[Chairman: Mr. Musgrove] [1:32 p.m.]

MR. CHAIRMAN: Members, welcome back to the Law and Regulations Committee. We have some minutes to approve, and then we have a couple of visitors we'll introduce to debate the subject at hand.

First off, the minutes for the last meeting have been circulated. We need a motion to approve. Nigel. Seconded by Jack Campbell. All in favour?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Okay. Today we're to consider Compensation for Security Interests in Expropriated Land. Mr. Hurlburt is here as the promoter of this through the Institute of Law Research and Reform. He has a couple of guests with him. Mr. Hurlburt, would you like to introduce your guests?

MR. HURLBURT: Mr. Chairman, immediately on my left is Mr. Emmanuel Mirth of the city law firm of Reynolds, Mirth & Cote. Perhaps I should disclose that that was my old firm, but there's no connection on this occasion. To his left is Mr. Ed Frost of the department of the Edmonton City Solicitor. Mr. Mirth is the solicitor for the Mortgage Loans Association, which is the organization of the sort of large-line mortgage lenders. I think Mr. Frost is really here to see that you hear all sides of this issue. I don't think he's here representing his client on this occasion, but he can tell you that if he is.

How do you wish to proceed, Mr. Chairman?

MR. CHAIRMAN: I leave this in your hands, Mr. Hurlburt. From what I understand, the committee would like to hear the debate on it today and ask some questions. Then we'll meet tomorrow to discuss it amongst the committee and make a decision on it.

MR. HURLBURT: That's fine, Mr. Chairman. We have had a discussion among the three of us. I think we concluded that, subject to the committee's wishes, I might lead off, Mr. Frost might follow me, Mr. Mirth might follow him, and since Mr. Mirth's arguments and mine go to the same general conclusion, I'm sure the committee would allow Mr. Frost any cleanup privileges he might want after that.

Mr. Chairman, I already made my pitch on this one last spring, but I might as well make it again unless I should assume that it was so exquisitely brilliant that it was carved into everyone's memory. There's really only one principal issue here. It arises when land or land and buildings, property, is expropriated and is subject to a security interest. For this discussion, for "security interest" we might as well read "mortgage". There are other kinds of security interests, but that's likely to be most intelligible.

The issue has to do with who gets what. There are two ways of deciding who gets what. One the institute has called in its report the outstanding balance theory. Basically, under that approach, upon expropriation you value the land as if it weren't mortgaged. You apply the amount arrived at against the mortgage account. If the value of the land exceeds the mortgage account, the landowner gets the balance. That's one way. Really, you pay off the mortgage in accordance with the face value owing at the date of expropriation, or you pay as much of it as you can.

The second is the market value theory, as we have called it. That takes a different approach to compensation. First, you value the mortgage itself; that is, you figure out what it would sell for. That's what the lender is entitled to get. That's the value of his interest. The mortgage may sell for more than its face value; it may sell for less than its face value. One of the main reasons would be whether the mortgage interest rate is higher or lower than going interest rates. If the mortgage interest rate is higher, it's worth more than its face value. If its interest rate is less, it's worth less than its face value. There are other elements as well. The mortgage lender has one separate interest in land. The owner has another separate interest in land. You figure out what the land would sell for subject to the mortgage, and that's basically what he gets.

So on one hand, you treat the compensation all as one. The mortgage lender is entitled to his account, and the landowner is entitled to the balance. On the other hand, you value them each separately as if they had nothing to do with each other, although there is an interrelationship, and pay them separately.

Until 1974 Alberta was under the outstanding balance theory. Even today, everybody else is under the outstanding balance theory. In 1973 our institute made a report about expropriation generally. We recommended a very substantial overhaul of the previous expropriation law. The Legislature enacted an Act that was based on ours. There were a number of changes made as it went through, but the Legislature accepted this market value theory, which is what we recommended. Since then we have had second thoughts, and those second thoughts are the subject of this report.

When you're expropriating, justice says that you should pay everyone for what they've lost and pay what it's worth. Usually, what it's worth is what it'll sell for; that is, market value. That's usually a fair way of doing things, and that's why the institute recommended to the government in 1973 that we treat mortgage lenders the same way as the holders of other interests in land.

But it has since seemed to us that there are real problems in applying that. The basic reason is that when you stop to think of it, a mortgage isn't really just an interest in land. It's an amount of money with some security attached to it, and we call the security an interest in land or chattels or what have you. But the whole package you're dealing with isn't just a claim against the land. You can't even visualize a security interest that doesn't have some money or something attached to it besides. So there's a money claim attached to it. Often there is an obligation attached to it. That is, somebody is under a personal obligation as well as the land being subject to obligation. There may be guarantees by third parties. There may be other collateral, other parcels of land that are security or chattels, so that you have to deal with the security interest as part of a larger package.

The greatest problem with the market value theory arises where it isn't just the land that's subject to the obligation, but somebody is, or there's some other collateral. That is, not only is the mortgage against my land, but I have a personal debt, a personal obligation, or, as the term goes, I've given a personal covenant to pay, or when there is another piece of property or a guarantee or something like that. These are where the problems arise, because what the expropriator has taken is just part of this larger package. He's taken this one interest in land, which is part of the larger whole.

If you look at the summary handed out, at the bottom of the left hand column, under the heading Present Law, you will see what we tried to do to cope with the situation. You will notice that it says "if covenant only, debt is discharged." That is, the Expropriation Act says that if a mortgaged piece of land is taken and if the owner is personally liable to the mortgage lender, then the land is sold, the mortgage lender gets the market value of the mortgage, and the debt is discharged. He may not have gotten paid in full, but he's lost the personal obligation.

That was one of the things we thought had to be done in order to give effect to this theory. But it can mean that he will have a relatively large money claim, that he will have seen the security sold, have received the value of his interest in that security, and his claim is then gone. There can be cases like that. It's not unknown for a bank to make a loan and take a little bit of security as sort of comfort for itself. The security isn't anything like the value of the loan. There are cases in which a mortgage lender may lend money to a very strong corporation in order to build a service station or a building of some kind, and they don't worry about getting full security. So if they lose the personal obligation against the corporation or owner, they will really have lost something in addition to the land.

If there is other collateral, the situation is even more complex because you may have the interests of third parties involved. There may be guarantees, there may be other land that other people have claims against, and so on. What the statute does there is say that the debt is not discharged but the board or the court, whichever one is deciding about compensation, will decide what the balance will be. On thinking about it, we can't really think of any principle on which they could decide what the balance would be. If you simply take the amount that's been realized and apply it to the mortgage debt, you're really going under the other theory, the outstanding balance theory, but you've taken valuations and a very strange process before getting there. There really isn't any relationship between the amount of money realized and the amount of the claim on that basis, so you would have to figure out some way of subtracting an apple from an orange and maybe getting a plum. I don't know what the answer would be. But there just doesn't seem to be any sensible way to determine or decide what that balance is if you have realized an amount equivalent to the value of the security interest which in itself may not have much to do with the amount that's in the mortgage account.

