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## Compensation on Expropriation: The Effect of Zoning and Other Land Use Restrictions on the Award

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Daniel F. Potter\*

Compensation on  
Expropriation: The Effect of  
Zoning and Other Land Use  
Restrictions on the Award

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*I. Introduction*

The purpose of this article is to ascertain the extent to which the existence of publicly-imposed land use restrictions affects the quantum of compensation payable on expropriation. As yet, this matter has not arisen in the case law of Nova Scotia. However, if the events which surrounded the plans for the now abandoned Sackville landfill site project, discussed below, are any precursor of things to come, the effect of use restrictions on compensation awards will not much longer be a moot issue.

The problem has, of course, come before the courts and compensation tribunals in other Canadian jurisdictions where the pressures of urban growth have for some time been forcing the various levels of government to regulate the use of property and to plan for and to acquire lands in aid of the provision of such services as highways, parks, schools, water supply, sewage disposal, and so on. In this regard, it is interesting to note that the proposed Sackville sanitary land-fill site just mentioned was a response to the demands of urban growth in the Halifax-Dartmouth area. It is trite to point out, therefore, that as the demand on government to supply services and to take an active part in assembling land for public housing and other such projects increases, every facet of expropriation law, and especially the more undeveloped aspects such as those to be dealt with in this article, will come into focus more sharply in Nova Scotia.

Obviously, the legal backdrop against which the present subject falls to be considered is the land-use planning regime. Indeed, the whole subject of compensation on expropriation is but a part of the larger, current debate concerning the public interest and private rights as reflected in the planning process. Referring to some of the

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problems under the Nova Scotia Planning Act,<sup>1</sup> the recent Royal Commission on Education, Public Services and Provincial-Municipal Relations pointed out that:

The most contentious matters arise because of attitudes to land ownership and because of differing views of private rights and the public interest. The issues encompass land acquisition and ownership, access, control, taxation, use, and planning.<sup>2</sup>

In a more blunt manner, another writer, in an article entitled "Expropriation without Compensation" (a now well-worn phrase), warned readers of *The Business Quarterly Review*:

There is one cloud on the horizon, however, and that relates to Land Use Control. The increased concern for the ecology will quite properly bring more and more land under greater governmental control and in the process people are going to be told what they can do — and what is more important, what they cannot do.<sup>3</sup>

Implicit in these two excerpts is the basic philosophical question of policy as to who should bear the costs of a publicly-controlled approach to land use. But, notwithstanding that the question may be a basic one and that the debate still rages, the classic answer at this time in virtually every Canadian jurisdiction, and certainly in Nova Scotia, has been the private land owner must bear the costs, at least as far as any diminution in the value of private property resulting from use restrictions is concerned.<sup>4</sup> If any authority be required for this proposition, reference can be made to *Canadian Petrofina Ltd. v. Martin and St. Lambert*, where it was stated by Fauteux J.:

The whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a land owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the

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1. S.N.S. 1969, c. 16, as am. by S.N.S. 1970, c. 87; 1970-71, c. 71

2. N.S. 2 *Royal Commission on Education, Public Services and Provincial-Municipal RELATIONS* (Halifax: Queen's Printer, 1974) (commonly known as the "Graham Report") c. 18 ("Planning") at 88

3. P. V. Betts, *Expropriation Without Compensation* (1973), 38 Bus. Q. Rev. 5 at 5

4. While this article is restricted to a consideration of cases where the value of property owners' lands is decreased as a result of use restrictions, it is obvious that not all property values will be affected adversely by use designations — indeed they will often be enhanced (betterment). For a good discussion of the interaction between planning and land values and the English approach in dealing with this phenomenon, see generally, N. Lichfield, *Economics of Planned Development* (London: Estates Gazette Ltd., 1956) and especially Part VI thereof.

status of land owner cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land owner are then insecure in the sense that they are exposed to any restrictions which the city, acting within its statutory power, may impose.<sup>5</sup>

The effect of the authorities<sup>6</sup> would appear to be generally that in order to be relieved from the use restrictions imposed by a zoning by-law by having it declared *ultra vires*, the land owner must prove to the court that not only was its enactment discriminatory in fact or that it amounted to a total prohibition on use, but also that it either constituted an unreasonable use of power (in the sense of being oppressive or palpably absurd) or that it was passed in bad faith.

In addition to the case authority, the Planning Act<sup>7</sup> makes it quite clear that, in adopting a Municipal Development Plan, a council may provide for such things as the use of lands in the municipality<sup>8</sup> and, more importantly in the present context, the reservation of land for public purposes.<sup>9</sup> The Act contemplates that these and other policy statements contained in a Municipal Development Plan will be given legal effect by the adoption of zoning by-laws<sup>10</sup> and that property owners will not be entitled to compensation for any diminution in value of lands which may be caused as a result.<sup>11</sup>

Upon expropriation, then, the question becomes one of to what extent, if any, is the owner entitled to base his claim for compensation on a higher (more valuable) use than that permitted by the existing zoning or other use designation governing the

5. [1959] S.C.R. 453 at 458-59; 18 D.L.R. (2d) 761 at 765

6. See *City of Toronto v. Board of Trustees of R.C. Separate Schools for Toronto*, [1926] A.C. 81; [1925] 3 D.L.R. 880 (P.C.) (Can.); *Township of Scarborough v. Bondi*, [1959] S.C.R. 444; 18 D.L.R. (2d) 161; *Soo Mill and Lumber Co. v. City of Sault Ste. Marie*, [1975] 2 S.C.R. 78; 47 D.L.R. (3d) 1; 2 N.R. 428; *Lacewood Development Co. v. City of Halifax* (1975), 12 N.S.R. (2d) 692; 58 D.L.R. (3d) 383 (*sub nom. Re Lacewood Development Co. and City of Halifax*); *Barrett Lumber Co. v. Municipality of County of Halifax*, S.H. 05946, judgment delivered: February 21, 1975, as yet unreported (N.S.S.C., T.D.)

7. S.N.S. 1969, c. 16

8. Section 13 (3) (b)

9. Section 13 (3) (c)

10. Section 33 (1)

11. Section 42 (1). While there is some doubt whether the term "injurious affection" has been properly used in this context inasmuch as it is generally restricted to situations where value is diminished by some development on a neighbouring property, the intent of the section is clearly that the public interest should prevail over any private rights affected. See E. C. Todd, *The Mystique of Injurious Affection in the Law of Expropriation* (1967), 3 U.B.C. L. Rev. 127

property. In other words, are there any circumstances under which a dispossessed owner is entitled to claim compensation on the basis of a "paper use" of the property which he would not have been legally entitled to implement or realize had his property not been expropriated?

This article will be devoted to the task of determining how this question has been dealt with in those Canadian jurisdictions where it has arisen with a view to projecting what might be the outcome when it comes to be dealt with in Nova Scotia. To this end, I will first give a brief outline of the general basis of compensation under the current expropriation statutes and then move on to a consideration of the decided cases and the factors which they disclose as being relevant to the issue. Next, brief consideration will be given to the attempts of some jurisdictions to deal with the question directly through legislation. Finally, I will assess whether the state of the law is satisfactory in those jurisdictions with similar legislation to that of Nova Scotia, or whether the legislative solutions of other jurisdictions are desirable.

## II. *Basis of Compensation — Generally*

A complete discussion of the principles of compensation under Canadian expropriation law would be beyond the scope of this paper.<sup>12</sup> For present purposes, it is sufficient to describe briefly the reforms which have occurred in this area in most Canadian jurisdictions over the past ten years or so.

In order to understand why reform of the basis of compensation was necessary it should be noted that expropriation statutes traditionally provided only that "due compensation" should be paid to an expropriated party.<sup>13</sup> This left the task of determining the basis of compensation to the courts which, after a long series of

12. For a comprehensive treatment of the subject see: 16 *Ont. Law Reform Commission: Report on the Basis for Compensation on Expropriation* (Toronto: Dept. of Attorney-General, 1967) at 12; R. D. Yachetti, *The New Approach to Compensation*, [1970] L.S.U.C. Special Lectures 301 (*Recent Developments in Real Estate Law*); *Institute of Law Research and Reform, Working Paper: Expropriation — Principles of Compensation* (Edmonton: U. of Alta., 1971); 12 *Institute of Law Research and Reform, Expropriation* (Edmonton: U. of Alta., 1972) at 69-122; E. C. Todd, *Winds of Change and the Law of Expropriation* (1961), 39 *Can. B. Rev.* 542 at 544-61; J. W. Morden, *An Introduction to the Expropriations Act, 1968-69*, (Toronto: Canada Law Book Co., 1969); R. Gosse, *Expropriation: The Law Reform Commission's Working Paper* (1971), 29 *Advocate* 302

13. It should be noted that in Canada no compensation is ever payable in respect of

conflicting cases, adopted what is known as the “value to the owner” approach. This test was set out explicitly by Rand J. in *Diggon-Hibben Ltd. v. The King* as follows:

[T]he owner at the moment of expropriation is deemed as without title, but all else remaining the same, and the question is what would he as a prudent man, at that moment, pay for the property rather than be ejected from it.<sup>14</sup>

The elements of this test were said to consist of market value, damages for disturbance, plus any special value, arrived at in a lump sum, without necessarily attributing specific figures to each item of loss.<sup>15</sup> Being subjective and uncertain, the “value to the owner” test made it difficult to negotiate settlements and, even where it was applied by arbitrators and courts, it led to gross overcompensation in some cases<sup>16</sup> and undercompensation in others, especially in blighted areas.<sup>17</sup>

It has been as a result of these inequities and uncertainties inherent in the “value to the owner” approach that all Canadian common law jurisdictions, except British Columbia, Saskatchewan, and Prince Edward Island,<sup>18</sup> have adopted what has been described as a “. . . black letter code of compensation law . . .”.<sup>19</sup> The content of the compensation provisions in all the new Acts is basically the same in that all require the separate assessment of specific heads of compensation culminating in a “built-up” award.<sup>20</sup>

