins "The Notice of Intention shall be published....", and the reference in the singular to the Notice of Intention might be taken to indicate that each Notice of Intention must be published separately. Where a pipe line company is forced to expropriate a large proportion of a long pipe line, the publication of a series of Notices of Intention could prove costly. It is believed, however, that the Surface Rights Board will not require publication of the full legal description to identify the lands in question, and that the newspaper publication of the notice can cover more than one parcel of land. This will save a great deal of advertising expense.

The contents of the Notice are prescribed by s. 8(5). Paragraph (g) requires a statement to the effect that a person does not have to make a formal objection under s. 10 in order to preserve his right to have the Board determine the amount of compensation payable. This is a totally separate right accruing under Part 2 of the Act and is not dependent on an objection being made

to the expropriation. In addition to the contents prescribed by s. 8(5), the Board has requested[94] that a precise plan of the land to be taken from each parcel be provided to each owner with the notice, and that the names and addresses of all the parties interested in the land to be taken be provided as well. These requirements are now incorporated in Form 1 of The Expropriation Form Regulations.[95]

b. Manitoba

In Manitoba an expropriation is initiated by a Declaration of Expropriation which (under s. 3) must be made by the pipe line company and confirmed by the Cabinet before the company can exercise its powers of expropriation. Section 4(1) sets out the required contents of the Declaration (a description of the land, the interest to be expropriated and a reference to s. 16 of The Pipe Line Act (or s. 27 of The Gas Pipe Line Act), which gives the company the right to expropriate, once it has obtained a construction permit)[96] and Schedule B prescribes the form which the Declaration is to take. Once this Declaration is

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94. Ibid.

95. Alta. Reg. 1/75.

96. There is a difference between The Pipe Line Act and The Gas Pipe Line Act regarding the expropriation of land for compressor stations and similar equipment. Section 16(1)(b) of The Pipe Line Act merely requires the company to possess a construction permit, whereas s. 27(1) of The Gas Pipe Line Act requires an application

signed by the Company, a notice of intended expropriation is filed in the Land Titles Office (s. 4(4)) indicating the land affected and that application for a confirmation order is pending. Section 4(4) does not require any further notice to be given other than the filing of the notice of intention. However s. 2(1) of Schedule A gives the company 30 days from the signing of the declaration to (a) serve notice on all the parties interested in the land (insofar as they can be ascertained from the records at the Land Titles Office and the realty assessment roll), (b) publish notice of the intended expropriation in a newspaper, and (c) submit the declaration to the Cabinet together with proof of service and publication. Section 2(2) of Schedule A requires that the company inform the landowner of his right to object to the intended expropriation and inform him of where he may lodge his objection.

In Manitoba, as in Alberta, there are no express directions as to the amount of land to be covered by a notice of intended expropriation or a declaration of expropriation. Section 4(4), dealing with filing of a notice of intended expropriation, refers to "lands" rather than "land" and requires the district registrar to endorse the notice on the certificates or records of title that are affected. It seems that the notice filed can refer to

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to the Public Utilities Board, filing of plans and other materials before the Board, and the obtaining of a Board order.

the entire pipe line. While each landowner will receive a separate notice of the intended expropriation, s. 2(1) of Schedule A which requires newspaper publication of the intended expropriation only requires the company to "publish notice of the intended expropriation", a more general requirement than in s. 8(4) of the Alberta Act ("The notice of intention shall be published") and one which would seem to be satisfied by one published notice covering all the land required for the proposed pipe line. The contents of the Declaration of Expropriation prescribed by s. 4(1) give the impression that a declaration refers to one parcel of land alone. Section 4(4), on the other hand, would seem to envisage a single declaration for all the lands to be expropriated by the pipe line company. However, when the role of the declaration is studied, it is clear that the declaration must refer to one parcel of land. Under s. 9(1) the Cabinet has power to confirm, refuse or modify the declaration. The decision will be made after a consideration of each separate case with representation perhaps from each affected landowner. It will not be made in blanket fashion in reference to the whole project at once. Accordingly, a separate declaration must be submitted (and confirmed) for each separate parcel of land to be expropriated.

2. Notice of Objection

a. Alberta

The holder of an interest in the land has 21

days in which to file an objection with the Surface Rights Board (s. 10(1)), stating inter alia the grounds of his objection (s. 10(2)(c)). This Notice of Objection is to take the form prescribed in Form 2 of The Expropriation Forms Regulations.[97] If there is no objection, the Surface Rights Board will proceed directly to the approving (or disapproving) of the expropriation (s. 11).

It must be stressed that the owner under s. 10 is only objecting to the expropriation itself and not to the compensation. It is only an objection to the expropriation itself that requires an inquiry under Part 1 of the Act.

Note the use of the word "owner", as defined in s. 1(i),[98] to limit the class of potential objectors to those with an interest in the land. In contrast, the Federal Expropriation Act allows any person to object, although to date that Act has proved somewhat less than satisfactory in its method of dealing with objections.

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97. Alta. Reg. 1/75.

98. Section 1(i) states:

Owner means

(i) a person registered in the land titles office as the owner of an estate in fee simple in land, or

(ii) a person who is shown by the records of the land titles office as having a particular estate or an interest, mortgage or encumbrance in or upon land, or

(iii) any other person who is in possession or occupation of the land, or

(iv) any other person who is known by the expropriating authority to have an interest in the land, or

(v) in the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in the land;

b. Manitoba

An "owner" has 30 days in which to make his objections known to the provincial Cabinet, and s. 3 of Schedule A requires the same information to be included in written objections in Manitoba as s. 10(2) of the Alberta Expropriation Act requires in Alberta. The definition of "owner" in Manitoba's Expropriation Act (s. 1(1)(l)) is slightly wider than the corresponding definition in Alberta's Act. In Manitoba, "owner" "includes ... any person who has any estate or interest in land ....", and covers a person who holds (for example) an unregistered encumbrance of which the expropriating authority is not aware. In Alberta, the holder of such an interest, not being registered (s. 1(i)(i)), nor known to the expropriating authority (s. 1(i)(iv)), is not entitled to object under s. 10 of the Alberta Act, but will have to hope that the Surface Rights Board, in its role as inquiry officer, will add him as a party to the inquiry on the grounds that he is a "person who appears to have a material interest in the outcome of the expropriation" (s. 14(9)(b)).

In Manitoba, if no objection is served on the Cabinet within thirty days, s. 4(1)(e) of Schedule A seems to give the Cabinet no alternative but to confirm the declaration (compare s. 11 of the Alberta Act). In fact this merely recognizes the practical realities of the situation. If the Cabinet has approved the construction permit under s. 10 of The Pipe Line Act (s. 19 of The Gas

Pipe Line Act) and there have been no objections to the expropriation (apart from disagreement over compensation which makes voluntary grants of rights-of-way impossible), there exists no reason why the Cabinet would suddenly prevent the pipe line company from expropriating the required land.

3. Appointment of Inquiry Officer by Attorney General

a. Alberta

When an objection is received the Surface Rights Board must immediately notify the Attorney General (s. 14(1)). Section 14(2) requires the Attorney General to appoint an inquiry officer within five days of being notified. Section 14(2) further provides that this inquiry officer shall not be "an officer or employee of the Crown or of any agency of the Crown". Section 14(4) however reads:

> Where the expropriating authority is other than the Crown or a municipality, the Attorney General shall appoint the Board to carry out the functions of an inquiry officer under this Act.

The members of the Board, in performing their duties under the Act, are "employees of the Crown," so that s. 14(4) is in conflict with s. 14(2). The only solution is to use the words in s. 14(4), "where the expropriating authority is other than the Crown or a municipality", to restrict the

application of s. 14(2) to cases involving expropriation by the Crown or a municipality, so that s. 14(4) applies in the case of expropriations by pipe line companies and overrules the latter half of s. 14(2).[99]

Since s. 14(4) states that where the expropriating authority is anyone other than the Crown or a municipality, the Attorney General shall appoint the Board to act as an inquiry officer, it seems a waste of time to go through the procedure in s. 14(1) and (2) of notification and appointment. It seems logical for the Board to act immediately as the inquiry officer, and merely to inform the Attorney General of its actions.

b. Manitoba

On receipt of an objection, the Cabinet formally requests the Attorney General to appoint an inquiry officer (Schedule A, s. 4). Under s. 4(2) of Schedule A, the Attorney General must appoint a suitable and independent person as inquiry officer, although no time is set down within which the appointment must be made (see s. 14(2) of the Alberta Act).

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99. Subsection (4) of s. 14 also seems inconsistent with subsection (3) which allows the Attorney General to appoint a chief inquiry officer. This person on his appointment becomes "an official or employee of the Crown", and thus s. 14(2) is breached. The solution would appear to be to change the title of "chief inquiry officer" to "chief administrative officer" and thus avoid the potential confusion caused by using the term "inquiry officer" and "chief inquiry officer" in consecutive subsections.

4. Notice of Inquiry

a. Alberta

Under s. 14(5) the Board sets a date for the (public) inquiry and notifies the company and all the objectors, who must be parties to the inquiry (s. 14(6)). The form of the Notice of Inquiry is prescribed by Form 3 of The Expropriation Forms Regulations.[1]

b. Manitoba

Under s. 5(1) of Schedule A, the inquiry officer has seven days in which to fix a time and place for the public hearing. Notice of the hearing is published in a local newspaper, and the expropriating authority and all those who have served a notice of objection are notified separately as they are in Alberta, and in addition all those who have been served with a notice of intended expropriation are, in Manitoba, personally notified of the hearing. Section 6(1) of Schedule A makes the pipe line company and each person who has served a notice of objection parties to the hearing. It seems that any other persons (for example, those served with a notice of intended expropriation), who know of the hearing but have not served a notice of objection, must rely on the exercise of the discretion of

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1. Alta. Reg. 1/75.

the inquiry officer under s. 6(2)(b) of Schedule A, whereby they may be added as parties.

5. Inquiry

a. Alberta

On the appointed date the inquiry is held, and under s. 14(8) the Board is to inquire into whether the proposed expropriation is "fair, sound and reasonably necessary in the achievement of the objectives" of the company. Sub-section 14(9) provides various guidelines for the conduct of the inquiry. The inquiry is not a forum for a discussion of general policy nor the merits of a project. What should be considered at the inquiry was stated in the McRuer Report:[2]

> The soundness and fairness of taking the particular piece of land described in the proposed expropriation plan.... The public interest and the interests of the owner must be considered. Evidence and comment on this issue, and on related issues such as the feasibility of the modification of the expropriation plan, or alternative sites or routes, or the taking of a lesser estate or interest in the land, should be relevant.

There are two occasions where an inquiry will not be held although an objection has been made. Section 13 permits the Cabinet to order that an intended expropriation proceed without an inquiry in cases where the

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2. At p. 1007.

land is urgently required and where delay would be prejudicial to the public interest. From a practical point of view it is very unlikely that a pipe line company will be able to persuade the Cabinet to act under s. 13.

Under s. 9 the Board may dispense with an inquiry where it is of the opinion that the owner has already had, under the provisions of some other Act, "substantially the same opportunity to object to the expropriation as he would have had on an inquiry under [The Expropriation Act]". When this provision was recommended by the Institute of Law Research and Reform[3], the hearings before the Energy Resources Conservation Board were cited as specific examples of a situation where substantially the same opportunity to object had been afforded the landowner and where the Surface Rights Board might well dispense with the inquiry. If this was the intention of the legislature, it is respectfully submitted that the wording of the section as it now reads does not give effect to this intention. Section 9 expressly refers to a previous opportunity to object <u>to the expropriation.</u> Since the holding of a permit is a pre-requisite to expropriation proceedings and since an expropriation is not contemplated until the Notice of Intention to Expropriate has been filed and served, it is impossible to say that the owner could have objected <u>to the expropriation</u> at the E.R.C.B. proceedings. Those proceedings allow objections

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3. Recommendation #9, Expropriation Report, p. 20.

solely to the general route of the pipe line, and, as has been already shown, the landowner very often does not have a chance to object to the granting of the permit at all.

b. Manitoba

Section 6(2) of Schedule A sets out the powers and duties of the inquiry officer. The purpose of the public hearing is similar to that in Alberta, viz., to determine whether the intended expropriation is "fair and reasonably necessary for the achievement of the objectives of the expropriating authority".

Section 9(7)(a) of the Act gives the Cabinet power to confirm the pipe line company's declaration without providing for an inquiry, if it is deemed "necessary or expedient to the public interest". As already stated, a pipe line company is unlikely to be able to persuade the Cabinet to exercise this power. The Law Reform Commission of British Columbia, in its report on Expropriation in 1971[4], reported that the dispensing power had not, as far as the commissioners were aware, been exercised in Manitoba in the first year of operation of that Province's Act, nor had the power been exercised by the Federal Government in the 18 months during which the Federal Expropriation Act had been in effect. The Ontario Government only exercised the power five times in the two and a half years following

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4. At p. 94.

the introduction of the new legislation, and none of those cases involved oil or gas pipe lines. In fact in most cases the expropriation had been considered by the Ontario Municipal Board at an earlier stage.[5]

c. Costs of the Inquiry

The provisions in the provincial Acts relating to the costs of the inquiry differ widely. In Ontario, s. 7(10) of The Expropriations Act[6] permits the inquiry officer to recommend to the approving authority that the expropriating authority pay a party to the inquiry a fixed amount (maximum $200) by way of costs.

Manitoba's provision, s. 4(3) of the Schedule, only provides for the remuneration of the inquiry officer, to be paid by the expropriating authority, but makes no mention of the costs of the parties.

In Alberta, however, s. 14(10) of The Expropriation Act states:

> The reasonable costs of the owner in

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5. The Law Reform Commission (at p. 94) gave one example of the use of the dispensing power in Ontario:
> In one particular case the inquiry provision was dispensed with where an easement was required across an owner's property to hasten the installation of water mains in order that an old age home could have adequate sanitary and fire protection at the earliest possible moment.

It is unlikely that a pipe line company could provide evidence of this type of urgency.

6. R.S.O. 1970, c. 154.

> connection with the inquiry shall be paid by the expropriating authority unless the inquiry officer determines that special circumstances exist to justify the reduction or denial of costs.

The wording of s. 14(10) is similar to that used in s. 37(1), dealing with costs incurred in determining compensation, and it is proposed to leave discussion of these costs, and especially what are "reasonable" costs, until later in this thesis.[7]

One important effect of s. ~~14(10)~~ of the Alberta Act is that an owner can receive all of his costs of the inquiry (so long as they are reasonable).[8] On the other hand, in Manitoba an owner cannot obtain his costs of the inquiry, while in Ontario he is limited to $200. In neither Province can an owner recover inquiry costs under the compensation provisions of the Act,[9] since any costs recovered under these provisions must have been paid for the purposes of establishing the amount of compensation due. An earlier inquiry to determine the necessity of the expropriation is not held for the purpose of establishing the compensation to be paid. Accordingly the pipe-line company is not liable for the costs

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7. Infra, p. 206.

8. In contrast to the Recommendations of the Institute of Law Research and Reform who recommended (at p. 31 of the Report) that the expropriating authority should not be liable for the owner's costs of the inquiry.

9. R.S.M. 1970, c. 78, s. 43; R.S.O. 1970, c. 154, s. 33.

thereof.[10] Section 14(10) preserves for the landowner in Alberta the right to his reasonable costs of this initial inquiry.

6. Report of the Inquiry Officer

a. Alberta

Where, as in the case of pipe line expropriations in Alberta, the Board is both the inquiry officer and the approving authority (under s. 17), the two roles tend to become merged, in practice at least. These will be discussed under the heading "Certificate of Approval" below.

b. Manitoba

Section 8 of Schedule A requires the inquiry officer to make and deliver his written report within 30 days of his appointment. His report is to contain a summary of the evidence and the arguments of the parties, his findings of fact, his opinion on the question before him, and on anything else he considers to be in the public interest.[11]

One problem that arises in following a strict

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10. Peloquin v. Junction Creek Conservation Authority [1973] 1 O.R. 258.

11. Compare s. 15(1) of the Alberta Act.

interpretation of Schedule A, is that, if an inquiry officer does not present his report within thirty days, he has within the terms of s. 7 of the Schedule failed "to carry out his duties in accordance with this Schedule". Under s. 7 of Schedule A his appointment must be revoked immediately and another inquiry officer appointed. There would seem to be no possibility of extending the time allowed by applying to a judge under s. 23(1) of the Act itself, since this section specifically excludes from its operation time limits set in Schedule A. If another inquiry officer is appointed, can he present the report that his predecessor would have presented, or must there be another inquiry, thereby putting back the date on which the pipe line company may take possession by as much as another 30 days ? In the light of s. 8 of Schedule A, which requires the inquiry officer in his report to set forth "his determination of the facts" and "his opinion on the question in issue" as well as other matters, it is submitted that he is precluded from presenting a report compiled by another person. To be able to determine the facts or present his own opinion, the new inquiry officer will have to hold another inquiry.

7. Certificate of Approval

a. Alberta

Whether there are objections or not, the

Surface Rights Board must grant a certificate of approval before the company may take possession of the land and begin construction. Where the Board is acting in its two roles, as inquiry officer and as approving authority, it must make a decision (approval, disapproval or modification) within 60 days of its appointment as inquiry officer, giving written reasons to all the parties.[12]

The certificate of approval is given in the form prescribed by Form 4 of The Expropriation Forms Regulations,[13] and when given can be registered at the Land Titles Office by the company (s. 18(1)). Registration vests in the company the title to the interest in the lands specified in the certificate.[14] In the event of failure to register within 120 days of the filing of notice of intention, the company will be conclusively deemed to have abandoned its expropriation. The certificate of approval can be varied, even after registration, if the variation is minor and within the parcel from which the land was expropriated, and if the owner is not prejudiced by the variation.

The Chairman of the Surface Rights Board has stated that certain requirements will have to be met before

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12. S.A. 1974, c. 27, s. 17(3).

13. Alta. Reg. 1/75.

14. The time at which the title vests may be important in determining market value. In Farlinger Developments Ltd. v. Borough of East York (1973) 5 L.C.R. 95, 98, the failure to obey the provisions of The Expropriations Act prevented the title to the lands vesting in the expropriating authority, and the market value of the lands was assessed as of a date four years after this first attempt at expropriation.

the Board will issue a certificate of approval:[15]

> There must be (i) a plan filed and numbered in the appropriate Land Titles Office; (ii) a permit issued by the appropriate authority under the relevant authorizing Act; (iii) an express request in writing from the expropriating authority for a Certificate of Approval; and (iv) evidence satisfactory to the Board showing all the persons having an interest in the lands to be expropriated.
>
> The plan is necessary so that the exact location of the lands expropriated can be determined and identified in the Certificate of Approval. The permit is required so that the Board can be satisfied that the "works" for which the expropriated lands are required, have been authorized. The request for the Certificate will indicate that no negotiated settlement has been reached, and the evidence of interested parties will provide the Board with a list of the persons who may ultimately be entitled to compensation.

b. Manitoba

The equivalent of the certificate of approval is the order by the Cabinet confirming the declaration submitted by the company. Section 9(1) of the Act states that the Cabinet may confirm, refuse or modify the declaration. Reasons for the decision are only given where the order is not in accordance with the opinion of the inquiry officer (s. 9(1) of Schedule A). Section 9(4) requires the Cabinet's order to be made within 120 days or the declaration is deemed to have been refused.

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15. Langridge, supra, n. 93, p. 104.

Similar registration procedures follow a confirming order as follow a grant of a certificate of approval. The pipe line company is given 14 days within which to register the declaration and the confirming order (s. 10), and such registration vests title to the expropriated lands in the company.

c. The Approving Authority

In Alberta, the approving authority for expropriations by pipe line companies is the Surface Rights Board (s. 7(c), Expropriation Act), while in Manitoba the approving authority is the Cabinet.[16]

The McRuer Report stated:[17]

> ...(T)he power of expropriation is such an infringement on civil rights that jealous and vigilant attention should always be given to the question of upon whom it should be conferred. The less responsible to public opinion a particular body may be, the more reluctantly should the power of expropriation be conferred on it. The same principle should dictate the choice of the approving authority.

As well as the McRuer Report, the Report of The Law Reform Commission of British Columbia[18] and the Report of the Institute of Law Research and Reform in Alberta[19] both

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16. S.M. 1970, c. 78, s. 1(1)(c) as amended by S.M. 1971, c. 79; s. 1.

17. At p. 992.

18. At p. 85.

19. At p. 14.

recommended that all expropriations be subject to the approval of a politically responsible person or body, such as the Cabinet or a particular Minister or a municipal corporation.

The Surface Rights Board is not an elected body; its members are appointed by the Minister of Agriculture under s. 3 of The Surface Rights Act[20] and retain their positions indefinitely, or, more correctly, at the pleasure of the Lieutenant-Governor in Council. There is the danger, implied in all the Reports on Expropriation, that such a Board will be less responsible and less responsive to public opinion.

The decision to approve a pipe line project and the expropriation of land therefor is basically a political decision. It is submitted that approval by a Minister of the Crown or by the Cabinet as is required in Manitoba, is preferable to the present system in Alberta. Approval by the Cabinet or a Minister would ensure that a body or person, accountable politically to the electorate, will take the responsibility for every expropriation. In addition it allows a review of the recommendations of the Board in its role as inquiry officer which is essential where objections to a project have been lodged.[21] It may well be

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20. S.A. 1972, c. 91.