So we have really concluded that in our opinion the thing isn't workable in any but the simplest situation, being one parcel of land, no covenant, which sounds very much like a house or a farm or something like that. Even then there has been a problem, in that in one case that came before the Land Compensation Board, the board seemed to find itself compelled to give a result that I think does seem a little unfair. There was a mortgage with face value of $110,000 and present value, so far as the money stream went, of $100,000. The security was land that was worth $100,000. The amounts were very close. The board said that a $100,000 mortgage against $100,000 worth of land isn't worth $100,000, because a prudent lender wouldn't lend $100,000 on a $100,000 parcel of land. A prudent lender would lend 75 percent of the value of the land. Therefore, the mortgage couldn't be sold for more than $75,000. That's the value to the mortgage lender, or in this case it was the original seller who held the mortgage. The board went on to say that the $25,000 went to the owner, so that although the owner had a parcel that was mortgaged either well beyond the hilt or to the hilt, depending on how you looked at it, he came out with 25 percent of the compensation.

While none of us may feel too sorry for mortgagees, that result doesn't seem fair to the mortgagee. I'm not being critical of the board. They took the law as they found it and applied it conscientiously, and that's where it came out. So we really concluded that, in our view, the market value theory, while it's fair in principle, fair in the abstract, really isn't going to work in practice and hasn't worked in practice.

The other one, paying off the mortgage account, is not as fair. In a sense, if the mortgage lender gets the face value of the mortgage, he will either get too much because the income stream isn't really worth the principal value, or he'll get too little because the income stream is really worth more than the face value. But it's a fairly rough-and-ready way of doing things. It would strike most people as fair that you get what your claim is and that the landowner should get the rest. So we've concluded that that's about where the law ought to go, even though it's not what we recommended 12 or 13 years ago.

Mr. Chairman, that is my statement of our reasoning behind all this.

MR. CHAIRMAN: I wonder if there are pertinent questions that you have for Mr. Hurlburt, or should we go on with Mr. Mirth?

MR. HURLBURT: Mr. Frost, if that's all right, Mr. Chairman, and then Mr. Mirth.

MR. CHAIRMAN: Okay.

MR. FROST: Mr. Chairman and members of the committee, my function here today is to present one side of this question. As Mr. Hurlburt indicated, this isn't necessarily the view of the city of Edmonton or of any other expropriating authority. I'm here to present one side of the picture, which I think is a valid side to this question.

I suggest to you that the present law requiring the evaluation of a security interest, a mortgage, on an expropriation is working and that at this stage it's premature to change it back to what it was before; that is, the outstanding balance method. I suggest that you haven't been presented with evidence or sufficient reasons to change the law and that it should remain as it is.

Presently, and this is perhaps going over old ground again, the law treats the valuation of a mortgage in the same manner it treats all other interests in land. The Land Compensation Board has been asked to evaluate leases, easements — well, the fee simple interest; that is, the whole interest in land, and they've been able to do this by receiving evidence from various experts and determining what any of those interests of land would bring on the open market. The Expropriation Act defines market value to be what an interest in land would bring on the open market if sold by a willing seller to a willing buyer. In the case of mortgages, at least conventional mortgages, there is, as has been shown to the Land Compensation Board, a market in mortgages. People buy and sell mortgages, and mortgage placement agencies or mortgage brokers have given evidence before the board, at least in one case, of a market that exists. So I suggest to you that it is possible to evaluate these mortgages and come up with a market value for them.

I suggest that to change back to the outstanding balance is to treat mortgages apart from other interests in land and to give this special class a special treatment, which I believe is what the institute was trying to get away from in the first place. In doing this, you may be acting to the detriment of another large class of persons with an interest in land; that is, the landowner: the farmer, the homeowner with a conventional mortgage, or a corporation with a mortgage.

Perhaps this could be shown by a simple situation, and I suggest that the law as it now stands treats the simple situation in the best possible way. A simple situation can be shown by the second case that came before the Land Compensation Board. Just briefly, this involved a homeowner in the Edmonton river valley named Vanee, who had a conventional mortgage. The city expropriated all his land for a park. What happened was that -- the owner didn't take part in this -- the holder of the mortgage, Credit Foncier, contested what the city was willing to pay for its mortgage. The evidence given by the city appraiser was that the land was worth $56,000. At the time, there was a five-year mortgage at 12 percent on the land, with one year left in the term. At the time, interest rates were running at 20.5 percent, which was the other way than it is right now. So besides getting someone, the appraiser, to show what the land was worth, the city got a mortgage broker and found that anyone buying that mortgage would not pay what the outstanding balance in the mortgage was, which was $28,000.

So here we had a $56,000 property with a $28,000 mortgage, a comfortable situation for anyone looking at buying that mortgage. But what the mortgage broker indicated was that anyone buying that mortgage would want at least an 8.5 percent discount on it and wouldn't pay the $28,000. In fact, the mortgage broker said that he would pay $25,825, $2,200 less than its outstanding balance. In order to evaluate it, they looked at some other factors, such as whether this person was paying the mortgage, the term of the mortgage, which had only one year to go, the amortization period, which was a regular one, and also whether there was a market for these mortgages, which there was, as I indicated.

So the board awarded $25,825 to Credit Foncier. Credit Foncier really didn't give much in the way of evidence about it, and in its reasons the board indicated that Credit Foncier could then go out with that lesser amount of money, invest it at a 20.5 percent interest rate the next day, and in one year recoup its $28,000. On the other hand, if the owner, Mr. Vanee, was going to buy another home or had to get another mortgage on a home he was buying, he could take the additional amount of money which was given to him, the additional $2,200, get a 20.5 percent mortgage, and both sides would end out in roughly the position they were in.

There are some other factors in the Act that helped both sides. Both sides had their legal fees paid. The mortgage company got a three-month bonus at the 12 percent rate to cover its disturbance damages. The city, being the expropriating authority, paid all those costs, including the costs of the appraiser, which was $800, and the cost of the evaluator, which was $500. In that way the market value of the mortgage was proven.

That's a simple situation. I say that the law today is well equipped to handle that situation and is better than it would be on the outstanding balance, because on the outstanding balance the mortgage company would have got $2,200 more than the mortgage was worth. The owner would have got $2,200 less and been forced to go out on the market, at a 20.5 percent rate, to get another mortgage. It may be that he would have been paid disturbance damages under the Act if he had been left in that situation, but if he was, then the body that would have paid that $2,200 would have been the expropriating authority. So in the end result the third-party expropriating authority would have been out the $2,200, the mortgage company would have got $2,200 extra, and the owner would have been in the same position.

As I go back to what I said at the beginning, I suggest to you that it's premature to change the Act. This is only the simple situation, but there have been only two cases before the board in the last 12 years. Neither of these cases was taken to the Court of Appeal. It hasn't been shown that the law is unworkable.

To be equitable and fair to all parties, which is what I believe this Legislature and the Expropriation Act is intended to do, evaluating the mortgage using the market value technique is the best. The risk for the speculator or the mortgage company is not removed. It seems unfair that a speculator or an investor could overmortgage land and then be paid the outstanding balance to the detriment of the expropriating authority.