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property taken except as authorized by statute: *Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315 at 322; 67 D.L.R. 209 at 210-11 (P.C.) (Can.), subject to the well established presumption that it is not intended to take land without compensation. See G. S. Challies, *The Law of Expropriation* (2d ed. Montreal: Wilson and Lafleur, 1963) at 82

14. [1949] S.C.R. 712 at 715; [1949] 4 D.L.R. 785 at 787

15. Ontario Law Reform Commission Report, *supra*, note 12 at 15

16. See Todd, *supra*, note 12 at 546

17. See H. E. Manning, *Expropriation of Lands and Imaginary Values* (1967), 15 Chitty's L.J. 37 at 38

18. *Expropriation Act*, R.S.C. 1970 (1st Supp.), c. 16; *The Expropriation Act*, S.A. 1974, c. 27; *The Expropriation Act*, S.M. 1970, c. 78; *The Expropriations Act*, R.S.O. 1970, c. 154; *Expropriation Act*, R.S.N.B. 1973, c. E-14; *Expropriation Act*, 1973, S.N.S. 1973, c. 7; *The Expropriation Act*, R.S.N. 1970, c. 121. The references to the three provinces which have retained the value to the owner approach are: *Land Clauses Act*, R.S.B.C. 1960, c. 209; *The Expropriation Procedure Act*, 1968, S.S. 1968, c. 21; *The Expropriation Act*, R.S.P.E.I. 1951, c. 53.

19. Morden, *supra*, note 12

20. There are additional provisions in the Alberta and Manitoba Acts which are germane to the present topic and which are discussed *infra*.

The backbone of the modern compensation provisions is the “market value” approach which is fleshed out with other specific heads of compensation such as disturbance damages, reinstatement, “a home for a home” provisions, *inter alia*, to ensure complete recovery in diverse situations. The definition of market value in all of the Acts is similar and is expressed in the Nova Scotia Act as

. . . the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.<sup>21</sup>

The Ontario Law Reform Commission had recommended that there be an express reference to the willing buyer in order to ensure that the “value to the owner” concept would be abandoned.<sup>22</sup>

The switch away from the “value to the owner” approach does not mean, however, that the market value must be based on the existing use. It had been well established at common law that if the expropriated party could prove that the land had some special adaptability or suitability for a potential use which would give it greater value than the value based on the use to which it was being put at the time, he was entitled to be compensated on the basis of the potential use. This fundamental principle has recently been affirmed by the Supreme Court of Canada in *The Queen in Right of Nova Scotia v. POW Investments Ltd.*,<sup>23</sup> where it was held that where undeveloped land is expropriated, the present value of its potentiality for future development is to be taken into account.<sup>24</sup> In order to avoid double recovery in these situations it had also been established at common law that where the land is valued on the basis of highest and best use (*i.e.* potential use), the owner is not entitled to receive disturbance damage as well.<sup>25</sup>

Inasmuch as the scheme of most of the new Acts<sup>26</sup> is to compensate the owner on the basis of market value or, alternatively, on the aggregate of the market value based on *present* use plus disturbance damage, with the owner to receive the higher of these two figures,<sup>27</sup> it is clear that the highest and best use principle of

21. Section 27(1)

22. Ontario Law Reform Commission Report, *supra*, note 12 at 19

23. [1975] 2 S.C.R. 86; 45 D.L.R. (3d) 398; 6 L.C.R. 305

24. See also, *Brushett Realty Ltd. v. Province of Nova Scotia* (1974), 6 N.S.R. (2d) 462 (S.C., A.D.)

25. *Horn v. Sunderland*, [1941] 2 K.B. 26; [1941] 1 All E.R. 480 (C.A.)

26. It is noteworthy that only the Newfoundland Act has restricted the basis of compensation to the existing use value: s. 27(1) (a), with a discretion in the Board to award additional compensation in certain circumstances: s. 27(2)

27. *E.g.* section 27(2) (a) or (b)

ascertaining market value has not been abandoned.<sup>28</sup> It has been argued, however, that there was an inherent flexibility in the “value to the owner” concept which enabled arbitrators and the courts to make exorbitant awards on the basis of the present value of all foreseeable potential uses, especially where properties subject to zoning restrictions were concerned.<sup>29</sup> This contention will be considered in due course; for the present, it is sufficient to reiterate that there appears to be nothing in the new expropriation Acts *per se* (except in Newfoundland<sup>30</sup>) to bar a claim based on the present value of a property for a potential use.

It will no doubt be appreciated that the ability to claim compensation for the loss of the value of a potential use is a crucial threshold requirement for anyone basing his claim on a higher use than that permitted by existing zoning because, by definition (with the exception of legal non-conforming uses), the present use will always be one permitted by existing zoning and, conversely, the potential use will always be one that will not be permitted.

Before turning to the cases, two related aspects of compensation which caused problems under the old law and which have been dealt with in the modern statutes should be mentioned. The issue arose in many cases as to whether in fixing the compensation to be awarded any regard should be had, first, to the purpose to which the expropriated land was to be put by the taker and, secondly, to any increase or decrease in the market value of the property by reason of any knowledge of the prospect of expropriation. These two issues are covered in the Nova Scotia Act as follows:

33. In determining the value of land expropriated, no account shall be taken of

(a) any anticipated or actual use by the expropriating authority of the land at any time after the depositing of the expropriation document in the registry of deeds;

. . .

(c) any increase or decrease in the value of the land resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation of the purpose for which the land was expropriated.

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28. This is obvious from the reports of the Ontario Law Reform Commission, *supra*, note 12 at 21-23 and Alberta Institute of Law Research and Reform, Report No. 12, *supra*, note 12 at 73.

29. Manning, *supra*, note 17 at 38

30. *Supra*, note 26



While it may be open to debate whether section 33(a) was designed to cover all types of uses to which the expropriating authority might put the land including, for example, the extraction of gravel,<sup>31</sup> it is at least clear that the intent is to preclude the owner from receiving an undeserved windfall in cases where the land is to be used for purposes of a development scheme.<sup>32</sup>

Section 33(c) is apparently intended to cover situations where the open market value of the property fluctuates by reason of public knowledge of imminent or actual expropriation and the stipulation that neither an increase nor a decrease should be taken into account reflects the policy that, at least where land is actually expropriated, the owner should neither enjoy a benefit nor suffer a detriment by reason of state participation in the "market". It must be noted, however, that this provision has not been, nor should it be, construed as covering directly situations where some governmental authority has affected the value of property by the imposition of use restrictions, whether or not such restrictions have been imposed to accommodate the use for which the property is slated upon expropriation. Indeed, if this section could be so construed, the whole question of the effect of use restrictions on compensation awards would be resolved, and this, as will be seen from the discussion of the authorities that follow, is far from being the case.

### III. *The Cases*

The first significant Canadian case to deal with the effect of zoning by-laws on an expropriation compensation award was the decision of the Ontario Court of Appeal in *Re Gibson and City of Toronto*.<sup>33</sup> In that case, the City Council had, on August 18, 1910, adopted a

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31. The Ontario Law Reform Commission Report, *supra*, note 12 at 24, had recommended that where the land was taken for construction materials, provision should be made for the compensation to reflect the value of the materials taken. This recommendation was not accepted by the Ontario Legislature and does not appear in the Acts of any of the other jurisdictions. In the opinion of at least one writer, the exclusion of this provision will probably wipe out the decision of the Supreme Court of Canada in *Fraser v. The Queen*, [1963] S.C.R. 445; 40 D.L.R. (2d) 707, in favour of the expropriating authority. In that case, the property had been expropriated for the purpose of extracting gravel to build the Canso Causeway and it was held that the owner was entitled to be compensated for the value of the gravel taken as rock *in situ*, notwithstanding that it only had this value to the taker: Yachetti, *supra*, note 12 at 304-5.

32. See Ontario Law Reform Commission Report, *supra*, note 12 at 24 and 12 *Institute of Law Research and Reform, Expropriation, supra*, note 12 at 7-9

33. (1913), 28 O.L.R. 20; 11 D.L.R. 529 (C.A.)

by-law declaring the part of St. Clair Avenue on which the owner's land fronted to be a "residential" street and prohibiting the erection of any building within seventeen feet of the north and south lines of the street. The arbitrator found that the real reason for passing this by-law (as appeared from the evidence of the City Assessment Commissioner) was that, as it was the intention of the City at a later date to expropriate seventeen feet for the purpose of widening St. Clair Avenue, it was deemed expedient to prevent buildings in the meantime being placed in this seventeen feet. Such buildings, if erected, would of course have increased the compensation which would have to have been paid to the owners when the property was expropriated ultimately.

This by-law was in force when the expropriating by-law was passed on June 23, 1911, but was repealed on June 24, 1912. The owner, of course, sought compensation on the basis that the highest and best use of the expropriated land was as a site for commercial buildings. The arbitrator found as a fact that such a use was not too remote upon which to base a claim for compensation but nevertheless limited his award to its value as residential property because he felt that the restrictive by-law precluded him from considering evidence of any higher use value.

On appeal to the Ontario Court of Appeal, the owner argued on two fronts: first, it was said that the use restricting by-law (the term "zoning" apparently was not used at that time) was in fact part and parcel of the expropriating machinery, and as such its effect in restricting the use of the land could not be regarded; secondly, it was argued that the arbitrator, if he did give weight to the by-law, also should have considered the fact that the City of Toronto might repeal the by-law.

