EXPROPRIATION ISSUES

Public Report No. 3

January 1983

OMBUDSMAN OF BRITISH COLUMBIA

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Legislative Assembly
Province of British Columbia

OMBUDSMAN

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December 31, 1982

The Honourable Garde B. Gardom
Minister of Intergovernmental Relations
Province of British Columbia
Victoria, B. C.

Dear Mr. Gardom:

I am happy to enclose herewith my comments on the proposed new Expropriation Act and on various matters related to expropriation.

I trust that my comments will be useful to you in your further review and consideration of the proposed legislation.

As the discussion of expropriation legislation has been public, I consider it in the public interest to release my comments to the public in the form of a public report early in January, 1983.

Again, thank you for the opportunity to make my views known.

Yours sincerely,

Karl A. Friedmann
Ombudsman

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I INTRODUCTION

Three months ago the Honourable Garde Gardom, Minister of Intergovernmental Relations, announced the government's intention to introduce a new Expropriation Act, and released a draft Bill for discussion. The Honourable Minister kindly invited comments and submissions on the draft Act. This is my submission.

As Ombudsman, I have received many complaints which involve the compulsory acquisition by government of private property for public purposes. I use the term "compulsory acquisition" rather than "expropriation" because in very few of these cases has the government actually employed its powers of expropriation. Yet in all of these complaints the government is effectively forcing the citizen to transfer all or part of his rights in his land to the Crown. The complainants typically make one of the following allegations:

1. The government is requiring me to sell all or part of my land to the Crown;

2. The government is requiring me to give all or part of my land to the Crown (without compensation);

3. The government has legally taken all or part of my land (with compensation; this is expropriation);

4. The government has done something which has devalued my property (without compensation); or

5. The government legally took my land some time ago, has never used it, never intends to use it, and refuses to sell it back to me.

Many of these complaints were resolved by action of the appropriate government authority following my intervention. In other cases the government authority has declined to implement my recommendations, and in some cases, the complaints were rectified after I reported my findings to the Legislative Assembly.

In other cases still, I concluded that the complainant had been treated fairly under the existing law. Yet, as will be seen, I have serious concerns that the existing law does not sufficiently protect the citizen when government decides that it requires part of his land for public purposes. It is for that reason that I take this opportunity to express my concerns.

The proposed Bill deals with a number of thorny issues in a very impressive manner. The protection proposed in the Bill for citizens

during the expropriation process goes a long way towards safeguarding the citizen's rights and interests. At the same time an appropriate balance ensures that the public interest will not be neglected. However, I do have a number of concerns and suggestions mostly dealing with issues which are not or not adequately addressed in the draft expropriation legislation.

I would begin by stating the general principle upon which I have based my comments. In my view, all costs directly resulting from a project undertaken for the benefit of the public, whether it is the creation of a hydro-electric dam or a secondary road in a rural area, should be borne by the public. Thus, all persons who are directly and adversely affected by a public program or project should be compensated for the entirety of their losses. These people are members of the public too and they will pay their share of the project costs by way of their taxes. They ought not to be expected to bear more of the burden than any other citizen/taxpayer.

Few would disagree with the above principle. However, as will be seen, though it may well be the policy of government authorities, it often is not the practice.

I have divided the remainder of this report into categories generally reflecting the types of complaints I have received which relate to the acquisition of private property by the government for public purposes.

II ACQUISITION WITHOUT EXPROPRIATION

It is generally not known that roughly 95 percent of all private property acquired by government each year is voluntarily sold to the Crown by the owner. One would think it unlikely that for every new highway constructed in British Columbia, nineteen out of every twenty owners affected are perfectly willing to sell the required part of their land to the Crown. How can this be?

The Law Reform Commission of British Columbia had this to say:

> A person or body with expropriation powers may never or only infrequently use them. The expropriating authority may have a policy of acquisition by negotiation. It may have skilled negotiators. It may avoid expropriation by being generous in its offers.
>
> Where expropriating powers exist, negotiated settlements generally cannot be regarded as voluntary on the part of the vendors. True, in some cases, they may be glad to sell and, in others, although they may have been reluctant to sell initially, the vendors may be happy with the price they bargained for. But the fact of the matter is that, unless the owners agree to sell, the expropriation powers will be exercised. No doubt most expropriating authorities will at some stage warn the owner that, if agreement cannot be reached, expropriation proceedings will be commenced.

My investigation of complaints received from citizens who have been invited to sell their property to the Crown suggests that most of the Law Reform Commission's suppositions are correct. Certainly, most expropriating authorities within my jurisdiction have a policy of acquiring property by direct sale from the owner to the Crown.