Perhaps one attractiveness of the outstanding balance method is simplicity; that is, outstanding balance is a formula. It would be easy to settle these cases. It's perhaps even what the homeowner would expect, although when he goes out to get a new mortgage, I suggest that he is going to have trouble. It's easier for the mortgagee; that is, he can plan his portfolios more easily using an outstanding balance. But I suggest that simplicity is not the underlying principle here. I think it's fairness to all.

It's been suggested that the cost of evaluating mortgages outweighs the principle of fairness. I suggest that on any evaluation of any of these interests -- easements, leases, fee simple — there is a cost to the expropriating authority. Expropriation is an extreme method, something the expropriating authority only goes to after exhausting its negotiations. In order to achieve fairness, there is a certain cost that the taxpayer has to bear, and I'd suggest that the two cases before the board haven't shown that the costs are excessive. In all the mortgages that are outstanding, the number of mortgages that have been expropriated is extremely small, and the costs are just not great.

There are some difficult situations, which Mr. Hurlburt has alluded to, when there is additional collateral, covenants that might be extinguished. If and when these situations arise before the Land Compensation Board, I suggest that you should have faith that the Land Compensation Board, which has worked very well to this date, can handle it. At least give them a chance before you change the law. They've handled some pretty difficult situations, such as the evaluation of business losses on businesses which have to be moved on an expropriation. They've been able to get the expert advice they need in order to evaluate them. I suggest that it's no different in this situation. But I suggest that it hasn't been tested as yet, and it's premature to change the law.

Basically, that is the side of the picture I would present to you. Thank you.

MR. CHAIRMAN: Thank you, Mr. Frost. Maybe we could hold the questions until we've heard from Mr. Mirth. Then we can ask questions of anyone, if that's the pleasure of the committee.

MR. MIRTH: Thank you, Mr. Chairman. Hon. members, I think the fact that there is a problem in practical administration with the legislation as it now stands is illustrated very well by the one widely reported case the board has had, and that's the Forster-Mah decision Mr. Hurlburt mentioned to you, where a property owner with a negative equity — he owed $10,000 more than the property was worth — got $25,000 on the expropriation, which came out of the lender's pocket. That case really crystallized for mortgage lenders the niggling, back-of-the-mind problem they had with the idea of market value at the time the new concept was brought into our statutes. I think it has come forward in the last few years as being the best illustration of why, while there may well be cases where it is fair to discount or bonus a mortgage, it's not a system that is practical. Therefore, the switch back to the idea of payment of the outstanding balance, which prevails elsewhere in Canada, is a desirable legislative move.

Now, I say that today, in a time when that might well be very adverse for mortgage lenders on loans that they placed two and three years ago and that still carry a much higher interest rate than is the norm. It's more likely today that a lender, on an expropriation, might lose an advantageous mortgage that he wrote two or three years ago at 18 percent, or whatever the case may be, and get paid only his principal even though he might prefer to leave the loan in place till maturity. Shortly after the Forster-Mah case came out, interest rates were going the other way. The recommendation of the institute would generally have worked in favour of the lender.

The lenders, at least so far as their views are expressed by the Mortgage Loans Association, say: "I'm prepared to accept the good with the bad. I'll take my 18 percent mortgage in 12 percent times with a payout to the outstanding balance and no bonus. I'd also like to have it the other way around. I want to be paid out in the event of an expropriation, and I'll take my lumps if I've got a particularly good mortgage."

In terms of what exists very widely today in mortgages, what we're talking about in many cases is not a serious dollar differential, because probably the majority of mortgages in number have a term that's relatively short. In 1974 probably most mortgages were five years or more in duration. In number the majority are probably now less than five years in duration, so the discounting and bonusing factors are not all that significant.

From the purely theoretical or logical point of view, the fundamental problem with the structure as it now is in the Expropriation Act is, as Mr. Hurlburt indicated, that it tries to deal with the instrument of mortgage or security as if it were like any other interest in land, but it's not. In fact, if it has a substance at all, its primary element is the promise of the borrower to repay. That gets reflected in a lot of different situations, in a lot of different ways. For example, if Shell Canada Limited, on its service station site with a value of $100,000, goes to a lender and says, "I want to borrow a half million dollars to develop this site," the lender might not even look seriously at the value of the real estate. He will look at who is promising to repay that loan. As Mr. Hurlburt indicated, banks do that quite commonly in situations where they have a long-term or a good credit relationship with somebody who might want to borrow some money and give a small amount of security for a much larger loan.

Even in the conventional, day-to-day house mortgage situation or a mortgage on an acreage or whatever the case may be, when the lender assesses the mortgage that the individual comes and asks for, he assesses it, number one, on whether or not that person is going to repay that loan. A person who is a good credit risk might easily get a loan of 75 percent, or even more, of the value of a very expensive property, whereas a person with a bad credit risk, a bad history, mightn't get 60 percent of a much smaller sum. That promise to pay and all of the personal considerations that are involved in making a loan are very significant factors in mortgages that do not apply to other varieties of interest in land. I could cite perhaps hundreds or even an almost unlimited number of examples of situations, of mortgages, that would be unfairly treated by giving only the value of the mortgage on some market value concept that excludes from the assessment that personal element, that promise to pay, and its enforcability.

To take the Forster-Mah case, for example, to the Shell service station example, let's suppose that the loan is for just a quarter of a million dollars rather than a half — to make it a little more realistic — and the property is worth maybe $150,000. If you applied the rationale of the Forster-Mah decision and looked at that mortgage, did the mathematical discounting if it was at a lower than current rate, and then added to it the additional formula, no lender would lend more than 75 percent of the value of the property. The lender in that situation would get 75 percent of $150,000, even though when he makes the loan he knows Shell Canada is going to pay him the full $250,000.. The only alternative to that unfairness would be to say to the expropriating authority, "sure you can expropriate this mortgage and compensate on value, but you've got to expropriate the whole package and pay the whole value, including the value that is attributed purely to the personal value of Shell Canada Limited as a person giving a promise to repay." I'm sure that the expropriating authorities don't want to have to buy mortgages and covenants to pay to that extent.

In the context of single-family loans, where the mortgages are perhaps not NHA or corporate mortgages and where the Law of Property Act comes into play to restrict the lender to the land alone, there is a considerably greater ability to see how the market value isn't going to adversely affect the lender. But even in those situations, the person who has had a history of making his payments honestly, good times or bad, has a personal characteristic on the loan application, on the loan valuation, that the fellow who's had a bad record does not have. It has nothing whatever to do with the land.

I suggest that you can't logically make the expropriating authority pay for that. By the same token, you can't fairly take it away from the lender. It's that basic, logical problem with the practical operation of valuation of mortgages that has the lenders coming forward saying: "It won't work. While it may seem fair in some respects, it won't work. Go back to the outstanding balance, as it was before and as it is elsewhere in Canada, and we'll take the good with the bad. We'll get paid out our balance on a 20 percent mortgage in 10 percent times" and so on.

