[Chairman: Mr. Musgrove] [10 a.m.]

MR. CHAIRMAN: Good morning, members. We'll call the meeting to order. As we don't have yesterday's minutes, we'll dispense with that.

Today we have to make a recommendation, and as I see it, there are three alternatives. We can recommend that we stay with the present law, or we can recommend that we go with the institute's proposal. Another alternative is that we find we're not well enough informed and that we not make a recommendation at all.

We've been through this at least twice now, but I think I'll ask Mr. Hurlburt to go over the facts again. If we stay with the present law, who benefits from that recommendation? Or if we go to the institute's proposal, who would benefit from that recommendation? Then we will have discussion from the members.

MR. HURLBURT: As I understand, Mr. Chairman, the question you want me to talk about is: who benefits from which? There are three slightly different points. One is the actual compensation for the land. Secondly, there is a home-for-a-home provision, which I'll come back to, that applies sometimes. Thirdly, there are disturbance damages.

If you look only at the compensation for the land itself or for the interests taken, I would say there is really no preference between classes by any of these rules. At any given time there can be. If interest rates are rising, the mortgage lender will get more by being paid his outstanding balance and the landowner will probably get less. If interest rates are falling, the mortgage lender will do better by the market value thing and the landowner will do worse. But looking at it overall, there's no reason to say that any class will be better or worse off. The expropriator will probably be about the same. It's impossible to say whether he might pay a little more sometimes or a little less other times. The only exception I can think of is that the holder of a very shaky mortgage will probably always do better under the outstanding balance thing; that is, if the security isn't very good. But that, I think, is not terribly significant.

As far as the compensation for the land itself and the interests in the land are concerned, You're not really talking about rules that favour one or the other. In specific circumstances, one rule will favour one and one rule will favour another. Certainly, examples are easy to think of where one rule will benefit the landowner and the other rule will benefit the mortgage lender, but it all really depends on where interest rates are going.

The home-for-a-home provision will sometimes qualify what I've said. That is a special section, 47, in the Expropriation Act, and it says:

> the Board [or the court] shall, after fixing the market value of the land used for the principal residence of the owner, award such additional amount of compensation as . . . is necessary to enable the owner to relocate his residence in accommodation that is at least equivalent to the accommodation expropriated.

I think I would still say that the two rules are colour-blind or don't discriminate, but you can have the comfort that if a given rule in a given case would give the homeowner who's living in the house less than the other rule, then the home-for-a-home will make it up to him. If he gets less because of whichever rule is adopted, the board should still go on and give him enough to find another house. That does not protect anybody but the homeowner who is living in the house, so you can regard that as a qualification or not. To the extent that it operates, it would give the homeowner the best position and penalize the expropriator to some extent, because if he's got to find money to replace the house, he may have to find more money than the market value of the house.

Then there is the subject of disturbance damages. What that says is that if by expropriating him you have put somebody to expense over and above the market value of the property, the person expropriated is entitled to get that expense back. I think this will tend to give the property owner who has received less money because of whichever rule is applied a chance to recoup himself if he has to go out and find another piece of property and if he can't find a mortgage at the rate he's been paying in the past. So I think there is built-in protection there for the property owner. If the mortgage lender is paid out on the outstanding balance theory, the property owner will still have an opportunity to go to the board or the court and say: "You've expropriated this piece of

property with this lovely mortgage. If you just give me the market value of the land less the mortgage, I can't go out and replace the existing mortgage. Because the interest rates were very beneficial and favourable to me, I have suffered this extra damage." I believe that would be a proper element of disturbance damage.

If you move to the outstanding balance theory, in a given case you may confer a better position on the mortgage lender than the mortgage lender now has. On the face of it, that would mean a worse position for the landowner. But assuming the landowner is going to relocate a business or something and needs a replacement property, he might be able to make the position stick that he's entitled to be compensated because he's lost a property with a good mortgage and is going to have to buy a property with a worse mortgage. That would be a matter for the board; it isn't a matter of law. If that is done, then more burden is shifted to the expropriator, because the expropriator would be the one to pay that disturbance damage.