Such a policy has a number of benefits for the expropriating authority. First, properties may be acquired without the necessity of obtaining approval for the acquisition from the Minister or other person having the statutory authority to expropriate. Second, property acquisitions may be made quickly without the need for any of the procedural steps associated with expropriation to be taken. Third, the owner of the property, under most expropriation statutes, has the right to seek arbitration over the amount of compensation to be paid. If the expropriating authority avoids expropriation, the vendor has no right to arbitrate the amount of compensation.

Similarly, there is no doubt that expropriating authorities have very skilled negotiators. This fact is demonstrated by the very high proportion of properties acquired by sale as opposed to expropriation. Government property negotiators are given large areas of discretion concerning price, conditions of sale, exercise of Crown rights of resumption under Crown grants*, and even matters relating to project design. Thus if a property owner bargains long enough and hard enough, he may obtain a very good price for his property, may elicit a variety of sweeteners from the authority in the compensation agreement, and may even have his concerns taken into account respecting, for example, the alignment of a public road.

*see page 18, below.

The Law Reform Commission's assertion that an expropriating authority may avoid expropriation by being generous in its offers has also been substantiated by my investigations. In one case, the Ministry of Transportation and Highways eventually increased its offer of about $33,000 for less than one acre of land to $58,000 after the owner retained a lawyer and complained to my office. Given that this did not reflect a corresponding increase in the value of the property between the time of the offers, one can only conclude that either the first offer was way below the real value or that the second offer was overly generous.

I am even more concerned that many people agree to sell their properties to government authorities because they are led to believe that they have no choice in the matter, i.e., that their property has already been expropriated and that all that remains to be done is to agree on a price. This is not surprising; it is common knowledge that government authorities have the power to expropriate and unless it is made clear to the owner that he has the right to decline to sell his property to the Crown, he may well conclude that the only issue he may dispute is the amount of compensation to be paid. Two letters sent to property owners by negotiators for the Ministry of Transportation and Highways stated as follows:

#1 With reference to the above described lands, please be advised that a portion of this property will be <u>required</u> for right-of-way . . . . It is suggested that the Department purchase all of Lots 3 & 4 and in this regard, we enclose our standard agreement form in duplicate recommending compensation in the amount of $5200. If you are in agreement, please sign the original before a disinterested party and return to this office at your convenience. (emphasis added)

#2 We are enclosing a part print of the district plan showing in red outline the area required for road purposes . . . . We are enclosing our standard agreement form in duplicate recommending compensation in the amount of $600.00. After due consideration and if this meets with your approval, please sign this document, have your signature witnessed, and return the original to this office so that we may process the cheque. (The attached form was entitled 'Offer to Accept Compensation for Land Required for Public Purposes'; emphasis added)

It is my view that a recipient of such a letter, not having a knowledge of the law of expropriation and current government practices, would believe that his land was required for public purposes and that he could not refuse to sell. Yet this is not the case. Until a government authority expropriates property, the owner can simply decline to sell his property. And, more importantly, until a government authority expropriates a property, an owner will obtain none of the procedural protections proposed in the draft Expropriation Act.

I do not think that nineteen out of twenty owners sell their properties to the Crown because they are anxious to dispose of their property, but rather because they are uninformed about their legal right to refuse to sell, and the rights which will accrue to them if the property were to be expropriated. I would suggest that the draft Expropriation Act provide that a standard form be attached to all government offers to purchase private property clearly informing the owner of his right to refuse to sell, and explaining his rights under the new Expropriation Act. I do not believe that government authorities should take advantage of citizens' goodwill toward government or their ignorance of their legal rights.

I am also concerned that the acquisition of many properties for a particular project may adversely affect those who do not wish to sell. I fear, as did the Law Reform Commission, that many properties will have been bought by the expropriating authority by the time the last few are expropriated. The problem of rolling back all such acquisitions may well cause an approving authority, after an inquiry, to throw up its hands and approve to the request of the expropriation of the remaining few even if the findings of the inquiry indicated that this may not be appropriate. I suggest that all owners affected by a project be given the statutory right to call for an inquiry as soon as government property negotiators make offers to any one of the affected owners. Alternatively, the legislation should make an inquiry mandatory whenever acquisition and/or expropriation action for a specific project may affect more than a small number (say three or four) of property owners.

I notice that the proposed Expropriation Act does not deal with situations such as those brought to my attention in 1980 by land owners in the Garibaldi area (see my Special Report No. 1 to the Legislative Assembly). In that case, because of the hazard posed by a potential land slide in the area, the Cabinet had approved an Order in Council which prevented owners of property in the Garibaldi area from selling, leasing, or developing their properties. These prohibitions were coupled with written offers from the Ministry of Environment to purchase <u>improved</u> properties (though <u>not</u> <u>un</u>improved properties) but agreements of sale had to be entered into by December 31, 1980 (this deadline was later extended

to June 30, 1981 and later yet to September 30, 1981). If an owner of improved property did not sell his property to the Ministry by the deadline, the property effectively became worthless as the Ministry refused to provide any assurance that the owner would be permitted to sell his property after the deadline had expired.