The Court agreed with both of the claimant's arguments. As to the first argument, Hodgins J.A., speaking for himself and two of the three other judges, said:

The general scheme was widening St. Clair avenue by expropriating this seventeen-foot strip and payment of the value of the land to the land-owners. In anticipation of this, it is asserted, by-law 5545 was passed to prevent buildings being erected on the seventeen-foot strip [in the meantime]. If that was its sole purpose, then, I think, it became part of the general scheme and should be so treated [*i.e., ignored*] . . . [The expropriating] authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is

contemplating expropriation.<sup>34</sup>

It was really the claimant's second argument, however, to which the Court gave more weight. It was held that, even if the by-law could not be ignored as being part of the expropriation scheme and was an independent legislative enactment (which was a question of fact for the arbitrator alone to decide),

. . . the arbitrator erred in not considering the possibility or likelihood of the consent of the City of Toronto being had by the repeal of the by-law, either because of its temporary character or on account of a change in the character of the locality.<sup>35</sup>

This requirement, that an arbitrator must consider the possibility or probability of a by-law being repealed or amended, was based largely on the rationale of a leading English case, *In re Lucas and Chesterfield Gas and Water Board*,<sup>36</sup> which Hodgins J. A. accepted as holding, *inter alia*, that:

. . . where a public body has obtained authority to expropriate land, the special adaptability of which depends upon the consent of the public body, the latter cannot eliminate from consideration by the arbitrator that element of special adaptability, by asserting that it can and will refuse its consent.

Hodgins J. A. then went on to say:

I do not think this case goes so far as to disable a public body from asserting in an arbitration those private [*sic*] rights which it possesses. But it is authority for the proposition that those private rights which may give it a commanding position when the matter comes to be dealt with practically, cannot be set up, if a market exists, though it be limited in extent, as destroying the natural adaptability of the site so that the arbitrator cannot consider the possibility of those rights being reasonably used to promote, instead of to defeat, the suggested use of the land.<sup>37</sup>

There have been several subsequent cases in which the thrust of both arms of the *Gibson* case have been applied. Three of the more interesting ones, which involved the "restriction as part of the expropriation scheme" aspect, are *Re Nanaimo-Duncan Utilities*,<sup>38</sup> *Kramer v. Wascana Centre Authority*,<sup>39</sup> and *Re Burkay Properties Ltd. and Wascana Centre Authority*.<sup>40</sup>

34. *Id.* at 28; 11 D.L.R. at 536

35. *Id.* at 27; 11 D.L.R. at 534-35

36. [1909] 1 K.B. 16 (C.A.)

37. (1913), 28 O.L.R. 20 at 29; 11 D.L.R. 529 at 536

38. [1950] 3 D.L.R. 461 (B.C.S.C.)

39. [1967] S.C.R. 237

40. (1972), 2 L.C.R. 9 (Sask. C.A.), *rev'd* (1973), 4 L.C.R. 59 (S.C.C.)

In the *Nanaimo* case,<sup>41</sup> an electric utility was expropriated by the British Columbia Power Commission. At the date of expropriation, the claimant was faced with the necessity of expanding its facilities in order to maintain the value of its undertaking. Some doubt was cast upon the validity of water licences upon which the claimant relied. Moreover, it could not expand without obtaining licences to develop further power sites. It was contended by the Power Commission that the government would not, in any event, allow any development at the existing water site or any other available site because it had then resolved to take the power of the whole of the undeveloped and ungranted water powers for its use. Wilson J. dealt with the matter as follows:

The Government has, of course, and properly, a wide discretion as to issuing licences for power development. This discretion is to be used in the public interest. If the Government meant, as it apparently did, to expropriate through its agent the Power Commission, the properties of Nanaimo-Duncan Utilities, and to supply the district with power from the Campbell River, it might wisely withhold the issuing of a licence which would result in the building of an unnecessary plant. It could only decently withhold the issuing of a licence on that basis. If it did not intend to provide a source of power for that district, it could not possibly justify the refusal of a licence to the Company which served it.<sup>42</sup>

He went on to hold that it was not the value of the property as it was, sterilized by the refusal to grant further water licences, which was to be awarded but the value as it would have been if there had been no decision against granting further licences.

*Kramer v. Wascana Centre Authority*<sup>43</sup> involved lands of the claimant situated in the vicinity of the provincial Legislative Building in Regina in an area described as one of unique attractiveness for development. The property was governed by a general subdivision by-law, No. 2356, which provided for use for single detached dwellings. Subsequent amending by-laws permitted a limited amount of local business use. A proposed development plan for the area, involving high density residential, commercial and other development, was submitted to the municipal authorities by the claimant. This proposed development was approved in principle but no amending by-laws were enacted to carry it into effect. Rather, by-law No. 3506 was adopted, embodying a

41. [1950] 3 D.L.R. 461

42. *Id.* at 472-73

43. [1967] S.C.R. 237

community planning scheme which called for the use of the lands for “public park and open spaces”. This was followed by a by-law, No. 3618, which revoked the previous zoning by-law, No. 2356, and provided that the lands would be designated for “public service”.

Under *The Wascana Centre Act, 1962*,<sup>44</sup> the Wascana Centre Authority was given power to expropriate lands and, following the adoption of the last mentioned by-law, the lands in question were expropriated. The arbitrator found that the community planning scheme adopted by by-law No. 3506 represented the state of mind of the City authorities at the time of its enactment and that the scheme was crystallized by zoning by-law No. 3618. The arbitrator held on the evidence that this by-law was an independent enactment, part of an overall city plan and not part of the expropriation proceedings — although passed of course with knowledge of the Wascana Centre Scheme. He held, therefore, that the by-law No. 3618, in limiting the use of the land expropriated to “public service use”, was a determining factor in assessing the amount of compensation which he fixed at \$506,500.

The claimant appealed to the Saskatchewan Court of Appeal,<sup>45</sup> the majority of which affirmed the finding of the arbitrator that the value must be determined on “public service use”,<sup>46</sup> but were of the opinion that the arbitrator had fixed the value for such “public service use” at too low an amount and accordingly increased the award to \$699,840.<sup>47</sup> Brownridge J. A. agreed with the majority as to the amount,<sup>48</sup> but was of the opinion that, for the purpose of finding the value of the lands, by-laws No. 3506 and No. 3618 and *The Wascana Centre Act* should all have been considered not to have been enacted, and that, therefore, the valuation should have been fixed on the basis of the use permitted by the repealed by-law, No. 2356, as amended by subsequent by-laws permitting local business use, with whatever added value the possibility of development in accordance with the proposed plan of subdivision of the area would have given the lands.<sup>49</sup>

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44. S.S. 1962, c. 46

45. Unreported decision

46. See judgment of Abbott J. in the Supreme Court of Canada ([1967] S.C.R. 237 at 239)

47. *Id.* at 239 (the judgment of Spence J.)

48. *Id.* at 242

49. *Id.*

On the claimant's appeal to the Supreme Court of Canada<sup>50</sup> to have the award further increased, Cartwright, Abbott, Martland and Ritchie JJ. agreed with the majority in the Saskatchewan Court of Appeal that the arbitrator was right in basing the award on "public service" use and dismissed the appeal. Spence J., on the other hand, while agreeing that the award should not be increased, preferred the view of Brownridge J. A.<sup>51</sup>

While the reasoning of Spence J. is, in these circumstances, *obiter dicta* at best, he was the only member of the Court to give any insight into what sort of factors might render a zoning by-law "part of the expropriating machinery" within the meaning of the *Gibson* case.<sup>52</sup>

During the course of his judgment, Spence J. pointed out

. . . that in order to be found to be part of the expropriating machinery one does not need to determine that the limiting by-laws were in any sense the result of a fraudulent conspiracy to deprive the owner of an award to which he was entitled.<sup>53</sup>

In other words, it would appear that, if Spence J. is correct, it need not be proved that the by-law was enacted in bad faith in the sense in which that phrase is used in proceedings questioning the validity of zoning by-laws.<sup>54</sup>

On the peculiar facts of the *Kramer* case, some of the factors which Spence J. considered sufficient to indicate that the by-laws there in question were part of the expropriating machinery are found in the following extract from his judgment:

Although both by-law 3506 and by-law 3618 required the consent of the Minister of Municipal Affairs, neither by-law received such approval until [approximately four months before the date of expropriation]. It is significant that by-law 3618 was enacted and both by-laws were approved after the *Wascana Centre Act* had

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50. *Id.*

51. Because of the fact that Brownridge J. A. had concurred in the actual dollar award of the majority in the Saskatchewan Court of Appeal, it would appear that it makes no difference what use a compensation award is based on. It should be noted, however, that were it not for the fact that the development scheme originally proposed by the claimant had only been approved in principle and that zoning by-law No. 2356 as amended would not have permitted such uses (the development therefore only being a possibility in the sense of the second arm of the *Gibson* case), Brownridge J. A. would have awarded the claimant \$1,500,000 instead of \$669,840. See [1967] S.C.R. 237 at 247-48

52. (1913), 28 O.L.R. 20; 11 D.L.R. 592 (C.A.)