21. See Walters v. Essex County Board of Education [1971] 3 O.R. 346 (Ont. H.C.) for an instance where the recommendations of the inquiry officer were not accepted by the approving authority.

that the Cabinet will be no more responsive to public opinion than an appointed Board (except perhaps at election time with regard to large proposed projects), but in the case of expropriations for pipe lines where the Board is at present both the inquiry officer and the approving authority, review of the decision by Cabinet seems preferable to the inevitable rubber-stamping by the Board of its own decision.

8. Possession

Under s. 36 of The Expropriation Procedure Act,[22] the accepted practice in Alberta was for the pipe line company to apply to the Surface Rights Board, or its predecessor, for an interim order of expropriation which would allow the company to begin construction of the pipe line at once. The application would often be made ex parte; although the Board could require notice to be given to interested parties, and the application would be accompanied by a deposit of a sum of money that the Board considered sufficient to cover any amounts found to be payable to the landowner. Notice of the interim order once granted was sent to all persons known to have an interest in the land.

A similar procedure was available in Manitoba

22. R.S.A. 1970, c, 130.

until 1st January, 1971. Section 56 of the old Expropriation Act[23] allowed a pipe line company to apply to a judge for leave for immediate possession. Section 56(2) required ten days previous notice of [illegible]lication to be given to the owner of the land to be [illegible] a deposit sufficient to satisfy the judge's esti[illegible]e likely compensation and costs of arbitrati[illegible]

In thec[illegible]he [illegible]erim orders made by the Board in Alberta could be [illegible]c[illegible]d when a final order of expropriation was made unde[illegible]5 of The Expropriation Procedure Act.[24] However the pra[illegible]l realities of the situation were explained by Clement, [illegible] in Dome Petroleum Ltd. v. Swan Swanson Holdings Ltd.:[25]

> When an interim [illegible]er is made giving a right to enter [illegible] the purpose of constructing a pipe line [illegible]nd the pipe line is then constructed, it is not practical to propose, as is done here, t[illegible]t the Board could subsequently, on [illegible]application for expropriation under s. [illegible]hear evidence that would lead it to [illegible]e that the pipe line should be l[illegible]at some other place in the interests [illegible] the landowner.

The same reasoning would no doubt have applied under the old Expropriation Act in Manitoba.

However, the new Expropriation Acts of both Provinces have done away with the interim order or immediate possession procedure. Both Acts require at least the

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23. R.S.M. 1970, c. E190.

24. See Expropriation Procedure Act, s. 36(7).

25. [1971] 2 W.W.R. 506, 511.

completion of the inquiry procedure and the vesting of title to the land in the company before possession of the land may be taken.

In Alberta, s. 62(3)(a) of The Expropriation Act requires the company to serve a notice of possession on the occupants of the land to the effect that it requires the land on a date seven days from the date of registration. In addition, s. 63(5)(b) ensures that the proposed payment offered by way of compensation has been paid before the company can take possession. The form of the Notice of Possession is prescribed by Form 7 of The Expropriation Forms Regulations.[26]

In Manitoba, once the company has registered its declaration and the confirming order from the Cabinet, it may require possession of the land (s.20(1)). A notice is served on both the owner and occupier of the land and ten days notice must be given (s.20(2)). It should be noted that the offer of compensation only has to be made (in writing) to the owner before possession may be taken in Manitoba (s.16(1)). Payment of the amount is not a pre-requisite as in Alberta.[27]

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26. Alta. Reg. 1/75.

27. The difference will only be of any significance in the case where a landowner refuses to accept the proposed payment (unlikely, now that the Act provides that acceptance of the proposed payment is without prejudice to any further claim). In Manitoba, the company, having made the offer, can take possession and begin construction. In Alberta, however, s. 62(5) insists that possession may not be taken until the proposed payment has been made, unless leave of the Court is obtained. In Alberta, therefore, when faced with a stubborn landowner, the pipe line company would have to make an application to a judge of the Supreme Court for an order allowing it to take possession.

B. PROCEDURE FOR EXPROPRIATION IN BRITISH COLUMBIA AND SASKATCHEWAN

1. British Columbia

Section 17(1) of The Pipe-lines Act[28] gives a company that has obtained a construction certificate the right to appropriate land for its pipe line. Section 17(2) states:

> The manner in which, and the terms upon which, the company may exercise the right to take and appropriate of any lands or interest therein shall be
>
> (a) in accordance with the terms of any agreement effected between the company and the owner of such land, other than Crown land, or any interest therein;
>
> (b) in the absence of any such agreement, as set forth in this Part.

However, Part IV of The Pipe-lines Act refers only to the Railway Act[29] and makes no provision for an inquiry into the reasonable necessity of the taking, nor for any separate approval of the expropriation itself.[30] Once the certificate has been granted by the Minister of Transport and Communications, the landowner cannot challenge the taking of his land, and can only dispute the amount of compensation payable. Any challenge to the expropriation

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28. R.S.B.C. 1960, c. 284.

29. R.S.B.C. 1960, c. 329.

30. Compare s. 6 of The Mines Right-of-Way Act, R.S.B.C. 1960, c. 246, which requires the approval of the expropriation itself.

itself must come at the earlier stage under s. 12(4)(e) of The Pipe-lines Act, when the grant or refusal of a construction permit is being considered. The Gas Utilities Act[31] provides a procedure for expropriation by gas utilities (which by virtue of s. 2 of the Act includes gas pipe line companies) and provides a system of arbitration to determine compensation. In practice, however, gas utilities do not expropriate under The Gas Utilities Act, but rather under The Pipe-lines Act.

The expropriation procedure in The Railway Act begins when the pipe line company deposits its plan, profile and book of reference, approved by the Minister of Transport and Communications under s. 11 of The Pipe-lines Act, in the proper Land Registry Office.

Section 50(1) of The Railway Act goes on to provide that ten days after the deposit of the plan, profile and book of reference, and having published a notice concerning the deposit in newspapers in the areas through which the pipe line will pass, the company may approach the landowners to be affected and negotiate the compensation due. This provision can surely have no application to pipe line companies. It cannot seriously be suggested that s. 50(1) prevents the companies' agents from negotiating voluntary grants by the owners of rights-of-way across their land, and yet this is what the subsection purports to do. If "After the expiration of

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31. R.S.B.C. 1960, c. 164.

ten days from the deposit ..., application may be made to the owner ..." is supposed to mean that no negotiations may be carried on before ten days have elapsed (let alone before the deposit of the plans etc.), then it is submitted that much clearer language must be used to take away the company's right to freedom of contract. If the landowner and the company agree on the price to be paid for the right-of-way, it is submitted The Railway Act as a whole, let alone s. 50(1), has no application, since there is no question of expropriation of interests in land.

If there is no agreement on the amount of compensation payable, then there will have to be an expropriation, but then s. 50(2) and not s. 50(1) will apply. The procedure followed for the determination of compensation will be discussed under "Compensation".[32]

Under s. 73 of The Railway Act, the company only has a right to take possession of the expropriated land when it has made payment of the compensation awarded or has paid the same into Court pursuant to s. 69. However ss. 75 and 76 provide a procedure similar to the procedure under the old Alberta and Manitoba Acts, for immediate possession of the land. The company must satisfy the judge to whom it applies that immediate possession of the right-of-way is necessary to carry on pipe-laying operations with which the company is presently ready to proceed. Section 76(a) requires the company to give to the landowner ten days notice of its intended

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32. Infra, p.137 ff.

application for a warrant for immediate possession. Under s. 76(b), security must be paid into Court sufficient to cover the judge's estimate of the compensation payable and costs, and at least half as much again as the amount offered by way of compensation. Once the judge grants the warrant, the company begins construction and the compensation remains to be agreed upon or determined by an arbitrator.

2. Saskatchewan

Until the enactment of The Expropriation Procedure Act,[33] the system in Saskatchewan of expropriation of land for pipe lines was very similar to the system in British Columbia, with one important difference. Whereas in British Columbia the company was, and still is, required to give the landowner ten days notice of an application for a warrant for immediate possession, in Saskatchewan s. 18(3) of The Pipe Lines Act[34] provides as follows:

> The manner in which (and) the terms upon which a permittee shall enter upon and use any land, ... , or interest therein shall be as set forth in any agreement effected between the permittee and the owner of the land, ... , or any interest therein; provided that in the absence of any such agreement the permittee may, without the consent of the owner, forthwith enter upon the land and proceed with the construction of the pipe line thereon and do all things reasonably necessary or incidental thereto.

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33. S.S. 1968, c. 21.

34. R.S.S. 1965, c. 413.

Although the sub-section contemplates an agreement being reached between the owner and the pipe line company, it does not require an attempt to reach agreement before a company may enter the land. The words "in the absence of any such agreement" do not mean "following an unsuccessful attempt at agreement", but are wide enough to include the case where there has been no attempt at agreement.

Section 5(1) of The Expropriation Procedure Act expressly exempts the expropriation of easements from its requirement that a reasonable effort be made to purchase the land required before expropriation proceedings are commenced. Accordingly before 1968 the first warning a landowner might have of the commencement of construction might have been the arrival of the pipe line company's construction team on his land.

The enactment of The Expropriation Procedure Act has not abrogated this right of the company to take immediate possession of the land required, although s. 9(1), which requires notice to be given to the occupier of the land before the expropriating authority enters for surveys, sampling and similar activities, surely applies a fortiori where land is to be taken.

The provisions of The Pipe Lines Act and The Expropriation Act[35] made it clear that the only issue to be determined was the amount of compensation payable:

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35. R.S.S. 1965, c. 56.

there was no inquiry procedure to determine the reasonable necessity of the proposed taking. Section 7(1) of The Expropriation Procedure Act gives any person with an interest in the land the right to apply to the Public and Private Rights Board for a review of "the route, situation or design" of the pipe line. As already explained, unless an injunction can be obtained to prevent construction, this right may be of little practical use.[36] However, if construction has not begun or can be prevented, this right to apply for review may have some value not only because of the greater likelihood of positive action by the Board but also because of the additional bargaining strength the owner may have in negotiations with the pipe line company.

The procedure to be followed under The Expropriation Procedure Act begins with the notice of possession (s. 11(2)) which is to be filed in the appropriate Land Titles Office immediately possession is taken. From the wording of s. 11(2) it is clear that a separate notice of possession is required for each parcel of land. Upon filing of the notice of possession, a note is made thereof on the certificate of title to the relevant land.

Within one year of possession, the company must file a declaration of expropriation and a plan of survey in accordance with s. 10. The declaration follows Form B of the Schedule to the Act, and provides specific information

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36. See again the comments of Clement J.A. in Dome Petroleum Ltd. v. Swan Swanson Holdings Ltd. [1971] 2 W.W.R. 506, 511.

on what land is being expropriated, in contrast to the notice of possession which only provides general details as to the extent of the interest taken.

Sections 11(1) and 12 provide that the interest in land vests in the expropriating authority upon the filing of the declaration of expropriation. When taken by themselves, these two provisions are in conflict with the provisions of The Pipe Lines Act (s. 19(3)) and would be expected to prevail. However s. 11(5) of The Expropriation Procedure Act states that,

> Notwithstanding this or any other Act, an easement registered under The Public Utilities Easements Act or pursuant to The Pipe Lines Act with respect to a pipe line shall not vest in the expropriating authority unless a declaration of expropriation filed pursuant to section 10 or to this section expressly states that such easement is thereby expropriated.

Under s. 19(3) of The Pipe Lines Act, when an award fixing compensation under The Expropriation Act is registered, "the rights in respect of which the award was made shall constitute an easement". It appears from this that until the award of compensation has been made, no easement can be registered. It follows therefore that, until the award of compensation and subsequent registration, the easement cannot vest in the pipe line company, as s. 11(5) of The Expropriation Act depends for its operation on the existence of "an easement registered ... pursuant to The Pipe Lines Act".

The declaration of expropriation requires no

confirmation, nor is there any requirement for any other form of approval of the expropriation. All that remains to be determined is the compensation payable to the parties affected by the expropriation.

By way of comparison, the procedure under The Surface Rights Acquisition and Compensation Act[37] not only provides for approval of the expropriation by the Board of Arbitration[38], but also prohibits the pipe line company from entering on the land unless permitted by the landowner or authorized by an order of the Board.[39] Under s. 26(4), the pipe line company may apply to the Board for an order granting them immediate right of entry at the expiration of seven days from the date of the notice of intention required under s. 37. At the time of application the company is to make a security deposit in accordance with s. 41. The landowner has the right to object to the issuing of an order granting an immediate right of entry, and, if he does object, the Board holds a hearing to determine whether the order should be issued.[40] In addition to the right to object to an order granting rights of immediate entry, the landowner can object to the expropriation as a whole, under s. 37. In the case of a hearing pursuant to s. 37 or s. 26(4), s. 27 applies with regard to the date of the

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37. S.S. 1968, c. 73.

38. Ibid., s. 35.

39. Ibid., s. 34.

40. Ibid., s. 26(7).

hearing and the right to be represented before the Board.

The present practice in Saskatchewan, which follows The Surface Rights Acquisition and Compensation Act,[41] clearly gives the landowner greater protection than the practice under The Expropriation Procedure Act, which as already submitted, is the practice that should, according to the legislation, be followed. Even if the pipe line company applies for an order of immediate entry, the landowner under The Surface Rights Acquisition and Compensation Act can delay the granting of such an order by perhaps a month. In contrast, The Expropriation Procedure Act allows a pipe line company to on the land without delay, merely giving notice of their entry.

41. The provisions of which prevail in the case of conflict with provisions of The Pipe Lines Act such as s. 18(3); Surface Rights Acquisition and Compensation Act, s. 5.

VI. COMPENSATION

A. PROCEDURE FOR DETERMINING COMPENSATION

1. Alberta and Manitoba

a. Notice of Expropriation and Notice of Possession

i. Alberta

As is made clear in s. 8(5)(g) of The Expropriation Act, the right to adequate compensation exists independently of the right to object to the expropriation. Section 29(1) provides that as soon as the certificate of approval has been registered, the pipe line company is to serve the landowner with a Notice of Expropriation in the terms of Schedule 2. This includes a copy of sections 28, 29, 30, 31, 33, 35, and 62, dealing with the landowner's rights to an immediate payment of compensation, with his rights to costs and with the company's right to possession. The Notice also includes the address of the Surface Rights Board to which the matter may be taken if the owner is not satisfied with the proposed payment offered by the company.

The company's right to possession has already been discussed.[42] It is not a right that depends for its

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42. p.125, supra.

existence on the full payment of the amount of compensation awarded by the Surface Rights Board. However, s. 62(5)(b) provides that the company must have made the proposed payment before possession date.

ii. Manitoba

This preliminary procedure is duplicated in Manitoba, where s. 14 of The Expropriation Act requires a Notice of Expropriation to be served by the company on all the parties interested in the land to be taken within 60 days of registering the declaration of expropriation. The Notice is to be substantially in the form set out in Form 2 of Schedule B. Compared with its counterpart in Alberta, the Notice of Expropriation supplies the owner with very little information as to his rights and the rights of the company under The Expropriation Act: it is merely stated that the company is bound by the Act to pay due compensation to the owner or persons holding an interest in the land.

Once the declaration of expropriation and the order confirming it have been registered, s. 20(1) and (2) permit the company to give the landowner ten days notice that it requires possession, provided that, following s. 16(1), the company has served an offer in writing of the amount the company is prepared to pay before it serves the notice of possession.

b. Negotiation and the Proposed Payment

i. Alberta

One of the gravest inequities of the old law was that the pipe line company was not required to make any payment to the owner until the amount of compensation had been finally determined by the Board (or by agreement). As a result, an owner who was dissatisfied with the amount offered might well be prevented financially from disputing the company's offer, and forced to accept an unsatisfactory settlement. A partial solution to this problem was found by the Board in s. 36(3) of The Expropriation Procedure Act.[43] At the hearing for an interim order of expropriation, the Board would require the company to make a deposit, the amount of which was usually arrived at by agreement between the company and the Board. Pursuant to s. 36(3) a portion of the deposit (usually about half of it) was made available to the landowner if he requested it. Any money so paid was deducted from the amount finally determined under s. 35.[44]

Section 29(2) of the new Act requires the

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43. R.S.A. 1970, c. 130.

44. In other jurisdictions, expropriating authorities would often voluntarily advance the landowner some portion of what they assessed to be the compensation payable. See for instance National Capital Commission v. Marcus [1970] S.C.R. 38, where the authority had voluntarily advanced $22,500 to the owner of property to whom compensation of $30,000 was eventually awarded. Such a prepayment reduced the amount of interest that would otherwise have been payable.

company, within 90 days of registering its certificate of approval, to notify the owner in writing of the amount which it estimates that he is entitled to by way of compensation. By s. 29(4) the owner can require payment of this amount as soon as he receives this written notification. This advance is termed by the Act the "proposed payment" and is to include the estimated value of the land expropriated and severance damage (s. 29(3)). The form which the Notice of Proposed Payment is to take is set out in Form 6 of The Expropriation Forms Regulations.[45] The company is to pay 100 per cent of the estimated amount,[46] and the owner can accept this without prejudicing his rights to claim additional compensation (s. 29 (5)). Section 30 requires a copy of the written appraisal on which the estimate is based to be sent to the owner along with the notification under s. 29(2). If the owner is satisfied with the proposed payment he does not have to do anything, and by the terms of s. 34(2) the proposed payment is deemed to be, at the expiration of one year from the date of its offer, the full compensation to which he is entitled. If he is not satisfied, he may institute proceedings under ss.34(1)(b).[47] Should the Board

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45. Alta. Reg. 1/75.

46. 100 per cent is the figured adopted by all the new Expropriation Acts, save that of Nova Scotia which requires pre-payment of only 75 per cent.

47. This can be done informally by a letter from the landowner to the Surface Rights Board stating his dissatisfaction with the proposed payment and requesting a hearing to determine compensation. In contrast to the

award him a greater amount than the proposed payment, the company will have to pay the difference. In the rare case where the Board awards an amount less than the proposed payment, the excess constitutes a debt which is recoverable by the company.

The Alberta Expropriation Act contains no negotiation provisions whereby the services of a third party can be used to effect a settlement as to compensation between the two parties before they go before a judge or a tribunal to determine compensation.

ii. Manitoba

Section 16(1) of The Expropriation Act makes similar provision for prepayment of an amount by the expropriating authority before final determination of the due compensation. Within 120 days of registering the declaration of expropriation, the company must serve an offer in writing on the owner of the land. This offer

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Continues from last page

Land Compensation Board which has adopted Rules of Procedure (Alta Reg. 15/75) which provide an elaborate system of application for a determination of compensation, the Surface Rights Board has decided to keep the procedure before it as simple and informal as possible. Accordingly, for the present at least, the Surface Rights Board will not adopt requirements similar to those of the Land Compensation Board for fear that such requirements may deter farmers (who comprise the bulk of applicants before the Board) from making applications to the Surface Rights Board.

states the amount offered in full compensation for the estate expropriated, and contains an offer to pay immediately the market value of the land taken as estimated by the authority. The written offer must also contain the statement that payment and receipt of the amount estimated to represent the market value of the land will not prejudice the rights of the parties and that the amount is subject to adjustment in accordance with the amount subsequently agreed upon or determined by the Land Value Appraisal Commission or the Court. It should be noted that the amount that the company offers to pay immediately will usually be less than the amount offered in full compensation, since the market value of the land is merely one of the components that go to make up the due compensation under s. 26(1).

At this stage the Manitoba system differs from that in Alberta, since there is provision for negotiation between the parties in an effort to settle compensation. In 1965, a Land Value Appraisal Commission was established under s. 11 of The Land Acquisition Act.[48] Initially its function was to determine the compensation payable in the situation where land was acquired under The Land Acquisition Act by the Crown or by two specified utilities.[49] As of

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48. S.M. 1965, c. 43, s. 11; R.S.M. 1970, c. L40, s. 11.

49. The Manitoba Hydro-Electric Board and The Manitoba Telephone System: s. 2(1).

1st January, 1971, the Commission's functions have been extended to cover expropriations under The Expropriation Act. Section 15(1) of The Expropriation Act gives the company and the landowner a right to apply to the Commission to request a hearing to determine the amount which the Commission estimates to represent the due compensation in the particular case. The application cannot be made until a notice of expropriation has been served, and the Commission may require notice to be given to interested parties. Once the Commission has certified an amount, the expropriating authority is not permitted without the approval of the Commission to pay or offer any amount other than the amount certified (or an amount awarded later by a Court). The Crown, expropriating under The Land Acquisition Act, feels bound to pay the amount certified, if the landowner is prepared to accept that amount, but in fact s. 12(3) of The Land Acquisition Act and s. 15(3) of The Expropriation Act do not impose such a positive requirement. The expropriating authority is not bound to pay the certified amount. However, it is not permitted to pay or offer to pay any amount other than the certified amount without the approval of the Commission. Section 15(3) in fact allows the expropriating authority to make no payment or offer at all, but since possession cannot be obtained until an offer is made (s. 16(1)), the practical effect of s. 15(3) is to make the amount certified by the Commission a minimum less than which the company cannot pay or offer,

unless the Court decides on a lesser amount. The landowner, for his part, does not have to accept the certified amount and is in no way bound by any determination of the Commission (s. 15(2)). If the issue of compensation is taken up at subsequent court proceedings, no reference is made to any amount certified by the Commission. Since all the proceedings before the Commission are without prejudice to either side, discussion can be carried on very informally in an attempt to settle hitherto unresolved differences.

