

COMPENSATION FOR EXPROPRIATION IN URBAN REDEVELOPMENT SITUATIONS

RAYMOND D. SCHACHTER*

Edmonton

Introduction

Expropriation has always been considered an intrusion into private rights because the concept of the sanctity of private property is at the core of our jurisprudence and our values.¹ As a consequence of such emotions, value to the owner as compensation for the taking of private property became the prevailing concept in expropriation law.² With the more widespread and frequent use of government powers to take land and, indeed, the necessity in the opinion of expropriating authorities for such taking, the cost to society of the "value to the owner" concept, the uncertainty which was the trademark of the concept, and the general ambiguity prevailing in the many decisions on the subject of compensation became increasingly unacceptable. Therefore, legislation has now been

* Raymond D. Schachter of the Ontario and Alberta bars, with Witten, Pekarsky & Vogel, Edmonton, Alta.

¹ Henry Riddell stated this concept most eloquently in his treatise, *Railway Parliamentary Practice* (1846), pp. 1856-1857, quoted in Morden. *The New Expropriation Legislation: Powers and Procedures* (1970), L.S.U.C. Lectures 225, at p. 239: "If to a company of individuals seeking for Parliamentary sanction to make a Railway through the demesne of A., and for powers to take so much of his land as may be necessary for the proposed Railway, that sanction be accorded, A. will be compellable to relinquish so much of his land as the company may in their Act have obtained powers to take. It may be contended here, that if A. receive an equivalent for his land, he has no cause of complaint; but A. may set a value on his land, which as it proceeds on other grounds than those of mere marketable value, cannot be estimated by any arbitrator or jury who may be appointed to award him a price for it. None will deny that A. has a right to set this inestimable value on his property; it may have cost him a lifetime in adorning it,—it may have been the seat of his ancestors for ten centuries—or it may be the spot he has chosen on account of its peculiar privacy, and in which he seeks to end his days:—no amount of money could repay him for its violation."

² Challies. *The Law of Expropriation* (2nd ed., 1963). pp. 90 *et seq.*, and in particular in *Re Lucas and Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; *Woods v. The King*, [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87; *Cedars Rapids v. Lacoste*, [1914] A.C. 569 16 D.L.R. 168 and *Diggon-Hibben v. The King*, [1949] S.C.R. 712, [1949] 4 D.L.R. 785, 64 C.R.T.C. 295. See also Morden, *An Introduction to The Expropriations Act* (1968-69) Ontario (1969), pp. 36 *et seq.*

enacted in most Canadian jurisdictions altering that concept to one of market value plus certain additional costs.³

Notwithstanding the efforts of the legislators, both federally and provincially, to draft and enact legislation which improved and clarified the common law as it had then developed with respect to compensation for expropriation, it is the writer's opinion that many inequities resulting from extensive and numerous urban development schemes have not been avoided or alleviated. This is particularly true at the present time, given the uncertain climate for development, accompanied by high densities of population in the cities, the need for more park space, the variety of municipal services now required, and environmental controls. This article focuses on the compensation problems which have arisen in the past decade resulting from such schemes and the present methods used by the courts to analyze and cope with some of these problems. It can be seen, by an examination of the cases that the problems have not been adequately resolved by present legislation and are not sufficiently clarified by existing judicial interpretation.

I. *Windfall Benefits.*

Community planning has greatly advanced both in technique and utilization over the past decade. Many municipal and provincial governments have announced general development plans and are continually revising these plans in accordance with the planning principles which are currently in favour, changing situations in the communities to be affected, and political pressures. Recently the public has grown more insistent about participating in the process of the development of such schemes, whether the schemes have local effects or are general in nature. Consequently these schemes become known to the community as a whole, and so, of course, to prospective purchasers of the property affected thereby. Concrete examples can be used to illustrate the possible unexpected effects on land value and compensation resulting from the new expropriation legislation.

For example, transportation and municipal services are important considerations for general development schemes, and rapid

³ Some of the new Expropriations Acts are as follows, with the compensation provisions relevant to this article indicated: R.S.C., 1970, 1st Supp., c. 16, ss 23-26, s. 24(a); S.A., 1974, c. 27, ss 39 *et seq.*, s. 43(c) & (e); S.M., 1970, c. 78, ss 26-27; R.S.O., 1970, c. 154, ss 13-14, as am., referred to *infra* as the Federal Act, the Alberta Act, the Manitoba Act and the Ontario Act.

It is the opinion of some that the new expropriation Acts have not eliminated the value to the owner concept, which appears to have been revived by the "special value to the owner" provisions in this legislation. See the Alberta Act, s. 40(2)(c) and the Ontario Act, s. 13(2)(d). This is the subject of comment in Yachette, *New Approach to Compensation* (1970), L.S.U.C. Lectures 301, at p. 315.

transit, expressways and truck routes often require land which, until the date of the expropriation, may be low density residential. The effects of the announcement of a rapid transit scheme on the market value of property in the vicinity of the route can be traumatic. If there will be access to rapid transit, and rezoning to high density residential or commercial is anticipated, the value of property near the proposed route will likely rise substantially in the market place. However, if the neighbourhood through which the proposed route runs was previously a quiet stable one, and the local residents will not receive any economic benefit or, perhaps, better access to the city core, property values may decline drastically. The critical fact, however, is that the plan is a proposal only, subject to public hearings, political pressure, and the many other factors which influence municipal decisions.

Particularly if the route chosen by the expropriating authority for the transit system appears to be the only viable plan, those residential properties which may eventually be expropriated will be severely depreciated between the time the scheme comes to the attention of the public and the time the notice of expropriation is filed.⁴ The depreciation will be due to several factors including, firstly, the desire of a prospective purchaser to acquire a stable residential property free from the fear of the forcible taking of that property at some indefinite time in the future, and secondly, the neighbourhood itself will probably show signs of deterioration if residents are leaving because of the expected changes, or urban blight takes hold of the area.