53. [1967] S.C.R. 237 at 243

54. *Supra*, note 6

been enacted. Under that statute, the Wascana Centre Authority was created with three participating parties — the Province of Saskatchewan, the City of Regina, and the University of Saskatchewan. It will be realized that the latter two, although independent legal entities, were in practical fact very much under the control and guidance of the former . . . . The *Wascana Centre Act* set up a master plan for the Wascana Centre and a detailed scheme for land uses in the area composing the Wascana Centre. As I have said, powers of expropriation were granted and there were special references to the expropriation of the very lands in issue on this appeal . . . .<sup>55</sup>

After mentioning the cost-sharing aspects of the scheme, he concluded:

I am of the opinion that in view of the circumstances to which I have referred above, one can only come to the conclusion that the enactment of by-laws 3506 and 3618 was simply a step, in so far as these lands are concerned, in setting up of the Wascana Centre and the acquisition of the Wascana Centre Authority of the lands in question.<sup>56</sup>

Statements such as this do little to clarify the general principles upon which it can be decided whether a zoning by-law is part of the expropriating machinery. Indeed, the same Saskatchewan Court of Appeal which heard *Kramer* was faced with the same issue shortly afterwards in an appeal from the same arbitrator in *Re Burkay Properties Ltd. and Wascana Centre Authority*.<sup>57</sup>

The submissions in the *Burkay Properties* case were basically the same as in *Kramer*; that is to say, the claimant in *Burkay Properties* also argued that the arbitrator erred in determining that the value of his expropriated property was to be based on its “public service use” and submitted that the use permitted under by-law No. 3618 and the community planning scheme, considered in conjunction with *The Wascana Centre Act*, should be treated merely as steps leading to the acquisition by the Wascana Centre Authority of the subject lands and therefore ignored for purposes of the award.

What was different about the *Burkay Properties* case, however, was that the claimant there had new evidence of collaboration between the Government of Saskatchewan, the City of Regina and the University of Saskatchewan. This evidence was in the form of testimony by one Preston, a planner, and the Director of Planning

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55. [1967] S.C.R. 237 at 246

56. *Id.*

57. (1972), 2 L.C.R. 9 (Sask. C.A.), *rev'd* (1973), 4 L.C.R. 59 (S.C.C.)

for the City of Regina during the relevant period. The Court found that Preston's testimony concerning the formation of two committees, the one consisting of the senior or elected representatives of the three bodies just mentioned, and the other made up of technical and professional personnel, coupled with the study conducted by the latter, established a collaboration or co-operation between the three parties resulting in a restricted permitted use of the lands as ultimately reflected by by-law No. 3618.

Maguire J. A., in giving the judgment of the Court on this point, said that he was applying the principles contained in the minority reasons of Spence J. in the *Kramer* case. He especially took pains to point out that

[t]his conclusion does not imply bad faith on the part of the city, nor the other participating parties, in the development and adoption of a scheme and subsequent legislation, all of which were most commendable in their purpose.<sup>58</sup>

Maguire J. A. also had occasion to comment on the *Gibson* case in so far as it concerned the passing of the by-law there in question by the City of Toronto *immediately* prior to the expropriation. He said:

There was not here, as in *Re Gibson and City of Toronto*, any immediate purpose or intent to expropriate the subject lands, but the certain intent was to control any development to the end that the lands would be available for the use and purposes of Wascana Centre Authority and its participating parties . . . . I am of the opinion that the restricted use for the purpose of immediate expropriation is not the determining factor. Such purpose does, of course, make the application of the principle easy, but the same result, affecting the value of the appellant's lands, occurs under circumstances such as existing here, and a land owner should not be left with the probable depreciated value, so arising.<sup>59</sup>

He culminated his decision on this portion of the case by saying:

This conclusion, by reason of the additional evidence here put in, in my opinion, is not contrary to the decision of the majority of the Supreme Court in *Kramer et al. v. Wascana Centre Authority*, above referred to.<sup>60</sup>

But the saga of the Wascana Centre Authority does not end here. The Saskatchewan Court of Appeal was merely the final resting ground for the zoning by-law as "part of the expropriating

58. (1972), 2 L.C.R. 9 at 16

59. *Id.* at 16

60. *Id.*



machinery” aspect of the two “rules” in *Re Gibson and City of Toronto*. The “possibility of rezoning” arm of the *Gibson* case also came to be considered by the Supreme Court of Canada<sup>61</sup> in the context of the *Burkay Porperties* case, but this time it was at the instance of the Wascana Centre Authority as appellant. Before discussing the details of this appeal, however, I should note two earlier decisions dealing with “the possibility of rezoning”.

The Supreme Court of Canada’s first opportunity to consider the “possibility of rezoning” rule came in *Metro Toronto v. Valley Improvement Co.*<sup>62</sup> The issues in that case were numerous and complex, but the relevant facts can be stated briefly.

The owner’s property consisted of some ten acres on which it carried on a restaurant business and proposed to build a motel with an accompanying parking lot. Some plans had been made to that end but no building permit had been sought nor had any application been made for rezoning. The land was zoned “green belt” but its use was a legal non-conforming one. About three and a half acres of this land were expropriated by the Conservation Authority for flood control purposes, and included in the land taken was the proposed motel site and its accompanying parking area. A few years before the expropriation, the municipality had passed a restrictive by-law zoning the land in question against both residential and commercial use but this by-law was given only limited approval by the Municipal Board to a specified date which had expired before the expropriation and no extension of approval had been sought.

The owner quite predictably claimed compensation on the basis that the highest and best use of the subject lands was for the erection of apartment buildings. The Ontario Municipal Board based its \$739 per acre award on the use permitted by the “green belt” zoning, namely, only single-family detached dwellings each with a minimum lot area of one acre. The Municipal Board had come to the conclusion “that there was not a reasonable probability of the desired zoning being realized”<sup>63</sup> and added nothing to the compensation on the ground of possible rezoning.

The Ontario Court of Appeal was of the opinion that, if the owner’s lands were rezoned to permit the erection of apartment houses, its lands would have a value of \$40,000 per acre, but that this value should be discounted by 33 $\frac{1}{3}$ % because of the

61. (1973), 4 L.C.R. 59 (S.C.C.)

62. [1963] S.C.R. 15; 35 D.L.R. (2d) 315

63. *Id.* at 22; 35 D.L.R. (2d) at 321

“uncertainties and delays implicit in the necessity of obtaining appropriate rezoning”.<sup>64</sup>

In laying down the principles which governed this aspect of the case, Cartwright J., on appeal to the Supreme Court of Canada, said:

. . . it is the duty of the tribunal to take into consideration the probability or even the possibility of the rescission of any by-law restricting the use to which the property may be put.<sup>65</sup>

He cited, *inter alia*, *Re Gibson and City of Toronto* as authority for this proposition.<sup>66</sup> He went on to say that whether such a probability existed at the date of expropriation and, if it did exist, its degree were both questions of fact on which the decision of the Board was final unless in arriving at its decision it had erred in some matter of law.<sup>67</sup> Because, in his view, the Ontario Court of Appeal had reversed the Municipal Board’s finding of the improbability of obtaining a rezoning on a different inference from the facts, Cartwright J. reinstated the Board’s finding and, thus, limited the owner to compensation based on “green belt” zoning.<sup>68</sup>

The next case of interest on the question of the probability (or possibility) of having a use restriction lifted is the Ontario Court of Appeal decision in *Teubner v. Minister of Highways*.<sup>69</sup> There, the claimant was the owner of certain agricultural lands bordering a provincial highway which were subject to municipal restrictions imposed under *The Planning Act, 1955*<sup>70</sup> preventing their use for commercial purposes. *The Highway Improvement Act*<sup>71</sup> precluded the issue of a permit for the desired development without the consent of the Minister of Highways and the zoning classification could not be changed without the approval of the Minister of Planning and Development. The owner had made applications for permits to establish a gasoline service station on part of the property which was subsequently expropriated, but the permits had been

64. *Id.*

65. *Id.* at 27; 35 D.L.R. (2d) 325-26

66. *Id.*

67. Cartwright J.’s finding as to the finality of the Municipal Board’s decision was based on the privative clause found in *The Conservation Authorities Act*, then R.S.O. 1960, c. 62, s. 25(10). It is interesting to note that, under the new Nova Scotia Expropriation Act, S.N.S. 1973, c. 7, s. 60(1), appeals may be heard on any question of law *or fact* or mixed law and fact.

68. [1963] S.C.R. 15 at 27-28; 35 D.L.R. (2d) 315 at 326

69. [1965] 2 O.R. 221; 50 D.L.R. (2d) 195 (C.A.)

70. Then, S.O. 1955, c. 61

71. Then, R.S.O. 1960, c. 171, s. 34(2) (a)

allowed to lapse. Before the date of expropriation, the owner once more applied for the necessary permits, but this time they were refused because of the possible impact which their granting might have on the highway projects that were then in contemplation.

The claimant first sought to have the Court ignore the refusal by the Minister of Highways to grant the necessary permits on the grounds that such refusal was merely “part of the expropriating machinery” within the meaning of the first “rule” in the *Gibson* case and also on the basis of the *Nanaimo-Duncan* case. However, these arguments were rejected:

[T]here is a real difference between zoning down a property by positive action to reduce its value before expropriation (the *Gibson* case) and refusing to give some consent which the owner needs to increase the value and without which it has a lower value.<sup>72</sup>

As to the question of the possibility of the Minister of Highways granting the permits (which Roach J. A. found had been refused validly because of the inconvenience which would result when and if the highway projects then in contemplation were completed), it was held:

The depressing effect of the prohibition imposed by [*The Highway Improvement Act*] should be measured by determining how much less a purchaser would pay for that highway frontage and take a chance on being able to obtain the necessary permit than he would be willing to pay if there were no prohibition. British American Oil Co. Ltd. was not at all interested unless it could get the necessary permit and neither was the Shell Oil Co. Whatever amount that should be should be deducted from the valuation made by the appraisers because their valuations were based on the premise that the permit or permits would be granted. The Board proceeded on the same footing. Giving the matter my best consideration, I would, for the reasons stated, discount those valuations by 35%.<sup>73</sup>

It is indeed difficult to ascertain from the reasons stated the basis on which Roach J.A. considered that there was a 65% probability

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72. [1965] 2 O.R. 221 at 233; 50 D.L.R. (2d) 195 at 207. In a rather confusing, if not incomprehensible, part of his judgment, Roach J.A., while willing to give every possible power to the Minister of Highways to restrict the value of the claimant's land, made it quite clear that any similar attempt to do so by the Minister of Planning and Development under *The Planning Act* could be ignored in determining the basis for compensation (at 229-30; 50 D.L.R. (2d) at 203-04). This decision has also been criticized by Manning, *supra*, note 17 at 40.