By and large and on the average, I think you should consider these rules as not really favouring anybody as a class. In individual cases, yes, but you don't know how many individual cases are going to be promoted by one rule or affected adversely by the other. So I think what you should really be looking for is the rule that in principle is fairest and most workable. I think you have to consider both those elements.

MR. CHAIRMAN: Mr. Hurlburt, in the case of the outstanding mortgage, the disturbance factor generally wouldn't apply? Is that what I understand? The disturbance allowance for a person to have to go and . . .

MR. HURLBURT: If we reverted to the outstanding balance theory and put that in legislation and turned up a case in which the landowner has a very favourable mortgage, the rate is low, the first step would be that the compensation for the land value would be divided up. The mortgage lender would get the face value of the mortgage, whatever is outstanding, and the landowner would get the rest. That would tend to penalize him, because he's lost a good mortgage and, if he's going to relocate, will have to take out a worse one and his land compensation won't pay for it. But where he has to find premises to replace those expropriated, I think the extra cost of financing would be a reasonable cost and expense under the disturbance damage section.

The Act does not specifically say that the cost of refinancing would be such a disturbance cost, but I think it would be. If the Legislature thought that was an important enough principle to state specifically, that could easily be done. I think it is within the contemplation of the existing Act. The existing Act doesn't say so in so many words.

MR. CHAIRMAN: Questions or comments?

MR. COOK: Mr. Chairman, yesterday I think I expressed the feeling that with one case that Mr. Hurlburt believed had worked out favourably — I believe it was the case in Edmonton — and another case, Forster-Mah, that had not worked out appropriately, we're being asked to make a recommendation to the Assembly that we should revert to another form of the legislation, the form used in other provinces. In the sense that it's now about 12 or 13 years since the new Act was adopted, I wonder if we've had enough time. We've gone through a period of rapid inflation of prices and now deflation of probably 25 percent, and I don't think we've really got into a steady state in the marketplace. We're being asked to look at this the basis of one case.

I wonder whether it wouldn't be reasonable to stop and take another look at it a few years down the road, when we've had a little more time and a little more case law. Mr. Frost from the city of Edmonton argued yesterday that the one case in question, the Forster-Mah case, wasn't well argued and that had counsel used all the resources available to them to put the case, the results might have been different.

I like to approach a problem like this basically on the premise that if there isn't a major problem, we should leave it alone. I would argue perhaps a little later that one option to the committee is to do nothing, and that might be one recommendation.

MR. HURLBURT: I don't really want to reargue the whole thing, Mr. Chairman. Your point is: it's too soon, which is basically what Ed Frost was saying. That's certainly a position that can be taken. My own position is that the day after

this Act went in, we started to worry about this point. We'd looked at it two or three times. We were beginning to think that there were intractable problems with it. This one case came along and jarred us that much more on it. The position the institute is taking isn't that this case shows the whole scheme is bad, but we think the whole scheme is unworkable and this case is some evidence of it.

With that, I can only leave it with you. I suppose I'm in the happy position that we have to be right either in 1973 or now or, alternatively, that we have to be wrong, and that isn't happy, either in 1973 or now. So our feelings won't be dreadfully hurt one way or the other. We do think there's a problem, but that's for you people to worry about.

MR. CHAIRMAN: We had two circumstances cited yesterday. We had the $110,000 mortgage with the property valued at $100,000. We also had the property that was valued at $56,000 with a $28,000 mortgage. Are they the only two examples or were there many more?

MR. HURLBURT: I don't know how people are settling, but those are the only two we're aware of that have gone to any form of litigation. They're the only two that have gone either to the Land Compensation Board or to court, and they're both to the board.

MR. CHAIRMAN: Mr. Clegg, you had a comment?

MR. CLEGG: Yes, Mr. Chairman. I'm wondering if there is a specific concern about what happened in the Forster-Mah case. One way of dealing with that would of course be to introduce a little more guidance on the evaluation of mortgages and say, for example, that a security should not be reduced in value when it's being assessed solely on the ground that it represents a high percentage of the market value of the land. In this particular case it seems that they took as an over-riding provision that nobody in their right mind would lend more than 75 percent of the appraised value of a piece of land, which of course is an opinion, but many people do lend more than that and, in fact, in this case they did. Some interpretational direction could be put in the Act to deal with that particular problem.