One last, small point I might offer is in the context of partial expropriations. They complicate the questions we're talking about here a good deal. Somebody takes a road-widening, as Mr. Frost's employer, the city of Edmonton, might very frequently do, or takes a right-of-way from a farmer for a road. The treatment of expropriation and who gets what in that situation is particularly difficult to deal with on a valuation basis. But while lenders might perhaps prefer to do what their contracts say — and their mortgages all say this, or most of them do, I'm sure — that even on a partial expropriation all the money goes to them, on balance I think the alternative suggested by the Institute of Law Research and Reform, which involves prorating that value, is not an unfair or unworkable one. It doesn't have all the same impediments, and it's certainly not, as a matter of degree, as likely to generate problems of the kind of the Forster-Mah decision.

So in sum, the position of the Mortgage Loans Association would be to strongly urge upon you adoption of the recommendations of the institute on all the aspects of their report.

Mr. Chairman, are there any questions?

MR. CHAIRMAN: Thank you.

MR. HURLBURT: Mr. Chairman, might I make a comments before the questions?

I don't think one rule is going to favour lenders or owners more than the other. It all depends where interest rates are going. I don't think we have a class-conscious choice to make here.

There could be a difference, as Mr. Frost has pointed out, in that sometimes the owner, when he's forcibly dispossessed, thrown out of his good mortgage, and has to go out and refinance, may get the difference in the way of disturbance damages, so that may be an imposition on the expropriator arising from the outstanding balance theory. But I submit that that isn't too serious. Anyway, what we're looking for is a rule for all seasons.

Secondly, I point out that the mortgage lender doesn't get his money in all events under the outstanding balance theory. It's only up to the value of the land; that is, if the mortgage is more than the land is worth, he doesn't get his money.

Mr. Chairman, I should also mention that I didn't even talk about the partial-taking point and one other, smaller point which I didn't think were controversial. We can come back to those, if you want.

MR. CHAIRMAN: I have one question before we go to the committee. I was interested in the home and acreage that was expropriated for a city park. As I understand it, there was a $28,000 mortgage, the mortgagee was paid out for $25,000-something, because it was a 12 percent mortgage and the interest at that time was 20 percent. So he was in fact penalized for having a low-interest mortgage in that case.

My question is: what would happen if this happened today, when mortgage interest rates are at roughly 11 percent, if he had a 20 percent interest rate? Would he then be given an additional amount of money and that taken off the landholder?

MR. FROST: Yes. On the valuation concept, the mortgagee in today's market would get the larger amount of money and the homeowner would get the smaller amount. But the homeowner would then be able to go out on the market, and he could have a 12 or 12.5 percent mortgage. It's the reverse of what it was then.

MR. CHAIRMAN: We heard the benefits to the landowner. He got his 12 percent mortgage paid out and he got another $2,800, I believe. But then he had to go out on the market to buy a new home at 20 percent. Now that wouldn't be very much of a benefit to him, would it?

MR. HURLBURT: It would protect him, Mr. Chairman. If he didn't get the extra money, he'd be that much worse off. I think the point probably is that if it's an actual home, there are home-for-a-home provisions in the Act that would protect him, and he might also be protected by disturbance damage provisions. But that would load the expropriator more heavily. So it's quite a balancing operation.

MR. CHAIRMAN: Mick, you had a question?

MR. CLARK: Yes, Mr. Chairman. We have two Acts in Alberta under which we expropriate land, the Expropriation Act and the Surface Rights Act. The Expropriation Act seems to be a little harder to deal with with landowners. They don't seem to have that problem with the mortgagors under the Surface Rights Act that they have with the Expropriation Act. Is that due to the difference in the way they compensate the people for the land or for the force-take part of it? There is no force-take part in the Expropriation Act. I've had land expropriated, and they simply give you what the cash value of it would be. But they never mention anything about the mortgage holder. Under the Surface Rights Act they never say, how much mortgage do you have on your farm? It all comes to you.

There must be some way under the Expropriation Act — I'm not as familiar with that as I am with the Surface Rights Act — that they can compensate the people for the force-take attitude they have in the Expropriation Act. Also, some of the other areas of taking a mortgage — a house owner who has been paying his mortgage and the mortgage holder has been receiving that mortgage and making money on it. All of a sudden that's disrupted. There must be some compensation for this disruption. Isn't there?

MR. HURLBURT: Under the Expropriation Act, the mortgage lender is entitled to three months interest on his mortgage, which is compensation for the disruption, if you like. If he wants to place his money, he has to go out and find a new mortgage. If the owner can show that he's been put to a business loss or something like that or has a replacement problem, there are disturbance damage provisions under which he can get damages as well as the value of the land. Have I answered your question?

MR. CLARK: I guess what I was thinking of was if I were a homeowner and had a 12 percent mortgage that had three or four years to go, and you come in and expropriate my land and the next mortgage I take out is 20 percent, who compensates me for that? Is that taken into effect in this Act the way you're bringing it in now?

MR. HURLBURT: I think the answer is that you can claim that as disturbance damages if you can show that you really are compelled to replace the better one with a worse one. But in any event, the general rule will have to be applied whether rates are going up or down. That is, you can't really change the rule just because interest rates have gone down this year whereas last year they went up, and proceed on some principle that's fair to the people involved.

MR. CLARK: In that case, though, I think some person could possibly get hurt pretty badly in that area.

MR. HURLBURT: This Expropriation Act was designed in an effort to be as fair as possible. It certainly does not give absolute fair results in every case. That is quite true. It does put the owner in a position to stand up and look at the expropriator eye-to-eye with his own evaluators, his own lawyers, if he wants. The basic principle is that he's to be paid for what he's got, and there are some special allowances besides. I think the basic pattern is fair enough. Now, there may be other views on that.

MR. CLARK: Just one more question, Mr. Chairman, if I could, following up on that. I am wondering if you had thought of following the part of the Surface Rights Act that says they compensate for force-take, for the fact that the person who is being expropriated has to give up his land whether he wants to or not. He has no choice about that. That is one of the things that is in the new Surface Rights Act. I wonder if there is any thought to putting it in this Act.

MR. HURLBURT: At one time there was a 10 percent allowance made very often — I've forgotten whether it was always made; I don't think it was — for forcible taking under the Expropriation Act. I think the view is that if he gets paid his costs for what he's lost, that should be good enough. There is the point here that under the Surface Rights Act the mineral owner or oil company is staying on the farmer's own land. It's a continuing relationship, a continuing nuisance. The farmer has to put up with the roads and the tank farms and the fenced-off well sites. That may be justification for something over and above the actual economic value of what he's losing.

MR. CHAIRMAN: Would Mr. Mirth or Mr. Frost want to make a comment in respect to that last question about the similarity of surface rights to expropriations?