In addition, the scheme may severely affect a person who owns property adjacent to the expropriation because, in the event that rapid transit is constructed, the owner may suffer injurious affection. Despite the fact that the legislation generally provides compensation for injurious affection,⁵ there will be an immediate devaluation of the property reflecting the future injury, whereas the compensation is payable only after the actual expropriation.

Naturally a property owner may have a myriad of reasons for selling his property, but for the sake of simplicity, the example

⁴ Timing for evaluation and for payment are always critical factors, both for the determination of the compensation and the time when business losses and interest start to run. See Todd, *The Law of Expropriation and Compensation in Canada* (1976), pp. 83-8, and Morden, *Determining Compensation in a Rising Market* (1969), 12 Can. Bar J. 360, at p. 361. See also Todd, *Winds of Change and the Law of Expropriation* (1961), 39 Can. Bar Rev. 542, at p. 547 for a brief description of English law on this subject which may be far more liberal. In a case discussed in more detail later in this article, *Re Farlinger Developments and the Borough of East York* (1975), 8 L.C.R. 112, (1976), 9 O.R. (2d) 553 (C.A.), the timing was exceedingly critical as the Borough failed to perfect the expropriation.

⁵ The Alberta Act, s. 40(2)(d); the Ontario Act, s. 13(2)(c).

chosen is that of an owner in the development area who is transferred out of the city and therefore must sell before the notice of expropriation is filed. The marketplace will not be prepared to pay this owner the price equivalent to a comparable property located at a safe distance from the development. A prospective purchaser will not trust the expropriating authority to pay him the true market value plus other compensation allowed by the legislation, in the event that the rapid transit scheme is built; nor would a purchaser take the chance that a beneficent expropriating authority will compensate him adequately for injurious affection. The vendor is in a dilemma, being protected by the provisions of the expropriation legislation insofar as society can reasonably offer him protection, yet he cannot persuade a prospective purchaser to pay for the "assignment of his rights".

In this interim period, a purchaser can acquire these properties at a substantially devalued price and make good use of the property until the actual taking. In the event of expropriation, the purchaser will argue that the decrease in the cost of the land to him resulted from a devaluation because of the imminent prospect of expropriation and thus must not reduce or influence the compensation ultimately paid to him by the expropriating authority.⁶ He will argue that compensation should be based upon the market value of a comparable property not located in the general vicinity of the expropriation so not devalued rather than being based on his purchase price, however recent that purchase may be. The expropriating authority will undoubtedly then argue that the publication of the scheme does not form a part of the expropriation and therefore the recent purchase price is the most important determining factor in assessing market value.⁷

The tables are easily turned by a minor change in facts. Let us suppose that part of the development scheme proposes a high density area adjacent to the proposed transit line. An owner of the property in this area likely will find his property increased in value. Naturally the expropriating authority will choose to take the position that the publication of the scheme does form a part of the expropriation and therefore the owner should not be compensated for the increase in value. It is quite conceivable that the expropriating authority may be arguing both points of view in simultaneous negotiations.

⁶ See, *infra*, text at footnote 12, where the relevant portions of the Ontario Act are set out, as well as similar extracts from the Alberta and federal legislation.

⁷ Two recent cases on this point are *Aldo Recreation Park Ltd v. Metropolitan Toronto and Region Conservation Authority* (1974), 5 L.C.R. 321, at p. 336, varied (1976), 9 L.C.R. 102 (C.A.) and *Slattery Management and Realty Ltd v. Minister of Highways* (1975), 8 L.C.R. 53, appeal dismissed on other grounds (1977), 10 L.C.R. 57; see also Todd, *The Law of Expropriation etc., op. cit.*, footnote 4, p. 155.

The expropriation legislation has made some effort to compensate owners for "urban blight" which may be caused by urban renewal projects in the inner city. With regard to all expropriations, section 14(4)(b) of the Ontario Act can operate to the owner's benefit, and particularly when valuation is based on the sale price of comparable property, prices in the blight area can be excluded.⁸ Homeowners have even greater protection by virtue of the "home for a home" theory, first enacted into law in Ontario by the new expropriation legislation in that province,⁹ which was to provide for almost all costs experienced by the homeowner to relocate his principal residence. The legislation itself has been commented on and its final breadth and interpretation is not yet clear.¹⁰ Notwithstanding the legislation, the interim period between the announcement of the scheme and the actual expropriation still presents grave difficulties for the owner. Further and equally important, the legislation contains no special provisions whatsoever for reinstatement of owners of commercial premises, or indeed of any premises not used by the owner as a principal residence. Depending on one's point of view, this is certainly unfair and illogical. Those cases in which the seriousness of the economic impact of urban blight on such properties has been placed before the courts illustrate the obvious inadequacy of the legislation.¹¹

⁸ *Zamonsky v. City of Sudbury* (1971), 1 L.C.R. 396 (Ont. L.C.B.); *Overhoff v. Town of Oakville* (1971), 1 L.C.R. 264 (Ont. L.M.B.); *Yore Developments Ltd v. Halton Region Conservation Authority* (1971), 1 L.C.R. 260 (Ont. M.B.); *City of Calgary v. MacLean* (1974), 5 L.C.R. 257; *Bishop v. Minister of Transportation and Communications* (1975), 8 L.C.R. 134 (Ont. L.C.B.).

⁹ S. 18(1) of the Ontario Act, and see Morden, *op. cit.*, footnote 4, at pp. 361-362: "With the aid of the legislative history referred to in the latter part of this comment it is relatively easy to say that the section is to provide compensation to cover the difference between the market value of the expropriated premises, which value is depressed for example, by some form of neighbourhood blight and the value of premises of an equivalent nature not subject to blighting influences."

Morden also comments that the word "compensation" lacks definition in the legislation, and the same may be said for the definition of "value" in the Alberta legislation. For further comments by the then Attorney General of Ontario on the "home for a home" theory, see at p. 366 of Morden's article. As stated in the text at footnote 10, there are no comparable provisions for commercial property. With respect to the Alberta legislation, s. 41 is particularly difficult to understand as it uses the term "value" which is not used in s. 40, the section which is instrumental for determining compensation. The Ontario Act, s. 13(2), is much clearer in this regard.