When the written offer of compensation by the pipe line company under s. 16(1) and the amount certified by the Land Value Appraisal Commission are the same, s. 18 provides that the offer may be made by the pipe line company in accordance with Form 3 of Schedule B. This offer is then served on the owner, who has 60 days in which to reject the offer (in writing). If the owner does not reject the offer within 60 days, he is conclusively deemed to have accepted it. If the owner and the company cannot agree on the compensation to be paid, either party may bring proceedings in the Court of Queen's Bench.[50] Chapter XXXI of The Queen's Bench Rules[51] prescribes the procedure to be followed in expropriation cases, and sets out various forms to be used.

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50. The Expropriation Act, S.M. 1970, c. 78, s. 37.

51. Chapter XXXI was added to The Queen's Bench Rules (Man. Reg. 26/45) by Man. Reg. 76/71.

iii. Costs

Section 33(2) of the Alberta Expropriation Act states:

> The owner may obtain advice from any solicitor of his choice as to whether to accept the proposed payment in full settlement of compensation, and the expropriating authority shall pay the owner's reasonable legal costs therein.

In addition, s. 33(1) allows the owner at the company's expense to obtain an independent appraisal of the expropriated interest (as well as the appraisal already carried out on behalf of the company (s. 30)).

In Manitoba the problem of costs appears to be the only flaw in the system of negotiation. At least two members of the Land Value Appraisal Commission are required for a quorum.[52] The costs of the proceedings before the Commission are paid for by the expropriating authority (s. 15(5)).[53] Section 55(c), inserted in 1971,[54] gives the Cabinet power to prescribe the fees and charges before the Commission. These have been set at $100 per hour or part thereof,[55] and are to be paid to the Minister of Finance within 28 days of the hearing. It is submitted that the

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52. The Land Acquisition Act, R.S.M. 1970, c. L40, s. 11(9).

53. This provision was inserted by s. 9 of The Expropriation Act Amendment Act, S.M. 1971, c. 79.

54. Also by S.M. 1971, c. 79.

55. Man. Regs. 11/72.

object of the negotiation procedure, to bring the parties together in the presence of an independent third party, can adequately be fulfilled by a single arbitrator, as in the Federal Expropriation Act.[56] This would permit a fee of less than $100 per hour to be charged, and thus reduce the expense to the expropriating authority, and free at least one member of the Commission for other hearings.

However, just as the pipe line companies may have cause for complaint about the costs incurred, so the landowners may have similar cause. There is no section in the Act which specifically deals with costs (legal, appraisal or other) incurred at the negotiation stage. Section 15(5) refers merely to payment to the Government of the fees of the Commission, and the landowner is left to rely on the general costs provision, s. 43. Section 43, however, only allows the just and reasonable "legal, appraisal and other expenses incurred by the owner for the purposes of preparing and presenting his claim for due compensation". Does this section cover costs incurred at the negotiation stage of the proceedings ?

The only cases on this point have arisen under the Ontario Act, which provides for a Board of Negotiation along similar lines to the Manitoba Land Value Appraisal Commission. None of the cases are of great authority and so the point must still be considered open to doubt,

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56. R.S.C. 1970, c. 16 (1st Supp.), s. 28.

especially since the cases are in conflict. In two cases before Moore, Co.Ct.J, in his capacity as arbitrator,[57] the claim for costs incurred at the hearing before the Board of Negotiation was rejected on the grounds that they were not incurred "for the purposes of determining the compensation payable" (the wording in s. 33 of the Ontario Expropriation Act[58]). However, Taxing Officer McBride, in the cases of Smegal v. City of Oshawa[59] and Christianity & Missionary Alliance v. Metro. Toronto,[60] refused to follow the approach of Moore, Co.Ct.J, and held that costs incurred before the Board of Negotiation were costs incurred "for the purposes of determining the compensation payable". The Christian & Missionary Alliance case[61] provides the only reasoning supporting a particular interpretation. There the Taxing Officer contrasted the proceedings at the initial hearing before the inquiry officer with the proceedings before the Board of Negotiation. The former proceedings clearly have nothing to do with the amount of compensation payable and are not covered by s. 33 of The Expropriation Act. Instead the costs of the inquiry are separately provided for in s. 7(10)

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57. Kalinin v. Metro. Toronto (1970) 1 L.C.R. 177, 179 and Madsen v. Metro Toronto (1970) 1 L.C.R. 204, 207.

58. R.S.O. 1970, c. 154.

59. (1972) 3 L.C.R. 18, 27.

60. (1973) 6 L.C.R. 393.

61. Ibid., at 395.

of the Act. However there is no specific provision as to costs incurred before the Board of Negotiation. The Taxation Officer continued,[62]

> I do not find this strange because I think it is perfectly clear that these proceedings are part and parcel of the entire process set up by the Act for the determination of the compensation payable. The compensation payable is just as capable of being determined by negotiation as it is by arbitration.

This problem of the lack of clear authority is aggravated in Manitoba, since the words of the relevant section (s. 43) are not the same as those found in s. 33 of the Ontario Act. Is there a significant difference between the words "incurred ... for the purposes of preparing and presenting his claim for due compensation" and the words "incurred for the purpose of determining the compensation payable" ? Can it be said that a landowner is "presenting a claim for due compensation" when he appears before the Land Value Appraisal Commission ? The answer is probably in the affirmative, since the landowner is in a fashion presenting a claim to the expropriating authority, which will provide a starting point for negotiations before the Commission, negotiations which may result in the settlement of the claim. However the reasoning in Christian & Missionary Alliance v. Metro. Toronto is not available in its entirety in support of the affirmative answer given above. While the Ontario Act, by

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62. Ibid..

s. 7(10), makes some provision for the owner's costs at the inquiry procedure, the Manitoba Act makes no provision except as to the costs of the inquiry officer himself (Schedule A, s. 4(3))[63] so that the same contrast made by Taxing Officer McBride cannot be made when interpreting the provisions of the Manitoba Act. However one sentence still remains valid: "The compensation payable is just as capable of being determined by negotiation as it is by arbitration". For this reason it is submitted that the legal, appraisal and other costs incurred at a hearing before the Land Value Appraisal Commission should be treated in the same way as costs in proceedings before a judge and should be determined according to s. 43.

2. British Columbia

If the parties fail to agree on the compensation payable, s. 50(2) of The Railway Act[64] states that the dispute shall be settled "as hereinafter provided". The Act provides a system of arbitration, with appeals therefrom to the courts, but, as will be seen below, provides few guidelines which the arbitraters can use to help them arrive at a decision.

Briefly the procedure for the determination of

63. Supra, p.117.

64. R.S.B.C. 1960, c. 329.

compensation is as follows. Section 52 of The Railway Act requires a notice to be served on all parties interested in the land.[65] This notice of expropriation describes the land to be taken and contains a declaration that the company is ready to pay a certain amount as compensation. Section 53 requires that this notice of expropriation be accompanied by a statutory declaration made by a provincial land surveyor. This declaration states (1) that the land is required for the pipe line, (2) that the surveyor knows the land, or the amount of damage likely to be caused to the land by the pipe line, and (3) that the sum offered is, in his opinion, fair compensation for the land taken and any damage caused.

However, this offer of payment is not the same type of offer as the proposed payment in Alberta or the written offer of compensation in Manitoba. There is no provision in The Railway Act of British Columbia which allows the landowner to accept the offer without prejudicing his rights to a further claim if he believes the offer to be too low. In British Columbia, if the offer is accepted, then expropriation proceedings end there. If the offer is not accepted within ten days of the service of the notice of expropriation, s. 55(1) permits the company to apply to a judge of the Supreme or County Court

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65. In addition to the general notice given by the deposit of the plan, profile and book of reference and the published notice of the deposit: s. 51(1).

requesting that an arbitrator be appointed. Six days notice of the application is to be given to the landowner (s. 55(2)), and at the application hearing three arbitrators (one selected by each side and one by the Judge) may be requested instead of one arbitrator. The arbitrator or arbitrators is or are sworn in before a Justice of the Peace. Any award that is made by the arbitrator or arbitrators is final and conclusive except as otherwise provided (s. 56(2)). A majority decision is valid and binding on all parties (s. 62(1)). Section 68 provides for an appeal from the decision in certain cases. If the award exceeds $600 in value an appeal can be made to a single judge of the Supreme Court on a question of law or of fact. If the award is less than $600, the Act provides no appeal from the decision of the arbitrator(s), and s. 56(2) provides that their award shall be "final and conclusive". Not even the landowner it seems can appeal where the award is less than $600.[66]

A final problem is presented by The Lands Clauses Act.[67] Section 69 of that Act states that if "the promoters of the undertaking" (i.e. the pipe line company)

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66. However, despite s. 56(2), the Court still retains its "supervisory jurisdiction" and may review the validity of the arbitrator's award in the exercise of this jurisdiction. For examples of what is included in the scope of this "supervisory jurisdiction" see De Smith, Judicial Review of Administrative Action, (3d ed.), (1973) at pp. 317-8.

67. R.S.B.C. 1960, c. 209.

have not paid the compensation in accordance with an Act incorporated with the Special Act (i.e. The Railway Act), and if compensation claimed is over $250, the landowner may claim to have the matter settled by arbitration or by jury under The Lands Clauses Act. It is not proposed to discuss the procedure under this latter Act; the point is merely raised to illustrate yet another aspect of the outmoded legislation in force in British Columbia.

3. Saskatchewan.

The procedure for determining compensation in Saskatchewan followed closely the procedure in British Columbia until the introduction of The Expropriation Procedure Act in 1968. The 1968 Act still requires a notice of expropriation (s. 20) which is to be served on all interested parties immediately after filing the notice of possession. This notice, in Saskatchewan termed a notice of compulsory acquisition, is to follow Form C of the Schedule and sets out the description of the land, the interest to be taken, the purpose for which the interest is required, the date of possession, the address to which claims may be forwarded, and the time within which a claim for compensation must be commenced.[68]

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68. By s. 27(1) the period is two years from the date of compulsory acquisition. If no action is brought within the time limit, the offer will be deemed to have been accepted.

The Expropriation Procedure Act does provide for a payment by the expropriating authority similar to the proposed payment in Alberta or the offer of compensation in Manitoba. By s. 20(2) the pipe line company must, within four months of the date of possession, make an offer in writing stating the amount of compensation offered for the expropriated interests in land. The company may tender this money to the landowner, and if this offer is not accepted may pay the amount into Court (s. 23). Most important of all is s. 24, which permits the owner to accept the offer without prejudicing his right to claim further compensation. At the same time, s. 26 entitles the expropriating authority to a judgment against the landowner if the offer of compensation is greater than the amount awarded in a later action. When the offer of compensation has been served on the landowner, s. 22 allows the landowner to require an evaluation report from the pipe line company in respect of the land taken. This report is to contain inter alia the company's estimate of the value of the interest taken and the improvements, crops or other things on the land taken, and the company's estimate of the amount of damage to the rest of the property. Section 22(3) provides a penalty in costs if the company does not furnish an evaluation report, even though the company might have otherwise been entitled to costs under s. 43.

Where a landowner is not satisfied with the

offer of compensation, he may commence an action for the additional amount. Saskatchewan's procedure differs at this stage from all the other provinces. The action to determine compensation payable is commenced by way of statement of claim (s. 35(1)), a copy of which is filed with proof of service with the clerk of the district court.[69] The expropriating authority is required by s. 35(2) to serve on the interested parties, within 21 days of the statement of claim, a statement of particulars, a copy of which is also filed with proof of service in the clerk's office. Section 35(3) enumerates various matters with respect to which the parties in their statement of claim or statement of particulars must set forth the material facts on which they intend to rely at trial. These matters are examined under the heading "Assessment of Compensation".[70]

Once the statement of particulars is filed, or after the time has expired for filing the same, either party may file with the clerk of the court a notice, under s. 36, that the action is ready for trial. Thereupon the clerk will forward all the relevant documents to the judge designated by the Chief Justice of the Court of Queen's Bench under s. 31 to sit at the judicial centre where the action is set down for trial. Appeal from the judge's

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69. Actions for compensation are to be brought in the District Court: s. 29.

70. Infra, p. 162 ff.

award is to the Court of Appeal.[71]

The procedure for determining compensation under The Surface Rights Acquisition and Compensation Act is very simple and informal. Section 37 provides that the party wishing to have compensation determined by the Board should serve notice of his intention on all parties involved and file a copy with the Board. No provision is made for a proposed payment as in Alberta, but where the pipe line company has applied for a right of immediate entry and has made a security deposit pursuant to s. 41, the Board can advance to the landowner such sums of money out of this deposit as it deems fit (s. 30(3)). Finally, the guidelines for the assessment of compensation are provided by s. 39(1). These are more fully discussed in part B of this chapter.

4. Failure to Follow the Correct Procedure

In all four provinces the steps to be taken by an expropriating authority are prescribed by the legislation in mandatory terms. However none of the statutes provide any sanctions or penalties in cases where the authority fails to follow the correct procedure. True there are provisions permitting the penalising of the authority by way of awarding costs against it, but in this particular area of litigation, where costs are usually awarded

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71. s. 44(1).

against the authority anyway, a penalty in the form of costs is in most cases meaningless.[72]

The only effective sanction would appear to be to compel the authority to commence expropriation proceedings again. Authority for such a penalty is to be found in the case of Re Magnone,[73] where Maclean, J. of the British Columbia Supreme Court held that the procedural provisions of the Act (in that case The Vancouver Charter) must be strictly complied with. The posting of a notice in the prescribed fashion was held to be a condition precedent to the valid exercise of the power of expropriation. Furthermore it appears that it is irrelevant that the landowner suffers no prejudice by the failure of the expropriating authority to comply with the procedural requirements. Maclean, J. stated,[74]

> It may well be that no prejudice has actually been suffered by the property owner but in view of the explicit provision in the statute for service I think that the city must comply exactly with the terms of the statute before it can exercise its powers of expropriation.

One of the cases cited and approved in Re Magnone was

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72. There are also some provisions which allow penalties in the form of additional interest payments (see, for example, sub-sections (3) and (4) of s. 64 of the Alberta Act), but these are confined to omissions relating to the proposed payment.

73. Re Vancouver Charter, Re Arbitration Act, Re Magnone (1957) 23 W.W.R. 415.

74. Ibid., at 417.

R. v. Lee.[75] In that case Cassels, J. of the Exchequer Court made this statement:[76]

> Where a statute provides for certain formalities to be followed, if it is desired to exercise the right of eminent domain, the statute must be strictly complied with, and a court cannot say that compliance with such conditions precedent can be dispensed with.

His judgment was affirmed on appeal to the Supreme Court of Canada.[77]

What if the landowner is unaware of the breach, unaffected by it and continues to deal with the expropriating authority as if there has been no procedural omission (for example where the landowner accepts the proposed payment and the pipe line company takes possession of the right-of-way) ? R. v. Lee would seem to deny the expropriating authority the defence that the landowner has waived the requirements of the statute. However the question of waiver was discussed in Re Magnone,[78] where Maclean, J. cited Lord Atkinson in City of Toronto v. Russell:[79]

> The question is, "Has he waived it?" In other words, is there evidence from which it may fairly be inferred that he consented to dispense with the notice ? Bowen, L.J. in Selwyn v. Garfit (1888) 38 Ch.D. 273,

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75. (1917) 16 Ex. C. R. 424. Applied in Younes v. Halifax (1961) 28 D.L.R. (2d) 497.

76. (1917) 16 Ex. C. R. 424, 428.

77. (1919) 59 S.C.R. 652.

78. (1957) 23 W.W.R. 415, 417-8.

79. [1908] A.C. 493, 500.

> says: "What is waiver ? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shown that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered."

Maclean, J. found no evidence of waiver in Re Magnone. However Munroe, J. in Perry v. Board of School Trustees, District No. 57[80] held that a waiver of the requirements of The Lands Clauses Act was valid. In that case arbitrators appointed to fix compensation for land taken were required to make certain declarations before a Justice of the Peace to the effect that they would faithfully and honestly hear and determine the matter referred to them. These declarations were never made. However at the hearing counsel for each side expressly waived compliance with all the statutory requirements and submitted to the jurisdiction of the board members. It was held by Munroe, J.[81] that the statutory provisions could be waived by consent of the parties. His Lordship distinguished inter alia the decision of the Alberta Appellate Division in R. v. Bailey,[82] which held that jurisdiction for a court of limited jurisdiction cannot be created by waiver. His

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80. (1967) 60 D.L.R. (2d) 658 (B.C. S.C.).

81. Ibid., at 662.

82. (1965) 49 W.W.R. 560.

Lordship distinguished the case before him thus:

> The jurisdiction of a board of arbitration is not analogous to that of a court of limited jurisdiction. A board of arbitration can do all things, by agreement of the parties.

While this statement may be applicable in the case of an arbitrator for whose services provision is made in a contract or a lease, it is respectfully submitted that it is not applicable in the case of an arbitrator or arbitration board established by a statute, even though one or more of the members of that board have been selected by the parties. In Alberta, where the compensation is determined by the Surface Rights Board, in Manitoba, where it is determined by the Court of Queen's Bench, and in Saskatchewan, where proceedings are before the District Court, the respective tribunals cannot, it is submitted, permit waiver of any of the statutory procedural requirements. In British Columbia, however, where there is provision for arbitration, s. 55(1) of The Railway Act allows the opposing parties to name two of the three arbitrators. It is suggested that despite the Perry case it would be dangerous for counsel for the expropriating authority to rely on the defence of waiver in the face of the statement of Cassels, J. in R. v. Lee[83] that "a court cannot say that compliance with such conditions precedent can be dispensed with".

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83. (1917) 16 Ex. C. R. 424, 428.

The practical effect of R. v. Lee and Re Magnone is to make the company recommence the procedure for the determination of compensation,[84] thus putting back the date of possession by the time it takes to comply with the procedure. If possession has already been taken, it is possible that an injunction may issue to prevent the company from continuing its operations until the formalities have been complied with. In Younes v. City of Halifax,[85] Ilsley, C.J., of the Nova Scotia Supreme Court, granted an injunction restraining the city's workmen and contractors from performing any acts on the plaintiff's property which had been improperly expropriated because procedures required by the City Charter had not been properly complied with. His Lordship referred to Thomson v. Halifax Power Co.,[86] where the right of the landowner to an injunction was fully discussed. The facts of that case are not exactly in point (the expropriation statute there concerned did not cover the lands that the company had purported to expropriate), but some of the comments of Graham, E.J., for the Nova Scotia Supreme Court are perhaps of value to the present discussion. His Lordship quoted from Kerr on Injunctions:[87]

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84. In fact in Re Magnone the City of Vancouver and the landowner were able to come to an agreement, thus avoiding the necessity to recommence the expropriation.

85. (1961) 28 D.L.R. (2d) 497, 513.

86. (1914) 16 D.L.R. 424.

87. Ibid., at 434.

> The inability of private persons to contend with these powerful bodies, raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers and prevent them from deviating from the terms prescribed by the statute which gives them authority. If they enter upon a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect his land by stirring one step out of the exact limits prescribed by the statute. The principle upon which the Court interferes in such a case is not so much the nature of the trespass as the necessity of keeping such bodies within control.

However it must be remembered that an injunction is a remedy that may be granted or refused at the court's discretion. In both the Younes and Thomson case the landowner was prejudiced in the first case by the non-compliance with the statute and in the second case by the ultra vires expropriation. In a situation where a mere technicality has been overlooked, and where the landowner has not been prejudiced, it remains to be seen whether a court will refuse to exercise its discretion to grant an injunction or whether it will feel that it is compelled by the judgment of the Supreme Court of Canada in R. v. Lee to grant an injunction as the only effective penalty for non-compliance with the statute.

How far do the statutes and regulations of the Provinces overcome the problems raised in Re Magnone ?

In Alberta, s. 21 of The Expropriation Act states:

> Registration of the certificate of approval is conclusive proof that all the requirements of this Act in respect of registration and of matters precedent and incidental to registration have been complied with.

As a result any defects in procedure up to and including registration are ignored once the certificate has been registered. As far as the procedure for determining compensation is concerned, The Expropriation Act is silent, as are The Rules of Procedure and Practice of the Surface Rights Board.[88] Rule 11 of The Land Compensation Board Procedure Regulations[89] is not applicable to procedure before the Surface Rights Board, and in any event does not cover defects in procedures prescribed by The Expropriation Act, but only defects in procedures laid down by regulations. Accordingly it appears that the reasoning in Re Magnone may well apply in Alberta where the procedure provisions relating to the determination of compensation are not complied with.

In Manitoba, the provisions of Schedule A of The Expropriation Act dealing with the procedure up to the confirming order by the Cabinet are deemed conclusively to have been complied with once the confirming order has been made.[90] However, s. 23(2) of the Act states as follows:

> The failure of an authority to do anything within the time limited by this Act does not invalidate the expropriation; but the authority is liable to pay to any person affected by the failure interest upon the due compensation payable to the person from the date of the confirming order.