MR. FROST: Well, I'd have to agree with what Mr. Hurlburt said as far as compensation for the force-taking aspect. In a couple of instances, the Land Compensation Board has held that it just doesn't exist under the Expropriation Act. Market value is the key. There is also a provision in the Expropriation Act, though, that if the land has a special value to the owner over and above what it would have to other owners, he can be compensated for that. An example of that is a case in the city where an Italian grocer lived in a house right next to his grocery store and could provide a security for his business premise that another owner couldn't do because of his proximity to his place of business. When his grocery store was expropriated, they gave him something over and above the market value, but it doesn't exist in the Act.

The first part of your question, compensating the person with the low mortgage who has to go out into the market, just going back to the example, there was only one year left in the term of this five-year mortgage and yet the owner got $2,200 on a $28,000 mortgage. All they were compensating him for was the one year remaining in the term at 20 percent. That's the kind of money he got.

There's a real attempt to make things fair and equitable, but you can't remove the stigma of expropriation. There are certainly all kinds of people who don't want to move, and no amount of money is going to make them happy. But I don't think either the outstanding balance approach in this case or the market value approach is going to solve that question.

MR. MIRTH: Mr. Chairman, in the context of that latter point, if the expropriating authority is taking over a property that has a mortgage with only a few months left, the fact that there is some discounting and a small amount of money put into the pocket of the owner certainly isn't going to help one iota if at the end of the few months he still has to lay out for a 20 percent mortgage. There isn't any mechanism in the Expropriation Act to deal with that kind of situation or the disruptive factor or the fact that quite often the expropriating authority will choose bad times to do the expropriation because they'll get a better price from their perspective. The only answer for that that comes to my mind would be the one Mr. Hurlburt suggested, that perhaps there is room in the provision in the Act for disturbance compensation to pick up some of those kinds of considerations.

The issue of whether or not there should be a special hammer against the expropriating authority in the context of municipal and highways types of expropriations is quite a larger subject, and I'm not sure I could offer much insight on that from a lender's perspective. There's not much involved there to express. There may be considerations in the fact that those are often public functions that are being performed as opposed to private functions that occur more commonly in surface rights. That may be a sufficient reason to distinguish between the two kinds of statutory treatments.

MR. HURLBURT: If I might, Mr. Chairman, I've just refreshed or created my memory by looking at section 50 of the Expropriation Act. If the property is a residence, the expropriating authority is to pay

> in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation . . .

which is quite broad. It goes on:

> including [if it's a residence] an allowance of 5% . . . or the actual amount proved . . . to compensate for inconvenience and the costs of finding another residence . . .

or if it's nonresidential land, the costs of finding alternative premises. In either event:

> relocation costs . . . moving costs . . . legal and survey costs and other nonrecoverable expenditures incurred in acquiring other premises.

So there is something there, anyway.

MR. SHRAKE: A couple of questions. I saw your recommendation. The institute is recommending that we stay with the fair market value theory, I gather.

MR. HURLBURT: That isn't right, Mr. Chairman. The institute is the other way. The institute in 1973 was for market value; it's now against it.

MR. SHRAKE: I'm looking at item 4 on page 3 of our little handout. My question is: what do we do with the person who bought land in good faith in 1982 and suddenly he's in the middle of the LRT right-of-way or the freeway or whatever, and they want to expropriate his land? Maybe at the time, he bought it with a 20 percent equity, had good credit, so a prudent lender would lend 80 percent on property. Suddenly, between '82 and '84, when the expropriation began, there is a 30 percent decrease in price. There would be a 10 percent deficit if you go on fair market value, because all your appraisers do is appraise what the last parcels of land have sold for in this geographical area, and they try to find similar parcels of land. But suddenly, because you're in a temporary slump -- the prices might go up again -- the holder of the land is going to take a terrible loss. They'll lose the equity they put in, plus they end up with this 10 percent deficit. Sometimes they can be sued for that difference by the lending institution.

How do you handle that? How do you handle this matter of -- in the case of Alberta, the recession that hit in '82. Prices were up here, and suddenly they dropped down to here. Is there any way we can build anything in to protect these people?

MR. HURLBURT: Mr. Chairman, that's a large question. Firstly, at the cost of sounding callous, I could say that they've already lost it; that that, in effect, is what the property they have is now worth. If it's gone down 30 percent, that's true for everybody as well as the person who has been expropriated. I realize that isn't an answer to the human problem you're raising.

There is this much help in the Act. I could find the exact wording; I don't have it in my mind, but Mr. Frost already mentioned it: the time to find a willing buyer and a willing seller. How far you can argue before the courts or the board to say that the depths of the recession is not the time to find a willing buyer, wait until the market improves before you fix the compensation or something like that, I don't know. That's about all there is in the Act at the moment, I think.

MR. SHRAKE: A further question. Is there no way this can be averaged over a -- the market value in '82 was so much; it dropped in '83. On the other hand, in '84 you were at the very rock bottom of the recession. Then, of course, as I'm sure we're experiencing now, some of the prices have firmed up and have even come up a little bit here in '85, and indications are they will slip up a little further in '86. But if the city of Calgary takes the little couple's lifetime investment in '85 and if it goes up in '86, they have no claim. Is there no way that some recommendation would come forth that there would be some averaging on this to save them from the lows and the highs?

MR. FROST: Mr. Chairman, one thing that comes to mind is that there is this home-for-a-home concept. The Act provides that homeowners are able to receive compensation over and above the market value of their home -- say it's at the low end -- for the cost of finding an equivalent home. That is, he would be given the opportunity of presenting evidence -- and I've had cases like this -- that he has looked around for homes that have the same kinds of attributes his home has, but they may cost $5,000 to $10,000 more for various reasons. He is given that money by the expropriating authority so that the couple can relocate in an equivalent home. The thing that comes to mind is that in a slump, other homes which may be for sale will also be at that low price. So it's a little unfair to the expropriator, perhaps, to do some of this averaging or to pay the owner for what it may have been worth in '82, when the theory is that he should be able to go out and relocate in an equivalent accommodation.

What isn't compensated for and what gets people down -- and this is quite apart from the mortgage, what we're arguing today -- is the fact that they have to move at all, especially the older person. My experience is that I don't know of any way of compensating those people. I don't think it's money they're after.

MR. SHRAKE: Is there coverage for a home if they're not resident in a home, if this is their investment?

MR. FROST: No, it doesn't cover that.

MR. SHRAKE: We're running into more of that, I think. The ones who live in their homes usually have been there long enough that somehow they come out a little better off than the one -- we look upon the speculator as somebody bad or evil, even though if we didn't have some of these speculators and entrepreneurs, we'd probably have poor housing stock in Canada like they have in Russia.

MR. MIRTH: Mr. Chairman, I might offer a comment in regard to the timing of valuation. I think the statutes have always — and Mr. Hurlburt can correct me on this — keyed on a moment of time being necessary. There is a classic example I can remember reading about in the media, where the moment of expropriation was back in that '82 period. The valuation got fixed at values of that day, notwithstanding the fact that by the time the hearings were over, the values had collapsed to a very much smaller sum.

