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A Comparison of U.S.-Canadian Excess Condemnation, Expropriation and Property Taking: A Valid Form of Governmental Recoupment of Added Value

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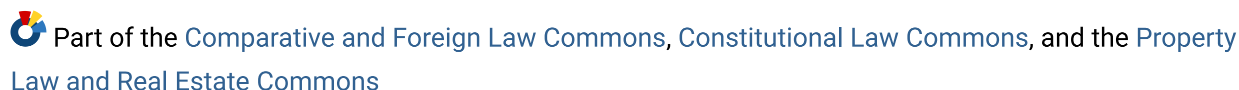
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A Comparison of U.S. - Canadian Excess Condemnation, Expropriation and Property Taking

A Valid Form of Governmental Recoupment of Added Value?

Andrew Bechard

Introduction

In the United States, all levels of government are being made painfully aware of a crumbling infrastructure.[1] The continuing deterioration of this structural base threatens to seriously debilitate municipal and urban centers through exacting major capital expense and investment, which proves to be problematic for state and municipal budget offices. The past ten to fifteen years have seen a political shift toward public policies which de-emphasize social service and infrastructure expenditures on the federal, state and municipal level.[2] The advent of fiscal restraint in these areas and the resultant deterioration necessitates new ways of approaching infrastructure building and rebuilding, while also allowing intelligent and planned expansion. If the huge structural bases of U.S. cities and regional areas are to be maintained and expanded, new methodologies of finance and development must be developed which can offset the enormous capital expenditures required.

This essay will examine a method that a municipality, city, public authority or other public entity might use for offsetting some of the expense involved in infrastructure development. Two land planning legal doctrines will be addressed, the first being the U.S. doctrine of excess condemnation.

Excess condemnation is the exercise of eminent domain powers (a fifth amendment "taking"[3]) wherein the condemning authority takes more land than is physically necessary for the public improvement.[4] In fact, the term "excess condemnation" is a misnomer. The term does not mean an "excess" beyond that which is legally permitted, but refers to an excess of property needed to construct the public project.[5]

An additional inquiry will be made into the Canadian doctrine of expropriation — the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers.[6] To provide a coherent and concrete analysis in which such methods may be used, this essay begins with an examination of a particular urban problem, and then moves on to a doctrinal exposition revealing how each approach allows for a governmental recoupment of the added value bestowed on private property by a public project. Significant value increases in private property are often created by the installation of public facilities; a recapture of a portion of the added value which society creates is rational and appropriate and is discussed within.

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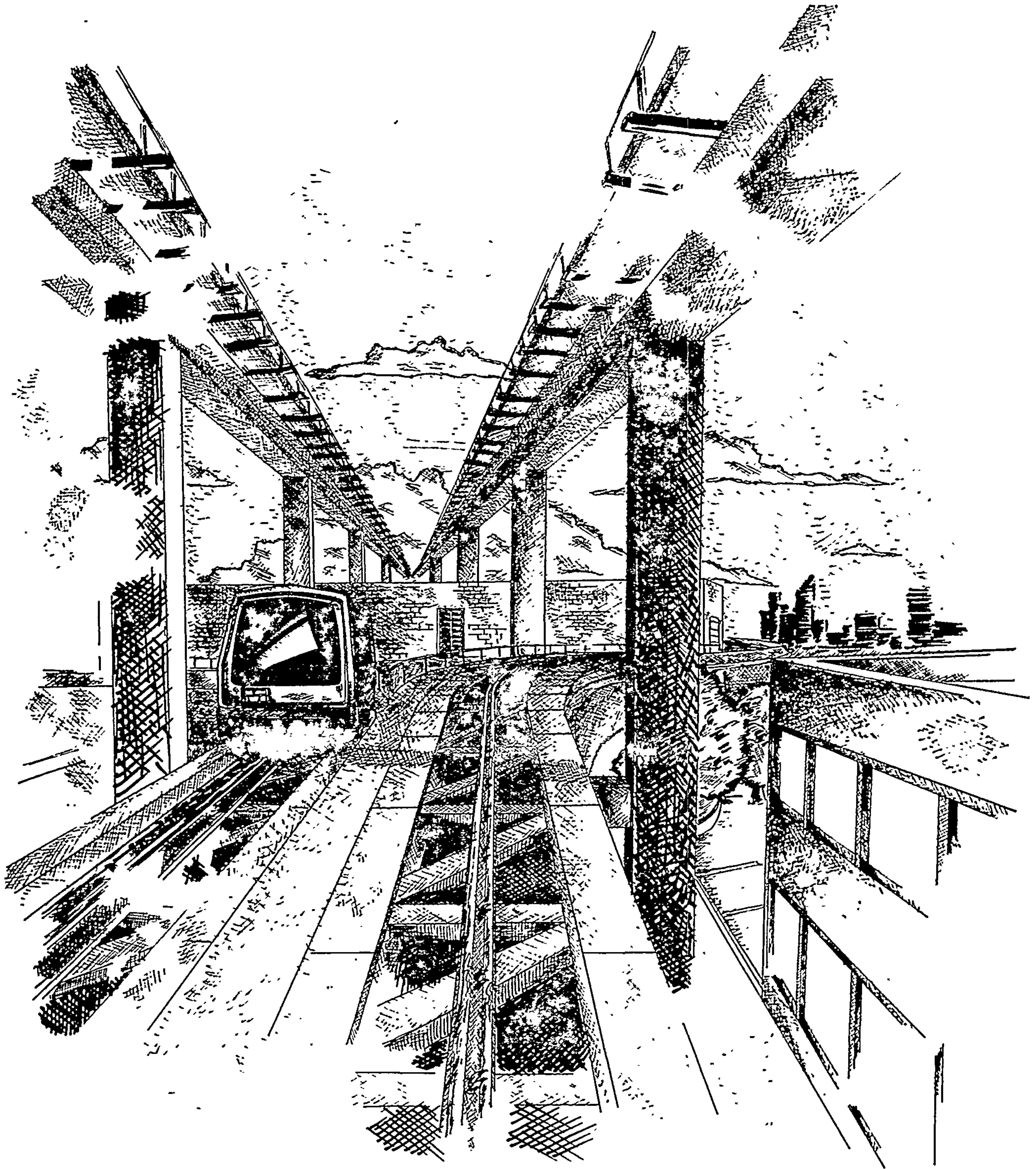
Urban Mass Rail Transit as Example[7]