73. *Id.* at 234; 50 D.L.R. (2d) at 208

that the permits would have in fact been granted had the land in question not been expropriated. Perhaps, although it is by no means clear, this was a mere application of what Cartwright J. in *Metro Toronto v. Valley Improvement Co.* said it was duty of the tribunal to do; namely, to “take into consideration the probability or even the possibility of the rescission of any by-law . . . [emphasis added]”.<sup>74</sup>

Notwithstanding the real difficulties in choosing a percentage figure, this practice of “discounting for the chance”, as was adopted by Roach J. A. in the *Teubner* case, may not be too objectionable as a method of doing “rough justice” to the claimant. Nor is the practice totally unfounded in principle, although ostensibly the finding of a 65% chance of obtaining development permits from the Minister of Highways appears to fly in the face of the earlier finding that such a permit had already been refused without the slightest intimation that it would be granted in future. The principle that mitigates the apparent absurdity of such situations is one of long standing, at least under the “value to the owner” approach to value. This principle is perhaps best identified in the following passage from the judgment of Duff J. in *Cunard v. The King*:

One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence. The proper application of that principle . . . seems to me to be this — you are to estimate the value of the property as if the property were not required for the public purposes to which the Minister, who is taking the proceedings, intends to devote it. The circumstance that it is so required is not to enter into the computation of value as either enhancing or diminishing it.<sup>75</sup>

This principle is, of course, merely a specific application of the well-entrenched policy of the courts in expropriation matters reiterated well by Rand J. in *Diggon-Hibben Ltd. v. The King* in the following terms:

A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his

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74. [1963] S.C.R. 15 at 27; 35 D.L.R. (2d) 315 at 325-26

75. (1910), 43 S.C.R. 88 at 99-100

neighbour's should be required for public purposes . . . .<sup>76</sup>

When Roach J.A.'s decision in *Teubner* is looked at from this point of view it becomes much more palatable. Before the conception of the highway project which eventually led to the expropriation, the Minister of Highways had once granted the permits which were allowed to lapse. If the highway project is deemed to have no existence for purposes of compensation, it becomes a matter of more reasonable speculation that the Minister might have, once again, granted the permits.

It was just this sort of speculation, however, that caused the Saskatchewan Court of Appeal's decision in *Re Burkay Properties Ltd. and Wascana Centre Authority* to be reversed on appeal to the Supreme Court of Canada.<sup>77</sup> As indicated earlier, the Saskatchewan Court's refusal to follow, in *Burkay Properties*, its own decision in the *Kramer* case on the issue of whether by-laws No. 3506 and No. 3618 where part of the expropriating machinery was not disturbed by the Supreme Court of Canada. However, after finding that these by-laws could be ignored in assessing the compensation payable, the Saskatchewan Court of Appeal had still to consider the possibility of rezoning.

This latter issue arose in the *Burkay Properties* case by virtue of the fact that the claimant's lands had, prior to the Wascana Centre scheme, been zoned Agricultural A2, under by-law No. 2848 passed in 1956, some eight years before the date of expropriation. It may be noted that the A2 zone permitted only limited commercial use and, while single-family residences were permitted, these were restricted to ten-acre sites. In addition to this restriction, the claimant's land had come under general "Interim development control" in 1958, imposed under the provisions of *The Community Planning Act, 1957*.<sup>78</sup> This was found, quite rightly, by the arbitrator and by the Saskatchewan Court of Appeal to be an independent measure implemented as a matter of general benefit to the whole city. Under the terms of this scheme no application for development could be approved unless it conformed with the community plan being prepared.<sup>79</sup>

76. [1949] S.C.R. 712 at 715; [1949] 4 D.L.R. 785 at 787

77. (1972), 2 L.C.R. 9 (Sask. C.A.), *rev'd* (1973), 4 L.C.R. 59 (S.C.C.)

78. S.S. 1957, c. 48

79. This form of development control is not unlike that current in the Halifax area at the present time with the Municipal Development Plan in the process of being prepared; here no development can be undertaken unless it conforms with the

Although the owner based his claim for compensation on the property's value for a multi-family residential use, it appeared from the evidence that he had never made any application for a development permit. The Court, therefore, had to face the now familiar problem of determining, as Roach J.A. said in the *Teubner* case, how much less a purchaser would pay for the property and take a chance on being able to obtain the necessary permit than he would be willing to pay if there were no prohibition.

In delivering the judgment of the Court on this issue, Maguire J.A. said:

By reason of the subsequent collaboration between the three bodies referred to, it is difficult to measure the probabilities, but I think it must be inferred that the community planning scheme, considered by itself with its initial purpose, raises a definite probability that the zoning required by the appellant to permit its suggested development would not have been approved nor granted by the city.<sup>80</sup>

Later, after discussing the deductions that would have to be made on account of sewer services, road access, *inter alia*, he said:

There falls to be deducted some item to cover the probability that full potential for this property would not be realized on the ground, as earlier stated, that the community planning scheme as initiated might well have restricted the permitted uses. I must arbitrarily set an amount. In an endeavour to conservatively do so, I set a 15% reduction.<sup>81</sup>

This fixing of an 85% chance of obtaining the desired zoning, caused the award to be increased from \$126,150, as awarded by the arbitrator on the basis of "public service" use, to \$159,060.

The Wascana Centre Authority's appeal to the Supreme Court of Canada was allowed by a unanimous decision of all five judges who heard the case. In a less than one-page decision delivered orally by Martland J., the Court recited Maguire J.A.'s conclusion,<sup>82</sup> that there was a definite probability that the necessary zoning and development permit would not be granted, and said:

In our view, with respect, the Court erred in resting its judgment on an event which it had concluded would probably not arise.<sup>83</sup>

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Regional Development Plan, which, while not intended to provide "interim controls in and of municipal planning", may have that effect in some situations.

80. (1972), 2 L.C.R. 9 at 19

81. *Id.* at 22

82. (1972), 2 L.C.R. 9 at 10

83. (1973), 4 L.C.R. 59 at 60

While it is no doubt true that the phrase “definite probability”, as used by Maguire J.A., was a poor choice of words, it is submitted that he later clarified this statement by fixing the 15% discount figure. What the Supreme Court of Canada did, in effect, was ignore its own previous ruling in *Metro Toronto v. Valley Improvement Co.*<sup>84</sup> that it is the duty of the tribunal to take into consideration the probability *or even the possibility* of the rescission of a restrictive zoning by-law. On the other hand, in fairness to the Supreme Court, as has been implicit in the discussion up to this point, none of the cases considered, including *Gibson* and *Metro Toronto*, are really instructive as to what test is to be applied in determining whether there is a possibility or probability of obtaining a rezoning. Indeed, even more basically, the courts have not even chosen between “probability” and “possibility”; rather they have used both terms interchangeably and, on occasion, have substituted such words as “likelihood” (*Gibson*) and “chance” (*Teubner*). In light of such confusion and uncertainty, however, it is perhaps all the more unfortunate that the Supreme Court did not take the opportunity presented to it in *Burkay Propeties* to give some guidance in the matter.

There is also a further question as to the type of evidence required in the practical application of what I have called the two “rules” in *Re Gibson and City of Toronto*. In the *Gibson* case itself, I noted that the City’s “real reason” for passing the restrictive by-law was determined by the testimony of the City Assessment Commissioner. In the *Kramer* case, Spence J. felt aided in determining whether the restrictive zoning by-laws were part of the expropriating machinery by the chronological sequence of the enactment of the by-laws in relation to the creation of the Wascana Centre Authority and the fact that, of the three bodies involved, the province of Saskatchewan was really the controlling organ. On the question of the possibility of rezoning, Roach J.A., in deciding the *Teubner* case, was inclined to look favourably on the claimant’s (or his theoretical purchaser’s) chances of obtaining development permits by reason of evidence of the fact that he had been granted such permits before. Similarly, in *Burkay Propeties*, Maguire J.A. had had regard to the evidence of the property’s potential for development and to the history and purpose of the community planning scheme, but, in the end, was forced to decide the possibility of rezoning arbitrarily.

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84. [1963] S.C.R. 15; 33 D.L.R. (2d) 315

This difficult question concerning the type of evidence admissible in applying the two “rules” was actually one of the questions submitted on appeal to the Supreme Court of Canada in *Metro Toronto v. Valley Improvement Co.* The Ontario Municipal Board, in the course of its decision, has used the expressions, “the municipality’s intent as to the future use of this property”, and “the thinking of the Conservation Authority of the corporation as to the ultimate use of the land”.

In answer to the question as to whether the use of such expression constituted an error by the Board, Cartwright J. quoted<sup>85</sup> the following passage from Lord Sumner in *Inland Revenue Commissioners v. Fisher’s Executors*, which he said was applicable to all corporate bodies:

In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company’s resolutions and instruments is their substance.<sup>86</sup>

Having cited this passage, however, Cartwright J. then went on to point out that:

On the same page Lord Sumner refers to cases in which Atkin L.J., as he then was, used the expression “the intention of the company” and Viscount Cave spoke of “the last thing which the company . . . desired”.<sup>87</sup>

The judge held that, looking at the Board’s reasons as a whole, he did not think that they had erred in law. Rather he said, rather aptly: “If they erred in their choice of words they appear to have done so in good company”.<sup>88</sup>

To sum up, then, the cases so far considered appear to present two major problem areas for further consideration: first, there is the problem of identifying the essence of the probability/possibility of rezoning “rule” and, secondly, assuming a satisfactory test can be formulated, what type of evidence can properly be used in applying the test to be given set of facts? An evidentiary problem is also, of course, raised by the problem of determining whether a zoning by-law is an independent enactment or merely a part of the

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85. *Id.* at 31; 35 D.L.R. (2d) at 330

86. [1926] A.C. 395 at 411 (H.L.)