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88. Alta. Reg. 73/73.

89. Alta. Reg. 15/75.

90. The Expropriation Act, S.M. 1970, c. 78, s. 9(5).

This section, it is submitted, renders Re Magnone inapplicable in Manitoba. Any omission can be termed a "failure ... to do (a) thing within the time limited". Accordingly it appears that the only penalty is that contained in s. 23(2).[91]

In Saskatchewan, there is no provision which prevents the application of Re Magnone, with the exception of s. 14 of The Expropriation Procedure Act which allows a declaration to be amended with the amendment operating retroactively from the date of registration of the declaration. Apart from this exception it appears that the reasoning in Re Magnone is applicable in Saskatchewan.

In British Columbia, s. 64(1) of The Railway Act states:

> No award shall be invalidated by reason of any want of form or other technical objection, if the requirements of this Act have been substantially complied with ....

This provision would seem to relieve the company from a strict application of the principles in R. v. Lee or Re Magnone. Only non-compliance which prejudices a landowner's rights will render the reasoning in those two cases applicable.

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91. Although presumably the judge could award costs against the company under s. 43. As already pointed out (supra p. 156) such a penalty is in most cases meaningless since the expropriating authority will usually have costs awarded against it anyway.

B. THE ASSESSMENT OF COMPENSATION

1. "Market Value" or "Value to the Owner" ?

The expropriation statutes of Alberta and Manitoba on the one hand, and the expropriation provisions of The Railway Act in British Columbia on the other,[92] provide respectively excellent examples of the new-style and old-style legislation. Section 56(1) of The Railway Act states:

> The arbitrators, or the sole arbitrator, as the case may be ... shall proceed to ascertain such compensation in such a way as they or he, or a majority of them deem best.

This subsection illustrates the most frequently criticized feature of the old legislation, namely its failure to provide any guidelines to assist the tribunal assessing compensation. The failure of the legislation in Canada to provide criteria for the determination of compensation left the courts with the task of formulating such criteria.

The basis for compensation was established by the courts to be "value to the owner", a concept taken from the decisions of the English courts before 1919. The term "value to the owner" was imprecise in its meaning. It meant little or nothing to the owners whose land was being expropriated, and from a reading of some of the cases one

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92. R.S.B.C. 1960, c. 329.

suspects it meant little more to some members of the legal profession. The most often quoted test to determine the value to the owner was enunciated by Rand, J. in Diggon-Hibben Ltd. v. The King:[93] "The question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it?"

There are three major criticisms of the "value to the owner" basis of compensation. First, the way in which the law has developed and the conflicting and confusing decisions as to what items are allowed in assessing compensation means that a great deal of time and effort on the part of the lawyer is required to determine what the value to the owner is in a particular case. Secondly, the test is a subjective one, and inconsistency on the part of the courts in prescribing which subjective elements are permitted and which are not, makes the test still more difficult to apply. Thirdly, the awards have often been made as lump sums, without any effort on the part of the courts to break the award down into the various items for which compensation is payable. Again this method provides no aid on assessing compensation in future cases.[94]

The new expropriation legislation such as that in Alberta and Manitoba has adopted what one writer has

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93. [1949] S.C.R. 712, at 715.

94. For an example of a lump sum awarded by the Supreme Court of Canada without explanation as to how that sum was arrived at see Woods Manufacturing Co. v. The King [1951] S.C.R. 504, 515.

called a "shopping list" of compensable items,[95] one of which is the market value of the land. Section 40(2) of the Alberta Act can be given as an example:[96]

> Where land is expropriated, the compensation payable to the owner shall be based upon
> (a) the market value of the land,
> (b) the damages attributable to disturbance,
> (c) the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion, and
> (d) damages for injurious affection.

"Market value" has a meaning that can be easily grasped by most people, laymen and lawyers alike. Furthermore, the term provides an objective basis of valuation to which more subjective elements of compensation can be added where the particular case warrants their addition.

2. The Determination of "Market Value"

a. Highest and Best Use

The definitions of "market value" in the Alberta and Manitoba Expropriation Acts are for all practical purposes the same. Section 27(1) of the Manitoba

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95. Professor Eric C.E. Todd, The Canadian Law of Expropriation, a paper delivered at a Seminar on Expropriation, Edmonton, 5th December, 1974.

96. See The Expropriation Act, S.M. 1970, c. 78, s. 26(1).

Act states:[97]

> The market value of land is the amount that the land might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.

The market value is not necessarily based on the existing use to which the land is being put. In cases where land is not being used to its best advantage, the use to which the land may be put is, generally, an element properly taken into account in determining the market value of the land.[98] However, if the present use of the land is its "highest and best use", then damages for disturbance will be paid in addition to the market value of the land.[99] If the land is valued on the basis of some use other than its existing use then disturbance damages are not payable.[1] Since disturbance damages, as will be explained below, do not play a significant part in the assessment of compensation for pipe line rights-of-way, problems of "double recovery" are unlikely to occur in pipe line compensation assessments.

"Highest and best use" is a term often found in expropriation statutes[2] and one which has been subjected to

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97. Compare s. 39 of the Alberta Expropriation Act.

98. Law Reform Commission of British Columbia, Report on Expropriation, (1971), 128. See also C.N.R. v. Grenn [1965] 2 Ex. C. R. 402, 408, p.169 infra.

99. Alta: s. 41(b).

1. Alta: s. 41, Man.: s. 28(2).

2. For example, s. 41(b)(i) of the Alberta Act.

close judicial scrutiny. The best explanation of the term is probably that of Hewak, Co.Ct.J. in Turner v. City of Winnipeg[3] "It is that use of land which may reasonably be expected to produce the greatest net return to the land over a given period of time". It has been emphasized that the expectations of future potential must be reasonable. Ritchie, J.A. in Mitchell v. C.P.R. stated:[4]

> The possibilities must be reasonably capable of realization and not too remote nor uncertain. A chance should not be treated as a certainty nor a hypothetical purchaser as a purchaser in fact.

The scheme of future development must not only be a realistic possibility, but it must also be one which the party, whose land is expropriated, had considered. Thus, in Lake Louise Ski Lodge Ltd. v. The Queen[5], Gibson, J. held that certain grandiose schemes of development prepared about ten years after the expropriation, were not in the contemplation of any of the parties at the relevant date, the date of expropriation. Such schemes were not actual factors in the market at the date of expropriation and were therefore to be disregarded.

To what extent does a decision as to the highest and best use result in additional compensation ? If a pipe line company expropriates an easement across farm

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3. (1972) 4 L.C.R. 319, 323.
4. (1960) 44 M.P.R. 339, 343.
5. [1968] 2 Ex. C. R. 402, 408.

land that is part of a future sub-division plan, is the farmer entitled to compensation at the per acre rate applicable to subdivided land ?

In C.N.R. v. Grenn[6], Cattanach, J. stated:

> It is well established that the value of expropriated property should be estimated on the basis of the most advantageous use that could be made of it, whether present or future, but it must be remembered that, while consideration must be given to the future advantages and potentialities of the property, it is only the present value as at the date of expropriation of such advantages and possibilities that falls to be determined.

Accordingly, the farmer, in the question posed above, cannot expect to be compensated at the per acre rate for land that is already subdivided, but only at the rate applicable to land that has similar subdivision potential. This is only logical. If "market value" is to be established by reference inter alia to "a willing buyer", no buyer is going to pay for the land the same sum that he hopes to receive from it, having spent time and money subdividing the property. He will only pay the present value of this future potential.

b. Comparable Sales Approach to Market Value

Once the "highest and best use" of the land

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6. [1965] 2 Ex. C. R. 537, 548.

has been determined, the market value of that land remains to be calculated. The most reliable method of establishing the true market value of land in pipe line expropriation cases has been found to be the "comparable sales approach".[7] In Metro. Toronto v. Loblaw Groceterias,[8] Spence, J. for the majority of the Supreme Court of Canada, stated:

> The comparative method may be briefly described as the consideration of actual sales of like lands in a like area, and determination from such comparison of the going market value of the lands in question at the date of the expropriation.

How "like" those lands should be was discussed in Purdy v. Nova Scotia,[9] where McIntosh, J. quoting from Challies, The Law of Expropriation,[10] stated:

> For evidence of other sales to be a fair criterion there should be reasonable similarity in conditions regarding the property, proximity of situation and if possible a likeness in use or in potentiality.[11]

In pipe line expropriations where only a small amount of land is required,[12] there is often great difficulty in obtaining sufficient data relating to comparable sales

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7. Other approaches used to establish market value, such as the "income approach" or the "reproduction cost approach" are not applicable to pipe line expropriations.

8. (1972) 21 D.L.R. (3d) 551, 559; 1 L.C.R. 118, 126.

9. (1973) 6 L.C.R. (Nova Scotia Supreme Court).

10. 2d edition, (1963), at pp. 102-3.

11. (1973) 6 L.C.R. 70, 74.

12. For example, a 60-foot right-of-way across a quarter section will require about 3.64 acres.

of small parcels of land. In one appraisal report this writer examined, the appraisers, in seeking evidence of sales of small parcels comparable to a small parcel that had been expropriated in Wetaskiwin, had gone as far afield as Red Deer and Edson. As a result, it is suggested that the words of Spence, J. be given a broad interpretation. Consideration of comparable market data should not be restricted to "actual sales", but should include, where appropriate, settlements in other areas with the pipe line company[12a] or other expropriating authorities, and also offers to purchase.

Very often the only evidence of other sales of small parcels in the neighbourhood is provided by negotiated settlements between the pipe line company and other owners or perhaps between other expropriating authorities and the owners. The courts have been very wary of admitting these settlements to show market value and have adopted the presumption that such sales are prima facie not free and voluntary.[13] The reason for the objection to admission of such data was discussed by Rand, J. in Gagetown Lumber v. The Queen:[14]

> The objection to admission is that the power on one side to take and the necessity on the other ultimately to yield introduce

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12a. See Great Plains Development Co. v. Lyka [1973] 5 W.W.R. 768.

13. Whittaker v. Hydro Electric Power Commission of Ontario (1972) L.C.R. 74, 82-3; Smegal v. City of Oshawa (1972) 2 L.C.R. 109, 122. This presumption is of course not applied if both parties agree to the admission of the relevant data.

14. [1957] S.C.R. 44, 55.

factors that destroy freedom of action between the parties.

His Lordship continued:[15]

> The primary question is of freedom in the negotiation as a fact, and it is for the tribunal, in the light of the circumstances, to say whether the price was influenced by extraneous elements, or whether the parties were concerned only to reach agreement on a figure deemed to be the fair value of the property.

If the circumstances surrounding the sale to the expropriating authority can be shown to support the contention that the figure agreed upon was a fair one and one freely agreed on, then the presumption that the sale was not voluntary will be rebutted: Whittaker v. Hydro Electric Power Commission of Ontario.[16] However if no evidence other than records of the sales can be produced, then the presumption still applies: Smegal v. City of Oshawa.[17] The burden of proving that the sales were freely negotiated is on the party who relies on them as comparable sales.[18]

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15. Ibid., at 56.

16. (1972) 3 L.C.R. 75, (Ont. L.C.B.).

17. (1972) 2 L.C.R. 109, (Ont. L.C.B.).

18. Smegal v. City of Oshawa (1972) 2 L.C.R. 109, Re McLean and Municipality of Metro. Toronto (1975) 7 L.C.R. 308.

In contrast, where sales in the open market to persons other than an expropriating authority are claimed by the landowner's appraiser to be comparable, these sales will be deemed to be comparable unless the expropriating authority challenges them. It is up to the expropriating authority to show that the sales are not comparable: Pasteris Bros. v. The Queen (1973) 5 L.C.R. 202 (Fed.Ct., Pratte,J.).

One interesting aspect of the new legislation is the indirect effect it may have on settlements by the pipe line companies. With the additional time involved in the inquiry procedure and the additional expense in the form of costs, the attitude of the pipe line companies may be to settle at almost any price rather than expropriate. In relation to the admissibility of such settlements, it would seem that objections could be raised not on the basis that the landowners were not willing sellers but on the basis that the pipe line company was not strictly a willing buyer.[19]

In Kelner v. City of Toronto[20] the Ontario Land Compensation Board had occasion to deal with the weight to be placed upon an offer to purchase as evidence of market value of the expropriated land. The majority of the Board stated that offers are usually not regarded as being relevant, on the grounds that they are easy to fabricate and may be based on considerations that are unsound. However in Re Barkay Properties Ltd. and Wascana Centre Authority,[21] where the arbitrator in determining compensation had relied upon an offer from the University of Saskatchewan prior to expropriation, Martland, J. (for

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19. On this point see Morden v. Hamilton Region Conservation Authority (1972) 3 L.C.R. 249 (Ont. L.C.B.), where a sale to an authority of a parcel for which the authority had been denied the right of expropriation was held not to be representative of market value since the authority was not a willing buyer.

20. (1974) 6 L.C.R. 200.

21. (1972) 4 L.C.R. 59.

the Supreme Court of Canada) said,[22]

> This was a bona fide offer by a responsible institution and in our view was the best evidence of value placed before the arbitrator.

In Michon v. National Capital Commission[23] evidence of an offer to purchase made by an individual was held to be admissible and relevant by Lacroix, J. in the Federal Court on the grounds that the offer was bona fide. In summary, if an offer to purchase is to be presented as evidence relevant to the question of market value, it must be shown (i) that the offer was made (ii) that it was made before the expropriation proceedings began (iii) that it was made bona fide and without any knowledge of impending expropriation proceedings. From the cases it appears that the tribunal determining compensation will give added weight to the offer if it was made by a "responsible institution", or if the offeror appears before the tribunal to give evidence.[24]

Once all the evidence of the comparable sales is before the tribunal, it must determine the weight to be placed on each sale and use the data to establish the market value of the property in question. This cannot be done by

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22. Ibid., at 60.

23. (1973) 6 L.C.R. 152.

24. See Kelner v. City of Toronto (1974) 6 L.C.R. 200, 204. In [illegible] v. Essex County Board of Education (1975) 7 L.C.R. 216, the Ontario Land Compensation Board held that an agreement for purchase and sale was not admissible since there was no one before the Board who could be examined on the terms and provisions of the agreement.

a mathematical averaging of the per acre values of the comparable parcels,[25] nor can there be a simple averaging of the opinions of the two sides' appraisers. However just because the tribunal's opinion coincides with the average of per acre values or the opinion of the appraisers does not mean that the tribunal must reject it.[26]

c. Where there are no Comparable Sales

Where there are insufficient comparable sales to provide a reliable basis for valuation, the tribunal determining compensation must find some other method of valuing the land taken. Two other methods have been used by the courts - the "before and after" method and the "formula" method.

i. The "Before and After" Method

This method was described by Bissett, J. in Trustees of Sydney River United Church v. The Queen:[27]

> ... the proper method of assessing

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25. Ives v. Manitoba [1970] S.C.R. 465. Although this case was decided with reference to the old concept of value to the owner, the principle is still sound when applied to the new expropriation legislation: Lerer v. City of Toronto (1971) 1 L.C.R. 341, 346 (Ont. L.C.B.).

26. Whittaker v. Hydro Electric Power Commission of Ontario (1972) 3 L.C.R. 75, 89.

27. (1971) 1 L.C.R. 110 (N.S. S.C.).

> compensation is to fix the value of the lands to the owner immediately prior to expropriation, and the value to him of what he has left immediately after the expropriation. The difference between these two figures must necessarily include the value of all the land he has lost and the damage sustained by what he retains.

However, while such a method may be easily applied in cases where a large portion of the owner's land is taken,[28] the value of the test must be queried where only a small percentage of the land is expropriated, as is the case in pipe line expropriations.[29] In Starr v. Municipality of Toronto,[30] Lyon, Co.Ct.J. pointed out that s. 14(3) of the Ontario Expropriations Act,[31] which provides for a "before and after" test, does not make such a test mandatory. His Honour continued:[32]

> In the present case, where the interest in land taken is in fact an easement, and is a relatively small percentage of the land in terms both of title and of moneys, and where it would appear that the value of the remainder may not change simply as a result of the taking, it is my view that compensation should be paid on the basis of the value of the lands taken and not on the basis of the before and after test ....[33]

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28. As in N.C.C. v. Sheahan [1971] S.C.R. 406, where 17.5 acres out of 68 were taken.

29. As noted above, a 60-foot right-of-way through a quarter section only requires 3.64 acres.

30. (1969) 1 L.C.R. 40.

31. R.S.O. 1970, c. 154.

32. (1969) 1 L.C.R. 40, 42.

33. For a similar example, see Barnfield v. Minister of Transport (1971) 1 L.C.R. 311 (Ont. L.C.B.).

Section 27(3) of the Manitoba Expropriation Act is for all practical purposes identical to s. 14(3) of the Ontario Act. It provides:

> Where only part of the land of an owner is expropriated, and that part is of a size or shape for which there is no general demand or market, the market value of the part taken and the injurious affection of the remainder caused by the taking of the part may be determined as being the market value of the whole of the owner's land less the market value of the remainder.

From the subsection it is clear that the "before and after" test is only applicable where there is no evidence or insufficient evidence as to comparable sales.[34] Even where there are no comparable sales, the test does not have to be employed and the courts, following the reasoning in the Starr case, should find some other method of estimating the market value of the land taken.

In Alberta, before the introduction of The Expropriation Act, the "before and after" test does not appear to have been used as in other provinces. In Re Sturgeon and Pelletier,[35] the Public Utilities Board declined to use the "before and after" method when valuing a strip of land expropriated for a highway. Since the enactment of The Expropriation Act, it is submitted that the "before and after" test is definitely inapplicable in Alberta. First of all the Alberta Act contains no

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34. Starkman v. City of Brampton (1974) 7 L.C.R. 329; 341-3.

35. (1968) 9 P.U.B.D. 164.

provision similar to s. 27(3) of the Manitoba Act, so that the option to use the test is not expressly given to the Surface Rights Board. Secondly s. 55 provides:

> On the expropriation of an easement or right of way, the Board, in making its award for the value of the interest taken, may ignore the residual value to the owner.

The Board's present practice is to ignore any residual value to the owner. Since the sum arrived at by using the "before and after" test will include the residual value of the strip, the Board would have to calculate this residual value and add that amount to the award if it wished to assess compensation on the basis that there was no residual value.

ii. The "Formula" Method

The problem of insufficient comparable sales has been present in pipe line expropriation proceedings for a long time. In Alberta, it was recognized at an early stage that valuation of the easement at the value per acre of the whole parcel of land from which it was taken was not fair.[36] It became the practice of the Public Utilities Board, under the chairmanship of G.M. Blackstock Q. C., to allow an extra fifty per cent to be added to the per acre

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36. Re Imperial Pipe Line Co. and Bahal [1948] 2 W.W.R. 20, 33. For a more recent expression of this recognition, see Swanson v. Dome Petroleums Ltd. (1973) 5 L.C.R. 174, 184 (Alta. A. D.).

value of the whole parcel.[37] Subsequently the Alberta Appellate Division discussed the "Blackstock formula" in a number of cases,[38] and disapproved the use of the formula where there was evidence of sales of small parcels. The Public Utilities Board adopted this approach, but were still of the opinion that, where there was no evidence of comparable sales, the use of the formula was appropriate.[39]

In Copithorne v. Shell Canada Ltd.[40], however, McDermid, J.A. rejected the Blackstock formula altogether. His Lordship's judgment in the case dealt solely with the formula, and he otherwise concurred in the judgment of Allen, J.A.. Allen, J.A. (with whom Cairns, J.A. concurred) did not reject the formula in such a forthright manner but stated that resort should not be had to the formula where there was evidence of other recent sales of comparable land.[41] It is submitted that, despite the judgment of McDermid, J.A. in Copithorne, the Blackstock formula may still be applied in Alberta; where there is no evidence of comparable sales, especially since the award of the Board

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37. Re Imperial Pipe Line Co. and Pahal [1948] 2 W.W.R. 20; Re Valley Pipe Lines [1940] 3 W.W.R. 145.

38. Interprovincial Pipe Line v. Z.A.Y. Development (1960) 34 W.W.R. 570; Calgary Power Ltd. v. Danchuk (1962) 41 W.W.R. 124; Copithorne v. Shell Canada (1969) 70 W.W.R. 410.

39. Calgary Power Ltd. v. Hutterian Brethren of Pincher Creek (1961) 35 W.W.R. 227.

40. (1969) 70 W.W.R. 410.

41. Ibid., at 415.

in that case was held to be fair and reasonable.[42] In the most recently reported case dealing with this matter, Re Canadian Reserve Oil and Gas Ltd. and Lamb,[43] the Saskatchewan Court of Appeal agreed that the "Blackstock formula" should not be applied where there is evidence of comparable sales.[44] The Court found that there had been sufficient evidence of comparable sales before the District Court Judge and that the formula should not have been used. However their Lordships, referring no doubt to instances where there were no comparable sales, stated that "the addition of 50 per cent to the determined value per acre might well be a serious factor for consideration".[45] The question to be decided in the case was whether the offers made by the company represented adequate compensation, and although the Court of Appeal retained the additional 50 per cent in its calculations, it specifically did not give approval to the use of the formula. Since the offers were held to be adequate, even with the inclusion of the additional percentage, the inclusion or exclusion of the 50 per cent was not a factor in the outcome of the case.