In an attempt to reduce the crush of intercity private auto traffic, conserve energy resources, and reduce metropolitan pollution problems, more than fifteen North American cities have constructed new urban mass rail transit systems in the past two decades.[8] In addition, many of the urban rail transit systems existent prior to 1965 have made additions to their original lines.[9] While the past ten to fifteen years have seen the advent of fiscal restraint in social service and infrastructure expenditures on the federal, state, and local level,[10] there is still a general continuing need for urban mass rail transit in North American megalopolis regions and medium to small size cities.

The birth of the U.S. Urban Mass Transportation Administration (UMTA) occurred in January of 1968,[11] with UMTA established as an agency operating under the umbrella of the Department of Transportation. While the Urban Mass Transportation Act of 1964 established the first comprehensive program of federal assistance for urban mass transportation, the Urban Mass Transportation Assistance Act of 1970[12] included substantially increased funding and officially designated UMTA to provide consolidated management for all federal mass transit programs.[13]

Although a flurry of activity was taking place on the urban transportation front in the late 1960's resulting in the UMTA, that activity has yet to substantially subside as evidenced by the recently completed Buffalo (Fall 1986), Portland (Fall 1986) and Atlanta (Summer 1986) systems. Nevertheless, as stated above, federal funding commitments have not matched existing interest. The reasons



for such continued interest remain much as they were during the 1960's and 70's building heyday of urban rail transit systems, primarily the failure of private auto/highway/public bus transportation systems to meet the peak demands of the suburban and ring neighborhood to downtown work commute.[14] During the four peak rush hours of every working day the surface highway gridlock experienced by urban centers can be greatly reduced by tens of thousands of private vehicles when underground rapid rail transit is utilized.[15] In addition to the physical deficiency of the urban center in dealing with traffic, there are other social factors making urban rail systems desirable.[16]

In light of the continuing needs for urban mass rail transit construction in the present atmosphere of fiscal restraint and pragmatism, excess condemnation doctrine may assist cities or transit authorities in partially defraying some of the tremendous capital expenditures involved,[17] or system operating costs. Wherever a subway station is located in an urban area, that area instantly becomes accessible to a larger number of persons who, because of their carlessness or physical handicap, may not have been able to frequent that area before. The station area immediately becomes a hub of social interaction, a magnet for commuters, shoppers and anyone traveling within the city. Because of the heightened traffic, retail possibilities increase, commercial rents increase as do residential rents and property values in general.

What we now have is an area with "added value" resulting from the construction of the subway station. The private property owners in close proximity have reaped a monetary windfall from the new area hub, built as a public project and funded with public monies.

The major question that this paper will deal with is should those private property owners be permitted to retain that windfall or is it possible for the public entity to reclaim or recoup the "added value" to the properties surrounding the public project? Should it be possible for the public entity to reclaim the added value along a rail transit route for example, if that increase in value did not necessarily constitute a net increment to the city's total land value? Furthermore, if the transit line is a catalyst which made possible the realization of potential values that would not otherwise have developed, should there be promotion or prohibition of the use of excess condemnation doctrine to recapture that added wealth concentration?

Excess Condemnation Law in the United States

> The supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society which was the end for which they entered into it; too gross an absurdity for any man to own. Men, therefore, in society having property, they have such a right to the goods, which by the law of the community are theirs, that nobody hath a right to take them, or any part of them, from them without their own consent; without this they have not property at all.[18]
>
> J. Locke

The framers of the U.S. Constitution were heavily influenced by natural law theorists such as John Locke. In the words of James Madison, "government is instituted no less for the protection of the property, than of the persons of individuals."[19] There are broad limitations written into the U.S. Constitution that limit the power of eminent domain as a result of these philosophical underpinnings.