Fixing on a day can work both ways, like everything else in the expropriation process. If you fix on the '82 date and then have the hearing three years later, the expropriating authority may have to pay quite a bit more than it would if it was fixing on today's date or took an average, whereas if they were to give a notice today, they might well pay an awful lot less than they would have if they gave the notice in '82.

Any regime is going to be somewhat arbitrary. But in terms of being able to practically deal with the question of what should be paid, unless you're going to have expropriation proceedings go on forever, you have to fix on a date somewhere. That date presently in the Act, and I think in most statutes, must be the date the expropriating authority says, "Today, I'm hereby notifying I'm expropriating."

MR. SHRAKE: The city of Calgary is doing the reverse on that. There are a few cases, a fairly recent one last week. They had offered $400,000, and the fellow was going to accept. They didn't have it in writing; they were in the negotiation stage. Suddenly they are now offering $186,000 to this gentleman for his property. Now they will probably expropriate.

MR. CHAIRMAN: Further to Gordon's question on the market value concept. Providing the value of the property has dropped, let's say 30 percent, and the expropriation award is less than what the mortgage is, who is responsible for the balance of that mortgage? If it were a $100,000 home that was being expropriated, the value is now $75,000, and the expropriation award is less than what the mortgage is, does the property owner still owe the amount left on that mortgage in these cases?

MR. MIRTH: Mr. Chairman, if the recommendation were adopted, if the amount found to be the value of the property was $75,000, and $100,000 was owed on the mortgage, then $75,000 would be all the expropriating authority would pay. It would all go on the mortgage. There would still be a debt owing beyond that. If it was a person's house and it was a mortgage that was subject to the Law of Property Act, then from the lender's point of view that would be the practical end to the matter, because he couldn't sue for the difference. If it was a corporate borrowing — by way of example, on a piece of raw land, speculative land — or if it was some other variety of mortgage that isn't governed by the Law of Property Act, then the lender could still sue for the balance and collect the balance of his debt.

MR. CHAIRMAN: Nigel, you had a question.

MR. PENGELLY: Thank you, Mr. Chairman. Through you to Mr. Hurlburt. I have some constituents whose land will be expropriated for highways. In one case it goes diagonally across the farm, so what is fair market value for the others, where it follows the quarter line fence line, will not be the same for him. I found a term under the Expropriation Act, and this is really my question. What is meant by "injurious affection"? Is that something the same as "force-take" under the Surface Rights Act?

MR. HURLBURT: Well, it doesn't mean you always hurt the one you love or anything like that.

MR. PENGELLY: We're going to take your land but we still love you anyway. We hope you love us.

MR. HURLBURT: It has to do with the effect of taking the road on the balance of the land; that is, the two wedge shapes or whatever he's now got left. We're probably getting a little bit beyond my recollection of expropriation law, but basically he should end up with an amount of money which will mean that the money plus his remaining land is worth what he had before the whole thing started. That's a homespun way of putting it, but that's probably about the answer.

MR. PENGELLY: Mr. Chairman, on the same point. Market value for the land might be

$1,000 an acre, but the injurious affection on that quarter section might amount to $40,000, I understand.

MR. HURLBURT: I believe that to be correct, Mr. Chairman. You should look at the effect on the whole holding, really.

MR. CHAIRMAN: Does that answer your question, Nigel?

MR. PENGELLY: Yes.

MR. CHAIRMAN: Any other questions?

MR. CLARK: Can I have another one, Mr. Chairman? I'd like to put out an example of whether or not there's anything for people like this. Around the cities of Calgary and Edmonton, in about '73 the government put in a transportation corridor, and we have people caught in this transportation corridor. Now they're starting to pick up this land and this land is now going to expropriation, or they're putting a value on it, the market price of today. These people have had caveats on their land. They couldn't build or develop it in any way.

I wonder if you can see in the Act anything for people like these, who are caught in that they couldn't sell because of the caveats and four years ago they could have sold at maybe $80,000 an acre. The person I'm talking to around Calgary is now being offered $106,000 for nine acres. I am just wondering if there is going to be anything for people like that.

MR. HURLBURT: Mr. Chairman, I'm afraid we're really getting outside my depth. I don't know whether Ed is up on these things. Certainly, there was a proposition that the expropriating authority couldn't downzone and then pay at the lower — zone it for parkland and then expropriate it on that basis. But how far that's gone and whether that covers the RDA, I'm afraid I can't say. You're really beyond my depth at this point.

MR. CHAIRMAN: Do we have anyone else?

MR. FROST: Last month I was before the Court of Appeal on that very section, 45(e) of the Expropriation Act, although it would only partially answer your question. If the province of Alberta was expropriating your constituent's land and had an RDA caveat on it, the Land Compensation Board would ignore the effects of that caveat and would treat the land as best it could as if it were unencumbered. In fact, when the province buys this RDA land, its practice is to ignore the caveat and have an appraiser appraise it as if it were adjoining land without the caveat. But, as I say, that only partially answers the question, because if the situation is that back before 1981, say, that landowner had been able to sell the land and wasn't able to because of the caveat, he's only going to get market value at today's rate and he will be out that money.

There's another case in the Supreme Court of Canada, where a landowner in the situation of your client is unable to get a permit to do some mining in a park. The Supreme Court of Canada held that although they hadn't expropriated his land, the same effect was achieved, and therefore he was paid compensation for just that kind of thing. This owner would have to go to court and prove that the caveat made it impossible for him to sell his land. It's a pretty hard thing to do, but I think we're getting a long way away from what we're here to do today. I'd say that your constituent is in a very complex situation.

MR. CHAIRMAN: I really think that does relate to the decision here. If we're looking at market value and these values have dropped considerably, and for some reason or another a person was not able to sell his land and then is forced to sell it at a current depressed value, there should be some relation in there to what the expropriation value is.

MR. MIRTH: Mr. Chairman, there may be a very much broader question that at some point might be considered by the Legislature, and that is the question of whether for various kinds of publicly sponsored freezes or impediments to development there should be a broad form of expropriation that's outside the scope of anything we've had in the Expropriation Act in our law.

There are other examples one might offer, such as the imposition of height restrictions because of the installation of an airport or perhaps the designation of properties as an historical site. There may be other examples of things that can happen in the law where, for one reason or another, what government, local or provincial, decides to do in an area effectively expropriates from the point of view of the property owner and there's no mechanism for compensation. That would require a pretty comprehensive assessment of whether it's going to be for the benefit of the community to adopt within our law a broad, general principle of what I guess in the constitutional days was even considered to be the idea of ensconsing property rights in some Bill of rights or other kind of concept.

MR. HURLBURT: Mr. Chairman, in relation to your last remark I think I should say that while there might be cases in which one rather than the other of these theories would help with the disappearing equity, it would be very hit-and-miss. It isn't related to that. If you took the house and the equity has nosedived, you still wouldn't have any award for the homeowner as such, because the house still won't sell for anything with the mortgage on it. So if you're going to try to cure that, I think it would have to be done some other way.