It was my opinion that the situation created by the Order in Council was tantamount to expropriation. In my view, whenever an owner has no reasonable option but to sell his property to the Crown, then the government has effectively expropriated the property. I would suggest that the definition of "expropriation" in the draft Act be broadened to include cases where, in the opinion of the Expropriation Compensation Board, an owner has agreed to transfer all or part of the interest in his property to the Crown which he would not have agreed to but for circumstances created by a government authority.

This principle leads us to another type of complaint frequently received by my office.

III DEDICATION OF LAND TO THE CROWN

How many of us would willingly agree to give a part of our land to the government without compensation? One would think not many, but I continually receive complaints from people who are being required to "dedicate" (i.e., give without compensation) part of their land to the Crown in return for obtaining government approval to subdivide their property.

Some such required dedications are in my opinion fair and just. For example, a person who wishes to create one or more additional lots out of his property can reasonably be required to provide public road access to each lot. Otherwise he would be able to sell these lots and the public purse would have to provide access for the purchasers. I do not think it unfair that the owner provide public road access in return for the right to subdivide his property. It is not the public interest that is being served by the creation of the additional lots, but the owner's.

However, I do think that many of the demands from government authorities that lands be dedicated, without compensation, as a condition of subdivision approval are unjust. Applying my general principle of expropriation in this situation, it seems to me that whenever land is being required to serve only the public interest, then only the public in general (through government) should pay.

For example, it is common practice to require owners of property with streams or rivers traversing their land to dedicate a buffer zone on each side of the creek to the Crown so that the natural environment of the watercourse remains undisturbed. Who benefits from such a requirement? The public benefits, as owners of the stream. And the public should pay, not the subdivider.

A much more common complaint is that the Ministry of Transportation and Highways is insisting that a strip of land adjacent to a public road be dedicated to the Crown for future road widening purposes. For example, owners of property along Highway 97 in the southern Okanagan, who have subdivided their properties in at least the last ten years, have been required to dedicate wide strips of their land to the Crown. The Ministry intends to widen the existing highway from two lanes to four lanes at some time in the future.

Clearly the construction of a four lane highway in the southern Okanagan is not for the benefit of these property owners but rather for the benefit of the public in general. Is it just that property owners be required to give part of their lands, without compensation, for the future use of the public? I think not. It is similarly unfair that these persons are required to give up part of their properties free of charge, while others who did not wish to subdivide will be paid compensation for any part of their lands needed when the four lane highway is constructed.

One complainant was asked to dedicate both a buffer zone along a creek and a strip of land for future road widening before obtaining subdivision approval. The complainant's agent wrote:

> My client also would like to raise the question as to how many bites of the cherry the Provincial Authorities are allowed to have.

It is my opinion that although approving officers should continue to have the authority to require that lands be dedicated by owners wishing to subdivide their properties, provision should be made for the payment of compensation where such land is required to serve the public interest. I expect that if compensation has to be paid, we would very quickly discover that a lot less private land is necessary to serve the public interest than is presently the case.

Parenthetically, I should point out my concerns about the apparent conflict of interest that currently exists in the position of many subdivision approving officers. In all rural areas, approving officers are employees of the Ministry of Transportation and Highways. It appears to me that it is all too easy for these approving officers to be unduly influenced by the Ministry's anticipated land requirements for future public roads. Approving officers are statutory office holders. While they are required to take into account future road requirements, their position as employees of the Ministry of Transportation and Highways may induce them to give Ministry needs more consideration than they should. The fact that approving officers report to the same official within the Ministry who is responsible for the planning and design of future highways does not assist.

IV SECTION 4 OF THE HIGHWAY ACT, THE 1911 GAZETTE NOTICE AND THE RIGHT OF RESUMPTION

A. Section 4 Roads

By way of introduction to this subject, I should warn all readers that if the local Highways' grader operator kindly offers to grade your private driveway, the only prudent course of action is to say "Thanks, but no thanks". One grading of your driveway, and you may lose title to it to the Crown. Section 4 of the Highway Act provides that:

> Where public money has been expended on a travelled road that has not before then been established . . . [as a public road] . . . , that travelled road is deemed and is declared to be a public highway.

I have received numerous complaints about the application of section 4. In one case, the Ministry of Transportation and Highways asserted that a road was public because the road had been graded a few times in the past ten years. In another case, the Ministry asserted ownership of a road on the basis of section 4 because several of the Ministry's annual reports in the 1920's indicated that minor amounts of money had been spent in

maintaining the road. And in yet another case, the Ministry claimed that a road had become public by virtue of section 4 because two old-timers testified that they had worked off part of their taxes during the 1930's by doing maintenance on the road.