¹⁰ *Ibid.*

¹¹ *A.M. Souter & Co. Ltd. v. City of Hamilton* (1972), 2 L.C.R. 167 (Ont. L.C.B.), appeal and cross-appeal dismissed (1974), 5 L.C.R. 153, judgment in the Ontario Court of Appeal dealing with costs only. The case involved a claim for loss of rentals due to the expropriated area being designated as urban renewal area. The Board stated at p. 171: "This loss, if attributable to the respondent, is in the opinion of the Board, misconceived as a claim for disturbance damages, but in any

The example given above of windfall benefit to the purchaser of property in an urban blight (or urban redevelopment) area is of great interest because in that instance the provisions of the expropriation acts were designed to prevent inequities to owners of such land and may, in fact, require such payments to a speculator. The irony of the situation is that by denying the windfall gain to the speculator, the innocent owner who did not sell in the interim period between publication and expropriation will be denied relief as well.

This article will explore some of the case law in which the expropriating authority and related authorities have taken certain steps which have the effect of reducing the value of expropriated property. Such cases firstly circumscribe the range of activities in which expropriating and other authorities can indulge without invoking the provisions of the legislation which discount the effects of such activities on the value of the confiscated property. Secondly, some insight can be gleaned as to the difference between *bona fide* use of authority, planning or otherwise, and wrongful use of such authority. Thirdly, the differences in interpretation in the cases illustrates the ambiguous meaning of "imminence of expropriation" as that term is used in the legislation.

The discussion naturally includes some reference to the determination of highest and best use of expropriated land as the acts and omissions of municipal and other governmental authorities have a tremendous effect on property use.

II. *Existing Case Law.*

Prior to a discussion of the cases, it is of some assistance to set forth those portions of the Ontario legislation which exclude the influence of expropriation schemes on the value of land taken:¹²

event, if attributable to the respondent, was not a result of the designation of the area as one of proposed urban renewal. The claim for disturbance, prior to expropriation, is accordingly dismissed."

The *Souter* case is followed almost to the word by the Public Utilities Board of Alberta in *City of Calgary v. MacLean*, *supra*, footnote 8.

¹² The Alberta Act, s. 43(c) and (e): "In determining the value of land, no account shall be taken of

(c) any increase or decrease in the value of land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation;

(e) any increase or decrease in the value which results from imposition or amendment of a zoning by-law, land use classification or analogous enactment made with a view to the development under which the land is expropriated."

The federal Act, s. 24(9)(c): "Any increase or decrease in the value of the interest resulting from the anticipation by the Crown or from any knowledge or

In determining the 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 development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation.
- (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health.

It should be noted that the significance of a decision to ignore the effects of a development scheme pursuant to the legislation may be enormous, in some circumstances reducing the determination of the value of the land expropriated manyfold.¹³

In cases prior to the enactment of the new legislation such results were brought about by common law principles applied to an assessment of the future potential of the land.¹⁴ In cases subsequent, as we shall see, the court has the opportunity of varying the ultimate amount of compensation at three different stages of the decision making process, examples of this being provided in the conclusions to this article.¹⁵

There are a number of Appeal Court and Supreme Court of Canada cases in which these issues have been considered. Unfortunately each case appears to be almost unique, and together the cases seem to defy logical analysis.¹⁶ The case which is cited most often as the original authority for the obligation of the expropriator to assess the value of the land in the absence of a scheme or plan is *Re*

expectation, prior to the expropriation, of the public work or other public purpose for which the interest was expropriated;"

It should be noted that the Ontario Act was amended by S.O., 1972, c. 24, in two respects. Firstly, the original s. 14(4) (b) which read: "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;" was rescinded and replaced with the section set forth in the text of this article. Secondly, subsections (5) and (6) were added. Subsection (5) deals with the situation where there are two expropriating authorities. See *Runnymede Corp. Ltd. v. Minister of Housing (Hobart)* (1976), 9 L.C.R. 352, at p. 367 (Ont. L.C.B.), and dissent, at pp. 372-373; *Capus Developments Ltd, et al. v. The Queen* (1975), 8 L.C.R. 10 (F.C.T.D.).

¹³ For example in the *Farlinger* case, *supra*, footnote 4, the Ontario Court of Appeal held that compensation should be reduced from \$982,000.00 to \$360,000.00.

¹⁴ *Challies, op. cit.*, footnote 2, pp. 92-93.

¹⁵ See the conclusions to this article.

¹⁶ The writer attempts some form of rationalization in the conclusions of this article. In order to rationalize the cases it is important to appreciate that prior to the passing of the various new Expropriations Acts, compensation was based on the principle that "the value to be paid is the value to the owner . . . not the value to

Gibson and City of Toronto,¹⁷ decided in the Ontario Court of Appeal. Briefly the facts are as follows. Gibson was the owner of a lot on the north side of St. Clair Avenue in Toronto. The City expropriated the southerly seventeen feet of his lot, passing a by-law authorizing the taking in 1911. Previously, in 1910, City Council had passed a by-law declaring the use of that particular part of St. Clair Avenue as residential and prohibiting the erection of any building within seventeen feet of the north or south line of the street. Gibson argued that the arbitrator who originally heard the matter should have taken into account damage suffered by him for deprivation of the advantage of creating commercial buildings on the seventeen feet. Relying on the first by-law, the City argued that the land taken had no commercial value. The arbitrator had found as a fact that the City had passed the first by-law as an expedient measure to prevent buildings from being placed on the land when it was the intention of the City to expropriate at a later date.¹⁸

Four judges of the Court of Appeal heard the case, McClaren J.A., rendering the decision for the majority. He stated¹⁹ that he was "unable . . . to find anything in this case to justify the decision arrived at by the arbitrator" but goes on to state that:

. . . it was the duty of the arbitrator to have taken into account the probability, or, as he puts it, the certainty, of the by-law being repealed in the near future. Even apart from what he states was the reason for its being passed, the evidence shews that, from the rapidly changing nature of that part of the city, it was only a question of a short time when that part of St. Clair Avenue would cease to be a purely residential neighbourhood. . . .

and.²⁰

It would indeed be a gross abuse of the powers conferred upon the city corporation, if it should be able to use such powers to depreciate the value of property it was about to acquire.