87. [1963] S.C.R. 15 at 32; 35 D.L.R. (2d) 315 at 330

88. *Id.*; 35 D.L.R. (2d) at 331



expropriating machinery.<sup>89</sup>

In an attempt to shed at least some light on these problem areas, it is useful to consider briefly some of the more recent compensation cases, the majority of which are decisions of the Ontario Land Compensation Board, but there is also a recent decision of the Ontario Court of Appeal.

*Re Farlinger Developments Ltd. & Borough of East York*,<sup>90</sup> the Ontario Court of Appeal decision, has considerable significance. This is so for a number of reasons: first, the compensation award was based on the “market value” approach to compensation under Ontario’s recently codified compensation provisions; secondly, there is some indication given as to how the “independent enactment” versus “part of the expropriating machinery” issue might be circumvented as a matter of interpretation under the new compensation codes; thirdly, the Ontario Court of Appeal makes a clear statement regarding the possibility/probability of rezoning rule and; fourthly, the evidential aspects of determining the probability of rezoning are exemplified.

The facts are rather detailed but at least a cursory review of them is necessary for a proper understanding of the Court’s decision. Basically, the lands expropriated (the Goulding property) comprised 6.517 wooded acres in the south-east portion of the Borough of East York and included a large single-family residence. The Goulding property was adjacent to another 2.89 acre lot which was relevant to the case and which was known as the McLean property. There were also extensive apartment developments to the north, west and south of the Goulding property.

The zoning history of the property dated back to 1962 and official plan amendment No. 4, which consolidated and rewrote the general policies for development in East York. At the time when official plan amendment No. 4 was being considered, East York had sought to have both the McLean property and the Goulding property designated as public open space. However, when the amendment was approved in its final form and implemented by by-law No. 6752, a comprehensive zoning by-law, both the Goulding property

89. Outside of the legislative reform, *infra*, it would appear to be a difficult task to devise a better test than that contained in the *Gibson* case, as explained by Spence J. in the *Kramer* case.

90. (1975), 9 O.R. (2d) 553; 61 D.L.R. (3d) 193; 8 L.C.R. 112 (*sub nom. Farlinger v. Borough of East York*) (C.A.). Applications for leave to appeal were refused by both the Ontario Court of Appeal and the Supreme Court of Canada. See (1975), 9 L.C.R. 10

and the McLean property were designated R-1. Official plan amendment No. 4 also contemplated that each community in the Borough would be subject to a "Secondary Plan" and, while such plans were being prepared, all developments were subject to extensive controls. Official plan amendment No. 4 also contained the policy statement that areas zoned for apartment dwelling generally would be separated from areas zoned for very low density residential uses.

Official plan amendment No. 5, adopted in 1964, did not relate directly to the subject property but changed the use of some lands nearby from industrial to residential use (high density, medium density and low density).

On November 20, 1963, McWilliam, the Planning Commissioner for East York, was told by the Metropolitan Parks Department that the McLean property and the Goulding property should be acquired by East York for park purposes. On March 23, 1964, the Council of East York approved the purchase of the McLean property.

On August 20, 1965, Farlinger entered into an agreement of purchase and sale with Mrs. Goulding to acquire the Goulding property for \$150,000. On September 7, 1965, Farlinger advised McWilliam of its purchase. The Council of East York met on September 8, 1965, and adopted by-law No. 7562 expropriating the Goulding property. East York, however, failed to register a plan of expropriation which was a condition precedent to the vesting of the Goulding property in East York. On October 5, 1965, the Council of East York adopted report No. 12 of the Parks and Recreation Committee, instructing its solicitor to inform Farlinger that the Goulding property was zoned R-1 and that Council had no intention of changing it.

Official plan amendments No. 6, No. 7 and No. 10 followed in the years 1966, 1967, and 1969, the result of these being that the Goulding property was reserved as public open space.

In early 1970, East York discovered the defective nature of its expropriation proceedings and, by agreement with Farlinger dated March 11, 1970, allowed the effective date for determining compensation to be fixed at September 15, 1969 and Farlinger waived certain procedural provisions of *The Expropriations Act, 1968-69*.<sup>91</sup>

When the question of compensation came to be decided by the

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91. S.O. 1968-69, c. 36, ss. 6, 9, 10 and 25(1) (now R.S.O. 1970, c. 154)

Land Compensation Board in 1973 there were two main issues considered:

(a) what was the highest and best use of the Goulding property — a single-family residential development in accordance with the existing R-1 zoning, or a high density apartment development. The parties agreed that if the highest and best use was as a site for single-family residential use, then its market value was \$360,000.

(b) if the highest and best use was for a high density apartment development then what should be the amount of compensation to be paid?<sup>92</sup>

In addition to the records of the zoning by-laws and of the amendments to the official plan, the Board had the assistance of the opinions of three professional planners, two traffic experts, and four appraisers in deciding these issues.

As to the highest and best use of the property, the majority of the Board chose to rely on the evidence of Farlinger's planner who concluded that the Goulding site, if not expropriated, would have been used best residentially and for a higher density use, namely, a 600 suite apartment building. The Board agreed with this planner that the Goulding property was designated R-1 as a holding zone and that this designation was not a deterrent to its possibilities for another use if that use was shown to be a proper one. The Board also accepted the view of this planner that, considering the relevant zoning by-laws as of September 19, 1965, including official plan amendment No. 7, it was clear that the area had, in a general sense, been identified as an area of potential high density residential development and, indeed, was progressing rapidly towards fulfilment of these policies. The Board further preferred the opinion of Farlinger's traffic expert that a 600 suite apartment would not be judged improper because of traffic aspects.

Regarding the market value of the property for high density residential use, the majority of the Board more or less split the differences among the four appraisers. It is interesting to note that, as well as giving evidence as to the proper discount in value for the delay that would be encountered in making an application for rezoning, the majority of the appraisers also gave opinions as to the discount a purchaser would require in view of the risk that rezoning might not be obtained. On account of these two factors, the majority

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92. (1975), 9 O.R. (2d) 553 at 559; 61 D.L.R. (3d) 193 at 199; 8 L.C.R. 112 at 118

of the Board discounted 15% and 35%, respectively, and ended up granting Farlinger an award of \$982,900.

The principal issue in East York's appeal to the Ontario Court of Appeal was whether the majority of the Board erred in concluding that the highest and best use of the Goulding property was as a high density apartment development.

In that Court, Howland J.A. found that, by virtue of the agreement between East York and Farlinger, the compensation was to be determined in accordance with the provision of *The Expropriations Act, 1968-69*, the relevant sections of which he considered to be:<sup>93</sup>

13. (2) Where the land of the owner is expropriated, the compensation payable to the owner shall be based upon,
  - (a) the market value of the land;
  - . . . .
14. (1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.
  - . . . .
  - (4) In determining market value of land, no account shall be taken of,
    - (a) the special use to which the expropriating authority will put the land;
    - (b) any increase or decrease in the value of the land resulting from the imminence of the development in respect of which the expropriation is made or from any imminent prospect of expropriation.
  - . . . .

After noting that, because of East York's initially defective expropriation, the expropriation procedure was not completed until the execution of the "expropriation agreement" in March, 1970, the judge, in a somewhat confusing manner, went on to say that the designation of the Goulding property as public lands in the official plan amendments No. 7 and No. 10 was to be ignored for purposes of compensation.<sup>94</sup> This was confusing because it was not made clear whether this was due solely to the fact that the effective date

93. *Id.* at 562; 61 D.L.R. (3d) at 202; 8 L.C.R. at 120. It will be noted that the substance of these provisions is identical to sections 27(1) and 33(a) and (c) of the Expropriation Act, 1973, S.N.S. 1973, c. 7.

94. *Id.* at 563; 61 D.L.R. (3d) at 203; 8 L.C.R. at 120

for assessing compensation (September 15, 1969), as fixed by the agreement, antedated the adoption of the amendments (September 18, 1969) or, whether it was also based on the principles contained in paragraphs (a) and (b) of subsection (4) in section 14. He did say, however, that:

With reference to s. 14(4) (a) and (b) it would be basically unfair if the market value of an owner's property could be reduced by the decision of the expropriating authority to downgrade it to a use which had less value.<sup>95</sup>

If Howland J.A. meant this to be an interpretation of sections 14(4) (a) and (b), then based on such an interpretation, those provisions not only cover situations where the open market value is affected by the fact of expropriation (as was suggested earlier in this article), but also govern situations where the market value may be affected not by the fact of expropriation but by the fact of zoning. I would argue that it is clearly not the intent of sections 14(4) (a) and (b); if it were, it would mean that a municipality could never affect the value of private property prior to its expropriation, even when this was done independently, as a general measure, in the best interests of a community.<sup>96</sup> The fact that Alberta and Manitoba, which apparently thought that it was right that land values not be so affected, felt it necessary to expressly protect them in this regard also creates doubts about the correctness of Howland J.A.'s interpretation. Moreover, although it seems that it cannot be used as an aid in judicial interpretation,<sup>97</sup> the Report of the Ontario Law Reform Commission, in which sections 14 (4) (a) and (b) were recommended, makes it clear that the Commission never intended to change the law relating to the effect of down-zoning prior to expropriation.<sup>98</sup>

The real value of Howland J.A.'s decision in the *Farlinger* case, however, does not lie in his comments on the first "rule" in *Re Gibson and City of Toronto*, which in any case were merely *obiter dicta*.<sup>99</sup> What was important about his decision was his ruling on the

95. *Id.*

96. See *e.g. Kramer v. Wascana Centre Authority*, [1967] S.C.R. 237

97. The weight of authority would seem to be against the use of such materials as evidence of intention. However, see E. A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 128, where he refers to two seemingly conflicting House of Lords' decisions on the point.