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42. Ibid., at 416-7.

43. (1974) 7 L.C.R. 205.

44. Ibid., at 211.

45. Ibid.

3. British Columbia and Saskatchewan

In 1964, the Honourable J.V. Clyne in his Report of the British Columbia Royal Commission on Expropriation, 1961-63 (The Clyne Report), stated:[46]

> ... I have come to the conclusion that the concept of 'value to the owner' as the measure of compensation has resulted in many inappropriate and unjust awards. The result of such awards is uncertainty in the application of the rule and distrust in its validity.

Nevertheless, despite the recommendations of the Clyne Report (which were echoed emphatically by The Report on Expropriation by the Law Reform Commission in 1971) that compensation be based on the "market value" of the land taken, there has been no move by the Legislature of British Columbia to give effect to these recommendations.

As far as expropriation of land for pipe lines is concerned, s. 56(1) of The Railway Act,[47] quoted above,[48] allows the arbitrator to assess compensation in the manner in which he deems fit. The only guidelines given to those assessing compensation are contained in s. 64 of The Land Clauses Act:[49]

> In estimating the purchase-money or compensation to be paid by the promoter of the

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46. In his "Summary of Findings and Recommendations", p. 1-22 of the Report. (The Report is now out of print, but The Summary of Findings and Recommendations can be found at pp. 200-207 of The Report on Expropriation by the Law Reform Commission of British Columbia, 1971).

47. R.S.B.C. 1960, c 329.

48. Supra, p. 164.

49. R.S.B.C. 1960, c. 209.

> undertaking in any of the cases aforesaid, regard shall be had by the Justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

In an effort to compensate the owners of expropriated land the courts interpreted the words "value of the land to be purchased" to mean "value to the owner". One of the components of the sum that the owner would be prepared to pay rather than be ejected was the sum it would cost him to move. He would be prepared to pay almost as much as his moving costs would be in order not to have to move, and the interpretation of "value of the land purchased" to mean "value to the owner" allowed the courts to award compensation for disturbance costs for which provision was not otherwise made.

The Lands Clauses Act is a general expropriation Statute that was first enacted in England in 1845 as The Lands Clauses Consolidation Act,[50] and was received as a part of British Columbia's laws in 1858.[51] In 1918 the procedures in the various Lands Clauses Acts were rejected by the Scott Committee in its report to the British

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50. (1845) 8 Vict., c. 18.

51. English Law Act, R.S.B.C. 1960, c. 129.

Parliament[52] as being out of date, and these Acts were largely replaced by The Acquisition of Land (Assessment of Compensation) Act, 1919[53] and subsequent statutes. In British Columbia, The Lands Clauses Act, outdated though it may be, still continues in force. However, its inadequacy to cope with the changing problems encountered in expropriation cases has led to the enactment of numerous special provisions in a host of other provincial statutes, so that the purpose of The Lands Clauses Act, namely that of consolidating the applicable expropriation law, has been defeated. Some statutes have expressly declared The Lands Clauses Act to be inapplicable to proceedings under those statutes,[54] but as far as The Pipe-lines Act and The Railway Act are concerned The Lands Clauses Act is applicable, at least in the absence of provisions on the particular point in question. One such section that is applicable is s. 64, quoted above, and this section will be further discussed under "Injurious Affection"[55].

As a result of the failure of the Legislature in British Columbia to follow the recommendations of either

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52. Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918), p. 7.

53. (1919) 9 & 10 Geo. 5, c. 57.

54. See for instance The Highways Act Amendment Act, S.B.C. 1964, c. 22, s. 2.

55. Infra, p. 191 ff.

The Clyne Report or The Law Reform Commission Report, the assessment of compensation is still based on principles that are confusing and out of date. It is hoped that the Legislature in British Columbia will soon come to grips with the task of codifying the legislation regarding expropriation in order to put an end to the present confusion.

In Saskatchewan, neither The Expropriation Procedure Act[56] nor The Surface Rights Acquisition and Compensation Act[57] made any attempt to codify the principles by reference to which compensation was to be assessed. Section 35(3) of The Expropriation Procedure Act merely lists some of the matters with respect to which the parties must state the material facts in their statement of claim or statement of particulars if they intend to rely on these facts at trial. These matters include:

> (a) the best use that can be made of the expropriated land;
>
> (b) any zoning laws applicable to the expropriated land;
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> (c) designation of land that may be claimed to be comparable to the expropriated land the sale of which could form a basis for an opinion of the value of the expropriated land;
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> (d) damage caused by the severance of the expropriated land from other land;
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> ....

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56. S.S. 1968, c. 21.

57. S.S. 1968, c. 73.

(g) the fair market value of the parcel of land from which the expropriation was made, both before and after expropriation;

(h) the sum or each of the several sums claimed by the owner as damages.

From these provisions it appears that the judge is to determine compensation on the basis of "market value" (para. (g)), which is not defined in the Act, and is to take account of the best use of the land given the applicable zoning laws (paras. (a) & (b)). However it is unclear whether paragraph (c), which incorporates the "comparable sales" approach, is to prevail over paragraph (g) which involves the "before and after" method of assessment. No provision is made for compensation for items of special value to the owner, nor for disturbance costs, unless these can be included in paragraph (h). If these items cannot be included in paragraph (h), it is difficult to see how they could otherwise be included, since paragraph (g), which prescribes "market value" as the basis of compensation, would seem to prevent the courts from adopting a "value to the owner" approach which would include these items in its scope.

The Surface Rights Acquisition and Compensation Act, in s. 39, states various matters to be considered by the Board of Arbitration in assessing compensation. Vague considerations such as "the value of the land" and a failure to provide for compensation on the basis of the best use of the land or for compensation for items of special value to the owner, suggest that the concept of

"value to the owner" still applies under The Surface Rights Acquisition and Compensation Act (in contrast to the concept of "market value" which it is submitted applies under the Expropriation Procedure Act). This interpretation was adopted by the Saskatchewan Court of Appeal in Re Canadian Reserve Oil and Gas Ltd. and Lamb.[58]

Once again it seems that the confusion caused by these inadequate statutory provisions can only be dispelled by a comprehensive codification of expropriation principles relating to assessment of compensation.

Under The Surface Rights Acquisition and Compensation Act, the Board of Arbitration appears to have developed a formula for compensation for flow lines and service lines.[59] While the items under s. 39(1)(b) are given consideration in the light of each case, the decisions of the Board indicate that some sort of formula is employed especially in respect of severance damage (s. 39(1)(b)(iii) and (iv)) and nuisance (s. 39(1)(b)(vi)).[60]

The residual value of the right-of-way is to be considered under both Acts. Section 35(3)(g) of The Expropriation Procedure Act refers to the market value of

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58. (1974) 7 L.C.R. 205.

59. See Sychuk, Compensation for Acquisition of Surface Interests for Oil and Gas Operations in Saskatchewan, (1972) 36 Sask. L. Rev. 387, 421-457.

60. Though note the disapproval of these formulae by the Court of Appeal of Saskatchewan in Re Canadian Reserve Oil and Gas Ltd. and Lamb (1975) 7 L.C.R. 205, 212.

the land before and after the expropriation, while s. 39(1)(b)(v) of The Surface Rights Acquisition and Compensation Act requires the Board of Arbitration to subtract the residual value of the right-of-way from the value of the land taken. The provision under the latter Act is mandatory, so that the reasoning of Lyon Co.Ct.J. in Starr v. Municipality of Toronto[61] is inapplicable. Although s. 35(3)(g) of The Expropriation Procedure Act does not make such a mandatory requirement, it is supplemented by s. 49(4) which provides that the judge assessing compensation must take into account the value of rights granted to the landowner by the pipe line company (such as the right to farm the right-of-way).[62] The mandatory provisions of s. 49(4) would also render the reasoning in the Starr case inapplicable. The landowner in Saskatchewan is left to rely on the Board of Arbitration to find that residual value is small if he is to receive the compensation that landowners in the other provinces receive.[63]

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61. (1969) 1 L.C.R. 40. See p.176 supra.

62. Compare s. 49(4) of The Expropriation Procedure Act with s. 34(1) of The Expropriation Act of Manitoba. The former subsection provides for the setting-off of rights granted to the landowner by the pipe line company against the compensation payable, whereas the Manitoba provision only allows this setting-off to be made against claims for "injurious affection of land or other damage".

63. The landowner will do well to employ the reasoning in Re Interprovincial Pipeline Co. [1955] O.W.N. 301, where the Ontario Court of Appeal agreed that the residual value of a sixty-foot strip was unassessable on any logical approach. See also Murphy Oil Co. v. Dau (1969) 7 D.L.R. (3d) 512, aff'd [1970] S.C.R. 861, where similar reasoning was employed.

4. Other Components of Compensation

a. Disturbance Damages

As already noted, the concept of "value to the owner" permitted the inclusion by the courts of compensation for the landowner's disturbance costs. The Expropriation statutes of Alberta and Manitoba, where "market value" has been adopted as the basis for compensation, include generous provisions for the compensation of owners, tenants, security holders and business firms. In Alberta, s. 48 begins:

> The expropriating authority shall pay to an owner ... , in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation,....[64]

These costs include, where the owner's residence is taken, an allowance of five per cent of the market value (or the actual cost, if greater) to compensate for the inconvenience and cost of finding another residence plus a reasonable allowance for improvements the value of which is not reflected in the market value of the land. Where the land taken does not include a residence, the owner is entitled to the cost of finding land to replace that taken. Finally moving costs and legal, survey and other similar costs are recoverable.

Since expropriations for pipe line rights-of-way

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64. Manitoba: s. 28(1).

do not involve the taking of people's homes, disturbance damages are not an item of compensation that is usually applicable to such expropriations. Costs incurred by the landowner for the relocation of (say) a barn or irrigation channel are properly included under "incidental damages" in accordance with s. 54(b) of the Alberta Act.[65] The only exception seems to be where the landowner has had drawn up plans for subdivision or plans for a proposed alteration in the use of the land. If the presence of the pipe line means that these plans have to be abandoned, the pipe line company will be liable to pay the cost incurred by the landowner in having these plans drawn up.[66]

b. Special Value to the Owner

Section 40(2)(c) of the Alberta Act provides for the inclusion of a sum which represents

> the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion.[67]

This does not involve merely showing a willingness to pay a certain sum over and above market value in accordance with

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65. Manitoba: s. 30(1).

66. See Schweitzer v. Essex County Board of Education (1975) 7 L.C.R. 316 and Rosenthal v. City of Brampton (1974) 7 L.C.R. 329. The reasoning in these cases is equally applicable in the case of an expropriation of land for a pipe line.

67. Manitoba: s. 26(1)(d).

the Diggon-Hibben test. The expropriated party must show the special advantages which give the land the added economic value for him: National Capital Commission v. Hobbs.[68] "Special value" also includes the value to the owner of alterations such as those made by a handicapped person to his home to accomodate his disability, even though such alterations may detract from the market value of the expropriated property.[69] It must be remembered that the unrealized potential of land is a totally different consideration from "special value". "Special value" is the value to the owner of the land or buildings that is not reflected in market value. It is a purely subjective item of compensation in that the special features which give this added value in the eyes of the owner may be valueless to any purchaser of the land. In addition, these special advantages of the land must be accruing to the owner at the time of the expropriation. The unrealized potential of the land is a factor included in market value based on an objective assessment of what future use could be made of the land in the foreseeable future. If the land is not being put to a particular use, a question of "special

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68. [1970] S.C.R. 337, 340. Other examples of "special value" are given by the Institute of Law Research and Reform at p. 71 of their Report on Expropriation: Lake Erie Railway v. Schooley (1916) 53 S.C.R. 416; R. v. Lynch's Ltd. (1920) 20 Ex. C.R. 158; Gagetown Lumber Co. v. The Queen [1957] S.C.R. 44; Manitoba v. Rigol (1972) 4 L.C.R. 329.

69. This item is also covered under s. 48(a)(ii) of the Alberta Act dealing with disturbance costs.

value" to the owner does not arise.[70]

From the foregoing paragraph it will have been gathered that the item of "special value" is very rarely taken into account in assessing compensation for pipe line rights-of-way.

c. Injurious Affection

Where part only of a parcel of land is expropriated, there is often a reduction in the market value of the remaining land as well as the damage caused by the right-of-way bisecting the parcel or "severance damage" as it is termed in the legislation. Both these types of loss are compensable under the provisions relating to injurious affection in the expropriation statutes of the provinces.[71] Because the two are so closely interrelated, calculation is usually made of injurious affection as one item. How this calculation is made varies from province to province. The Manitoba Expropriation Act, for example, provides for a "before and after" test,[72] which will not only determine

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70. POW Investments v. Province of Nova Scotia (1973) 5 L.C.R. 57, 59.

71. Alta.: s. 54; Man.: s. 30(1); B.C.: Lands Clauses Act, s. 64; Sask.: Expropriation Procedure Act, s. 35(3)(d), Surface Rights Acquisition and Compensation Act, s. 39(1)(b)(iii) and (iv).

72. S.M. 1970, c. 78, s. 27(3).

the market value of the land taken but will also include the amount by which the value of the remaining lands has diminished as a result of the expropriation. As already discussed,[73] the value of the "before and after" test must be queried where only a small percentage of land is taken, and the approach of the Alberta tribunals of appraising the value of the land taken separately from the injurious affection to the remainder of the parcel may provide greater accuracy.[74]

The reduction in the market value of remaining lands may be substantial in the case where the lands through which the right-of-way travels is to be sub-divided at some time in the (forseeable) future. In Alberta, for example, s. 37(3) of The Subdivision and Transfer Regulations[75] under The Planning Act[76] reads as follows:

> Where any pipe line as defined in The Pipe Line Act, 1958, crosses or is situated in the vicinity of land which an applicant proposes to subdivide, the subdivision shall be designed
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> (a) so that the pipe line is located within the right-of-way or parallel to and

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73. Supra, p.176.

74. See St. Mary River Development Co. v. Murray (1960) 21 D.L.R. (2d) 809 and Re M.D. Sturgeon and Pelletier (1968) 9 P.U.B.D. 164. Where calculation of the damage due to injurious affection is very difficult to determine, perhaps, as a last resort, some percentage amount may be used: In re Howe St. Ltd. and City of Vancouver (1955) 14 W.W.R. 337, 341 (B.C. S.C.).

75. Alta. Regs. 215/67 as amended by Alta. Regs. 425/68, s. 14.

76. R.S.A. 1970, c. 276.

alongside a quarter section line or the right-of-way of a public roadway or lane, and

(b) so that no habitable building on any parcel so created in the proposed plan of subdivision shall be sited closer than 50 feet to the center line of the pipe line or center line of the pipe line right-of-way, whichever is the lesser, and

(c) a parcel to be created that is adjacent to or abutting a pipe line right-of-way shall not be less than 150 feet in depth.

The cases of Copithorne v. Shell Canada[77] and Swanson v. Dome Petroleum Ltd[78] are good examples of the injurious affection to land remaining after a pipe line right-of-way has been taken. In both cases the Appellate Division of the Supreme Court of Alberta awarded compensation for injurious affection resulting to the remaining land in the light of the requirements of The Planning Act and the relevant Regulations.[79] Swanson v. Dome Petroleums Ltd. should also be noted with reference to other costs which might be included in an award of injurious affection, such as the cost of lowering and casing an existing pipe line when putting in a roadway in a future subdivision. Costs of insurance which a landowner might be required to take out while building the roadway on top of a pipe line, and the costs which he might have to pay to the pipe line company if the pipe line was required to be shut down during the

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77. (1969) 70 W.W.R. 410.

78. (1973) 5 L.C.R. 174.

79. See also Hoydalo v. Regional Municipality of Sudbury (1974) 7 L.C.R. 374.

building operations, could similarly be included in an award of compensation for injurious affection.

The effect of the severance caused by the pipe line right-of-way may itself be such as to cause added compensation. Section 18(1) of the Alberta Act states that registration of the Certificate of Approval "vests in the expropriating authority the title to the lands therein described as to the interest specified in the certificate". If the Certificate of Approval gives the company the right-of-way across the land and the power to construct and operate "works" in connection with the pipe line, in the light of the broad definition of the word "works"[80] the landowner's right of enjoyment of the land may in theory at least be severely curtailed.[81] If the company's rights over the land are this extensive, it would perhaps be wise for the company to enter into some form of agreement with the landowner, whereby the latter agreed to maintain or use the land. Otherwise the company might be held liable for its failure to carry out its obligations to maintain the right-of-way (e.g. clearing of weeds), especially in agricultural areas. However, the company's interest in the land is still only a right-of-

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80. Section 1(k) of The Expropriation Act reads:
"work" or "works" means the undertaking and all the works and property that may be acquired, constructed, extended, enlarged, repaired, maintained, improved, formed, excavated, operated, reconstructed, replaced or removed in the exercise of any powers conferred by an authorizing Act.

81. The interest of the landowner does not revert to him automatically. He or the company must apply to the S.R.B. for an order terminating the company's interest and revesting the right-of-way in him : s. 68(3).

way. At common law, while the holder of an easement over his neighbour's land could not be excluded from the land covered by the easement, he had no right to prevent the owner of the servient tenement from using the land for purposes that did not interfere with his easement. A right-of-way under the statute must surely be treated similarly.

Finally the Manitoba Expropriation Act provides that the expropriating authority may mitigate the damage for which compensation is claimed under injurious affection. Section 34(1) provides for various undertakings which the expropriating authority may carry out to the benefit of the landowner. Any undertakings of this nature are set off only against the amount awarded for injurious affection.[82]

d. Other Damages

In Alberta, these include "incidental damages" under s. 54(b): for example, the extra expense of farming around above-ground installations, or the cost of relocating a barn or irrigation ditch. In addition, s. 56 allows compensation for damage to lands off the right-of-way; for damage to livestock and other personal property; and for expenses incurred in recovering livestock that have strayed due to the fault of the pipe line company.

In Manitoba, the relevant section, s. 30(1)(c)

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82. Compare The Expropriation Procedure Act, S.S. 1968, c. 21, s. 49(4) which permits the set-off to be made against all the compensation payable.

states as follows:

> Compensation for injurious affection ... shall consist of the amount of
>
> (a) ....
>
> (b) the damages sustained by the owner as a result of the existence and the use of the works upon the part of the land expropriated; and
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> (c) such other damages sustained by the owner as a result of the existence, but not the 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.

The distinction in Manitoba between damages flowing from the existence of the pipe line on the one hand and from the use of the line on the other means that the former damages can be compensated at the original court hearing on compensation. Recovery of compensation for injuries caused by the use of the pipe line must be effected in a separate court action. This separate action will be founded on tortious liability whether nuisance, Rylands v. Fletcher, trespass or negligence and raises the problem of the extent of legislative authority as a defence to the claims based on Rylands v. Fletcher or nuisance. The wording of s. 30(1)(c), referring as it does to statutory authority, may be seen as strengthening the argument that such statutory authority does provide a defence, but it is submitted that prevailing judicial opinion in Canada would not accept such an argument.[83]

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83. See Linden, Strict Liability, Nuisance and

In Alberta, use of the word "operations" in s. 56 avoids the problems caused in Manitoba by the use of two words. However, once compensation has been finally determined, any further claims will of course have to be brought in the courts.

5. Other Payments

a. Additional Payment for Compulsory Taking

In many expropriation cases before 1961 an additional percentage, usually 10 per cent of the value of the land, was awarded to compensate the landowner for the compulsory nature of the acquisition.[84] So common was the additional percentage that it aroused little comment in most of the cases, and was given in many cases even though the statute authorizing the compensation said nothing about compensation for the compulsory nature of the expropriation.[85] The reasons for granting the percentage

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Legislative Authorization, (1966) 4 O.H.L.J. 196 and McLaren, Compensation in Canada, Chapter 13 of Studies in Canadian Torts [illegible], (1966), at p. 320. It is interesting to note the approach of the courts in England, where the defence has been extended further than it has in Canada - see Dunne v. N.W. Gas Board [1964] 2 Q.B. 806 (C.A.).

84. For a comprehensive review of the practice of awarding a percentage, see the discussion by Thorson, J. in R. v. Sisters of Charity [1952] 3 D.L.R. 358, 375-391.

85. St. Mary Development Co. v. Murray (1960) 21 D.L.R. (2d) 203.

varied widely. In R. v. Hunting[86] it was stated that the award was to be made as a matter of course.[87] In St. Mary Development Co. v. Murray[88] the ten per cent was allowed to cover items that could not be given a precise monetary value.

In 1961, the Supreme Court of Canada examined the percentage allowance in Drew v. The Queen.[89] Although the members of the court disagreed on the reasons why the percentage had been granted, they did agree on one point: that the allowance was not to be made unless special circumstances existed. Locke, J. held that the allowance was awarded for disturbance costs and similar expenses.[90] Judson, J. stated[91]

> In fixing the amount of an award there are often factors, other than the market value of the property expropriated, which must be taken into account but which are not easily calculated. In such cases the tribunal of fact may decide that compensation for such factors can best be appraised in the form of a percentage. This is but a part of the process of determining value to the owner. Once that value has been assessed ... it represents full compensation and the owner is not entitled to

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86. (1916) 32 D.L.R. 331.

87. See also Diggon-Hibben Ltd. v. The King [1949] S.C.R. 712, per Estey, J. at 719-720.

88. (1960) 21 D.L.R. (2d) 203 (Alta. A.D.).