Clearly the *Gibson* principle was enunciated to dissuade municipal and other government authorities from abusing their zoning and other powers to confer upon themselves unfair advantage, rather

the taker". Per Lord Dunedin in *Cedar Rapids v. Lacoste*, *supra*, footnote 2, at p. 576. See also *Challies, op. cit.*, footnote 2, p. 90 and *Cunard v. The King* (1910), 43 S.C.R. 88. See also comment on the problems involved in this type of determination of value: Todd, *Winds of Change and the Law of Expropriation, op. cit.*, footnote 4, and in general, Law Society of Upper Canada, *Special Lectures in Expropriation* (1958), pp. 18-26.

¹⁷ (1913), 28 O.L.R. 20, (1913), 11 D.L.R. 529 (C.A.); see also *Re Nanaimo-Duncan Utilities Ltd.*, [1950] 3 D.L.R. 461.

¹⁸ The arbitrator based his conclusion on the dictum of Meredith C.J., in *Toronto Railway Co. v. City of Toronto* (1907), 13 O.L.R. 532.

¹⁹ *Supra*, footnote 17, at p. 531 (D.L.R.).

²⁰ *Ibid.*, at p. 532.

than for the purposes for which they were intended, and this general principle has subsequently been argued and applied in later cases.²¹

Prior to the passing of the new expropriation legislation in the various Canadian jurisdictions, the Supreme Court of Canada had the opportunity of examining the effect of a general community planning scheme in the City of Regina, in which the *Gibson* principle was argued. In *Kramer v. Wascana Centre Authority*,²² the facts are concisely stated as follows. Kramer owned land near the provincial legislative buildings in an area described as one of unique attractiveness for development. The lands were governed by a general subdivision by-law which provided for single detached dwellings, which by-law was subsequently amended to permit limited local business use. A proposed development plan which included high density residential, commercial and other development for the subject area was submitted to the municipal authorities and approved in principle in November, 1959, but no amending by-laws were enacted to carry it into effect. Instead, in December, 1961, a by-law was enacted adopting a community planning scheme which called for the use of the lands for "parks and public open spaces". This by-law was followed by a second by-law, passed in December, 1962, which repealed the previous zoning allowing limited commercial use and established that the lands would be designated for "public service". In 1957, the Legislature had enacted the Community Planning Act, and pursuant to that Act the Council of Regina had authorized preparation of a type of general plan for the whole city. In 1962, the scheme was passed and later approved by the Minister of Municipal Affairs. Also, The Wascana Centre Act, 1962, was passed and pursuant to this Act, the Wascana Centre was given the power to expropriate, which power it used in that year to expropriate Kramer's land. It should be noted that both of the zoning by-laws referred to above were approved by the Minister of Municipal Affairs only after the enactment of The Wascana Centre Act, and the second zoning by-law, in fact, was passed after the Act as well.

The arbitrator whose job it was to assess the value of the land fixed compensation on the basis of use for "parks and open spaces" at \$506,500.00. The Saskatchewan Court of Appeal,²³ in

²¹ For an interesting account of the application of similar principles in the United States, see Rams, *Valuation for Eminent Domain* (1973), ch. 7. See also the recent Supreme Court of Canada decision of *City of Vancouver v. Simpson* (1976), 65 D.L.R. (3d) 669, and *City of Nelson v. Minister of Environment* (1977), 11 L.C.R. 97, at p. 108 (B.C.S.C.).

²² [1967] S.C.R. 237.

²³ This decision is referred to by the Supreme Court but does not appear to have been reported.

the majority, affirmed that value must be determined on "public service use" according to the by-law which was in effect at the time of the expropriation, thereby increasing the compensation to \$669,840.00. Brownridge J.A., however, determined that for the purpose of finding value the Community Planning Scheme, the rezoning by-law and The Wascana Centre Act, 1962, should all have been considered not to have been enacted. Therefore valuation should have been based upon the limited commercial zoning with whatever added value the possibility of development in accordance with the proposed plan of subdivision would have given the land. Notwithstanding his dissent, Brownridge J.A., came to the same conclusion as the rest of the court as to value.

The Supreme Court of Canada²⁴ agreed with the arbitrator that the rezoning by-law was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings, although passed with knowledge of the Wascana Centre Scheme. Therefore the by-law, in limiting the use of land to "public service use", was a determining factor in assessing the amount of compensation. The majority decision of the Supreme Court was delivered by Abbott J., who followed the views expressed by the majority of the Saskatchewan Court of Appeal. He stated:²⁵

The arbitrator held on the evidence that this by-law was an independent zoning 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.

Abbott J., affirmed this point of view. Spence J., also dismissed the appeal, but in so doing agreed with Brownridge J.A., stating:²⁶

The submission of the appellants to the Court of Appeal of Saskatchewan and to this Court was that in considering the possibilities for the highest and best use of the lands the tribunal should exclude any limitations on the development of the lands which were in fact mere steps in the expropriating machinery. The appellants cited *Re Gibson and City of Toronto* and particularly Hodgins, J.A., who said at p. 28:

"If that was its sole purpose, then, I think it became part of the general scheme and should be so treated. If it is not part of the expropriating machinery as such, it is part of the plan adopted, of which it and the valuation of the lands by arbitration were essential factors. I see difficulties in the way of holding that by-law No. 5545 should be treated as part of the expropriation proceedings. But in this case it makes little difference in the result.