Eminent domain in its broadest sense, is the power of a sovereign entity to take property for public use without the owner's consent.[20] The fifth amendment of the U.S. Constitution provides us with the relevant language:

> "[N]or shall private property be taken for public use without just compensation."

Additionally, fourteenth amendment language regarding property rights[21] have caused fifth amendment protections to be held applicable to the states.[22] Many states have adopted their own fifth amendment within their own state constitutions[23] since a great deal of condemnation is done by the states or state empowered entities.[24]

The law of eminent domain requires a two-fold inquiry in any situation in which a property owner claims that he has been deprived of his property without just compensation. First, it must be determined if the individual in question was deprived of his property without just compensation. Stated more simply, was the individual fairly remunerated for any taking that has occurred? Second, has the government the power to take the property in question? An exercise in eminent domain is only valid where it is found to be for some "public use". The second part of the inquiry measures the scope of eminent domain and involves an inquiry as to the objective for which the power is invoked.[25] This examination of the growing definition of public use will be the major inquiry into excess condemnation.

Public Use[26]

The doctrine of required public "use" has been progressively liberalized over the course of American jurisprudence. Formerly it was construed to demand actual physical use by the public.[28] This view was weakened in the late nineteenth century as courts and legislatures began to recognize exceptions to the public use requirement for such instrumentalities of commerce as utility and railroad rights-of-way.[29] Public "purpose" became the substitute criterion for public use. This public purpose doc-

trine has evolved into the concept that if the exercise of eminent domain in a given case will materially benefit the public or a considerable portion thereof, as by enhancing the public welfare of the prosperity of the community, the exercise is for a public purpose and valid.[30] This generous attitude has been greatly nourished by modern cases regarding urban renewal.[31] Urban renewal involves redevelopment authorities, which condemn "blighted" areas, see to their razing, and then resell the land to private parties. To justify investing these agencies with the power of eminent domain, the courts went to great pains to destroy any vestiges of the theory that direct public ownership and use was always essential to public purpose.[32]

This progression has expanded to the point where, given the proper circumstances, a government may take an individual citizen's private property and transfer it to another private party or corporation to satisfy some ultimately pliable public need. Municipalities seeking economic advantage or reprieve have used their power on behalf of private enterprise in return for the promise of jobs, tax revenues, or other, less obvious benefits.[33] Such was the case when, in 1980, the General Motors Corporation asked the City of Detroit to buy and demolish everything that stood on the 465 acre tract that the company wanted for a new assembly plant. The city agreed, and in *Poletown Neighborhood Council v. City of Detroit,*[34] the Michigan Supreme Court upheld the plan. The plaintiffs, some of the 4,200 residents of the old inner- city neighborhood, protested that the city had unconstitutionally condemned their 1,100 plus homes for the benefit of General Motors. The city answered that the condemnation served the public's need to stop the exodus of jobs from Detroit. With unemployment in Detroit at eighteen percent and the city's economic mainstay, the auto industry, facing record losses, the city welcomed the potential of six thousand jobs.[35] Quoting the landmark urban renewal case *Berman v. Parker,* the Michigan Supreme Court wrote that "when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.' "[36] Thus, while what constitutes a public use/purpose is ultimately a matter of constitutional interpretation and therefore a judicial question, heavy considerations are given to legislative determinations. In fact, seldom are legislative proposals invalidated.[37] Courts have generally stopped addressing the issue of what the public use/purpose clause permits. They treat legislative authorization as raising the presumption that if a public use exists, there is a presumption of constitutionality.[38] The Minnesota Supreme Court, upholding the condemnation of an office building for a major downtown renewal plan, wrote:

> If it appears that the record contains **some evidence, however informal,** that the taking serves a public purpose, there is nothing left for the courts to pass upon.[39]
>
> (emphasis added)

On the other side of the public use question are jurists such as Justice Van Voorhis of the New York Court of Appeals, who, in writing one of many dissents on the public use issue, in *Courtesy Sandwich Shop v. Port of New York Authority,* wrote:

> This is not all a matter of policy for the Legislature. It is the function of the courts to give effect to the Constitutions, State and Federal. It is the solemn duty of the courts to enforce the constitutional limitation against taking private property by eminent domain except for public purposes.[40]

This view is shared by those courts that read the public use/purpose clause narrowly, but expansion has occurred in *Courtesy Sandwich Shop* and in other cases.[41]

The Recoupment Theory of Excess Condemnation

There are several theories of excess condemnation, including the remnant theory which advocates the taking of extra land - the remnant - if that land has been rendered worthless by the original taking. There is also the protective theory, whereby excess land adjacent to the public improvement but unnecessary to its construction is taken so that the government may control the use of that land either by holding the property or by selling it with the appropriate use restrictions attached. Finally, there is recoupment theory, the area where this inquiry will be focused. Here, the condemning entitity is allowed to attempt to recapture the value bestowed on adjacent property by public improvement through the condemnation and sale of the adjacent property.[42]