Was it really the intention of the Legislature that private roads should become public roads automatically, and without compensation being paid, merely because minor amounts of pubic money were spent in maintaining the road? I think not. Section 4 was originally enacted in 1905. At that time there were numerous roads throughout the Province which were commonly accepted as public roads but which had not as yet been legally surveyed and registered in the Land Registry Offices. To prevent private parties from obstructing the public use of these roads, section 4 was enacted.

At the time of its enactment, a deadline was written into the section so that it would only apply to roads constructed prior to 1905. Apparently the Legislative Assembly did not intend that the section should be used as a mechanism for creating new public roads but only as a mechanism for protecting public roads which had previously been constructed but which had not yet been surveyed and registered.

It appears, however, that the Department of Highways was never able to keep up with the job of surveying and registering new public roads and the deadline for the applicability of section 4 was extended three times in the years that followed until in 1945 the deadline was removed.

It is my opinion that the continued use of section 4 is oppressive and unjust. It is in effect expropriation without compensation. Worse yet, not only may a person be deprived of his property without due process, but sometimes no process is entered into at all: the fact that a Ministry employee grades a private road can result in the instantaneous and compulsory transfer of the ownership in the road to the Crown.

During 1982 I made recommendations to the Ministry of Transportation and Highways, one of which was that section 4 be reconsidered with a view to recommending its repeal. While the Ministry has stated that it is unwilling to accept my recommendations at this point in time, it has issued a policy directive in which Highways officials were properly informed of the conditions which must exist before the Courts will agree that a private road has become a public road pursuant to section 4. This action is commendable and may ensure that the law, as it now stands, is at least properly and consistently applied throughout British Columbia.

Nevertheless, it remains my belief that the use of section 4 as a means of expropriation without compensation is unjust and oppressive and should be stopped. I intend to continue my discussions on this matter with the Ministry.

B. The 1911 Gazette Notice

A notice published in the British Columbia Gazette in August, 1911, stated as follows:

> Notice is hereby given that all public highways in unorganized districts, and all main trunk roads in organized districts are 66 feet wide, and have a width of 33 feet on each side of the mean straight center line of the travelled road.

The Ministry of Transportation and Highways has taken the position that this Gazette Notice resulted in all public highways which existed in unorganized districts in 1911 being automatically widened to 66 feet. Most roads in existence in 1911 were narrow cart trails and if the Ministry's interpretation is correct, the Gazette Notice resulted in a massive and blanket expropriation of countless properties throughout British Columbia. As in the case of roads made public by section 4, these roads would not have been recorded in the Land Registry Offices and consequently there are many land owners today who are not aware that there may exist a public right-of-way through their property. Pity the individual who happens to build his house on such a right-of-way: his house stands on someone else's property.

Last July, I submitted a Special Report to the Legislative Assembly about my investigation of a complaint received from Mrs. Vera Reid of Pemberton (Special Report No. 5). A narrow trail had been constructed in about 1903, across property now owned by Mrs. Reid, but had long since been abandoned. However, because a developer wished to subdivide the adjacent

property, the Ministry informed Mrs. Reid that, as a result of the 1911 Gazette Notice, not only did she have a trail across her property but that there was a public right-of-way 66 feet wide which could be developed by the developer to provide access to his subdivision.

Following my investigation, I reached three conclusions. First, I discovered that the Supreme Court of B.C. had declared the Gazette Notice invalid in 1920. Second, because of this, I concluded that the Ministry's actions in laying claim to countless properties since 1920 on the basis of the Gazette Notice and without paying compensation was unjust and oppressive. My third conclusion is discussed later in this Report.

The Ministry argued that the judgment of the Supreme Court of 1920 did not affect it and disputed my, and the Supreme Court's conclusion that the Gazette Notice was invalid and without statutory authority. After making a recommendation dealing with Mrs. Reid's complaint, I made three recommendations about the Gazette Notice as follows:

RECOMMENDATION #2

> That the Ministry of Transportation and Highways seek a declaration from the Supreme Court of British Columbia for the purpose of determining whether or not there is a public right-of-way having a width of sixty-six feet through Mrs. Reid's property pursuant to the Gazette Notice of 1911, and for the purpose of determining whether or not the Gazette Notice of 1911 is valid today.

RECOMMENDATION #3

> (a) That the Ministry of Transportation and Highways seek to identify all right-of-ways over which public ownership has been asserted on the basis of the Gazette Notice of 1911 and where compensation has not been paid but is authorized to be paid under the relevant legislation, the Ministry of Transportation and Highways seek to locate the owner of the property at the time public ownership was asserted and pay compensation to that person.
>
> (b) That the Ministry of Transportation and Highways provide me with a list of properties identified pursuant to Recommendation #3(a), the owners of the properties at the time public ownership was asserted, and the amount of compensation paid, if any, to the owners.

RECOMMENDATION #4

> That, if the Court determines that the Gazette Notice of 1911 was and is ineffective and unauthorized by statute, that the Ministry of Transportation and Highways cease its practice of asserting ownership of properties on that basis.