89. [1961] S.C.R. 614.

90. Ibid., at 623, 626.

91. For himself, Cartwright, Fauteux, Abbott, Martland, and Ritchie, JJ..

an additional amount for compulsory taking.[92] Does the allowance for compulsory taking apply in Alberta and Manitoba now that the basis of compensation is no longer value to the owner but market value ? This question was answered in the negative by Hall, J.A. for the Manitoba Court of Appeal in McLeary v. Manitoba.[93] His Lordship continued,[94]

> In our view the principles to be applied in assessing due compensation are clearly and adequately set forth in The Expropriation Act, 1970 (Man.), c. 78, and they do not include one of a percentage formula for compulsory taking. If the principles therein set forth are applied to adequate supporting evidence, due compensation can be made without introducing an arbitrary percentage formula for compulsory taking.

In Alberta, the Institute of Law Research and Reform advocated the abolition of the additional percentage.[95] However, s. 42 of the Act states that "no allowance shall be made on account of the acquisition being compulsory except where unusual circumstances exist for which no provision is contained in the Act". (emphasis added).

It is not clear what s. 42 means, but it is submitted that, on an application of the reasoning in McLeary and the reasoning of Judson, J. in Drew, if the value has been properly assessed under the remaining

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92. [1961] S.C.R. 614, 632-3.

93. (1973) 6 L.C.R. 148, 151.

94. Ibid..

95. Report No. 12 on Expropriation, 1973, at 75-6.

sections of The Expropriation Act, then there should be no additional amount awarded under s. 42.[96] This of course, makes the emphasized clause (above) totally redundant, and deletion of the clause is the obvious solution.

In both British Columbia and Saskatchewan, the Drew case has brought about a situation similar to that in Alberta and Manitoba. While a percentage may be used as a part of the process of calculating the value of the property taken, it cannot be used to add to the total compensation which is properly due.

b. Costs

i. Costs Under the New Expropriation Acts

Under the old legislation, costs connected with expropriation proceedings were usually in the discretion of the tribunal assessing compensation.[97] The practice of the tribunal was to allow costs of the proceedings, taxed as between party and party, in all cases where the amount of compensation awarded exceeded the amount offered to the landowner by the company. In addition the expropriated

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96. This is the policy of the Surface Rights Board in Alberta: Paper presented by Mr. B.E. Langridge, Chairman of the Surface Rights Board, at a Seminar on Expropriation, Edmonton, 5 December 1974.

97. Expropriation Procedure Act, R.S.A. 1970, c. 130, s. 35(2)(f); Expropriation Act, R.S.S. 1965, c. 56; s. 12(1).

party would usually receive the cost of obtaining an appraiser's report, although the witness fee allowed would not cover the cost of the appraiser's attendance at the hearing.

The new legislation is based on the principle of total economic reimbursement, and the provisions regarding costs follow this principle in an attempt to ensure that the expropriated landowner does not suffer financially simply because he decides to challenge the amount of compensation that he has been offered for his land.

In Alberta, s. 37(1) of The Expropriation Act[98] provides as follows:

> The reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable shall be paid by the expropriating authority, unless the Board determines that special circumstances exist to justify the reduction or denial of costs.[99]

In Manitoba, s. 43 of The Expropriation Act[1] refers to

> ... such legal, appraisal and other expenses incurred by the owner for the purpose of preparing and presenting his claim for due compensation as the court deems just and reasonable...[2]

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98. S.A. 1974, c. 27.

99. It should be remembered that costs incurred at other stages of the expropriation procedure are covered in a similar fashion elsewhere in the Act - see s. 14(10) relating to costs of the inquiry and s. 33 relating to costs incurred in connection with the proposed payment. These costs must also be "reasonable" so that the comments below relating to what is reasonable will apply to those other costs.

1. S.M. 1970, c. 78.

2. Whether these expenses are to be taxed as between

In Saskatchewan, The Expropriation Procedure Act[3] provides for payment of costs by the expropriating authority where the award exceeds the amount offered by the authority. However, The Surface Rights Acquisition and Compensation Act[4] leaves the assessment and award of costs to the discretion of the Board of Arbitration. Finally, The Railway Act of British Columbia[5] provides for payment of costs by the expropriating authority where the award exceeds the offer.

ii. Party and Party or Solicitor and Client Costs ?

Section 58(2) of The Railway Act of British Columbia states that costs may be taxed "in such manner as may be directed by the Court". The practice, however, is to tax the costs as between party and party, and taxation between solicitor and client, if ordered, must be ordered in express terms.[6]

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party and party or as between solicitor and client will be discussed in subsection (ii), infra.

3. S.S. 1968, c. 21, s. 43.

4. S.S. 1968, c. 73, s. 39(3).

5. R.S.B.C. 1960, c. 329, s. 58.

6. See Bowell McLean Motor Co. v. City of Vancouver (1973) 4 L.C.R. 1 (B.C. C.A.). The reasoning of McFarlane, J.A., although in reference to the Vancouver Charter, is equally applicable to s. 58 of The Railway Act.

In Saskatchewan, The Expropriation Procedure Act makes no provision for the taxation of costs, but it is understood that the practice is to tax costs as between party and party. However, s. 39(3) of The Surface Rights Acquisition and Compensation Act states that,

> The board may allow to the owner or occupant, if any, reasonable costs and expenses incurred by the owner or occupant relating to the hearing with respect to the acquisition of the rights mentioned in clause (b) of Section 33 and shall fix the amounts thereof.

It is submitted that the words "reasonable costs and expenses incurred by the owner....." permits the same reasoning to be applied as is applicable in respect of the Alberta legislation and that, accordingly, s. 39(3) envisages the taxing of costs as between solicitor and client. It must be remembered however that although it must be the Board of Arbitration that fixes the amount of costs, the Board has a discretionary power whether or not it will allow costs. If it has such a power, it seems a fortiori that it has the power to allow costs on some basis less generous than solicitor-client basis.

In Alberta it is clear that costs are to be awarded on a solicitor-client basis. In Salvadore v. Minister of Highways[7], Taxing Officer McBride considered the words "reasonable legal, appraisal and other costs actually incurred by the owner ..." (which also appear in The Expropriations Act of Ontario)[8]. The Taxing

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7. [1970] 1 O.R. 116; (1969) 1 L.C.R. 172.

8. R.S.O. 1970, c. 154, s. 33(1).

Officer held[9]

> ... It is crystal clear from the words used in that section that the costs therein provided for are to be assessed with reference to the costs and expenses actually incurred by the claimant and not with reference to some Court scale.

He continued,[10]

> The reasonableness of the costs and whether or not they have been actually incurred "for the purposes of determining the compensation payable" are not only two of the factors to be considered when taxing the costs but they are the only two factors to be considered. And I have no hesitation in concluding that the reasonableness of the costs, at least in respect of quantum, can have no definable or measurable relation to the tariff of party-and-party costs of any Court.

It is submitted that this reasoning is as applicable to s. 39(3) of The Surface Rights Acquisition and Compensation Act as it is to s. 37 of the Alberta Act.[11]

Section 43(1) of The Manitoba Act, however makes express mention of costs on a party and party basis:

> (1) Where the amount of the due compensation to which an owner is entitled upon an expropriation is determined by the court and the amount offered by the authority is ninety per cent, or less, of the amount determined by the court, the due compensation shall be increased by the amount of such legal, appraisal and other expenses incurred by the owner for the purposes of preparing and presenting his claim for due compensation as the court deems just and reasonable and the authority shall pay costs on a party and party basis.

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9. (1969) 1 L.C.R. 173.

10. Ibid., at 174.

11. And, of course, ss. 14(10) and 33 of The Alberta Act.

Section 43(2), which applies where the authority's offer is more than ninety per cent of the amount determined by the court, makes similar mention of party and party costs. In both subsections (1) and (2) a distinction is made between "costs" on the one hand and "expenses" on the other. The various "expenses incurred by the owner for the purpose of preparing and presenting his claim for due compensation" are to be included (in full if they are reasonable) in the compensation which the expropriating authority must pay. The "costs", i.e. those costs incidental to the proceedings, are payable on a party-and-party basis - presumably those laid down in the tariffs in The Queen's Bench Rules.[12] The distinction between "costs" and "expenses" was considered by the Court of Appeal (although in a different context) in Weston Bakeries Ltd. v. Bakes Perkins Inc.[13] Miller J.A., for the majority, disallowed over $28,000 in costs on the basis that they were not "costs" at all, but "expenses".[14] These "expenses" included consultations between solicitor and client, and consultation with and advice from experts, research, investigation and experiments by experts to get the facts on which to give their evidence. From the definition of "costs" and

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12. Man. Reg. 26/45 as amended.

13. (1960) 31 W.W.R. 200. The case involved interpretation of s. 100(1) of The Queen's Bench Act, R.S.M. 1954, c. 52, relating to the awarding of costs.

14. Ibid., at 214.

"expenses" in this case, it follows that in Manitoba, an expropriating authority, or more specifically a pipe line company, is liable (if s. 43(1) applies) to pay for all expenses such as appraisal reports, reports on future potential, consultations and so on. The major difference from the costs awarded in Alberta is that the attendance at the hearing to determine compensation comes within the meaning of "costs" and accordingly must be remunerated, so far as the pipe line company is concerned, in accordance with the tariff established in The Queen's Bench Rules.[15]

iii. Reasonable Costs Actually Incurred

The relevant provisions in Alberta, Manitoba and under The Surface Rights Acquisition and Compensation Act in Saskatchewan all refer to reasonable costs that have been incurred in determining the compensation payable (or words of similar meaning), and as noted above these are the only two factors to be considered when taxing costs.[16]

The question of what costs have been incurred in determining compensation has already been discussed with reference to costs before the inquiry officer and

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15. The landowner is left to pay the difference between the amount agreed upon with the expert witness and the amount received under The Queen's Bench Rules.

16. Per McBride, Taxing Officer, in Salvadore v. Minister of Highways (1969) 1 L.C.R. 172, 174.

before the Board of Negotiation.[17] No general principles can be drawn from other costs which have or have not been allowed as "incurred for the purposes of determining compensation", as these have been determined on a case-to-case basis depending on the particular facts of the case.[18] However it is clear that costs incurred in pursuit of a contention that was not accepted by the tribunal will still be allowed if they are reasonable.[19] The time when such costs were incurred is immaterial, although, where the costs were incurred before the expropriation proceedings commenced, it may be difficult to show that they were actually incurred for the purpose of determining the compensation payable.[20] Finally, it should be noted that the words "actually incurred" do not mean that the bills must have been paid by the expropriated party. However he must have already been charged for the costs - he must have received the bill or statement of account.[21]

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17. Supra pp. 117 and 145 respectively.

18. The following cases should be noted however: Peloquin v. Junction Creek Conservation Authority [1973] 1 O.R. 258; Lalli v. Metro. Toronto (1970) 1 L.C.R. 177; Shiner v. Metro. Toronto [1972] 3 O.R. 557.

19. Speed v. City of Oshawa (1972) 3 L.C.R. 18, 21-2; German Aviation Ltd. v. New Mount Sinai Hospital (No.2) (1974) 6 L.C.R. 166.

20. Salvadore v. Minister of Highways [1970] 1 O.R. 116, (1969) 1 L.C.R. 172.

21. Peloquin v. Junction Creek Conservation Authority [1973] 1 O.R. 258, 260.

The remaining question is how to determine what costs are reasonable. While it may be "reasonable" to retain senior and junior counsel, a highly qualified appraiser and sundry expert witnesses when a large area is being expropriated, is it reasonable to retain the same people for an expropriation of a pipe line right-of-way across a quarter section ? In Salvadore v. Minister of Highways,[22] Taxing Officer McBride stated:

> The quantum of costs, and particularly of fees, must be reasonable, having regard to the amount of the award, the number and complexity of the issues involved, the time expended by the claimants' solicitors and expert advisers, the degree of skill and competence demonstrated by them and the degree of success realized in the proceedings.

In Oriole Pharmacy v. Metro. Toronto (No.2),[23] the arbitrator, Moore, Co.Ct.J., citing Salvadore held that, even though very little more money was awarded than had been offered, the costs were still reasonable (for the most part) because the issues that had been raised were complex ones. In Seres v. Minister of Transportation (No.2),[24] it was held that, since the case was relatively simple, legal and appraisal expenses in excess of the amount in dispute were not reasonable and should be reduced.[25] In Arsco

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22. (1969) 1 L.C.R. 172, 174.

23. (1970) 1 L.C.R. 253.

24. (1974) 6 L.C.R. 316.

25. On the other hand, see Re Johnson and Minister of Transport and Communications (No.2) (1979) 7 L.C.R. 296,

Investments Ltd. v. Metro. Toronto,[26] it was held that the case was not of such a complex nature that both senior and junior counsel were required at the arbitration. This case also provides a good example of an instance where overpreparation was not reasonable. Taxing Officer, McBride, felt that the appraiser's report represented a substantial degree of overkill. He continued:[27]

> I doubt if it would require a more elaborate written brochure and a greater expenditure of time and effort to sell the Brooklyn bridge.

The appraisal costs were reduced from $4,500 to $2,000. Costs for attendance by the experts at the hearing are costs which the expropriating authority must pay (at least in Alberta, although not in Manitoba), and it is reasonable that these experts remain at the hearing after they have given their evidence in case they have to rebut the testi[illegible] other side's expert witnesses.[28]

[illegible] be remembered that the costs under discussion [illegible] which the expropriating authority has

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where the [illegible]tario High Court held that costs amounting to $84,00[illegible]ere reasonable for the purposes of determining com[illegible]sation of $60,000.

26. (197[illegible]2 L.C.R. 312.

27. Ibid., at 315.

28. Smegal v. City of Oshawa (1972) 3 L.C.R. 18. But where the claimants had expressed a lack of confidence in the work of their appraiser, it was unreasonable for them to expect the respondents to be required to pay for this appraiser's remaining at the hearing in an

to pay for the landowner. The landowner may still have to pay an expert witness more than the amount awarded against the expropriating authority by way of costs. Taxing Officer McBride referred to this problem in Shegal v. City of Oshawa:[29]

> I add only that nothing I have said or decided in these reasons is intended to act as a bar to the various experts collecting from the claimants payment in full of their respective accounts. These charges are a matter of contract between the individual expert and the claimants and I have no jurisdiction to interfere with that.

The sole exception to this rule relates to the lawyer. Where the costs awarded are solicitor-client costs, the lawyer is bound by the award of the Taxing Officer with respect to those services for which costs are allowed as against the authority. He may not charge the client more for these services.[30]

iv. When are Costs to be Paid by the Company?

Although the landowner may claim reimbursement

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advisory capacity: Seres v. Minister of Transportation (No.2) (1974) 6 L.C.R. 316.

29. (1972) 3 L.C.R. 18, 26.

30. Peloquin v. Junction Creek Conservation Authority [1973] 1 O.R. 256, 260; (1972) 2 L.C.R. 101, 109.

for his reasonable costs, there are some circumstances in which he may not be entitled to any costs or in which he may even have to pay the pipe line company's costs.

In Alberta, s. 37(1) provides that the landowner is to receive his costs, "unless the Board determines that special circumstances exist to justify the reduction or denial of costs". In the other three provinces, the party who bears the costs of the expropriation is determined in part by the difference between the amount offered by the company to the landowner and the amount finally awarded by the assessing tribunal. Alberta's Act contains no similar provision, but if the proposed payment offered by the company is greater than the final award, the Surface Rights Board may decide that this constitutes the "special circumstances" under which it may reduce or deny costs. Section 31(2) provides that an owner who withholds relevant information concerning his property may be penalized in costs, and from a reading of this section and s. 37(1) it appears that, unless the owner withholds information, the Surface Rights Board cannot award costs against him. Section 37(1) does not give the Board complete discretion as to costs. It only allows the Board to reduce or deny costs. Accordingly it appears that, in Alberta, no matter how unreasonable the landowner's action, in refusing a generous proposed payment for instance, he will not have costs awarded against him.

Section 39(3) of The Surface Rights Acquisition

and Compensation Act also makes no mention of the offer made by the company, and because of the subsection's instructions as to the awarding of costs, it may well be that the Board of Arbitration like the Surface Rights Board has no power to award costs against the landowner. The most it can do in the way of penalizing the landowner is to make him pay his own costs.

The Expropriation Procedure Act of Saskatchewan and the expropriation legislation of British Columbia and Manitoba, all provide for account to be taken of the statutory offer made by the company before the hearing to assess compensation. However each statute operates in a different manner. Section 58(1) of The Railway Act of British Columbia provides that if the award exceeds the amount previously offered, the costs are borne by the company. If the award is equal to or less than the statutory offer, then the landowner bears the costs, which are deducted from any compensation he may receive. The Expropriation Procedure Act of Saskatchewan provides, in s. 43, that, where the award exceeds the offer, the company is to pay costs, but gives the judge discretion as to costs where the offer is the same as or exceeds the award.

The relevant section in Manitoba, s. 43, provides greater incentive for the owner to accept the statutory offer made by the company. Under s. 43(1), the statutory offer must be ninety per cent, or less, of the award before the company automatically pays costs.[31] If the

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31. The Manitoba provision creates exactly the

offer is greater than ninety per cent of the award, s. 43(2) leaves the matter of costs to the discretion of the Court.

Three problems have arisen under the Ontario legislation. First of all, what if there is no offer ? Secondly, what if there is more than one offer ? Finally, what if there is no-award ? In Four Thousand Yonge Street v. Metro. Toronto,[32] the expropriating authority had made no statutory offer of compensation and the Land Compensation Board held that since there was no provision in The Expropriations Act dealing with this situation, the only section relating to costs, s. 33, was to be applied. Because "the offer" was effectively $0.00, the award was "eight-five per cent or more" of "the offer". Accordingly the expropriating authority had to pay costs.[33] However,

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opposite situation to that in Ontario. Section 33(1) of The Expropriations Act (R.S.O. 1970, c. 154) provides for the awarding of costs against the expropriating authority where the award is 85 per cent, or more, of the statutory offer. This provision dulls any incentive of the owner to settle since he has nothing to lose by going before the assessing tribunal even if the award is up to 15 per cent less than the the previous offer.

32. (1972) 2 L.C.R. 191, 199.

33. See also Disposal Services Ltd. v. Metro Toronto (1973) 4 L.C.R. 242, 257, where the Ontario Land Compensation Board held that one party had no interest to be compensated and hence awarded that party nothing. Since the compensation awarded (nothing) was the same as the amount offered to that party (nothing), the Board ordered that costs were to be paid by the expropriating authority. However, on appeal to the High Court, this award of costs was held to be beyond the jurisdiction of the Board and was set aside.

the expropriating authority must be given an opportunity to make an offer. Thus, in Pugliese v. City of Hamilton,[34] where a (successful) claim for disturbance damages was first made at the hearing itself, the expropriating authority had no prior notice of the claim and hence had made no offer. The Board refused to allow the costs connected with this part of the claim.

If the expropriating authority makes a second offer, claiming it to be a statutory offer, which party is to pay the costs in the event that the award is more than the first offer but less than the second offer ? In Harvey v. Minister of Highways,[35] the British Columbia Court of Appeal held that account should be taken of the second offer, and that the words "the sum offered" did not necessarily refer only to an offer made under other sections of the relevant Act. Since this second offer exceeded the award, the Act provided that the claimant had to pay the Minister's costs. However the statute involved in that case was The Department of Highways Act of British Columbia,[36] and it is unlikely that the reasoning in the Harvey case will be applied to the Expropriation Acts of the western provinces, in light of the decision in Jakubowski v. Minister of Transportation.[37] In that case

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34. (1972) 3 L.C.R. 55, 74.

35. (1974) 6 L.C.R. 113.

36. R.S.B.C. 1960, c. 103.

37. (1973) 6 L.C.R. 29.

the Land Compensation Board of Ontario held:[38]

> Section 33 would appear to contemplate only one offer and if that is a proper interpretation of the section then the offer must necessarily be that referred to in s. 25(1) as there is no other section within The Expropriations Act which makes provision for an offer.

This reasoning would seem to apply to The Railway Act of British Columbia[39] and to The Expropriation Procedure Act of Saskatchewan.[40] Manitoba, however, has a provision s. 16(2) which permits the expropriating authority to amend its offer at any time up to the hearing to determine compensation.[41] It is presumably the last of these offers that qualifies as "the amount offered" within the meaning of s. 43 of the Manitoba Act.

Finally, if the parties settle before the hearing, can the landowner still have his costs paid by the authority in appropriate circumstances ? Section 37(3) of the Alberta Act provides that upon settlement, where the parties are unable to determine costs, the Surface Rights Board may determine costs in accordance with s. 37(1). None of the other provinces have such a provision

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38. Ibid., at 44.