98. *Supra*, note 12 at 21

99. This, of course, is because of the fact that the relevant date for assessing compensation was prior in time to the adoption of official plan amendments No. 7 and No. 10.

question of the possibility/probability of rezoning. On this issue, after reviewing some of the authorities already discussed in this article, he said:

. . . the highest and best use must be based on something more than a possibility of rezoning. There must be a probability or a reasonable expectation that such rezoning will take place. It is not enough that the lands have the capability of rezoning. In my opinion, probability connotes something more than a 50% possibility.<sup>100</sup>

On the facts before him, Howland J.A. then held:

A consideration of the probability of rezoning the Goulding property from R-1 to permit a high density apartment development involved a consideration of two principle matters:

(a) the suitability of the Goulding property for a more intensive use than was permitted by R-1 zoning.

(b) the intention of the Council of East York and of the Ontario Municipal Board as shown by their respective acts and statements.<sup>101</sup>

Then, with respect to the suitability of the property for a high density apartment dwelling, Howland J.A. was content to accept the Board's opinion, based as it was, on the evidence of the planner and the traffic expert retained by Farlinger.<sup>102</sup>

On the problem of determining the intentions of the Council of East York and the Ontario Municipal Board, the judge felt that he was confronted with a much more difficult issue.<sup>103</sup> One of the considerations rendering this problem a difficult one was the fact that section 35(22) of *The Planning Act*<sup>104</sup> provided that:

Where an application to the council for an amendment to a by-law . . . is refused or the council refuses or neglects to make a decision within one month . . . the applicant may appeal to the Municipal Board and the Municipal Board shall hear the appeal and dismiss the same or direct that the by-law be amended in accordance with its order.

While Howland J.A. recognized implicitly that this provision in *The Planning Act* gave the expropriated property owner a notional

100. (1975), 9 O.R. (2d) 553 at 566; 61 D.L.R. (3d) 193 at 206; 8 L.C.R. 112 at 123

101. *Id.* at 567; 61 D.L.R. (3d) at 207; 8 L.C.R. at 123-24

102. *Id.* at 567; 61 D.L.R. (3d) at 207; 8 L.C.R. at 125

103. *Id.*

104. R.S.O. 1970, c. 349. It should be noted that section 39 of the Planning Act, S.N.S. 1969, c. 16, gives an applicant a similar right of appeal to the Planning Appeal Board.

second opportunity to obtain a rezoning, he chose, presumably for reasons quite understandable in terms of proof, to ignore the duty which he had placed on himself of considering the intentions of the Ontario Municipal Board.<sup>105</sup>

As to the question of the intention of the Council of East York, he concluded that

. . . there [was] not sufficient evidence to justify the reasonable expectation of the majority of the Board that rezoning would take place to permit a high density apartment development.<sup>106</sup>

The major reasons which led the Court to this conclusion can be summarized as follows:

- (1) Official plan amendment No. 4 did not indicate any intention to vary the low density zoning but rather indicated, as a matter of policy, that areas zoned for apartment development generally would be separated from areas zoned for low or very low density residential uses;
- (2) A “secondary plan” amendment and official plan amendment, or at least a special study followed by a site plan by-law, would have been required before a rezoning of the Goulding property;
- (3) The word “possibilities” used by Farlinger’s planner, fell short of what was required to conclude that there was a probability of the property being rezoned for a high density apartment development.

It is interesting to note that Howland J.A. did not consider that the planners were incompetent to give evidence as to the probable intention of the Council. On the contrary he had said earlier in his judgment that:

The determination of highest and best use, including as part and parcel thereof the probability of rezoning, is a matter on which the evidence of experts in the field of planning was required.<sup>107</sup>

The judge did not seem to have much doubt as to the

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105. Howland J.A.’s neglect to consider the intentions of the Ontario Municipal Board can perhaps be partially justified on the grounds that the Municipal Board had, as is required under *The Planning Act*, already approved official plan amendment No. 4 and by-law No. 6752 under which the Goulding property had been zoned R-1. It should be noted, however, that there is no similar requirement for Planning Appeal Board approval of zoning by-laws under the Nova Scotia Planning Act.

106. (1975), 9 O.R. (2d) 553 at 567; 61 D.L.R. (3d) 193 at 207; 8 L.C.R. 112 at 125

107. *Id.* at 566-67; 61 D.L.R. (3d) at 206-07; 8 L.C.R. at 124

appropriateness of considering the opinions of planners in reaching his decision on the probability of rezoning. Similarly, arbitrators generally rely on such opinions. However, at least one lawyer has had serious reservations about the practice. H.E. Manning, Q.C., writing in *Chitty's Law Journal*, posed the following questions:

Who are planners anyhow? Is there a mystique of planning? Can a planner give evidence of probabilities relating to his profession which clearly it would be idiotic to permit a lawyer to give as to law, or even a doctor to give as to changes expected or demanded by him in medical philosophy?<sup>108</sup>

Mr. Manning would no doubt be even more disturbed by the recent decision of the Ontario Land Compensation Board in *Spruceside Construction Ltd. v. City of Hamilton*,<sup>109</sup> where the *Farlinger* case was cited in extending to appraisers competency to give evidence in relation to the probability of rezoning.<sup>110</sup>

Even if it is conceded that the evidence of planners and appraisers in relation to the probability of rezoning does not deserve such strong criticism, the admission of such opinions to determine the future intentions of a municipal corporation is going far beyond a determination of intention from what is expressed in, or necessarily follows from, the proceedings of such corporations.<sup>111</sup>

In any event, notwithstanding that a finding on the probability of obtaining a rezoning is a highly speculative and arbitrary process and one which operates largely on the basis of opinions in the nature of second-guessing by planners and appraisers, the Ontario Land Compensation Board has apparently not been deterred from attempting to grapple with the issue when it has arisen in an increasing number of cases. For example, in *Hebron Investments Ltd. v. Scarborough Board of Education*,<sup>112</sup> where the claimant's lands were zoned commercial, but where its claim was based on a probable rezoning to permit high density residential uses, the Board reasoned as follows:

The Board has carefully considered the evidence of the two planners, . . . the evidence as to the history of the applications,

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108. *Supra*, note 17 at 41

109. (1975), 9 L.C.R. 128 (Ont.)

110. *Id.* at 135

111. See the quotation from Lord Sumner in *Inland Revenue Commissioners v. Fisher's Executors*, [1926] A.C. 395 at 411 (H.L.), cited in *Metro Toronto v. Valley Improvement Co.*, [1963] S.C.R. 15 at 31; 35 D.L.R. (2d) 315 at 330

112. (1973), 3 L.C.R. 356 (Ont. L.C.B.)



and the attitude of the planning staff and the Planning Board, together with the able submissions of counsel.

In the result, the Board, using its best judgment, has come to the conclusion that the reasonable man in the market place . . . would probably decide that the highest and best potential of this property, from an economic standpoint, was for [a high density residential development], and hence would conclude that a rezoning to permit such a use could reasonably have been expected to have been approved at some level.<sup>113</sup>

The Board went on to base its award on a high density residential use with a deduction of 25% for the risk of not obtaining rezoning.

In another case, *Havlik v. Essex Separate School Board*,<sup>114</sup> the Land Compensation Board turned the probability of rezoning issue on its head. At the date of expropriation, the claimant's property was not officially zoned but in the official plan affecting the town in which it was situated, the proposal for zoning was rural R-2, permitting only single family dwellings (and only those when used by a farmer farming on the lot). In order to be effective the by-law would have had to be approved by the Ontario Municipal Board.

The Board concluded:

In the instant case there was no evidence as to the possibility or probability of approval of [the by-law] by the Ontario Municipal Board. As there had been no zoning regulations in Kingsville prior [to the expropriation date], in the absence of approval by the Ontario Municipal Board, this Board must approach the determination of market value in this case on the basis that there was no effective zoning . . . . By reason of its location within the town and the relative activity in subdivisions . . . the Board has no difficulty in finding that the subject property had a very definite potential for residential development at the date of expropriation.<sup>115</sup>

No deduction was made for the possibility that the by-law might be approved.

A further variation on this theme can be found in *Genman Holdings Ltd. v. New Mount Sinai Hospital*.<sup>116</sup> Here, a zoning by-law, which would have allowed the claimant to build a high density commercial development (and upon which basis he later claimed compensation), was objected to by the expropriating authority at the Ontario Municipal Board approval stage. The Board

113. *Id.* at 375

114. (1975), 7 L.C.R. 354 (Ont. L.C.B.)

115. *Id.* at 359

116. (1973), 4 L.C.R. 223 (Ont. L.C.B.)

held that, since the authority's opposition to rezoning was not based on proper planning principles, but on the prospect of expropriation, the claimant should be compensated on the basis that the rezoning would be approved.<sup>117</sup>

The cases discussed disclose some of the problems in the current approach of arbitrators, compensation tribunals and the courts to the problem of use restrictions on expropriated property. With these in mind, it is useful to consider some of the legislative reforms that have been adopted in an attempt to ameliorate the situation.

#### IV. Legislative Reforms

In discussing the *Farlinger* case, I argued that Howland J.A. must have misinterpreted sections 14(4) (a) and (b) of the Ontario *Expropriations Act* (sections 33(a) and (c) of the equivalent Nova Scotia Act) when he said that, in light of those provisions, it would be basically unfair (and, thus, presumably contrary to the section) for an expropriating authority to downgrade a claimant's property to a use which has less value. Assuming he was incorrect in this, it merits repeating that, of all Canadian jurisdictions, only Alberta and Manitoba have taken any legislative steps to correct the confusion caused by the first "rule" in *Re Gibson and City of Toronto*,<sup>118</sup> as explained by Spence J. in *Kramer v. Wascana Centre Authority*<sup>119</sup> and by Maguire J.A. in *Re Burkay Properties Ltd. and Wascana Centre Authority*.<sup>120</sup>

The form of the provision in the Alberta *Expropriation Act*<sup>121</sup> is as follows:

43. In determining the value of the land, no account shall be taken of

. . . .