MR. COOK: Mr. Chairman, I appreciate the counsel from three senior lawyers in town here. After listening to the discussion, I think I'm going to have to go back and read up and do some reflection.

I'd like to ask one question. Mr. Frost made one point that seemed fairly important to me. He said that only two cases on this point of law had been heard before the board. I guess my question, in part, to Mr. Hurlburt is: is there really a problem if in fact only two cases have been brought before the board and neither has been appealed?

MR. HURLBURT: I think I might say this. I don't really like the thought of waiting for litigants to clear up the law at the expense of litigants; that is, if you see a problem that looks like a practical problem, it's as well to cope with it so they don't have to. Certainly, nothing in the Credit Foncier case bothered me at all. That was exactly what we thought should happen in the first place. No problem. The Forster-Mah case did seem to expose problems that we had already been worried about. So we looked to it as some confirmation. I don't think one should say it's only the Land Compensation Board, because it is in fact the Land Compensation Board that really has dealt with most of the expropriation law so far. If their decision shows a problem, I think there's a problem.

MR. COOK: Mr. Chairman, can I ask a supplementary question? In the Forster-Mah case, as I understand it, the mortgage value was discounted by 25 percent. It seems evident to me that at the time of the mortgage being placed, a lot of people got out of whack with the market and were perhaps lending — I know we've had problems where mortgage lenders were not being prudent and actually encouraged people to take on onerous amounts of debt. At the same time, a person with very little equity who wanted to buy a house was allowed to do that, and both sides are in trouble now. Perhaps this would have the effect of disciplining the marketplace, on the side of both the purchaser and the person offering the mortgage.

MR. HURLBURT: There's no doubt that that was a case of speculators plunging the market up beyond any reasonable place for it to be, and indeed it's a little difficult to cry too hard for the holder of the mortgage in that case. I think the land had been sold for $120,000 with a $110,000 mortgage, or something like that, and it had been parlayed up to that level. The problem isn't so much that as the fact that there was a deal, a contractual arrangement entered into, under which the landowner owed $110,000. That was discounted to $100,000 because of the interest rates, but then there is $100,000. The landowner has really got nothing, but he gets $25,000, which is subtracted from the mortgagee, the vendor. When you get down to those facts, that's where the problem is. It isn't the fact that the land value and the mortgage value went down and so on. That, again, we would foresee, and it wouldn't trouble us. But it's that extra hitch that really seemed to be the wrong. Mind you, the mortgage lenders would also look at the 25 percent discount as being wrong, too, but that's a matter of opinion.

MR. MIRTH: Mr. Chairman, if I might just add to that. In the context of that particular case, the lender involved was not a conventional variety of lender. It was a sort of "vendor take-back" kind of mortgage. What happened to the lender there that really exacerbates the problem is that he got a double whammy: number one, his mortgage was discounted back from $110,000, and then he got hammered again by the 75 percent concept. As a result, the case comes out with a particularly unfair result from the lender's point of view.

MR. FROST: Taking the other side, too, my reading of the case is that it would appear that with a little better evidence the 25 percent discount might have been reduced somewhat. That's just speculation, but I think this is one case you have. Perhaps mortgagees faced with similar situations before the board might perk up a bit and make sure that they present a better case. I think you're being asked to change the law on the basis of one case in which, it would appear from reading what the Land Compensation Board has to say, they were forced into the situation of making that 25 percent discount. That would be my comment on that.

MR. COOK: Mr. Chairman, if I could ask one final supplementary. Is it reasonable for the Legislature to consider this on the basis of one case where it's gone before the board and you're happy with the result, and another case where perhaps enough documentation was not provided and both parties seemed to be — maybe "negligent" is too strong a word but probably not using good judgment either in the case of the person taking the loan or the company offering it? Does that establish a trend that we should look at?

MR. HURLBURT: Mr. Chairman, it's more our own look at the thing that has caused us to worry about it. With what we think are sober second thoughts, we don't see how it can work. The case came along about the time we were getting worried about it. I wouldn't say that one swallow necessarily shows that we're in the depths of winter or something. I think it's more a case of looking at the section, looking at the provisions, and trying to see how they will work when future cases come up. Again, we think there's a real danger that people are going to litigate these things unnecessarily and results are going to come out, because we can't see how they come out right but will be thought wrong.

MR. CHAIRMAN: Thank you. Mr. Clegg, you have some observations.

MR. CLEGG: Yes, Mr. Chairman. I have three quick comments to make, one with respect to the Forster-Mah case. It may well be that it wasn't well argued. Perhaps there were good arguments that could have been made that could have prevented that discounting because, after all, the parties had agreed on that mortgage. But it's not uncommon for a person who takes back a mortgage, by doing so, to enable a sale to be made at a fairly good price and thereby take his profit at that end — take back a mortgage at a fairly high leverage and take a risk that goes with it. I don't know whether that happened here, but he may well have been able to make that sale at $125,000. If he hadn't offered any take-back, he might have got only $100,000 for it in the first place, in which case he took his risk. He decided to push the deal around a bit with what he was prepared to offer.

With respect to timing, there is no element in either of these two proposals which really compensates for an untimely taking. It is possible to argue that if a person is expropriated at the bottom of the market and if it's a general market situation rather than a particular timing which affects his piece of land, his remedy is to go out two or three days later and buy a similar property, still at the bottom of the market. He will get some disturbance compensation for having to go out and do that, just as the mortgage lender will have some disturbance compensation for having to go out and reinvest his money. That can apply both with a residence and with commercial land. I think that is the general remedy which is open to anybody: get back in the market immediately.

As far as the general principle, the thing which distinguishes the two solutions, it seems to me to be the question of whether a mortgage lender is in any way a co-investor. Is he also taking a risk along with the owner of the land? To what extent is he playing along with the market when he lends money and secures money on the land? There's no doubt that when a mortgage lender is approached to lend money, he will look at the land, at its value, at the possibility of its value going down, in both a general and a special sense, if the land happens to be located in an area where something might happen, and he will look at the record of the mortgagor. He will decide what terms to offer his money on, at what price to sell his money. He may decide that there is a risk, that the land may go down in value, or that the borrower may not be a very prompt repayer, and he may fix a fairly high rate of interest. If some of those things do in fact go wrong and the land is expropriated or if the land value does go down, he has already assessed those things. You could take the position that he has collected his reward for taking those risks in the higher interest rate he has been charging.

It is arguable that the proposal to just go back to the mortgage balance, which is indeed much simpler, has the effect of sheltering the mortgage lender entirely from all those risks which he has indeed looked at and for which he has perhaps charged a higher rate of interest or maybe even declined the mortgage and forced the borrower to go to a person who does take higher risks for higher rates of interest.

It is all very well for the mortgage lenders to say, and they can easily say, that they will take the rough with the smooth. They will allow a 20 percent mortgage to be expropriated and suffer, and they'll take a 10 percent one when they will gain, but they can do this because they have a business. They are taking back mortgages every day. The landowner generally only gets expropriated once in his life, unless he's very much in the business of owning land. What happens to him is not something he can average out next month with some other mortgage or average out three or four years later. He only has one chance, and that is an argument for making certain that he gets a very fair assessment of his interest in the land.