It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not be able, by the exercise of its other powers

²⁴ In a four to one decision, with Cartwright, Abbott, Martland and Ritchie JJ., in the majority.

²⁵ *Ibid.*, at p. 239.

²⁶ *Ibid.*, at pp. 243-244.

immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and or which it is contemplating expropriation.”

In considering whether the doctrine outlined by Hodgins, J.A., applies to the circumstances of this case, one must keep in mind 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.

And:²⁷

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 . . . 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 the setting up to the Wascana Centre and the acquisition by the Wascana Centre Authority of the lands in question. Counsel for the respondent points out that the two by-laws deal not only with the lands in question but with all lands within the City of Regina and that, therefore, there can be no implication that the enactment of the by-laws was part of a “scheme”. To that submission, there are two answers: Firstly, as I have pointed out, no “scheme” in any nefarious connotation need be proved, and secondly, whatever the impact and purpose of the by-laws were as to other lands, the impact and purpose as to the lands in question were very plainly to prevent such a development as had been envisaged by the appellants and instead included them in the limiting, although commendable, design of the Wascana Centre Authority.

I am, therefore, of the opinion that it is the duty of the tribunal fixing the award to consider the situation without regard for the enactment of the limiting use in those two by-laws.

The Supreme Court of Canada had a second opportunity to adjudicate an expropriation arising out of the Regina urban renewal scheme. In *Re Burkay Properties Ltd and Wascana Centre Authority*,²⁸ the lands which were expropriated by the city again formed part of the same community planning scheme. The lands were originally zoned “Agricultural A2” in 1956. The city scheme, passed with the approval of the Minister of Municipal Affairs, zoned the subject lands for “public service use”. The Wascana Centre Act 1962 was passed retroactive to April 1962, a fact later used by the Saskatchewan Court of Appeal in this case to find that there was a sort of loose conspiracy to sterilize the land and then expropriate it for reduced compensation. There was provision under an Interim Development by-law passed pursuant to The Community Planning Act 1957, granting persons desiring to develop lands leave to apply to a Board the powers of which were limited to approval of applications conforming to the community

²⁷ *Ibid.*, at p. 246.

²⁸ (1972), 2 L.C.R. 9, rev'd. [1973] S.C.R. vii, [1973] 4 L.C.R. 59n.

planning scheme then in preparation.²⁹ The subject lands were expropriated in 1964 and the arbitrator determined compensation based upon the "public service" use at \$126,150.00, coincidentally the amount offered by the University of Saskatchewan to purchase the property prior to the expropriation.

The Saskatchewan Court of Appeal had before it evidence which it considered sufficient to distinguish this case from the *Kramer* case on the basis that the new evidence adduced proved a conspiracy existed between the city, the university and the provincial government. According to McGuire J.A.:³⁰

The evidence does establish a collaboration or co-operation between the three parties resulting in a restricted permitted use of said lands. . . . There was not here, as in *Re Gibson and City of Toronto, supra*, 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 use and purposes of Wascana Centre Authority and its participating parties, as the concept was itself gradually developed, and lands within the Centre devoted to use or uses as requested by the participating parties or any one of them. I am of the opinion that restricted use for the purpose of immediate expropriation is not the determining factor. Such purpose does, of course, make the application of the principle reasonably easy, but the same result, affecting 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.³¹

The court assessed compensation on commercial, multiple family and single family residential use at \$159,600.00.

Upon appeal to the Supreme Court of Canada,³² Martland J., found that the Saskatchewan Court of Appeal erred in that the court had found as a fact that, given the community planning scheme, the zoning required would not have been approved or granted. Nevertheless, the court allowed compensation on the basis that there was a probability that such zoning would have been granted. There was no further discussion by the court of the *Gibson* principle, or its application to the subject matter. Martland J., makes the surprising statement:³³

The learned arbitrator awarded compensation in accordance with the offer of the University of Saskatchewan of \$126,150. This was a *bona fide* offer by a responsible institution and in our view was the best evidence of value placed before the arbitrator.

²⁹ The possibility of such an application may be important as it indicates some chance, though not a probability, of rezoning. It was not a factor in this case.

³⁰ *Supra*, footnote 28, at p. 16.

³¹ This clearly shows that the *Gibson* principle, in McGuire J.A.'s, mind, is of greater breadth than the new legislation in which imminence is the sole factor. Reference to this passage is made *infra*, text at footnote 59 where the immediacy of the purpose of intent to expropriate is examined with respect to discounting the value of the property after highest and best use has been determined.

³² *Supra*, footnote 28.

³³ *Ibid.*, at p. 60 (L.C.R.).

It should be noted that McGuire J.A., had reviewed the evidence and this evidence was given in sufficient detail to enable the Court of Appeal to determine value not only by present value and future potential, based on existing use, but also by value established by the land residual method.³⁴ In the writer's opinion, therefore, the Supreme Court decision should be interpreted as being restricted solely to the facts of the *Burkay* case and not as establishing any general principles.

A recent case in which arguments of this nature were advanced is that of *Re Farlinger Developments Ltd and the Borough of East York*.³⁵ This case illustrates the difficulties of the issues at hand, and, though the courts have not yet clarified the problems completely, leave to appeal to the Supreme Court from the Court of Appeal of Ontario was refused. Howland J.A., sets out the facts in his judgment, and briefly they are as follows: The land expropriated "the Goulding property", consisted of about six and one half acres in the Borough of East York on which was situated a large single family residence. To the north was situated a small park, to the north east and north west single family homes, to the south west "the McLean property", and to the south and east of that lay the ravine. The history of the area commenced with official plan amendment #4 which established the general policies for development in East York, and was approved by the Ontario Municipal Board in 1972. The borough intended to control development until a secondary plan was prepared and it made some general statements in the said amendment regarding apartment development and public open space. At the same time that amendment #4 was being considered, an application was made to designate the McLean and Goulding properties as public open space but they were, in fact, designated R-1 (single family residential). In 1962 a resolution was passed by the East York Recreation Advisory Committee recommending purchase of the Goulding property for parkland, but this resolution was rejected by council. In March, 1963, the Council of East York permitted an apartment development adjacent to the Goulding property on the west in accordance with the official plan amendment which had noted an intention that this property be developed at high density, though at the date of the amendment it was zoned for low density. In March, 1964, by amendment #5 to the official plan, the land to the north west of the Goulding land was changed from industrial to high, medium and low density residential and in the same month council approved

³⁴ The admissibility of the offer as evidence is discussed by McGuire J.A., *ibid.*, at p. 24, and he cites *Diggon-Hibben Ltd v. The King*, *supra*, footnote 2 and *Woods Mfg. Co. Ltd v. The King*, *supra*, footnote 2.