The Ministry has refused to implement my recommendations. I remain of the view that because the Supreme Court in 1920 said that the Gazette Notice was invalid the Ministry should cease using it to claim private property without paying compensation.

C. The Right of Resumption

If you are a property owner, take a look at the original Crown grant of your property some day. You may find that the Crown reserved the right to take back five per cent of your land for road purposes without paying compensation. Although you will see no specific mention of this on your Certificate of Title, this matters not because section 23 of the Land

Title Act provides that all reservations in the Crown grants of all properties continue in force.

I suppose the practice of putting this reservation into all grants of land arose in a time when it was much simpler to reserve a part of the land for future public use at the time of granting it rather than having to expropriate and pay for the lands required at a later date. In my view, however, this is a feudal practice and runs contrary the modern system of granting indefeasible title in the land to the owner.

There are two other aspects of this problem which deserve mention. First, the fact that the government can take back private lands for public use without compensation disguises the real cost of public projects. While the Crown pays nothing for the land resumed, the cost to the owner may nevertheless be great. A farmer may have his fields divided by a four-lane highway or a home-owner may find a busy street established outside his front door. Because the property was not expropriated the owners are not granted the protections proposed in the draft Expropriation Act, nor does he obtain a right to compensation for the disruption caused to his property. If a government authority had to pay for all of the costs involved in a particular project, it might well decide not to proceed.

Second, the right of resumption constitutes a floating charge over a person's land which may alight at any time in the future on a particular part of his property. This uncertainty may create problems for the owner

in deciding how and when to develop his property.

It is my opinion that the Crown's right of resumption is no longer necessary in our society, and I would suggest that those sections of the Land Act, the Highway Act, and the Land Title Act which permit the taking of land without compensation be reconsidered. Most people are unaware of the Crown's right to resume part of their property, at the time of purchase, and the exercise of this right becomes akin to expropriation. Further, it is now government practice to demand fair market value for all Crown land sold to members of the public. The buyer has then paid fully for the land and the government should not be able to return at some unspecified time in the future for another five percent of the value of the land.

I believe that land should only be acquired by government by purchase or by expropriation, thus giving land owners the procedural protections granted under the proposed legislation. Section 4 of the Highway Act, the Gazette Notice of 1911, and the right of resumption were each created in the early years of our Province at a time when perhaps the circumstances of the day required that the public interest ride roughshod over the rights of individuals. Those conditions no longer exist and these powers should be reconsidered. As it is, they appear to permit the Ministry of Transportation and Highways to take private property without anyone's approval and without paying compensation to the owner of the land from whom it is taken. I do not believe that expropriation without compensation is any longer acceptable in our society.

V EXPROPRIATION

As mentioned earlier, I have received relatively few complaints which involve actual expropriation of private property by government. Most property is acquired by negotiation and I have dealt with my concerns in that area earlier in this Report. Generally it is my view that the provisions of the draft Expropriation Act will provide adequate protection to citizens whose property will be expropriated.

The complaints which I have received about expropriation can be broken down into three areas, and I deal with these separately below.

A. Delay in Expropriating

Last year I wrote to the other eight provincial Ombudsmen in Canada and asked for their comments on an issue which had arisen in a number of complaints. I stated the facts involved in one of the complaints as follows:

> My complainant and her husband purchased a few acres some years ago with the intention of developing a small hobby farm. Since their purchase of the property, they have done a great deal of work and now take some pleasure in working their small farm. About two years ago, a government department announced its intention of constructing an arterial road in the vicinity, and the preliminary plans indicate that the road will traverse directly through the middle of the complainant's property. These

> plans have been published in the local newspapers, and public hearings have been conducted in order to determine the optimum location and design of the arterial road. It is expected, however, that construction of the road will not begin for some time.
>
> In the past few months, the complainants have decided that there is little point in continuing to upgrade their property, and they have therefore listed it with a local real estate agency. However, because of the substantial awareness of the fact that a road may be constructed through the property, the offers which they have received are substantially less that what they feel the property would have been worth had there been no publicity respecting the government department's intention of constructing a road in the vicinity. They complain that the government department has injuriously affected the value of their property because of the publicized intentions to construct the arterial road, and feel that the market value of the property has been lessened to a significant degree. The fact that the government department will probably purchase the property at the time that plans for the road have been finalized is of little solace, given that they wish to sell the property now and it may be some months or some years before the government department has reached the point at which it will acquire property in the area.

I should note that a good deal of the delay involved in the above case resulted from the road in question being a joint project with a local municipality.

This situation is not uncommon. In another case involving the Ministry of Transportation and Highways, the Ministry wrote to the complainant's lawyer stating:

> The Ministry of Tranportation and Highways in cooperation with the Regional District have been working together for a number of years to establish a future road network plan for the . . . areas. One of the main arterial streets has been referred to as the . . . Road. This future road will affect your client's property.