So the way I see it, and maybe Mr. Mirth and Mr. Frost will comment on this, is: are we not talking about the philosophy of whether mortgage lenders are involved at all in the ownership of the land? Should they be regarded as people who are completely detached from the risks attached to the land, or by going into it and lending money to the owner and taking interest at a rate which they determine, can they be said to have been accepting some of the risks, some of the upside and some of the downside, the upside being an uninterrupted flow of high interest and the downside being maybe losing something on an expropriation or a bad loan?

MR. MIRTH: If I might respond, two things are perhaps too confining a focus in those statements. I respect the validity of the statement in many contexts — in the context, for example, of a nonrecoursable single-family mortgage. But number one, to talk about a mortgage lender is too narrow. We're here talking about all security interests, and that could include a loan by a bank that's basically made for somebody's purchase of a business, and is secured, incidentally, on land. It includes the person who sells his only real estate asset, his home, and takes back a vendor take-back mortgage.

Similarly, focussing on the land — and this is the fundamental problem with the existing statute and its limitations — is too narrow a focus. You cannot do that and cope with the Shell Canada Limited example that does exist in the marketplace, is part of that great mass of things that are security interests lumped together in the statute. This statute has to cover all of those things and work for all of them, or it becomes impractical. The reason lenders suggest going back to the payment of the outstanding balance is because it's the only method that's going to be practical.

MR. HURLBURT: If I might say, Mr. Chairman, I usually try to occupy the high moral ground. Mr. Clegg has got there this time. My real concern is: will the high moral ground work? My answer really is: it's unworkable.

MR. FISCHER: You mentioned before, and I didn't catch it, what it was like in the rest of Canada. Is it all the way the present situation is now?

MR. HURLBURT: No. It's the way we're recommending. The situation across Canada, including Alberta, was what we've called the outstanding balance theory. The mortgage gets paid off according to the mortgage account. In 1973 we recommended the change to the market value theory, and that was built into the Alberta legislation. But everybody else is still on the other basis.

MR. FISCHER: In your eyes, does the way we're recommending it now protect the lenders?

MR. HURLBURT: I don't think it basically protects either lender or owner as a class. It all depends on which way interest rates are going.

I personally don't think there's much difference. If you look at lenders as a class and owners as a class, I don't think either rule favours one more than the other. In individual cases, obviously, an individual will be favoured one way or the other but not as a class.

MR. CHAIRMAN: One of the things that has been alluded to but the point wasn't brought out was that in the case of a 12 percent mortgage when interest was 20 percent, it actually increases the value of that property or the sale potential of it. Was that brought into the award by the expropriation?

MR. FROST: It was alluded to in the evidence before the board. When the appraiser appraised the property, the fact of having a very advantageous mortgage on it would affect its value. The appraiser looked at the value of that property and said, "What would a similar property with the same attributes bring?" One of the attributes was an advantageous mortgage So on a proper evaluation of any property, I think it's valued with what comes with it.

MR. CHAIRMAN: I see.

MR. FROST: It's just like having a good view. A good mortgage is another attribute.

MR. CHAIRMAN: So low interest rate was part of the value of the property?

MR. FROST: I believe that was taken into account, yes.

MR. CLEGG: But if the proposal is adopted, that will no longer be available, because it will be valued as if it was clear title.

MR. CHAIRMAN: Are there any other questions?

MR. COOK: Mr. Chairman, not a question but an observation. I was discussing this with you earlier. Perhaps it would be timely to consider this in detail tomorrow.

MR. CHAIRMAN: Yes. The plan was to hear the arguments or debates and then allow the committee to digest it until tomorrow. Then we would perhaps have Mr. Hurlburt come in, in case there were some questions the committee wanted to ask him. But I think we have to evaluate tomorrow what we feel should be the recommendation. We have a meeting called for 10 o'clock tomorrow morning.

MR. CLARK: Can I ask one more question to clarify something? Would your proposal guarantee that the outstanding balance of all the loans against that property would be paid? Is that it?

MR. HURLBURT: Up to the value of the land.

MR. CLARK: Up to the value of the land that's taken?

MR. HURLBURT: Yes. The money would go first on the mortgage. The mortgage is the first charge. If the mortgage is the first charge, it would be paid first.

MR. CLEGG: The question brought up something which I hadn't thought of. When that happens, if damages are paid for injurious affection of other land, that is not distributed to the security holder, is it? It goes to the person whose land has been affected.

MR. HURLBURT: I'm talking primarily the value of the land; also, I think, the injurious affection part but not the disturbance damage part.

MR. CLEGG: Because there are cases where the injurious affection award is significantly more than the reward for the land taken, particularly in farming operations. If you take a six-foot strip across the middle of a field, they may get $5,000 for that and maybe $50,000 in injurious affection for the rest of the farm.

MR. HURLBURT: Oh, just a minute.

MR. MIRTH: Mr. Chairman, I believe the injurious affection would have to be part of what goes on the mortgage, because the mortgage on a partial taking is still going to remain on the balance affected. The disturbance aspect in terms of moving costs and so on — I don't know what the present regime would be. Do you know, Mr. Frost?

MR. FROST: I believe it would get to the owner.

MR. CHAIRMAN: Don Sparrow, you had a question?

MR. SPARROW: Yes, Mr. Chairman. In the evaluation, I have a concern that maybe hasn't been addressed. In the economic times we've gone through in the last two years, we've seen the appraisals not being fair in the long run. If there is no market, there is very little for the appraiser to compare against. If we are going to make some changes, I think we should consider looking at that aspect of it, where the minimum on expropriation should be set in for the landowner of cost plus cost of improvements as a base. I've seen many cases where buildings have been foreclosed on mortgages, and the appraised value has been brought down so dramatically that total equity has disappeared on the proponents. We wouldn't want that same case to happen with reference to expropriations. We should have some basic rules on appraisals, because it's been hard in the last three years to get a reasonable, fair appraisal, and we always talk about market value being tied to an appraisal.

MR. HURLBURT: We are outside our particular report, Mr. Chairman. Anything the Legislature asked we would undoubtedly consider.

MR. COOK: Mr. Chairman, if I could make a comment on that point. I think it would relate more appropriately to Mr. Clegg's earlier remark that if the appraised value is low at this point, the person would simply have to take that same money and go and buy some more property and re-enter the market.

Mr. Chairman, is it timely to move a motion to adjourn today's discussion?

MR. CHAIRMAN: If there are no other questions for Mr. Mirth or Mr. Frost, it certainly would be.

MR. BATIUK: I'll second it.

MR. CHAIRMAN: Okay. We will meet again tomorrow morning at 10 o'clock. I'd like to thank Mr. Mirth and Mr. Frost for attending and for their presentations. We found them very interesting. It leaves us with something to think about, certainly, on what recommendation we will make on this subject.

[The committee adjourned at 3:13 p.m.]