Recoupment theory is not a new concept. Napoleon III employed it to finance the construction of many of the broad avenues of Paris still in use today.[43] Recoupment is a European concept and therefore there is little experience with it in the United States; however, recoupment remains a major device in the European and Canadian financing of public projects.[44]

There is little case law which speaks directly to the problem of recoupment and this no doubt is due to the fact that U.S. cities have traditionally considered recoupment to be a typically foreign device for financing public works. But an aforementioned New York case *Courtesy Sandwich Shop*[45] held that a taking for the purpose of stimulating trade and commerce with a reletting to private interests is valid. The taking for the New York World Trade Center was upheld in the face of a charge that the Port Authority intended to rent a substantial portion of this project to tenants only remotely connected with trade and commerce, solely to defer the cost of the project. Although recent cases have not decided the validity of recoupment per se, they definitely have set a precedent for the government to finance public projects through excess condemnation so

long as there is some public purpose associated with the project.[46]

More recently the concept of recapturing conferred value was accepted by Chief Judge Breitel of the New York Court of Appeals in *Penn Central Transportation Company v. City of New York.*[47] In the context of determining whether a property owner was able to obtain a reasonable return on his investment, Breitel recognized that much of the value of a piece of urban property was not the result of private effort but actually resulted from opportunities for exploitation made available by a community. Breitel believed that society was entitled its due to the extent it had created value.

This opinion tends to echo the social philosophy espoused by the American economist Henry George. Writing in the nineteenth century, George proposed that the value of land is created by the settlement of people around it and not by anything the owner has done (excluding any improvements he has made upon the land, e.g., grading, construction of buildings, etc.). If the value of land is created by the community, George's main premise was that we should take that which rightly belongs to the whole before we take that which rightfully belongs to the individual. George was of the opinion that all land should be taxed to recover this "unearned value" which rightfully belongs to the community but which, for practical necessities, we permit individuals to hold:

> The truth is, the market value of land is merely the reflection of the value of the productive capital placed upon it and in its immediate vicinity. It has no real value of its own; it costs nothing to produce; but since the laws have endowed it with the vital principle of wealth by subjecting it to individual ownership, it can no longer be obtained without giving in exchange for it an equivalent portion of the capital present and designed to concur with it in the production of wealth.[48]

Both Brietel's and George's theories claim to recapture for the community a value which **belongs** to the **community** and not the private land owner. In America, the historical weight of the natural law theories of property proposed by Locke, Blackstone, Vattel, and others dominate.[49] It is generally because of these ideological origins and constitutional rights theories that there persists an "American" resistance towards government's involvement in the sphere of acquiring land and selling it for profit, even when that profit is conferred by a governmental project.

Expropriation Law in Canada

Because of the inherently different parliamentary governmental structure in Canada and its heavy reliance on European politics, philosophy and attitudes toward land and its value, legal scholars must look not so much at constituting documents and common law for evidence of expropriation law; instead, attention must be directed to the political, parliamentary product or the statute. The first expropriation legislation to be enacted in Canada was the Public Works Act of the Province of Canada of 1841.[50] It gave to the Board of Works power to take the land necessary or useful to the performance of any public work, and provided that the compensation would be fixed by three arbitrators.[51] After the Canadian Confederation this statute became the Public Works Act of 1867. It gave the Minister of Public Works the right to take lands, (or an interest therein) streams or watercourses necessary in his opinion for the use, construction, and maintenance of any public work.[52] While the statutes conferring this expropriative power are very detailed in how expropriation procedures are to be carried out, and exactly what may be expropriated, the governmental minister's opinion becomes the all important determinant.[53]

Every expropriation statute and the governmental exercise of that power must follow general principles, the first principle being that expropriation power must be based on statute.[54] This principle is exemplified first in the case of *Kingston & Pembroke Ry. v. Murphy*[55] where the company, by special legislation, was given the power, during the period of construction, to expropriate all the land necessary for a railway line. The company in order to qualify for a subsidy from the City of Kingston declared the construction completed. Subsequently, wishing to extend the railway one mile further into Kingston, it attempted to expropriate additional lands. It was held that it could not do so because the power to expropriate, being purely statutory, ceased upon the completion of the line.[56]

The next general principle of expropriation is a strict construction of statute. In a more modern case we find Ontario Justice Blackburn stating: "It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication such an intention appears."[57] Other language can by found expressing the tremendous power of expropriation: "The power of expropriation is such an interference with the right of property that it should not readily be implied."[58]

The final general principle is that all formalities in the statute must be strictly fulfilled. In Quebec, if the requisite formalities for expropriation are not carried out, property taken for public purposes is taken illegally, and the owner can recover it by petitory or possessory action or can take a direct áction for indemnity.[59] In the Common Law Provinces an entry upon land without the owners consent or without the fulfillment of the formalities provided under a statute giving the right to expropriate is a trespass for which damages may be awarded or an injunction obtained.[60]

The general course of the procedural steps found in an expropriating component of a statute are basically:

1) Notice of intention to expropriate;
2) inquiry;
3) approval;
4) expropriation;
5) Statutory offer and payment;
6) negotiation;
7) arbitration; and finally
8) possession.[61]

While the formulation of these general rules may sound extremely restrictive, there is in fact a method for all governmental entities to opt out of these restrictions under the umbrella of ministerial opinion. In the cases that have been examined so far it may appear that there are strict limits within the statutes and the case law of Canada. However, a closer look reveals that the statutes leave it to the **discretion of the Minister** to decide **what** and **how much** land is necessary for a public work.[62] Moreover, it has been held that a judicial review of the Minister's opinion is outside of the courts' jurisdiction:

> The Minister having deemed it advisable to expropriate, as provided by the Expropriation Act, has exercised his statutory discretion, and the Court has no jurisdiction to sit in appeal or in review of such decision. These questions are political in their nature and not judicial. . . . The Courts cannot enquire into the motives which actuate the executive or governmental authorities or into the propriety of their decision.[63]

Furthermore, in *R v. Beech*,[64] the Minister of Railways had instituted proceedings to expropriate land, including that of the defendant, at Churchill, Manitoba, for the Hudson Bay Railroad terminus. Beech alleged that his land was not necessary for the purpose and that in fact a great part of it had not been so used. The Minister testified that he had been advised to take the whole of the east peninsula at Churchill, including Beech's land, to avoid speculative land transactions. Justice MacLean wrote that, "(i)f in the minister's judgement the land thus taken is necessary for a public work, then I think it is not open to review."[65] Thus there is a body of case law giving a great deal of excessorial condemnation power to the political appointments of ministers with portfolio within the Dominion and Provinces of Canada.

A Comparison of the U.S. and Canadian Doctrines

It is clear that there are legal differences in two countries that are otherwise very similar in culture and geography. If a governmental entity in the United States attempts to exercise the power of eminent domain for a purpose other than a "public use", the citizen can do more than seek judicial review for just compensation; the citizen may be able to enjoin the condemnation. If a governmental entity in Canada exercises its power of expropriation, it can, as long as it does so within the confines of the statutory enabling act, expropriate as much as the minister possessing the power thinks is necessary. There is little opportunity to enjoin the expropriation, and no constitutional claims can be made. The only claim that can be made is that for compensation, and as a result there is voluminous Canadian case law on the expropriation topics of assessment, compensation for injurious affection or consequential damage, indemnity for forcible dispossession, and appeal from award.[66]

What does this point to in a general manner if we wished to distinguish between the two countries? The general political philosophies are the most easy to determine. When dealing with windfall recapture in excess condemnation in the United States, many regard this practice as unAmerican.[67] Many Americans consider the increase in property value, through rezoning or from nearby public projects, rightfully belonging to the private property owner as a vested property right, despite the typical state's constitutional provisions prohibiting gifts of public funds to private entities.[68]

Hagman and Misczynski, in their book *Windfalls for Wipeouts* give the typically American reformist view of windfall recapture:

> There are very good reasons for windfall recapture. It is a good revenue source, and the community is asking only for a return of increased land-value wealth it creates. In addition, windfall recapture is less socialistic than public land ownership, a competing technique for keeping land-value increases in the public domain.[69]

This comment demonstrates the differences between the two systems of government. Canada, drawing on English and French legal traditions and contemporary political movements in those countries, is more willing to attempt a more socialist route in building and modernizing its urban infrastructures. The Toronto Transit Commission and The Montreal Urban Transport Commission have the expropriative power to condemn with the objective of recoupment[70] and land banking.[71] There is little that a condemnee could do to enjoin either commission from acquiring the land in question. However, if a similar authority in the United States was empowered by its state legislature to condemn in excess with the purpose of recoupment of added value, such an action would be greeted with public outcry and subsequent attempts to enjoin it in the courts using the public use clause of the state constitution.

Conclusion

Canada and the U.S. have many of the same assumptions about property and how property should be administered. However, because of political traditions there

is a much stronger public and private interest distinction[72] in the U.S. than there is in Canada.[73] But in recouping added value from public works there is much more of an opportunity for potentially disabling and individualistic legal intervention to prevent necessary infrastructure rebuilding in the United States. The conclusion those in the U.S. may want to draw upon is that which was articulated in *R. v. Imperial Bank,*[74] — that questions of excess condemnation are political in their nature and not judicial.

Land planning battles need to be fought out in the legislature, at the polling booth and on the streets, among citizens. There is little place for the land planning battle being fought out in the courthouse, among lawyers, judges and propertied clients. A more political and inclusive route should be taken to allow all citizens to participate in land planning decisions. This route should allow such decisions to be made more freely of individual, legal, profit-motivated, capitalist and regressive concerns. After all, how can communal, progressive concerns be prioritized when property is part of a market economy?