> It is not the intention of the Ministry to construct this road in the forseeable future, but simply to establish a corridor which will someday be required to handle traffic demands of the developing area. At the present time the drawings are being used to control subdivisions [thus taking land, without compensation, at the same time] and building development in order that future routes are not blocked. There is no intention to purchase property at this time.

Unfortunately, if the complainant attempted to sell his property on the market, he would receive much less than he would have, had the proposed road not been announced. Not many of us are interested in purchasing residential property that is to be expropriated some time in the future.

I do not suggest that government should keep their plans secret; public input on the location of future roads is necessary and desirable. However, I do believe that some steps should be taken to mitigate these types of adverse effects on properties which may be expropriated.

First, there must not be unreasonable delay in the planning process. If we must ask people to accept a planning process which may result in the devaluation of their properties on the market, let us ensure that the planning process is completed as quickly as possible so that the sword of expropriation is not left dangling over anyone's head for an unnecessarily long time.

Second, I do not believe that government should be able to take advantage of the effect of their actions in depressing the market value of affected properties. Some complainants have worried that when their property is

eventually acquired by the government, they will only receive the market value of the property. As noted, this value has already been depressed because of public awareness of the government's intentions to use the property.

This latter problem is dealt with by the proposed Expropriation Act. Section 34(d) provides that

> in determining the market value of land, no account shall be taken of an increase or decrease in the value of land resulting from the development or prospect of the development in respect of which the expropriation is made, [or] an increase or decrease in the value of land resulting from any expropriation or prospect of expropriation..

Third, I would support the recommendations of both the Clyne Commission on Expropriation and the Law Reform Commission. The Law Reform Commission recommended that

> Where there is public knowledge of the plans of an expropriating authority which reveal an intention to acquire property by expropriation or otherwise in the foreseeable future, and where such public knowledge has had the effect of depressing the market value of that property, the owner of that property should be entitled to require the authority to commence proceedings to expropriate it.

If enacted, such a provision would avoid the unfortunate and inequitable situation which many complainants have found themselves in. And if the expropriating authority subsequently decides to abandon the project, such lands can be returned to the original owners as provided by section 19 of the proposed Expropriation Act or sold on the market. I do not believe,

however, that individuals should be left holding property that cannot be sold for its fair value while government agencies take their time in deciding when and where to construct a project. Had one of my complainants, for example, been required by his employer to transfer to another community, he would have had little choice but to sell his property at a loss.

B. Refusal to Expropriate

A number of complaints I have received involve the refusal of a government authority to expropriate a road which the complainant would like to see as a public road in order to obtain access to his property. One complainant who owned a logging company asked the Ministry of Forests to expropriate a road across his competitor's land because his competitor refused to let him use it and my complainant needed the road to obtain access to his property. The Ministry refused to expropriate the road because there was no public interest involved and to expropriate from one private party for the sole purpose of benefiting another was improper. I agreed and concluded the complaint was not substantiated.

Yet in the case of Mrs. Reid, which I discussed earlier, when Mrs. Reid objected to the Ministry's claim that the Gazette Notice of 1911 had created a public road across her property, the Ministry expropriated the road. The only party who benefited by the creation of a public road was the developer; he wanted a convenient public access road to improve the

attractiveness of his subdivision. I concluded that the Ministry's action was done for an improper purpose; expropriation should only be employed where the public interest clearly requires that the private interest of the individual in his property be subordinated.

Yet the Ministry has refused to implement my recommendation that the road be returned to Mrs. Reid. The Minister wrote to me as follows:

> With reference to the Section 6 [expropriation] proceeding, your suggestion that my actions were taken for an improper purpose is categorically denied. The content and spirit of that statutory provision have been totally adhered to. While I see no reference whatever within the statute to your suggested test of public interest, I can assure you that such a consideration, along with all other relevant factors, received my full attention as I met the responsibility resting with me under the indicated section of the statute. (my emphasis)

I would suggest that the many statutes which confer a power of expropriation on government authorities be reconsidered with a view to ensuring that expropriation powers may only be exercised where they are required to serve the public interest.

C. Compensation for Expropriation

Many complaints have concerned the amount of compensation offered by a government authority for the complainant's property. Often these people have been under the impression that their property had already been expropriated, when in fact government was officially doing nothing more than to offer to purchase their property. In these cases, I have

suggested to the complainant that they refuse to sell if they were not happy with the price offered. If government then expropriated they would have the right to have their claim for compensation arbitrated by a third party.

The compensation provisions of the draft Expropriation Act should resolve many of the problems associated with compensation. The proposed legislation also addresses the situation of those complainants referred to above. Section 3 provides that where an owner is willing to sell his property to the Crown, but is not happy with the price being offered, then he and the government authority can agree to let the Expropriation Compensation Board determine the amount of compensation to be paid.