(e) any increase or decrease in value which results from the imposition or amendment of a zoning by-law, land use

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117. For further examples of cases in which the compensation award was based on a higher use than that allowed by the current zoning with a deduction being made for the risk, see: *Lazarowich v. Minister of Highways for Ontario* (1971), 1 L.C.R. 198 (Ont. C.A.); *Linat Holdings Ltd. v. Minister of Highways for Ontario* (1970), 1 L.C.R. 289 (Ont. Mun. Bd.); *Whittier Park Development Corp. v. City of Winnipeg*, [1974] 4 W.W.R. 236; 6 L.C.R. 322 (Man. C.A.)

118. (1913), 28 O.L.R. 20; 11 D.L.R. 592 (Ont. C.A.)

119. [1967] S.C.R. 237 at 243

120. (1972), 2 L.C.R. 9 at 16

121. S.A. 1974, c. 27

classification or analogous enactment made with a view of the development under which the land is expropriated.

In the Manitoba *Expropriation Act*,<sup>122</sup> the section reads:

27.(2) In determining the due compensation payable to the owner no account shall be taken of

. . . .

(c) any depreciation of the value of the land which is attributable to the fact that, whether by way of designation, allocation or other particulars contained in a development plan published by any government of government authority or whether by any other means, an indication has been given that the land is, or is likely, to be acquired by any authority.

While the wording of the provision in the Manitoba Act is slightly wider on its face, it is quite clear that it, as well as section 43(e) of the Alberta Act, was designed to prevent an expropriated party from bearing the cost of a public decision to expropriate his property rather than that of his neighbour. In other words, under either of these provisions, it is no longer necessary for a claimant to prove that the down-zoning was a “part of the expropriating machinery” within the meaning of the *Wascana* cases; rather, in any ordinary case, it should be sufficient to prove that the use restriction was imposed prior to the expropriation and that the nature of the permitted use in itself points to a public development.<sup>123</sup>

It should be noted that these provisions do not speak in any way to the issue of the probability of rezoning. That this is so is probably best illustrated by the 1974 decision of the Manitoba Court of Appeal in *Whittier Park Development Corp. v. City of Winnipeg*.<sup>124</sup>

In that case, the claimant’s lands had for some time been zoned M.2-light industrial and F-Flood Plain, neither of which permitted residential uses. It was found as a fact that the claimant had sought rezoning to allow the development of a rental housing project and that the City had refused at least partially on the basis that the land might be required for a major highway programme, for which

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122. S.M. 1970, c. 78

123. An example of such a situation might be the designation of Hemlock Ravine as “park and recreational” under the Halifax-Dartmouth Regional Development Plan. It would be more difficult, however, to prove that the restriction was imposed with “a view to the development under which the land is expropriated” in a case where the land has been zoned R-1 and then expropriated by a public housing authority. In this case the permitted use *per se* does not point to a public development.

124. [1974] 2 W.W.R. 236; 6 L.C.R. 322 (Man. C.A.)

purpose it was ultimately expropriated.

Notwithstanding that the facts were particularly strong in this case, in the sense that the City had frozen deliberately the use of the claimant's land, the Court was content, in doing justice to the claimant, to hold that there was a probability of rezoning to the desired use, subject to a 15% discount for the risk of not obtaining it. That is to say, even though it was armed with section 27(2) (c), the Court was not willing to say that the effect of the City's refusal to rezone was tantamount to a depreciation of the value of the land by a means which indicated that the land was likely to be acquired by it.

It is plain, therefore, that the additional provisions contained in the Alberta and Manitoba expropriation statutes are of very narrow application and that, even where they do apply, they do not alter significantly the law under the first "rule" in *Re Gibson and City of Toronto*, as developed by the *Wascana* cases.

It is often said by those proposing reforms in this area, especially in the field of rezoning, that perhaps it might be advisable to adopt some of the provisions of English expropriation law.<sup>125</sup> While it is beyond the scope of this article to discuss the law of compulsory purchase in the United Kingdom, it may suffice to point out that the Land Compensation Act<sup>126</sup> of that jurisdiction is tied in inextricably to a highly sophisticated and complex history of land use control. For example, it would be folly to adopt the English provisions which preclude an expropriated party from claiming compensation on higher than existing use value, without also adopting the "assumed planning permission" scheme.<sup>127</sup>

### V. Summary and Conclusion

It was mentioned at the outset that the purpose of this article was to lay a foundation for determining how the Nova Scotia Expropriations Compensation Board might deal, in its compensation awards, with the questions raised by the presence of land use restrictions on

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125. See, *Institute of Law Research and Reform, Working Paper: Expropriation — Principles of Compensation*, *supra*, note 12 at 23-24; Manning, *supra*, note 17 at 43; Todd, *supra*, note 12 at 354-58

126. 1973, 21 & 22 Eliz. 2, c. 26. For a good technical discussion of English expropriation (compulsory purchase) law see: D. M. Lawrence and V. Moore, *Compulsory Purchase and Compensation* (5th ed. London: Estates Gazette, 1972), particularly c. 12

127. S.N.S. 1969, c. 16

expropriated property. It was also indicated that the events surrounding the proposed Sackville landfill site project almost gave rise to the Board's first case in the area. In summary, therefore, it might be interesting to conjecture as to the outcome in that situation had the property been expropriated.<sup>128</sup>

This speculation is made easier by the fact that the proposed project did give rise to litigation, the basis of which was sufficiently similar to that which would have been the case on an expropriation. *Barrett Lumber Co. v. Municipality of the County of Halifax*,<sup>129</sup> involved an application by a company for a declaration that a by-law of the defendant municipality, rezoning the plaintiff's land from general building area to salvage and dump zone, was *ultra vires*.

The relevant facts, as they appear in the judgment of Jones J.,<sup>130</sup> were that the Metropolitan Area Planning Commission (MAPC) applied to the municipality for the rezoning of lands to accommodate a new sanitary landfill operation which was to be operated by the Regional Authority on behalf of the three metropolitan area governments. It appeared from the evidence that the lands, all of which belonged to the plaintiff company, would be acquired by the provincial government and then turned over to the Regional Authority to manage the scheme.

The company led evidence, in the form of an appraiser's affidavit, that the rezoning to salvage and dump use had drastically reduced the value of its lands. On the basis of this, the company claimed, *inter alia*, that the municipality's purpose in enacting the by-law was to depress the value of the property in the sense that, upon expropriation, compensation would only be payable on the basis of the salvage and dump use.

Jones J. considered this contention of the company to be an allegation of bad faith on the part of the municipality.<sup>131</sup> However, notwithstanding the fact that he considered there had been no satisfactory explanation given as to why expropriation proceedings were not commenced before the application to rezone, he held that the municipality did not act in bad faith in adopting the by-law and

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128. The proposal to put a sanitary landfill site in Sackville on the lands in question was rather controversial in terms of protest by local residents, *etc.* The scheme has apparently been abandoned.

129. S.H. 05946, judgment delivered: February 21, 1975, as yet unreported (N.S.S.C., T.D.)

130. *Id.* at 1-5

131. *Id.* at 12

that the by-law was valid.<sup>132</sup>

The only statement made by Jones J. as to the possible effect of the by-law had the property been expropriated was:

I cannot conclude on the evidence that the purpose of the application was to depreciate the value of the land even though it may have that effect. I may say that I am not entirely satisfied that the rezoning will in the result affect the compensation payable in the event of an expropriation.<sup>133</sup>

In light of the authorities discussed earlier in this article, there would appear to be little doubt that the rezoning to salvage and dump would not affect the compensation payable upon an expropriation. On the one hand, it could be argued quite effectively, on the basis of the two *Wascona* cases, that the zoning by-law was merely “part of the expropriating machinery”. In this regard, it should be noted that bad faith need not be proved and that, on the facts, it could quite reasonably be inferred that there was collaboration between MAPC, the municipality and the province. Indeed, it was MAPC which had made the application for the rezoning and there was evidence that the province intended to expropriate the land and turn it over to the Regional Authority which was to run the scheme for, *inter alia*, the Municipality.

On the other hand, even if this argument were unsuccessful, it would appear to be highly probable, ignoring the use to which the land was to be put by the expropriating authority in accordance with section 33(a) of the Expropriation Act,<sup>134</sup> that an application for rezoning, back to a general building zone, would be successful. Moreover, it would be almost inconceivable in such circumstances that any discount would be made for the risk of not obtaining such rezoning.

In the result, it appears that this case is perhaps too clear on its facts to really test the applicability of the jurisprudence. The far more difficult decisions will come in situations similar to the *Farlinger* case, where the Expropriations Compensation Board, if it applies the principles properly, will be forced to second-guess the intentions, not only of the particular council involved, but also of the Planning Appeal Board.

In conclusion, it can be questioned whether the approach indicated by *Re Gibson and City of Toronto* and the cases which

132. *Id.* at 15

133. *Id.* at 15-16

134. S.N.S. 1973, c. 7

followed it is really capable of being applied in an age of planning where more than one level of government or governmental agency has jurisdiction to determine the uses to which land can be put. Both issues, down-zoning prior to expropriation and the probability of rezoning to realize full potential, where they are given proper consideration, involve a great deal of time and expense in terms of testimony by expert witnesses, preparation and argument by counsel, and decision-making by the tribunal. Does the almost inevitable "rough justice", which results from the exercise, really justify such a cost?

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