Whenever property is taken, individual citizens have to suffer a burden which can be satisfied monetarily through a compensation at fair market value. But can these people be compensated for the distress and loss of identity in the destruction of their sense of community?[75] It seems clear that they cannot. The value of community is something which cannot be assessed in a monetary figure or expressed in market terms:

> It is obvious from their conduct that the Poletowners cannot be made whole by monetary just compensation. After all, an eminent domain taking of their homes and neighborhood, to be accompanied by compensation payments, is exactly what they are resisting. In these circumstances, we can easily see that property may represent more than money because it may represent things that money itself can't buy - place, position, relationship, roots, community, solidarity, status - yes, and security too. . . .[76]

It is an easy task to propose that excess condemnation is an appropriate and rational doctrine which could be effectively used by intelligent and planned communities for rebuilding and measured growth. But do cities often grow in intelligent or planned directions, or are cities actually governed by market forces pushing and pulling on what can be defined as "public purpose" as the *Poletown* case so clearly illustrates?

For property taking to be used intelligently, and without abuse of power, what may be needed is a "niceness" analysis.[77] Such an analysis would be oriented, not toward a community of the dominant class, which seems to be the class which we must all be or aspire to be in if we are to participate fully in American life, but toward the communities that each of us actually live in, work in and socialize in. Essential to such an analysis would be an attempt at an understanding of the intricacies, cultures, subcultures and nuances of each community as elements of a city. Without such understanding marginalization, displacement and insecurity about the possibility of community and the potential of the city as concept will persist:

> [T]he city chose . . . to carve a "green field" out of an urban setting which ultimately required sweeping away a tightly-knit residential enclave of first- and second-generation Americans, for may of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives.[78]

Each of us acting as public citizens with intelligence and sensitivity to all of the diverse elements which make up the concept of city, can bring planning decisions down to a rooted and democratic street level. This essay has shown that recoupment is legally permissible, and perhaps a permissible methodology, but only if its use is sensitive enough to know when to tear down, when to build, and when to preserve the communities which we all must live in.

ENDNOTES

1 *See Williamsburg Bridge is Shut for Two Weeks as Cracks are Found* N.Y. Times, April 13, 1988, at A1, col.1. This closing was necessitated by poor maintenance and budget cutbacks. The Williamsburg Bridge became a symbol of infrastructure decline for New York City throughout the Spring of 1988. *See Bread on the Table, Rust on the Span* N.Y. Times, May 19, 1988, A30, col.1.

2 *See generally* **Rebuilding America's Infrastructure** (M. Barker ed. 1985); **R.J. Bamberger, The Economic Losses of Infrastructure Deterioration** (1984); **P. Choate & S. Walter, America In Ruins** (1983).

3 **U.S. Const.** amend. V, "[n]or shall private property be taken for public use without just compensation".

4 **J. Sackman, The Law of Eminent Domain** Section 7.25 (3rd Ed. 1983); **R. Cushman, Excess Condemnation** 1-4 (1917); City of Cincinnati v. Vester, 281 U.S. 439, 441 (1930). In widening a street in Cincinnati, the City appropriated in excess of that actually used by the widened street. The Supreme Court held that a general explanation of purpose was insufficient to allow for an excess appropriation, and required a specific explanation of purpose.

5 Johnson, *The Effect of the Public Use Requirement on Excess Condemnation.* **48 Tenn. L. Rev.** 370, 370 (1981).

6 *See generally,* **G.S. Challies, The Law of Expropriation** (1963).

7 For a broader analysis of this example *see* Freilich & Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through itegration of Eminent Domain, Zoning and Growth Management Techniques,* 55 **UMKC. L. Rev.** 153 (1987).

8 Some of the more notable projects among them being those in Montreal, San Francisco, Washington, Portland, Baltimore, Atlanta, and Miami. *Portland, Ore., Gets a New Rail Transit System,* N.Y. Times, Sept. 27, 1986, at A27, col.1.

9 These cities include New York, Chicago, Boston, Philadelphia, Toronto, and Cleveland. *See* **L. Fitch, Urban Transportation and Public Policy** 39 (1972).

10 *See* sources cited *supra* note 2.

11 49 U.S.C. Section 1608 (1968).

12 49 U.S.C. Section 1601 (1970).

13 *Id.*

14 Fitch, *supra* note 9 at 126.

15 *Id.*

16 These include: conservation of nonrenewable energy resources, the health factors involved in the reduction of urban pollution and smog problems, local government serving the interests of the transit dependant (careless, elderly, handicapped, urban poor). Finally, urban rail systems are a component of public assistance and urban development in the revitalization of decayed urban cores as retailing and manufacturing has fled to suburban shopping malls, and other more affordable and accessible spaces.

17 The final cost of the 6.4 mile Buffalo Metro Rail system is estimated to be $529 million dollars; Portland, Oregon's 15 mile long Metropolitan Area Express cost $320 million; Atlanta's Metro System cost $447 million N.Y. Times supra note 8.

18 **J. Locke, Of Civil Governmen** 187-88 (Everyman's Library ed. 1924) (1st ed. 1690)..