39. Where the corresponding sections to ss. 33 and 25 of the Ontario Act are ss. 58 and 52 respectively.

40. Where the corresponding sections are ss. 43 and 20(2) respectively.

41. If an amount has been certified by the Land Value Appraisal Commission in accordance with s. 15, the expropriating authority cannot offer a different amount without the Commission's approval.

in their legislation. The legislation of British Columbia and Manitoba and The Expropriation Procedure Act in Saskatchewan all refer to the amount of compensation awarded when determining by whom costs are payable. In the absence of any "award", the costs provisions seem to be inapplicable. In two Ontario cases before Taxing Officer McBride,[42] this point does not appear to have been argued, but in both cases following a negotiated settlement an award of costs was made in favour of the expropriated claimant as if an award of compensation has been made to him in accordance with s. 33(1) of the Ontario Act. In both cases the terms of the settlement were embodied in an order of the Land Compensation Board, which order also directed that costs be taxed pursuant to s. 33 of the Ontario Act. It remains to be seen whether the same award of costs would be made where settlement was reached without any reference to the Board or its equivalent in other provinces. If an expropriating authority offers an amount by way of compensation which comes close to the compensation actually payable under the Act but refuses to pay costs, the landowner may be put in the unenviable position of having to choose between accepting the settlement and paying his own costs, or refusing the settlement offer, going before the assessing tribunal, and perhaps finding that the amount offered exceeds the award so that (in B.C. at least) he

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42. Shiner v. Metro. Toronto (1972) 2 L.C.R. 330; Nazarot Construction Co. v. Scarborough (1973) 4 L.C.R. 196.

not only has to pay his own costs but those of the expropriating authority. The same problem occurs under the Manitoba provision which allows for an amended offer at any time up to the hearing. Because the final offer governs by whom the costs of the action may be payable, the landowner may be faced with the risk of losing his costs because of an eleventh-hour offer by the expropriating authority which brings the case under s. 43(2) of the Manitoba Act.[43]

v. Costs of Further Hearings

Three of the statutes under discussion make express provision for the matter of costs on an appeal from the decision of the board. Section 37(4) of the Alberta Expropriation Act provides that the expropriating authority is to pay the costs of the appeal (on the same basis as payable under s. 37(1)) in all cases except where the owner appeals and is unsuccessful. In the latter case, costs are in the discretion of the Appellate Division. Subsections (4) and (5) of s. 44 of the Manitoba Expropriation Act provide that where the expropriating authority appeals, it must pay costs on a solicitor-client basis. Where the owner appeals, costs are in the discretion of the

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43. Although costs do still remain in the discretion of the Court under s. 43(2). See the comments of the B.C. Court of Appeal in Harvey v. Minister of Highways (1974) 6 L.C.R. 113, 118-9.

Court of Appeal. The Surface Rights Acquisition and Compensation Act of Saskatchewan provides an initial appeal by way of trial de novo before the District Court. Section 55(5) gives the Court discretion as to costs.

The appeal under the same Act from the District Court to the Court of Appeal is governed by s. 57(2). A similar section, s. 68(2) of The Railway Act governs appeals in British Columbia. Both sections provide that the practice and procedure upon appeal shall be the same as upon normal appeals from a lower court. What consideration should these appeal courts take into account when determining costs ? In Re Souter & Co. and City of Hamilton,[44] the Ontario Court of Appeal stated that it was the intention of the Expropriations Act that a claimant should receive his legal and other costs. This intention should be kept in mind by the appeal tribunal when awarding costs. Accordingly the Court awarded costs against the City on a solicitor-client basis.

Although this reasoning is, it is submitted, applicable in the case of The Surface Rights Acquisition and Compensation Act of Saskatchewan and The Railway Act of British Columbia, it is doubtful whether it is applicable to appeals under Saskatchewan's Expropriation Procedure Act. Section 44(2) of that Act provides that costs shall be awarded against the expropriating authority if it appeals

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44. (1974) 1 O.R. (2d) 760, 5 L.C.R. 153.

from a judgment of $5000 or less.. Does this express direction constitute the only guidelines for a higher Court to follow, or does s. 43 still govern the matter on appeal ? An appeal to the Court of Appeal still constitutes "an action under this Act". If the result of the appeal is that the award is still greater than the statutory offer of compensation must the expropriating authority pay the owner's costs of the appeal ? An affirmative answer was given to this question by the Appeal Division of the Nova Scotia Supreme Court in Martell v. City of Halifax,[45] where the City, which had been successful in its appeal, still had to pay the owner's cost since the award, although reduced, was still greater than the amount offered by the City. On appeal to the Supreme Court of Canada,[46] the award to the owner was increased again, although not by as much as the amount claimed. Although Laskin, C.J.C., for the Court, did not refer to the award of costs in the Appeal Division, he ordered that "success being divided, the appellant should have one half of his costs in this Court".[47] It remains to be seen how far the Courts in British Columbia and Saskatchewan will allow a landowner to take his case without any expense to himself.

As well as appeals from the judgment of the

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45. (1971) 2 N.S.R. (2d) 1.

46. (1974) 9 N.S.R. (2d) 87.

47. Ibid., at 88.

assessing tribunals, there are further hearings before taxation officers to determining what costs are reasonable and are payable by the expropriating authority. These often time-consuming hearings in turn generate further legal costs and none of the provincial statutes provide any indication as to which party or parties is or are responsible for these costs. The determining factor is whether these costs are "incurred for determining the amount of compensation payable", and unfortunately the reported cases on point reach different conclusions. In Nazaret Constructions Co. v. Scarborough,[48] Taxing Officer McBride was not prepared to award costs of the taxation reference as he felt that there was simply no provision for the award of these costs in the Act. Six months earlier, however, in Shiner v. Metro. Toronto,[49] the same Taxing Officer had said[50]

> ... I think the cost of the legal services rendered in connection with the normal procedure for the taxation of the costs of the arbitration are payable by the authority.

Finally, in Four Thousand Yonge Street v. Metro. Toronto,[51] Taxing Officer Saunders cited the decision in Madsen v. Metro. Toronto[52] where Aylesworth, J.A. said:[53]

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48. (1973) 4 L.C.R. 156, 160.

49. (1972) 3 L.C.R. 101.

50. Ibid., at 104.

51. (1973) 5 L.C.R. 23, 28.

52. (1970) 1 L.C.R. 27 (Ont. C.A.).

53. Ibid., at p.39.

> Accordingly, we remit the matter before us to the arbitrator for the sole purpose of the fixing by him of the reasonable legal, appraisal and other costs mentioned in the award.
>
> The question of any costs arising out of this additional hearing will, of course, be disposed of and fixed by him under [s. 33] of the Act. [Emphasis added by Saunders, T.O.]

The Taxing Officer accordingly ordered the reasonable costs of the taxation to be paid by the expropriating authority. It appears that the balance of authority supports the view that the costs of the taxation reference are part of the reasonable legal costs awarded to the owner.

vi. Conclusion

The approach taken by the new expropriation statutes to the matter of costs is one of the most striking changes of the recent legislation. The general principle behind this new approach was enunciated in the Working Paper on The Principles of Compensation produced by the Alberta Institute of Law Research and Reform in 1971:

> ... the owner should not be out-of-pocket in any reasonable step he takes to determine the amount he should receive. He has not chosen to be expropriated.

Total reimbursement of the expropriated party's reasonable costs has resulted in a much higher proportion of the amount of costs awarded compared to the amount of

compensation awarded.[54] This proportion of costs to compensation is still higher in the case of expropriations for pipe line rights-of-way where the final sum awarded by way of compensation is relatively small, and when one remembers that the pipe line company has its own legal, appraisal and other costs to pay, the proportion is raised yet further.

This very generous approach to costs has affected both the pipe line companies and the landowners. There is little incentive to settle if the landowner believes that he may receive more compensation at no extra cost to himself by requiring assessment by the relevant provincial tribunal of the compensation due. The reaction of the pipe line companies has been to settle at almost any cost. The companies can afford to make very generous offers and yet still pay less than they would if they expropriated the right-of-way.[55]

In its Working Paper on The Principles of Compensation, the Alberta Institute of Law Research and Reform stated,[56]

> To aid the negotiating procedure, there must be something consequent upon the

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54. For some of the more extreme examples of the proportion of costs to compensation, see Robinson, Report on The Expropriations Act, 1974, pp. 16-17.

55. The other influencing factor is time, and the prospect of drawn-out expropriation proceedings has had the effect of increasing further the offers by the pipe line companies to the landowners. See further Chapter VII.

56. At p. 89.

negotiating offer and its acceptance or rejection.

Section 37(1) of the Alberta Act in fact makes no mention of the offer by the expropriating authority, but merely refers to "spec[illegible]umstances". It is submitted that there should be [illegible] in the Act a direct connection between th[illegible]offe[illegible]e final award which would furnish some objec[illegible] g[illegible]nes along which to assess the costs, and would a[illegible]he[illegible]me time emphasize the dangers of refusing a g[illegible]s offer.

[illegible]nking of the negotiating offer with the final award o[illegible]mpensation has however brought its own problems. In [illegible]ario, which has a provision (s. 33) that gives costs to [illegible] expropriated landowner if the award is 85 per cent, or [illegible]re, of the offer, the basis on which costs are awarded has received severe criticism.[57] In his Report on The Exp[illegible]riations Act, R.B. Robinson, Q.C. advocated the de[illegible] of any reference to 85 per cent of the offer.[58] The [illegible]fer itself should govern costs. This raises the further problem of which offer it should be that will govern costs. The prevailing judicial opinion as evidenced in Jakubowski v. Minister of Transportation[59] would appear to permit only one offer to govern costs.

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57. R.B. Robinson, Q.C., Report on The Expropriations Act, October 1974, Chapter III.

58. Ibid., at 18.

59. (1973) 6 L.C.R. 29.

Very often this is made with little information concerning the land to be expropriated especially in relation to such items as future potential and severance damages. It is hardly surprising that the expropriating authority underestimates the value of these items in making its intitial offer. Only Manitoba, in s. 16(2) of its Expropriation Act, allows for an amendment of the statutory offer. It is submitted that a provision permitting an amendment of the statutory offer up to and including the day before the hearing to determine compensation should be added to all the provincial expropriation statutes. Taggart, J.A., for the British Columbia Court of Appeal in Harvey v. Minister of Highways,[60] pointed out the dangers of improper drafting of such a provision:

> I have reached this conclusion [that the landowner should pay the Minister's costs] reluctantly because it seems to me patently unfair that a property owner should be faced with the risk of losing the considerable costs of an expropriation such as this one because the Minister makes an offer a few days before the proceedings are to open.

His Lordship agreed with the trial judge that the relevant statute should be amended so that the landowner should still be entitled to his reasonable costs incurred up to the time when the last offer was made. The same solution was advocated by Mr. Robinson, Q.C.,[61] and it is submitted

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60. (1974) 6 L.C.R. 113, 119.

61. Report on The Expropriations Act, 1974, at 18.

that the same approach should be adopted in the legislation of the four western provinces.

One final provision which offers an interesting alternative approach to the awarding of costs is s. 50(1) of The Highways Act of Saskatchewan:[62]

> If the difference between the sum awarded to the claimant and the amount offered by the minister is less than the difference between the sum awarded to the claimant and the amount claimed [under s. 45], the claimant shall pay all costs and expenses of the arbitration; and if the difference between the sum awarded to the claimant and the amount offered by the minister is greater than the difference between the sum awarded to the claimant and the amount claimed, the department shall pay all costs and expenses of the arbitration.

This section serves the useful function of discouraging both extravagant claims by the landowner and unreasonable offers by the expropriating authority. With both parties attempting to "second-guess" the tribunal's actual award the chances of settlement before the hearing increases greatly. Such a provision merits serious consideration when a revision of the sections relating to costs is undertaken.

Mr. Robinson, Q.C., in his Report, stated that "the present provision for costs seems to presuppose a claimant's right to carry his case through to a full hearing without cost to himself". It is submitted that this is a

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62. R.S.S. 1965, c. 27.

fair presupposition in an expropriation case where the owner has been forced to incur these costs. The present provisions are however too generous where they permit overpreparation of the case by lawyers, appraisers or others representing the landowner. Mr. Robinson, Q.C. sums up the problem thus:

> As a general principle, an expropriating authority should have to pay solicitor and client costs reflecting economical and straightforward preparation. Service beyond that should be paid for by the client, if he wishes it.

Overpreparation of his case is the prerogative of any litigant, but it is unreasonable to expect an expropriating authority to pay for such a luxury.[63]

c. Interest

i. Where no provision made

Not all of the expropriation statutes under discussion contain specific provisions relating to interest. The Railway Act of British Columbia, The Surface Rights Acquisition and Compensation Act of Saskatchewan, and, before its repeal in 1974, The Expropriation Procedure Act of Alberta all omit any reference to the payment of interest. Nevertheless this has provided no bar to the

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63. As to the overpreparation of cases and the establishing of tariffs (in particular for appraisers' fees) see Robinson, Report on The Expropriations Act 1974, pp. 19-22.

awarding of interest in appropriate circumstances, and the Courts in these three provinces have been prepared to make an award, unless the relevant statute expressly excludes such an award.[64] In one case, St. Mary Development Co. v. Murray,[65] the Alberta Appellate Division applied s. 34(16) of The Judicature Act,[66] which allows the court to award interest where payment of a just debt is improperly delayed.

ii. At what rate ?

The remaining statutes make express provision for the payment of interest. The Expropriation Procedure Act of Saskatchewan is the only statute that prescribes a fixed figure (6 per cent).[67] The Expropriation Act of Alberta provides for interest "at such rate as the Board considers just",[68] while The Expropriation Act of Manitoba provides for a rate which is to be fixed from time to time.[69] These two latter Acts provide a greater flexibility which enable

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64. Northwestern Utilities Ltd. v. Timm (1964) 47 W.W.R. 415 (Alta. A.D.); British Pacific Properties v. B.C. Minister of Highways (1959) 29 W.W.R. 193 (B.C. C.A.) approved [1960] S.C.R. 561; Twaske v. The Queen (1964) 47 D.L.R. (2d) 254 (Sask. C.A.).

65. (1960) 21 D.L.R. (2d) 203.

66. R.S.A. 1970, c. 193.

67. S.S. 1968, c. 21, s. 40(1).

68. S.A. 1974, c. 27, s. 64(1).

69. S.M. 1970, c. 78, s. 35(1).

the tribunal or court to grant interest at a rate that reflects current interest rates in the community. On this point, see Sadownick v. The Queen,[70] where Maher, D.C.J. took judicial notice of the fact that for a considerable number of years the prevailing rates of interest have been in excess of the legal rate of five per cent, and awarded interest at the rate of eight per cent.

iii. Payable from what date?

The Expropriation Acts of both Alberta and Manitoba state the date from which interest is payable on any unpaid amounts. Section 64(1) of the Alberta Act provides that with respect to compensation and severance damages the interest shall be calculated from the date of acquisition of title (i.e. the date on which the certificate of approval is filed under s. 18(1)) to the date of payment in full. However s. 64(2) provides that the owner is not entitled to interest until he has given up possession of the expropriated land. It is not made clear whether this subsection means that, until he surrenders possession, the owner is not entitled to claim payment of the interest which is still calculated from the date of acquisition of title by the company, or whether it means that interest is only to be calculated from the date on which possession

70. (1975) 7 L.C.R. 198, 204 (Sask D.C.).

is given up. It is suggested that this latter interpretation will be adopted, especially in light of the opening words of s. 64(2): "Notwithstanding subsection(1)". Section 35(2) of the Manitoba Act puts the matter beyond doubt by clearly providing for the calculation of interest from the time at which the authority takes possession (unless the court approves an earlier date).

Where pipe line expropriations are involved, only a strip of land is taken and problems may arise as to the date of relinquishment of possession where the pipe line company does not begin construction at once.[71] In Manitoba, the pipe line company may serve a notice of possession under s. 20, giving at least ten days notice. However there is no requirement for the company to take possession at any particular time, so that if construction will not be starting at once, the company can simply delay serving the notice of possession. In Alberta, however, s. 62(2) states that,

> After the certificate of approval has been registered, the expropriating authority may ... serve on the person in possession a notice that it requires the land on the date specified therein.

Subsection (3) of s. 62 continues:

> The date specified in the notice shall be
> (a) seven days from the date of registration of the certificate of approval

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71. This may well occur where, because of previous hearings or inquiries, the pipe line company is prevented from beginning construction by the weather.

where the land expropriated is other than occupied land or is for a right-of-way.

If the notice is given immediately upon registration of the certificate of approval, the date on which the land will be required will be seven days after the date of registration. However, s. 62(2) does not make the serving of notice mandatory,[72] and, if the company does not serve notice or serves notice after a period of seven days has elapsed since registration of the certificate of approval, s. 62(3) becomes meaningless. The intention of s. 62(2) and (3), viz. to give the landowner notice of the company's commencement of construction on the land, will be defeated if a notice, served (say) ten days after registration of the certificate of approval, requires possession from a date three days prior to the notice itself. Even the inclusion of the words "at least" before the words "seven days" will make little more sense out of paragraph (a) of s. 62(3). Section 62(3)(b) of the Alberta Act contains the words "at least", and while this allows the expropriating authority to specify a date after the date on which notice is served, there is still nothing in s. 62 to prevent the specifying of a date before the service of the notice in cases where service of the notice is delayed beyond the 90 days referred to in s. 62(3)(b).

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72. Only the making of the proposed payment is a mandatory prerequisite in Alberta: s. 62(5).

In Manitoba, s. 20(2) makes the service of a notice for possession mandatory, and avoids all the problems of the Alberta legislation by stating,

> ... where the land is not occupied, the notice shall be served on the registered owner at least ten days before the date specified for possession.

The landowner in Manitoba is therefore given at least ten days' notice of the start of construction.

As the Alberta provisions stand at the moment, a strict application of them would have absurd results. However, the courts may not be prepared to give subsections (2) and (3) of s. 62 an interpretation which is totally unsupported by the words of those subsections. It is submitted that, in Alberta, legislative amendment, perhaps along the lines of s. 20 of the Manitoba Expropriation Act, is urgently required.

In the other provinces, where no date is fixed from which interest is to be calculated,[73] common law rules apply. The practice of the courts has been to allow interest only from the date on which possession was relinquished by the claimant.[74] The fact that the

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73. Section 40(1) of The Expropriation Procedure Act (Sask.) allows the Judge to fix the date.

74. Re City of Toronto and Toronto Ry. Co. [1925] A.C. 177; Inglewood Pulp and Paper Co. v. N.B. Electric Power Commission [1928] A.C. 492; British Pacific Properties Ltd. v. Minister of Highways [1960] S.C.R. 561, 570; R. v. Potvin [1952] Ex. C. R. 436, 447; Calgary Power Ltd. v. Grobe (1963) 42 W.W.R. 413, 415 (Alta. A.D.); Re Tyacke v. The Queen (1964) 47 D.L.R. 254, 260 (Sask. C.A.).

taking of a right-of-way does not give a right to complete possession is not important.[75]

iv. Use of interest as a penalty

Both the Alberta and Manitoba Acts provide for interest to be awarded as a penalty for delay caused by the expropriating authority. Section 64(3) of the Alberta Act, however refers only to a delay by the authority in notifying the owner of the proposed payment. Should this failure occur, penalty interest is to be paid from the beginning of the delay until the proposed payment is made.[76] Section 35(4) of the Manitoba Act refers to delays in determining the compensation, when additional interest (up to five per cent above the fixed rate) may be awarded.[77] Section 64(4) of the Alberta Act also provides for a penalty rate where the proposed payment is less than 80 per cent of the final award.

The Alberta Act, in leaving the amount of interest to be awarded to the discretion of the Surface Rights Board, provides for interest to be refused or reduced

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75. Calgary Power Ltd. v. Grobe (1963) 42 W.W.R. 413, 415.

76. Unless the Board is of the opinion that the expropriating authority is not to blame - s. 64(5).

77. For a case on the equivalent provision in Ontario's Expropriations Act, which is very similar to s. 35(4) of Manitoba's Act, see Schweitzer v. Essex County Board of Education (1975) 7 L.C.R. 316.

in appropriate circumstances.[78] Section 31(2) also provides for a penalty in the form of interest where information is withheld. The Manitoba Act however gives no such power to the court, and s. 35 by its wording provides for interest to be paid at least at the rate fixed by the Lieutenant-Governor in Council.

d. Mortgages

Where only a strip of land is taken representing a small proportion of the value of the entire parcel from which it is expropriated, it is submitted that complicated formulae to determine the distribution of the compensation between mortgagor and mortgagee are unnecessary.[79] Even provisions such as those in Manitoba,[80] British Columbia[81] and Saskatchewan[82] which provide for distribution provide an added complication which can be avoided.

It is submitted that the approach of the Alberta Expropriation Act, in s. 47(4), is the simplest and most satisfactory method of dealing with the problem.

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78. Note also s. 40(2) of the Saskatchewan Expropriation Procedure Act.

79. For an example of such a formula, see s. 24(8)(c) of The Expropriation Act, R.S.C. 1970, c. 16 (1st Supp.).

80. S.M. 1970, c. 78, s. 33(5).

81. R.S.B.C. 1960, c. 329, s. 71.

82. S.S. 1968, c. 21, s. 41.

Under that subsection the Surface Rights Board is to distribute compensation between the mortgagor and mortgagee "as it considers just in the circumstances". In the situation where the payments are up to date and the mortgage well secured it is expected that the Board will follow its previous procedure of awarding all the compensation to the mortgagor. If the circumstances are otherwise, it may be "just" to pay all or part of the compensation to the mortgagee.