³⁵ *Supra*, footnote 4.

purchase of the McLean property for a park pursuant to the recommendations of the Metropolitan Parks Department which also recommended the purchase of the Goulding property. In August, 1965, Farlinger agreed to purchase the Goulding property for \$150,000.00. On September 8th, 1965, council passed an expropriation by-law to expropriate the Goulding land but failed to register a plan of expropriation, thus, the land did not vest in the borough. In October, 1965, council informed Farlinger that zoning of the Goulding property would not be changed. Official plan amendment #7 of September, 1967, showed the Goulding property as public open space. In 1970, the borough discovered its error and agreed with Farlinger, *inter alia*, that the date for determination of compensation should be September 15th, 1969. The Land Compensation Board awarded \$982,900.00, based upon use for high density apartment buildings.

The Court of Appeal considered two issues. Firstly, what was the highest and best use of the land; and secondly, if the highest and best use was for high-density apartment development, what should be the compensation. Howland J.A., stated:³⁶

As September 15, 1969 is the important date for the purposes of s. 14(4) (a) in determining the market value of the land, consideration cannot be given to the fact that East York proposed to use the Goulding property for park purposes when the expropriation was complete. The expropriation would cover the period from September 8, 1965, to September 15, 1969, as that was the period during which the expropriation was being perfected. This would also eliminate from consideration the designation of the Goulding property as public lands in official plan amendments No. 7 and No. 10. With reference to the application of s. 14(4) (b) neither the use of the Goulding property for park purposes nor the perfected expropriation can be said to have become imminent for the purpose of determining the market value until shortly before the effective date of September 15, 1969, so that it is any decrease in value at that time that must not be considered. 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.

Howland J.A., does not really direct his attention to the meaning of section 14(4) (b),³⁷ and particularly does not comment upon the meaning of the word "imminent", although in the writer's view the imminence of the expropriation is of prime importance in determining compensation, and should and does depend on more factors than time alone. In the *Kramer* and *Burkay* cases the events which ultimately led to the expropriation and which the Saskatchewan Court of Appeal said formed part of the expropriation occurred over

³⁶ *Ibid.*, at pp. 123-124 (L.C.R.).

³⁷ S. 14(4)(a) is the special use to which the expropriating authority will put the land. Ss 14(4)(a) and (b) have been reproduced, *supra*, in the text at footnote 12.

a somewhat similar period of time. The Supreme Court of Canada, in both those decisions, implicitly disagreed with the Ontario Court of Appeal in the *Farlinger* case, yet leave to appeal in the *Farlinger* case was refused.^{37a}

The issue of imminence was substantially avoided by the Appeal Court in the *Farlinger* case in the following manner. The court, while ignoring the effects on the value of the subject land of certain amendments to the official plan and publicly expressed intentions of the borough, took these same factors into considerations in determining the probability of a rezoning, effectively setting the stage for deciding highest and best use. Howland J.A., after reviewing briefly the *Burkay* and *Kramer* cases on this issue, stated that:³⁸

From these authorities it would seem to be established that the highest and best use must be based on something more than a possibility of rezoning. There must be 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 higher than a 50% possibility.

And continued:³⁹

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 principal 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.

Howland J.A., found that the property was suitable for high density apartment development but decided against *Farlinger* on the basis that there was not sufficient evidence to justify the reasonable expectation that the rezoning would take place to permit high density apartment development. One of the factors considered by Howland J.A., was the use of the McLean property as parkland

^{37a} For further discussion on imminence and the provisions of s. 14(4)(b) of the Ontario Act, see *Runnymede Corp. Ltd. v. Minister of Housing (Hobart)*, *supra*, footnote 12, at p. 367.

³⁸ *Supra*, footnote 4, at pp. 123-124 (L.C.R.) followed in *Spruceside Construction Ltd. v. City of Hamilton* (1976), 9 L.C.R. 128, at p. 135 (Ont. L.C.B.) and *Biamonte v. Niagara Parks Commission* (1977), 11 L.C.R. 82, at p. 86 (Ont. L.C.B.). The method of defining possibility and probability by using contractual principles is quite novel and interesting. It is not, however, feasible to comment further in this article on the subject.

³⁹ *Ibid.*, at pp. 124-125 (L.C.R.). Howland J.A., notes that rezoning can take place even if opposed by the municipality. This may not be the case in other jurisdictions. The possibility of rezoning was also raised in the *Kramer* case, *supra*, footnote 29, but carried no weight as "there was no purpose in making an application to permit a development which obviously would not proceed" (at p. 245 (S.C.R.)).

while the intended use of the Goulding property as parkland could not be referred to. In the writer's opinion, the future of the McLean property could not be separated from that of the Goulding property, and the use of the McLean property for parkland was part of the same general scheme. In fact, both properties were proposed as parkland at the same time.

Howland J.A., also stated that official plan amendment #4 did not note the intention that the Goulding property would be developed as high density, although it is not clear from the decision whether the absence of such an intention is fatal in determining the probability of future use, and no reference is made to comparable situations elsewhere. The witness upon whom Howland J.A., relied most used the word "possibility" rather than "probability" with respect to the chance of rezoning, but again it is not clear from the decision whether that difference, as described in the judgment, was brought out in cross-examination. It must be conceded that one of the witnesses did not think there was any possibility of rezoning.