19 *The Federalist No. 54* at 370 (J. Madison)

20 The case first establishing the Federal Government's eminent domain power was Kohl v. U.S., 91 U.S. 367 (1875). *See* **J. Sackman, Nichols Law of Eminent Domain,** Section 1.11 (rev. 3d ed. 1983). This treatise is a leading reference source. Sources for tracking federal and state decisions are *Just Compensation, A Monthly Report on Condemnation Cases,* published by Just Compensation, Inc., P.O.Box 5133, Sherman Oaks, California 91403, and annual reports of the Committee on Condemnation, ABA Section of Urban, State, and Local Government Law.

21 **U.S. Const.** amend. XIV, section 1, "[n]or shall any state deprive any person of life, liberty, or property without due process of law".

22 Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416-17 (1896). The U.S. Supreme Court held for the first time that a state's exercise of eminent domain power for a private use was a violation of the due process clause of the XIV amendment.

23 *See, e.g.* **N.Y. State Const.** art. 1, section 7, par. a, "Private property shall not be taken for public use without just compensation".

24 **J.B. Gelin & D.W. Miller, The Federal Law of Eminent Domain,** Section 1.3 (1982) "The inherent power of eminent domain is only vested in the state and federal governments, it is not possessed by municipalities, counties, or other political subdivisions. The use of eminent domain by these subsidiary political bodies is the result of the delegation of the power by the sovereigns."

25 Fawcett, *Eminent Domain, The Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis,* 47 **U. Pitt. L. Rev.** 491, 494-97 (1986).

26 For a historical treatment of public use in the evolution of eminent domain doctrine *see* Berger, *The Public Use Requirement in Eminent Domain,* 57 **Or. L. Rev.** 203 (1978).

27 Fawcett, *supra* note 25 at 494.

28 *Id.*

29 *Id.*

30 *Freilich & Dierker, Eminent Domain in American Jurisprudence,* in **Compensation for Compulsory Purchase** 149 (J.F. Garner, ed. 1975)

31 Berman v. Parker 348 U.S. 26 (1954). In Berman the U.S. Supreme Court upheld the District of Columbia Act of 1945, which provided for the comprehensive use of eminent domain power to redevelop slum areas. Berman was not the first decision to hold that slum clearance for new housing was a public use; the New York Court of Appeals reached the same conclusion in New York City Hous. Auth. v. Muller, 270 N.Y. 333 (1936) and several other jurisdictions followed after passage of the United States Housing Act of 1937, ch. 896, 50 Stat. 888 (1937) (current version at 42 U.S.C. Sections 1401-1440). *See also* Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain,* 58 **NYU L. Rev.** 409, 415-17 (1983).

32 Freilich & Dierker, *supra* note 30 at 150.

33 Mansnerus, *supra* note 31 at 409.

34 410 Mich. 616, 304 N.W. 2d 455 (1981).

35 Tell, *Detroit's Fray: Progress v. Property, National L. J. June 1, 1981, at 1 cols. 1-3.*

36 "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." 348 U.S. 26, 32 (1954) (J. Douglas).

37 Goldstein, Pinard, Lenza, Peck, *Excess Condemnation - To Take Or Not To Take - A Functional Analysis,* 15 **N.Y.L.F.** 119, 119 (1969).

Mansnerus, *supra* note 31 at 426.

39 Housing & Redevelopment Authority v. Minneapolis Metropolitan Co., 259 Minn. 1, 15, 104 N.W.2d 864, 874 (1960).

40 In the Courtesy case the Port Authority of New York was attempting to condemn a number of city blocks in order to erect the World Trade Center complex; the project was held to be a public purpose and therefore valid. 12 N.Y.2d 379, 398, 190 N.E.2d 402, 410, 240 N.Y.S.2d 1, 13 (Van Voorhis, J. dissenting), *appeal dismissed per curiam,* 375 U.S. 78 (1963).

41 *See e.g.,* Atwood v. William County Navigation District, 271 S.W. 2d 137 (Tex. Ct. App. 1954) appeal dismissed 350 U.S. 804 (1955). Navigation district sought to condemn land for a port and support facilities

as part of a plan to develop the navigable waters of the state. The Texas court held that the acquisition of land by the navigation district for the purpose of leasing land near the port was reasonably necessary for the successful operation of the port, and was for a "public use" within the meaning of the Texas Constitution.

42 Johnson, *supra* note 5 at 383-94. Each of these several theories are described in detail.

43 **R. Cushman,** *supra* note 4 at 146-48.

44 Goldstein,*supra* note 37 at 151.

45 12 N.Y.2d 379, 398; 190 N.E.2d 402, 410; 240 N.Y.S.2d 1, 13 (1963).

46 Johnson, *supra* note 5 at 394.

47 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914, (1973), affirmed 438 U.S. 104 (1978).

48 **H. George, Our Land and Land Policy** 109 (1871)

49 *See* Grant, *The "Higher Law" Background of the Law of Eminent Domain,* 6 **Wis. L. Rev.** 67 (1931).