I am particularly happy to see that the draft legislation incorporates the Law Reform Commission's recommendations that compensation be paid for disturbance damages ("reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to [the owner] by the expropriation") and relocation expenses ("reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in other land"). Such costs are ordinarily very heavy burdens to be borne by the person whose property has been expropriated.

VI INJURIOUS AFFECTION

Injurious affection is an archaic legal term which concerns those situations where a government project adversely affects adjacent properties. For example, the construction of a four-lane highway through a quiet neighbourhood will ordinarily result in the devaluation of the properties facing the highway. Or the construction of an airport will ordinarily result in decreasing the market value of houses subject to the noise associated with the airport. The law now provides for compensation to owners of property injuriously affected by government projects but only in limited situations; most losses are not compensable under existing law.

The very real difficulty in developing rules in this area is knowing where to draw the line. For example, should municipalities be required to compensate land owners where changes in zoning adversely affect the value of their properties? Perhaps not, but then what type of losses should be compensable?

In one complaint I received, the Ministry of Transportation and Highways relocated a major highway some distance away from the complainant's campground. As a consequence, the complainant suffered substantial business losses since tourists would have to take a detour off the main highway to find his campground.

In the Garibaldi case, owners of unimproved properties also were prohibited from selling, leasing or developing their lands, and the government refused to buy them (my recommendation that the Ministry of Environment offer to purchase these lands was eventually implemented). In effect, their lands had been rendered worthless. Should these complainants have been compensated for their losses?

Injurious affection does not apply, of course, where all of a person's land is expropriated; the individual has no remaining land which could be adversely affected by the project. However, both the individual who has had none of his land taken, but owns land adjacent to the project, and the individual who has had only a part of his land taken, may suffer damages as a result of the project.

The recommendations of the Law Reform Commission and the draft Expropriation Act treat these two situations differently. The draft legislation provides that where part of an owner's land has been taken he should be compensated for the reduction in market value caused to the remaining land. However where none of the owner's land has been taken, the owner is entitled to compensation for the reduction in the market value of his land only if he could have sued the Crown successfully under the law of negligence or nuisance; this is rarely possible.

I cannot agree that the individual who has had part of his land expropriated should be treated better in this area of the law than the individual who has had none of his land expropriated. The former will have already been compensated for that part of his property which has been expropriated. The adverse effects of the government project will be felt equally by an adjoining owner whether or not part of his property was expropriated for the project. There can therefore be no reason why one should receive compensation but the other should not.

Similarly, the draft legislation provides for a limited right to compensation for business or personal losses resulting from the government project to the owner who has had part of his land taken, but no such right to an affected person who has had none of his land taken. Thus, in the case of the campground owner, had the Ministry moved its highway to another part of the complainant's land, he may have been able to claim compensation for losses suffered by his campground business, but since the Ministry moved it onto someone else's land, he will have no such right. I fail to appreciate the logic behind this distinction and would suggest that such discrimination may be improper.

The Law Reform Commission stated the following as a general principle:

> Surely we live in a society today where, if an individual suffers losses because of undertakings carried out in the public interest, the public interest requires that the individual be compensated. Society cannot afford not to compensate him.

I agree. I believe that all costs directly resulting from a program or project undertaken for the benefit of the public, should be borne by the public. Thus, all citizens who are directly and adversely affected by a public program or project should be compensated for the entirety of their losses. These people are members of the public too and they will be required to pay their share of the project by way of taxes. They ought not to be expected to bear more of the burden than any other citizen.

I suggest that those phrases retaining the "actionable rule" of the common law in sections 40(1)(b) and 41(1) of the draft Act be reconsidered. While we do wish to safeguard the public purse from unreasonable claims, we also wish to ensure that those who suffer losses directly attributable to a government project are compensated for their losses. While a private corporation may not be required by law to pay compensation for such damages, it is my belief that government has a higher obligation.

VII ABANDONMENT

My third Special Report to the Legislative Assembly (July 1981) concerned a complaint I had received from Roy and Maureen Cuthbert. The Cuthberts owned a residential lot in Delta until 1968 when it was expropriated as part of the proposed Roberts Bank Superport development. The property was never used for that purpose and the Cuthberts were permitted to lease it back from the government. Since the British Columbia Harbours Board did not need the property for harbours purposes, I recommended that it be returned to the Cuthberts. In mid-1982 the Honourable Don Phillips, Chairman of the Harbours Board, ordered that the property be transferred back to the Cuthberts.

The draft Expropriation Act provides that where an expropriating authority decides that all or part of the land it has expropriated is not required for its purposes, it shall serve notice on the former owner. The former owner then will have the option of taking the land back, upon return of the compensation he received, or of keeping the compensation. I think this is fair.