The property was, therefore, valued at its present use, that of single family residential in accordance with the existing zoning, resulting in a reduction in compensation from \$982,000.00 to \$360,000.00. Only one witness gave evidence as to the value of the property as zoned R-1 and he attributed no incremental value whatsoever under the heading of future possibility of rezoning.^{39a}

The Minister of Highways has been responsible from time to time for expropriations and planning considerations often require that certain properties be limited in use according to transportation needs, both current and future. In *Teubner v. Minister of Highways (Ontario)*,⁴⁰ the Ontario Court of Appeal grappled with the effects of limitation of use in what might be considered a concerted effort to keep land undeveloped while the Department of Highways made its plans. Teubner owned land consisting of a ninety-eight acre parcel on the south side of a main highway (designated as a King's

^{39a} The *Farlingher* case was cited by Addy J., in *Karam et al. v. National Capital Commission* (1976) 9 L.C.R. 163 (Fed. Ct. T.D.). In this case, Addy J., determined as a matter of fact that the Regional Municipality of Ottawa-Carlton would have approved the application to subdivide made by the claimant if the National Capital Commission had not made known its intention to create a buffer zone between Ottawa and a satellite city. Originally the subdivision was refused because of a scheme by Ontario Housing to develop an urban area adjacent to the subject lands as this satellite city. It is not clear from the facts stated in this decision whether the development of the satellite city was a factor in the refusal of the subdivision. If the National Capital Commission wished to expropriate and the development of the satellite city were the factor instrumental in the refusal of the application, it is questionable whether a conspiracy could be proved between the Regional Municipality and the National Capital Commission.

⁴⁰ (1965), 50 D.L.R. (2d) 195.

Highway) in Ontario near Toronto, the expropriated portion being a strip of land about 350 feet in depth and 1,300 feet in length, to be used for new highway construction, plus a triangular section intended for access to the highway. The land was expropriated in 1961, long before the new expropriation legislation had been enacted in Ontario. Teubner had acquired the land in May, 1956. At the time of acquisition, legislation in Ontario prohibited, except under permit, development within 150 feet from the centre limit of the King's Highway, and 600 feet from the centre point of the King's Highway where it intersected with another highway. Furthermore, in August, 1956, an Official Plan for the Township of Markham where the land was located, designated all of Teubner's land as agricultural and residential though no zoning by-laws were passed implementing the plan. Even so, the municipality could effectively exercise control over the use of any parcel less than ten acres by subdivision control by-laws then in effect in the township.

In order to develop the frontage on Highway 7, Teubner would have required rezoning for commercial use. In December, 1955, Teubner's husband applied for a permit to construct a one storey motel with a drive-in restaurant within 150 feet of Highway 7, which permit was issued subject to conditions. No construction commenced within six months and the permit lapsed. In June, 1956, Teubner gave an oil company an option to purchase 200 feet of frontage but the company was unable to obtain the necessary permits to construct a service station. A second option was granted to another oil company with the same result. In March, 1957, Teubner's husband made a second application and received his license, but again it lapsed for failure to build. Another option was granted but by this time the official plan had been passed and the option was dependent on the amendment to the official plan and the issuance of a Minister's permit. At the date of the expropriation neither of these obstacles had been overcome.

After various efforts, an amendment to the official plan was prepared, satisfactory to the Planning Board of the Township, which zoned the appropriate portion of Teubner's land commercial but the Minister refused to approve it pending further study which clearly involved examination of the need of Teubner's land for the extension of the Don Valley parkway north. The Department of Highways, too, refused to issue a license because of the proposed parkway plans. The land was, in fact, expropriated for the parkway. Naturally Teubner desired to receive compensation based upon the use of the land as commercial, in accordance with his application. In the Court of Appeal Roach J.A., discussed the decision of the Ontario Municipal Board,⁴¹ wherein the board stated

⁴¹ *Ibid.*, at p. 201.

that the Minister's act in refusing to approve the amendment to the official plan was a regular exercise of the discretion conferred by the Planning Act.

Roach J.A., then described the purposes of the Planning Act, and approved the use of that Act, and the Minister's powers thereunder, to control land use without exposing the Minister to criticism if particular properties were affected by application of the general principles of good land use planning. He put it in the following way:⁴²

It is obvious that [the permit] was refused because of its possible impact on the highway projects that were then in contemplation. I see nothing reprehensible in that. In refusing it the Minister was clearly exercising the discretion conferred upon him by the *Planning Act*.

The Minister's refusal, however did not deprive the claimant in the expropriation proceedings that followed of her right to be compensated for the land adjoining Highway 7 on the footing that the easterly 700 ft. thereof — that is the part covered by the proposed amendment No. 8 — was ripe for immediate rezoning from agricultural-residential to commercial and in my opinion the Board was clearly wrong in holding that it did. To hold that it did would amount to confiscation by the Province of the value attributable thereto which would be outrageous. There is nothing in the *Planning Act* that could possibly be construed as justifying it.

Roach J.A., stated that he was required by the principles long since established by Duff J., in *Cunard*, to value the expropriated property as though it were not required for public purposes, whether such requirement enhances or diminishes the value. But the decision becomes a little more complex when the restraints imposed by the Planning Act and those of the Highway Improvement Act were compared:⁴³

The next matter to be considered is the effect on the value of the expropriated land of the prohibition contained in s. 34(2) (a) of the *Highway Improvement Act* and the fact that the Minister refused to grant a permit thereunder. In these proceedings the effect is quite different from any effect flowing from the *Planning Act*. In my opinion the Minister, in the exercise of the discretion vested in him by the *Highway Improvement Act*, was entitled to refuse the permit notwithstanding that such refusal deprived the claimant of the enhancement in value that those lands would have had if the permit had been granted. I agree with the submission made by counsel for the appellant that having regard to the reason given by the Minister for such refusal that it may reasonably be concluded that had it not been for the proposed location of the new highway he would have granted a permit. But what the precise terms of it would have been can only be a matter of speculation. I am prepared to assume that its terms would have been to the complete satisfaction of the claimant.