50 Challies, *supra* note 6 at 4.

51 *Id.*

52 *Id.*

53 Due to Canada's federal constitution and the division of legislative power by the British North America Act (now called the Constitution Act of 1982 with some minor revisions and the addition of the Canadian Charter of Rights and Freedoms), there are two bodies of expropriation law in Canada, Dominion and Provincial. Therefore the governmental minister with expropriating powers may be a Federal or Provincial minister. The power to expropriate of the Dominion or Provincial governments, or of corporations or individuals authorized by such governments, is governed by the distribution of legislative powers effected by sections 91 and 92 of the Constitution Act. The provincial legislatures can within the fields enumerated in section 92 authorize expropriation and the Dominion government can do likewise within the enumerated heads of section 91. In case of conflict between legislation under the enumerated subsections of 91 and the enumerated subsections of 92, the Dominion legislation will prevail if the matter in question is of the substance of one of the enumerated subsections; but where the matter is only incidental or ancillary to such enumerated subsections and is also within section 92 and the field is clear, provincial legislation will be valid in the absence of legislation by the dominion. Where however the Dominion has legislated, provincial legislation if any will be overborne. **Cameron, The Canadian Constitution** 62 Vol. I. (1965).

54 Better Plumbing v. Toronto, 3 D.L.R. 422 (1951).

55 17 S.C.R. 582, (1888).

56 *Id.* at 588.

57 Toronto Transit Comm. v. Aqua Taxi, 5 O.W.N. 857 (1955).

58 Hydro Commission v. County of Grey, 55 O.L.R. 339 (1924).

59 **Chaillies,** *supra* note 6 at 14.

60 *Id.* at 15.

61 L.A. Stein *The Evolution and Nature of Canadian Expropriation Law,* in **Compensation for Compulsory Purchase** *supra* note 30 at 93.

62 **Chailles,** *supra* note 6 at 152.

63 R. v. Imperial Bank, 3 D.L.R. 345 (Ex. Ct.) (1923). *See also:* Miller v. Halifax Power, 13 D.L.R. 844 (1913) (N.S. C.A.); Boland v. C.N.R., 56 O.L.R. 653 (1924-25); Bawtinheimer v. Niagara Bridge Comm., O.R. 788 (1949).

64 Ex. C.R. 134, 136 (1930).

65 *Id. See also,* R. v. Halifax Graving Dock, 20 Ex. C.R. 44, 58 (1921); Melbourne v. McQuesten, O.W.N. 311 (C.A.) (1940); R. v. Toronto, Ex. C.R. 424 (1946); Springsteen v. County of Kent, O.W.N. 541 (1951).

66 **Chaillies,** *supra* note 6 at 72.

67 *See* **D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation** (1979).

68 **N.Y. State Const.** article 7, section 8. "The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking . . ."

69 **D. Hagman,** *supra* note 67 at xxx.

70 Address by D. Heffron Comparative Planning Law, State University of New York at Buffalo, Faculty of Law and Jurisprudence (Sept. 23, 1986). (Notes on file with Center For Public Interest Law.)

71 *See generally,* **A.L. Strong, Land Banking: European Reality, American Prospect** (1979); **H.L. Flechner, Land Banking in the Control of Urban Development** (1974). Land banking also been referred to as "advance acquisition" by American legal commentators. *See Freilich, supra* note 7 at 208.

72 *See* Freeman & Mensch, *The Public Private Distinction in American Law and Life* 36 **Buffalo L. Rev.** 237, 249 (1987).

> "Such a distinction is illustrated in Poletown Neighborhood Council v. City of Detroit, where the court invoked the public character of large private enterprise in allowing a whole neighborhood in Detroit to be destroyed, at a huge personal cost to displaced neighborhood residents, so that General Motors could build a plant on that location. The theory was that the public good would result from the plant's opening, for of course the plant meant jobs. As companies bargain with municipalities for favors, it is always the workers who are being held hostage. Conversely, however, in Local 1330, United Steelworkers v. U.S. Steel, 631 F.2d 1264 (6th Cir. 1980), an appellate court affirmed the privateness of large corporations and refused to stop the closing of two plants in Youngstown, Ohio, despite the court's stated awareness that the move would cause "an economic tragedy of major proportion" in the area. Rejecting the argument that the local community had gained a recognizable property interest or community "right" in the plants over the years, the court held that because the company was privately owned, its economic decisions were beyond public reach."

See also, Kennedy, *The Stages of Decline on the Public/Private Distinction,* 130 **U. Pa. L. Rev.** 1349 (1982).

73 *See* Fraser & Freeman, *Comparative Canadian American Perspectives on Constitutional Law and Rights,* 37 **Buffalo L. Rev.** 259, 270-71 (1987).

74 3 D.L.R. 345 (Ex. Ct.) (1923).

75 *See* Lewis, *Destruction of Community,* 35 **Buffalo L. Rev.** 365 (1986). Lewis defines community as a sense of not feeling lost and enjoying an established position in the world, the recognition that one's social and physical environment is related to thought, feeling and behavior.

76 Michelman, *Property as a Constitutional Right,* 38 **Wash. & Lee L. Rev.** 1097, 1112 (1981).

77 Fraser & Freeman *supra* note 73 at 277.

78 Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 658, 304 N.W.2d 455, 470 (1981) (Ryan J. dissenting).