MR. HURLBURT: Yes. Mind you, I think the board is quite right in principle. Whether the facts justify it on that point, I don't know. The point that troubles me is then giving it to the landowner, because the result is very odd. The landowner, without equity, gets money at the expense of the security holder.

But yes, it would be possible. One thing we had thought of suggesting as an alternative — ultimately, we didn't — is that you could put some kind of direction in the Act, make it clearer that that kind of result shouldn't follow, if that's the opinion of the Legislature.

MR. CHAIRMAN: But on lots of home mortgages there is a 90 percent mortgage on the property, as of 1981 at least, so the theory that a lender shouldn't lend more than 75 percent of the value of the property has been shot down by the actions of some of the mortgage companies.

MR. HURLBURT: Whether the board was right on its facts, I don't know. They may have been. This wasn't a home property; it was speculative property, and so on. So whether they would apply the same factor elsewhere, I couldn't say.

MR. MUSGREAVE: Mr. Hurlburt, I want to ask you something to clear my mind. Would what you're recommending prevent what's happened in item 2 with the present law?

MR. HURLBURT: What is item 2?

MR. MUSGREAVE: Where the mortgage was $110,000 but the market value was only $100,000. Would that prevent that situation from happening?

MR. HURLBURT: Yes. On those facts the mortgage lender would have got the whole compensation and applied it on the mortgage account. In that case it was a vendor, a seller, not a lender who took back a mortgage.

MR. CHAIRMAN: He would get the whole $100,000?

MR. HURLBURT: He would get the whole $100,000.

MR. CLARK: I don't know whether this is the

place to say this or not, Mr. Chairman, but I will anyway. It seems to me that about 10 years ago we made some changes in this Act because it wasn't perceived to be fair at that time, and this was going to be an improvement. Now you people are finding that that wasn't the way to go, that we should go all the way back to where we were before, which we agreed at that time wasn't perceived to be fair.

I'm not sure we shouldn't do some sort of a study on this and get some input from the public before we make any decision on it — something like we did with the Surface Rights Act -- so that someone a little more knowledgable than we sitting here are . . . There are a lot of people sitting here who have never had to use the Expropriation Act, and I don't know whether we could say, "Let's go back to what we had before," which we decided at that time wasn't right. I'd like to see some study done before we make any decision on it.

MR. HURLBURT: Might I comment on that, Mr. Chairman? I don't think you're going to get any help. I think you might as well make up your own minds or, alternatively, get some specific advice. I don't know whether Mr. Clegg gives this kind of advice to you or whether you would want it from the Attorney General's department, but that's one thing you could do. Beyond that, I think your own difficulties in coping with this — and I'm not suggesting you can't — would be enough to indicate that the public isn't really going to be able to sit down and read this thing or think about it and come to much in the way of conclusions. It is a comparatively small point in the Expropriation Act, and I really think you're in as good a position as your constituents to make up your minds on it.

MR. COOK: Could I move that the committee not make a recommendation on this particular report?

MR. CHAIRMAN: Would you say that again, Rollie, please?

MR. COOK: I move that the committee not make any recommendation on this report.

MR. HURLBURT: Do you want me here while you're discussing the motion, Mr. Chairman?

MR. R. MOORE: Unless we get a seconder, we aren't doing anything on it anyway, are we? If it goes to discussion, I'd like some clarification, but if we haven't a seconder, we'll see.

MR. CHAIRMAN: We don't need a seconder.

MR. R. MOORE: For clarification, does that mean the mover is saying that we just don't do anything: we aren't turning it down, and we aren't approving it? Is that the way you want it, just left hanging in the air?

MR. CHAIRMAN: If we do make some type of motion like that, I think we should have it tied to a reason why we're not making the motion. One of the reasons could be that we're only looking at two different examples, which probably is not enough of a reason we should recommend a change. Or we could recommend that we don't make a decision until there have been further examples to prove to us that there needs to be a recommendation for a change.