It should be noted that the same approach can be adopted with respect to agreements for sale or other forms of security interests in land.

e. Annual Rental

When considering the question of compensation, the Institute of Law Research and Reform examined the possibility of annual payments along similar lines to the annual payments made under the Surface Rights Act for rights of entry. However the suggestion was rejected, and the new Expropriation Act contains no provisions for annual payments. Recently there has been renewed pressure for awards of annual payments with respect to above-ground installations. The landowners argue that the installations are a continuing nuisance and should be paid for on a continuing basis. In addition the landowners complain that lack of care taken by the construction firms in properly conserving the top soil - especially in winter

projects where the topsoil requires burning prior to its removal - has resulted in poor crop yields from the right-of-way area and in some cases in subsidence which interferes with the landowner's operation. They suggest that there be at least some form of compensation for the first few years after completion of the pipe line, perhaps on a decreasing scale until the land "recovers".[83] However in the light of cases such as Home Oil Co. v. Bilben[84] and Pembina Pipe Line v. Karbach,[85] it seems that the company, having already paid compensation on the basis of the market value of the fee simple, is entitled to use the right-of-way as it pleases, and is not required to make additional payments. It is submitted that any change in the present situation must be brought about by legislation.

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83. The Surface Rights Acquisition and Compensation Act provides for an annual rental in s. 39(2), and an excellent example of the employment of this subsection by the Board of Arbitration can be found in an article by Professor M.J. Sychuk on Compensation for Acquisition of Surface Interests for Oil and Gas Operations in Saskatchewan, (1972) 36 Sask. L.Rev. 387, 434-5.

84. Unreported, 1964, P.U.B., Lewis and Thompson, Canadian Oil and Gas, Vol. 1, Dig. 220.

85. Decision No. 71-8 of the Board of Arbitration, 28 October, 1971. See pp. 90 and 91, supra.

VII CONCLUSIONS

Transportation of oil and gas affects, directly or indirectly, every sector of the Canadian economy. The cost of transportation from the well-head to the ultimate consumer will affect the price that a company can charge for its product, and in Canada, where the price of oil and gas is regulated, increased transport costs mean reduced profits and a further application by the company to increase the price of the relevant product. The price of the delivered product will affect industrial consumers, who may have to pass on the increased cost in the form of higher priced commodities and risk the decreased competitiveness of their product, or who may attempt to absorb the cost, thus reducing their profits. Delay in building a pipe line or the failure to obtain a permit to do so may prevent the delivery of new reserves and thus reduce the supply available to markets in Canada and the United States with resulting shortages, higher prices or the use of alternative sources of energy. Finally the property rights of those landowners through whose land the pipe line travels must be considered. To what extent should the landowner's right to privacy and enjoyment of his own land be sacrificed to the interests of the community in obtaining energy resources in sufficient supply and at reasonable prices ?

Every pipe line project must be viewed in terms of a balancing of the conflicting needs of the oil and gas companies, the individual landowners and the community at large, and in a country which has no constitutional safeguards concerning the right to property, this balancing must be achieved, to some extent by the principles of the common law, but for the most part by legislation.

The period before construction consists of two quite separate phases, during each of which the interests of the various parties receive different emphasis depending on the policies adopted. The first of these phases involves the obtaining of permission to construct a pipe line, and the problems involved in this phase were considered in Chapter II. The major problem is how much emphasis should be placed on the protection of the interests of the landowners through whose property the proposed pipe line will travel. Should the pipe line company be required to provide information concerning the specific location of the proposed line, and should the landowner be permitted to object to the proposed route and to have his objections heard by the person or tribunal that issues the construction permit ? It is a question of weighing the interests of the landowner against those of the community as a whole, and while the idea of the invasion of an individual's privacy and the infringement of his right to property conflicts with the principles on

which the English common law is based, public policy dictates that these rights must be sacrificed to the benefits accruing to the community in the form of reduced pipe line costs and the increased competitiveness of the price of the oil and gas produced.

Clement, J.A., in Dome Petroleum Ltd. v. Swan Swanson Holdings Ltd.[86] perceived the problems that could ensue if objections by individual landowners were permitted to influence the route taken by a pipe line. He said,[87]

> It is difficult for me to see how the scheme could work otherwise. As is disclosed in the present case, a pipeline traverses many parcels of diversely owned land through which it must maintain its continuity; the point of exit at the boundary of one parcel must coincide with the point of entry into the adjoining parcel. The scheme of the Acts does not contemplate or permit landowners to cause a change in the point of entry into, or the point of exit from, their respective parcels, which would cause a chain reaction dislocating the projected placement of the pipeline to an extent that could only be speculated on when applications for expropriation are undertaken.

In fact, all the western Provinces except Alberta have a provision in their pipe line legislation which allows objections of interested parties to be made known to the Minister who decides whether to grant or refuse the permit. Manitoba's Pipe Line Act provides that the Minister, following application by an affected

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86. [1971] 2 W.W.R. 506.

87. Ibid., at 512.

party, may order a public hearing, while British Columbia's Act provides that the Minister there is to take into account the objections of an interested party. Only Saskatchewan, in s. 36 of its Pipe Lines Act, makes it mandatory for the Minister to order a public hearing on an application to do so, unless the application is considered frivolous. The relevant provision in Alberta is s. 29 of The Energy Resources Conservation Act, but as submitted in Chapter II, this provision does not apply to the construction permit hearings since no right of the landowner is "directly" affected. In practice a hearing is often given to the landowner in Alberta and in the other western Provinces, but it is submitted that only in Saskatchewan does the landowner have the right to be heard.

At the permit stage the plans for the proposed pipe line are carefully scrutinized and its economic benefit to the community is assessed. Once the need is established for a pipe line between certain points, then a prime consideration is the economic viability of the pipe line. It becomes impossible to entertain objections that will have the effect of so altering the route that the project is no longer economically viable. At the permit stage the decision made is one of public policy in which the rights of individual landowners must be restricted in the public interest. It is at the expropriation stage that these rights must be properly protected.

Finally a comment should be made about the

scope of the examination of the construction stage in this thesis. The approach has been what might be termed a "micro-scale approach" since it deals with the effects of the proposed pipe line on the individual landowners in its path. Where a pipe line travels for a long distance, the problems faced by the communities along the route of the proposed pine are so numerous that they warrant separate examination. The "macro-style approach" to pipe line problems would include examination of the economic effects on communities adjacent to the pipe lines - the "boom and bust" effect which results from the influx of construction workers followed by their departure on completion of the line. Examination would also be of the ecological effect of pipe lines, especially in northern areas of Canada, and the rights of groups of people, who have no direct interest in the land affected, to make submissions and objections to the proposed pipe line. Finally the problem of native land claims arises: the rights of the native people to the land, the effect of a pipe line on those rights and how the interference with those rights should be compensated.

Once the permission to commence construction has been granted, another weighing of the competing interests must take place. At this stage the objections can no longer be directed against the route selected for the whole line, but must be directed against the location of the proposed right-of-way on the complainant's land. The likelihood of success of these objections varies between

the western Provinces. In British Columbia,[88] the ease with which a pipe line company can obtain possession quickly, creates the situation which arose in Dome Petroleum, and which was felt by the majority of the Appellate Division of the Supreme Court of Alberta to preclude the owner from objecting to the location of the line, especially when the line has already been constructed. Both the Alberta and Manitoba Acts do provide the owner with the right to object to the location of the pipe line on his land, and these Acts give the landowner the opportunity to request that the right-of-way be relocated within the general route already approved. The practical value of this right to object must however be queried where the land contained in the general route includes no features of special economic value which should be avoided.

This right to object then becomes a bargaining weapon in the hands of the landowner. He can threaten to delay the beginning of construction by objecting under the provisions of the relevant Expropriation Act. If the landowner does object to the expropriation, the time which elapses before the company may take possession and begin construction may perhaps be as outlined in

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88. And in Saskatchewan too, if the courts there were to hold that The Expropriation Procedure Act and The Expropriation Act must be read together. See pp. 98-102. supra.

Table 2[89]

Table 2

Action Taken	Section of Act	Day Number
Notice of Intention filed	8(1)	1
Notice of Intention served	8(2)	2
[Publication in Newspaper]	8(4)	1 & 8
Notice of Objection	10(1)(a)	22
Board notified A. -G.	14(1)	24
A.-G. appoints Board	14(2)	29
Board's decision and approval	17(3)	89
Company registers certificate	18(1)	90
Possession (after 7 days notice)	62(3)(a)	97

Table 2 does not take into account a further 65 days of extensions which the Attorney General may grant, nor an adjustment of the date of possession by the Supreme Court under s. 62(4). Similarly it does not take into account the possibility of administrative delays, appeal procedures,[90] or adjournment of hearings. The company

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89. Reference in Table 2 is to The Expropriation Act, S.A. 1974, c. 27. The procedure under the Manitoba Act takes approximately the same length of time. Unfortunately the latter Act (S.M. 1970, c. 78) does not prescribe a time within which the confirming authority must make an order in respect of the declaration of expropriation, although a confirming order should be made within 120 days or the declaration is deemed to have been refused (s. 9(4)).

90. Section 55, although note s. 16.

can do little to speed up the process, especially when it has to obtain a construction permit before it may even begin expropriation proceedings. It may take some considerable time to obtain this permit in the first place.[91]

Inflation today is a far more serious problem for a pipe line company to contend with than it was at the time the new-style expropriation procedures were introduced in Canada, and for the companies a delay of three to six months will mean a substantial rise in construction costs that would have been avoided under the old expropriation procedures which allowed immediate possession. In an effort to avoid this expensive delay, the companies appear to have adopted a policy of settling at any price, since the extra amount paid on settlement will be more than offset by the savings made by an early start on construction. On rare occasions where a recalcitrant landowner has refused even the most generous offer, a minor re-routing of the pipe line to avoid that person's property has proved less expensive than the alternative of expropriation with the attendant delay in construction. As the pipe line companies reorganize their forward planning, many of the problems caused by the new expropriation system, in Alberta in particular, will doubtless be ironed out. Nevertheless

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91. Even without a public hearing it takes two months to receive a permit in Alberta. When there is a hearing it may take much longer.

the new expropriation legislation can only result in higher costs, whether in the form of payments on settlement, or in the form of increased construction costs.

Expropriation may be the exception rather than the rule in acquisitions of land by pipe line companies, but the greatest impact of the new legislation will be in the form of the alternative that expropriation now provides to settlement. If a landowner feels he will obtain more compensation, at no cost to himself, by going before the statutory tribunal to have compensation assessed, he will almost certainly follow this route. Settlements must provide compensation generous enough to deter landowners from electing to be expropriated. As a result this new legislative approach to expropriation will mean a new approach to settlements by the pipe line companies.

To pursue the question of costs, the new expropriation legislation has provided generously (too generously perhaps) for the costs incurred by the landowner to be paid by the authority. Reasoning that the landowner had not asked to be expropriated and therefore should not be liable for the costs of proceedings, the legislators proceeded to reimburse all of the landowner's costs, whether legal, appraisal or other costs. Cases have resulted where the costs of the action have been higher than the compensation awarded in that action,[92] and

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92. See for example Re Johnson and Minister of Transport and Communications (No. 3)(1975) 7 L.C.R. 296 (Ont.).

overpreparation has occurred on many occasions. The cost of two appraisal reports, and the cost of experts in expropriations where the pipe line will travel through areas that have potential for future development, and where the value of that future potential must be determined, substantially increase the costs of a pipe line expropriation. Appraisal reports, the most common costs other than legal costs, were discussed by R.B. Robinson, Q.C. in his Report on The Expropriations Act, presented to the Ontario Attorney-General in October, 1974, and he advocated the adopting of a tariff for appraisers' fees as used in England.[93] Under such a tariff the fee for pre-trial work is directly connected with the amount of compensation determined, and this system seems highly appropriate for pipe line expropriations. In these expropriations compensation is as a rule fixed at a modest anount, and the fee permitted under the tariff would ensure that there is no overpreparation. Where the case is more complicated due to an element of potential value, the higher value of the land taken and the larger amount of compensation will mean a somewhat higher fee permitted to the appraiser.

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Div. Ct.), where costs of $84,000 were held to be reasonable even though the award was only $60,000. See also Robinson, Report on The Expropriations Act, 1974, (Ontario - Ministry of Attorney General) pp. 16-17.

93. See Report on The Expropriations Act, 1974, Appendix A, pp. 53-54.

The only problem appears to that recovery of costs incurred in pursuing a contention that is reasonable, but that is not accepted by the body determining compensation, will not be permitted where this tariff is used.[94] Where the amount claimed by way of compensation is more than the final award, a lawyer who has spent as much time preparing his case as he feels warranted having regard to the amount of compensation he anticipates will be awarded, may find he does not recover what he should in the way of fees, since these fees are based on the amount of the final award. It is submitted that the determining body must retain a general discretion over costs, so that in certain instances costs of reasonable but unsuccessful contentions may be allowed. This discretion, which the bodies determining compensation already have in relation to what costs are "reasonably incurred", must be exercised carefully, and a firm control should be kept over what costs will be permitted. In Ontario, the provision as to costs has caused great concern, and it is becoming the practice for counsel representing expropriating authorities to address the Land Compensation Board on the question of what costs are or are not reasonable and to request the Board to give some guidance to aid the Taxing Officer in determining which costs to allow. In pipe line expropriations in particular where the

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94. Recovery of such costs is possible under the new expropriation legislation: Smeral v. City of Oshawa (1972) 3 L.C.R. 18, 21-22.

costs awarded may comprise a large proportion of the total award, a close watch must be kept to ensure that these costs are reasonable in the particular case.

Perhaps the most difficult problem encountered in an expropriation of land for pipe lines is how to value the land that is taken. As already shown in Chapter VI, the "before and after" test, appropriate for partial takings where large amounts of land are expropriated, completely fails to assist in a determination of the value of a pipe line right-of-way. To discover the market value of such a strip of land by comparing other sales is often equally impossible, since there are no other sales of small strips of land or else too few sales for comparison to be reliable. As has been submitted, the tribunal assessing compensation should increase the scope of the evidence available and examine settlements, offers to purchase and so on, giving the proper weight to each piece of evidence. If this still produces no firm basis on which to assess compensation, then it is submitted that resort should be had to a formula, such as the "Blackstock formula". Decisions such as Copithorne v. Shell Canada[95] and Re Canadian Reserve and Lamb[96] do not preclude its use where there are insufficent comparable sales, and there appears

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95. (1969) 70 W.W.R. 410, 416-7.

96. (1975) 49 D.L.R. 759, 766.

to have been a definite advantage in the certainty such a formula gave to expropriations of easements and rights-of-way. Finally the simplicity of such a formula is in itself a recommendation for its adoption in cases where complicated appraisal reports may otherwise attempt to extract a market value figure from insufficient market data.

Expropriation of land raises important issues of civil rights. Unlike his counterpart in the United States who has the constitutional guarantee of fair compensation and due process of law, the Canadian landowner must rely for his protection on the legislation enacted by the Legislature of the Province in which his property is situated. Until recently this legislative protection of civil rights was sadly inadequate, and the Hon. J.T. Thorson, President of the former Exchequer Court of Canada had this to say:[97]

> I have frequently called attention to these provisions of the law and stated that Canada has the most arbitrary system of expropriation of land in the whole of the civilized world. I am not aware of any other country in the civilized world that exercises its right of eminent domain in the arbitrary manner that Canada does. And, unfortunately, the example set by Canada has infected several of the Canadian provinces in which a similar system of expropriation has been adopted.

While this "arbitrary" system still survives in British Columbia, the recent enactment of totally new expropriation legislation in Alberta and Manitoba, and the changes

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97. Grayson v. The Queen [1956-60] Ex. C. R. 331, 336.

adopted in Saskatchewan, have done away with most of the "arbitrary" features of the old legislation. However, when the new Acts are applied to expropriations of land for pipe lines, the success of the legislation in dealing with the problems that arise is limited. The Acts are designed to provide a new system of expropriation of fee simple interests in land, primarily those which include residential and business dwellings. Compensation is to be sufficient so that the expropriated landowner can be fully reimbursed for all his expenses, and put in the same position (as far as money can do it) as he was prior to the expropriation. The problem is that the provisions concerning both the procedure and the compensation do not take into account the different interests involved in an expropriation of land for a pipe line right-of-way. Different considerations apply when the expropriation is of a landowner's residence and when the expropriation will only include a 60-foot strip across a quarter-section of wheat. The same protection of the landowner's rights and compensation on the same basis are not required in the second case.

With regard to the procedure to be followed the new expropriation legislation does make some small distinction between takings of land including the owner's residence and takings of unoccupied land. Where land is unoccupied, possession can be obtained a little earlier.[98]

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98. S.A. 1974, c. 27, s. 62(3), S.M. 1970, c. 78, s. 20(2).

Pipe line companies may feel that this is only a small concession, but it is submitted that this is the only one that can be made with regard to procedure. To make any further concessions would prejudice the right of the owner to "the due process of law" to which his counterpart in the United States is entitled. Even though this right is given no constitutional protection, it should nevertheless be just as jealously guarded in Canada.

Compensation however must be fair, not to the landowners, but also to the pipe line companies. The new expropriation legislation has the potential to provide this "fair" compensation, but it also could, if wrongly administered, impose a burden on the pipe line companies which they should not have to bear. In summary therefore it is submitted that the "market value plus damages" approach of the new legislation is the most appropriate basis for compensation. Market value should be based wherever possible on comparable market data, but where such data is insufficient or felt to be unreliable, then a formula should be used unless exceptional circumstances make its use unfair. This formula may be 150 per cent of the market value per acre of the parcel of land through which the pipe line runs, or perhaps some other figure would be more appropriate. Whatever figure was adopted, however, it would give some measure of consistency and perhaps provide a basis for negotiations between the companies and the

landowners. All damage directly related to the pipe line must of course be compensated, including claims for injurious affection and severance. However it should be open to the companies to mitigate these damages or to give assurances that it will do so - perhaps by guaranteeing the landowner the use of the land after construction is complete. Finally the landowner should be entitled to his reasonable costs of the expropriation. However, what costs are reasonable should be spelled out clearly. The idea of a tariff is the most appealing, applicable not only to appraisers but also to other experts and the lawyers. The lawyer's client should be informed that if compensation of a certain amount is awarded, then the tariff provides for a lawyer's fee of such and such an amount. It is only this amount that the expropriating company will have to pay, and if the client wishes to overprepare his case he should be told that he must be responsible for the additional fee. Coupled with the use of tariffs should be the limiting of the number of witnesses called. Manitoba has such a provision limiting the number to one expert witness for each side, unless the judge orders otherwise,[99] and a similar provision should be introduced in the other new legislation. In some instances a particular expropriation may warrant legal fees in excess of the tariff or additional expert witnesses, and the assessing

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99. S.M. 1970, c. 78, s. 40.

tribunal should have the discretion to allow these extra costs. However such discretion should be exercised with the greatest caution, and additional costs firmly controlled. In addition there should be provisions in all the provincial expropriation statutes to encourage the landowner to accept a reasonable offer by the expropriating company. The assessing tribunal should have the power to reduce or deny costs, and in appropriate circumstances to require a particularly unreasonable landowner to pay the costs of the pipe line company.

Finally should expropriation of land for easements and rights-of-way be treated separately by the expropriation legislation of the Provinces ? It has already been noted that the present legislation has been designed for the expropriation of fee simple interests in land, and that its application is somewhat awkward in the case of expropriations of rights-of-way. This is not to suggest that easements and rights-of-way should be dealt with in a different statute. However there should be a separate part within the Expropriation Acts which makes it clear that such interests in land require different treatment when expropriation proceedings are undertaken. The procedural differences between fee simple and right-of-way expropriations that are already included in the new legislation should be incorporated into a separate part on rights-of-way. Similarly the components of compensation that are applicable in the case of easements

and rights-of-way should be listed in this separate part to emphasize the fact that compensation for the interest in land that has been taken should not be assessed in the same manner as in the case of a taking of the fee simple interest.

Finally, Regulations should be enacted setting out tariffs applicable to all the experts involved in an expropriation case for whose fees the expropriating authority might be liable. An express grant in the Expropriation Acts giving the Provincial Cabinets the power to make Regulations setting out these tariffs would serve to emphasize the importance of reasonable costs in expropriation actions.

In the final analysis, however, it is the manner in which the Acts are administered that is the most important factor in any attempt to improve the law relating to expropriation. Guide lines are only valuable if, in fact, they are followed. However, separate guide-lines, to be followed in expropriations of easements and rights-of-way, will surely assist the Provincial tribunals in dealing with these expropriations to which very different considerations apply.

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APPENDIX

ENERGY RESOURCES CONSERVATION BOARD

THE PIPE LINE ACT

PERMIT NO.

This Permit is granted to XYZ CO. LTD.

for a secondary line for the transmission of natural gas

as follows:

from a point in or about

legal subdivision 8 of section 29, township 15, range 8, west of the 5th meridian

to a point in or about

legal subdivision 6 of section 10, township 14, range 7, west of the 5th meridian

in accordance with the application of the said company dated July 17, 1975 and subject to the terms and conditions on Appendix A:

This permit is subject to the provisions of THE PIPE LINE ACT, and the regulations made thereunder.

Dated at the City of Calgary in the Province of Alberta this 5 day of August 1975.

ENERGY RESOURCES CONSERVATION BOARD

R.J. Allman

VITA

NAME: Francis Caradoc Rose Price

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