My concern is that there may be little incentive, in most cases, for the expropriating authority to conclude that land expropriated is no longer required for its purposes. For example, in the Roberts Bank Superport case, although the Harbours Board required relatively little of the four

thousand acres it expropriated for the port facilities, it continues to retain this land because it feels that its ownership protects the land from urban sprawl. Yet the Harbours Board has no statutory mandate to prevent urban sprawl. It was only authorized to acquire the land in the first place for harbours purposes.

I would suggest that a person, whose property has been expropriated, be given the right to seek a declaration from the court stating that his former property cannot be reasonably said to be necessary for the purpose for which it was originally expropriated. If the expropriating authority is unable to prove to the court that the land continues to be necessary for its purposes, then the court may declare that the owner has the right to have the land transferred back to him.

VIII COMMENTS ON SPECIFIC SECTIONS OF THE PROPOSED EXPROPRIATION ACT

Rather than commenting in detail on the proposed Expropriation Act, I have commented below only on sections in the draft legislation which are of real concern to me because they may seriously impair the rights of citizens whose property may be or has been expropriated.

Section 5 - This section of the proposed legislation permits the provincial Cabinet to dispense with an inquiry where it considers that undue delay would result, unjustified or unreasonable public expense would be incurred, or other special circumstances exist. It is my opinion that this power is too broadly stated and permits the Cabinet to deny an affected land owner his right to an inquiry in circumstances which may too frequently be thought to exist.

The right to an inquiry constitutes, in the context of expropriation, the right of an individual to put forward his side of the story before his property is taken from him. Such a right is fundamental to our belief in fair treatment and should not be set aside lightly. Not only does the right to an inquiry protect the affected landowner but it provides yet another check on the potential abuse of power by government. While there may be very rare occasions where an emergency exists and time is of the essence, it is my view that the power of the Cabinet to dispense with an

inquiry should be narrowly circumscribed in the legislation. Further, I would suggest that the exercise of powers under section 5 requires in each case a report to the Legislative Assembly at its next sitting, thus ensuring that such decisions can be debated by our elected representatives.

Section 8(2) - When government wishes to expropriate, it is required by the proposed legislation to deliver notice of the intended expropriation to each owner whose land is intended to be expropriated (section 6 reads "is expropriated") and to file a similar notice in the land title office. The draft Bill then provides that an owner who wishes to be heard at a public inquiry must request such an inquiry within 30 days from the date that the expropriation notice is filed in the land title office. What happens if the expropriating authority does not deliver notices to affected land owners until 30 days after it has filed the notice in the land title office? Under the current wording of the draft Bill, all such owners would lose their right to request an inquiry.

Surely this is not what the authors of the draft Bill intended. I suggest that owners be required to request an inquiry within 30 days from the date that the notice is delivered to them. Otherwise the right to an inquiry may be completely illusory.

Section 16 - The proposed legislation provides that after an inquiry is conducted a report of the inquiry's findings shall be submitted to the approving authority who may approve the expropriation, approve it with

modifications, or disapprove it. Approving authorities are defined in section 1 as being either the full Cabinet or a Minister of the Crown; this provision of course is to ensure political accountability for all expropriations and is a feature of the proposed legislation which is most admirable.

However, in cases where no owner requests an inquiry, or where the Expropriation Compensation Board has denied a request for an inquiry, section 16 of the draft Bill provides that the Cabinet or Minister who is the approving authority must approve the expropriation. I am at a loss to understand why approval in such instances should be mandatory. I believe that our political leaders should have the option of approving, approving with modifications, or disapproving any expropriation and should not be required by law to rubber stamp some of them.

IX CONCLUSION

The draft Expropriation Act is, in my opinion, a substantial and positive development in this area of our law. Expropriation powers have in the past been used by government authorities with few restrictions and frequently without due consideration of the serious effects of expropriation upon the citizens affected. That citizens will now be granted a good measure of protection from the use and abuse of expropriation powers is a positive step and one which should avert many of the types of complaints which I have received in this area.

I fully appreciate that the proposed legislation may not be the vehicle for resolving a number of the areas about which I have expressed concern in this Report. I am also well aware that some practices which I have criticized, such as the requirement that lands be dedicated for public use at the time of subdivision, are common among democratic societies. This of course does not make such practices right or just.

While an Expropriation Act may not be the proper vehicle to address all of these issues, in light of the well stated purposes of the draft Act, it may now be an appropriate time to reconsider these forms of land-taking with a view to consequential amendments to legislation which would bring existing legislation more in keeping with the spirit of the proposed Expropriation Act.

It is part of my role as Ombudsman to identify areas where I perceive that citizens are being unfairly treated and to bring them to the attention of the responsible authorities and the Legislative Assembly. Thus, I wanted to take this opportunity to state my concerns publicly in the hope that government will take positive action in these areas. I trust that with changes in legislation and administrative practice, the citizens of our Province will be better served.