MR. COOK: If I could speak to the motion in debate, Mr. Chairman, there are two cases before us. Mr. Hurlburt has suggested that one case, with regard to the city of Edmonton expropriating some parkland in the river valley, went well, that the basic principles of expropriation were used and there was a fair resolve. A second case involves the acquisition of a Shell service station property, I understand, the Forster-Mah case.

MR. HURLBURT: Sorry, it wasn't a Shell service station, but that doesn't matter.

MR. COOK: I'm sorry. That was an example that might have been given.

MR. HURLBURT: It was a speculative piece of property.

MR. COOK: A speculative piece of property, where the vendor sold the property to another individual with a take-back provision and, by doing that, probably succeeded in having the price considerably inflated, and with that result, his speculative venture was not rewarded, because he ended up losing some money on the deal. That's the other case before us.

These are the only two cases that have gone

to the board in 12 years, which I think doesn't indicate a serious problem. The problem isn't serious in the sense that it isn't being litigated extensively, and one of the two cases went well. Counsel before us yesterday argued that in the other case the arguments weren't well put, and there might have been a different result had they been well argued. I don't think there's enough evidence for us to really proceed intelligently one way or the other to make a definitive statement to the Assembly that we should adopt the institute's 1973 model or the institute's 1985 proposal.

MR. MUSGREAVE: Two points. First of all, we fund the institute to do the research and to come forward and make recommendations. Is that correct, Mr. Hurlburt, or not?

MR. HURLBURT: I didn't quite hear your question.

MR. MUSGREAVE: We fund the Institute of Law Research and Reform, do we not?

MR. HURLBURT: In part.

MR. MUSGREAVE: You, in effect, review the law and its consequences and report back to us and give us suggested ways of doing things. Is that correct?

MR. HURLBURT: That is correct, Mr. Chairman.

MR. MUSGREAVE: This is one reason I can't see our delaying it. I think we should try to make a decision here, and the decision should not be to delay and not make a decision.

On the point of the motion, I think it's all very well to say that there hasn't been any hardship of a significant nature. On the other hand, if you're the person who suffered that hardship, you wouldn't have much respect for the law if you got hurt by it and possibly got hurt severely. If we recognize that there is a problem there, and if all the other provinces are taking a different approach to it, surely that should tell us something, particularly those provinces that probably have had more experience in dealing with this than we have. There are more people there, so obviously there would be more cases. I think it would be unfair to those people who might be hurt by our not taking action.

MR. CHAIRMAN: Are there any other comments?

We have a motion on the floor. Do we have the motion written down?

MISS CONROY: Mr. Cook moved that the committee not make a recommendation concerning compensation for security interests in expropriated land.

MR. CHAIRMAN: Are you ready for the question? All in favour of not making a decision? Opposed? The motion is lost.

We have the other two alternatives: to recommend that we stay with the present law or recommend that we go to the institute's proposal. Do we have any comments on either one of those?

MR. MUSGREAVE: If you're open to comments, Mr. Chairman, I'll recommend that we recommend the proposal of the institute to the Legislature for its consideration.

MR. CHAIRMAN: Questions or comments?

AN HON. MEMBER: Question.

MR. CHAIRMAN: The question has been called. All in favour? Opposed? It's carried. So we are recommending that we go along with the institute's proposal for change.

This being the end of the mandate of the Law and Regulations Committee until we again sit in the Legislature and approve some other topics, this will be the last meeting until after the next sitting of the Legislature. I have to say that I appreciate the interest we've had in the last year in the Committee on Law and Regulations. Certainly, we've had improved attendance ever since it started. So there has been a lot of interest. Also, I would like to thank Mr. Hurlburt for his participation. He's certainly done a good job of explaining these issues, and we'll look forward to going through this procedure again when we have some other topics. Thank you very much, committee members.

MR. R. MOORE: I move we adjourn.

[The committee adjourned at 10:31 a.m.]