Counsel for the claimant relied upon the *Gibson* case arguing that compensation should be determined as though the permit had been available to her, but Roach J.A., distinguished the *Gibson* case on

⁴² *Ibid.*, at pp. 203-204.

⁴³ *Ibid.*, at pp. 205-206.

the basis that the city actively passed a by-law which depreciated the property whereas in the instant case, the property had always been subject to restrictions. Roach J.A., said:⁴⁴

I agree with counsel for the respondent that there 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. However, in so agreeing I do not want to be taken as implying that the expropriation authority by withholding the consent or permit can contain the value of the expropriated property below that which it would have if the permit or consent were given. . . . The power of expropriation is an extraordinary power and a government or its agent in which that power is vested has a corresponding extraordinary obligation to exercise it with a sense of complete fairness. To withhold a permit or consent that would otherwise be given for the express purpose of containing value would not, in my opinion be dealing fairly.

The fact that the prohibition is a general one imposed upon all lands adjoining the King's highway is also cited as reason for allowing the Minister in a situation such as this to exercise his discretion against the claimant without exposing the expropriating authority to liability therefore. The matter is disposed of by allowing compensation on the highest and best use as a service station and discounting the value thirty-five percent as a reasonable discount a purchaser would allow with regard to the risk of not being able to obtain the permit. Taking into consideration Roach J.A.'s assumption that the permit, if issued, would have been satisfactory, the discount factor does seem quite substantial.

The *Teubner* case was cited with approval in *Linat Holdings Ltd. v. Minister of Highways for Ontario*,⁴⁵ in a decision rendered by Mr. W. Shub of the Ontario Municipal Board. In this case it was alleged that the official plan omitted the expropriated lands from the designation as high density residential due to concerted planning between the municipality and the Department of Highways.⁴⁶ Mr. Shub reviewed the *Kramer* case and the new legislation, and came to the conclusion that:⁴⁷

. . . The Board accepts the *ratio decidendi* of the *Wascana Centre* case, and concludes the Etobicoke zoning was being governed not as independent decisions, but were taken in concert with Department of Highways planning, ready for any change that would not conflict with highway plans.

As a consequence of this type of zoning not based on pure planning principles, we have concluded that there was detriment to the owner. If it were not for the scheme and the imminence of expropriation we are of the

⁴⁴ *Ibid.*, at p. 207.

⁴⁵ (1971), 1 L.C.R. 289.

⁴⁶ See also *Re Don River Heights Ltd and Metropolitan Toronto & Region Conservation Authority*, [1969] 1 O.R. 445, 3 D.L.R. (3d) 31.

⁴⁷ *Supra*, footnote 45, at p. 297.

view that application would have been made for rezoning to R4 of all the claimant's lands in the state they were prior to expropriation with success almost a certainty. However, the market value of the lands expropriated would, in our opinion, be affected to some degree by the risk involved in dealing with lands that in fact were not yet zoned R4 and by a doubt as to the necessity of having to amend the official plan. For this factor it will therefore be necessary to consider some discounting.

Note that Mr. Shub apparently relied upon the decision of McGuire J.A., in the *Wascana* case, which was approved by Abbott J., in the Supreme Court, to the effect that if concerted action was established, actions of all planning authorities should be treated as though the actions were by a single authority. The Saskatchewan Court of Appeal relied on the same principle in the *Burkay* case, yet the Supreme Court rejected that decision. Mr. Shub also cited and relied upon section 14(4)(b) of the Ontario Act then in force. This decision appears to go considerably further than *Teubner*, and one may well ask whether development of the law or the current changes in the Expropriation Acts will have the effect of reducing or nullifying discounts of the nature of those awarded by the Court of Appeal in *Teubner*. It is interesting to note that had the view of the Minister of Highways prevailed the compensation awarded to the owner would have been about fifty per cent less, a loss of about \$400,000.00. There is no appeal of the decision reported.

There are few reported cases on these issues in the lower courts in the western provinces, and indeed there is a dearth of cases on the new expropriation legislation. One case of interest occurring prior to the new Alberta legislation is that of the *City of Calgary v. Interfaith Housing*,⁴⁸ a decision of the Alberta Public Utilities Board. In this case, the City Planning Commission had approved an outline plan of development in June, 1969. Although this approval did not extend to specific land uses and densities, these were indeed within the jurisdiction of the City Council. In September, 1969, the city indicated an interest in acquiring the subject lands for park, the land comprising about twelve acres of a twenty-six and one-half acre parcel. In December, 1969, the Planning Commission recommended rezoning part of the holdings not expropriated at a density of fifty-seven point three persons per acre, the previous density of the whole being twenty-five persons per net acre. The city naturally contended that the expropriated land should be valued upon the density prior to rezoning. The city had been encouraging higher density townhouse development in the area and all necessary authorizations from various city planning authorities had been obtained to proceed with such development. However, Interfaith had not yet completed subdivision plans and had not obtained the appropriate zoning at the time of the

⁴⁸ (1972), 2 L.C.R. 376.

expropriation. The Arbitrator, Mr. W. D. Abercrombie, reviewed numerous authorities, including *Nanaimo-Duncan Utilities*,⁴⁹ *Cunard* and *Gibson*, and in the following excerpts from his decision commented upon the exercise of power by the expropriating authority which lowered the value of the expropriated land:⁵⁰

The question as to whether the exercise of a power by an expropriating authority which decreases the value of land it later expropriates is or is not part of the expropriation scheme is, in the Board's view, a question of fact. From a review of the cases, it appears to the Board that it is not a difficult task to make such a finding where the evidence clearly establishes, by intention or inference, that the exercise of the power is to assist in the acquisition of land by expropriation. The task is made easier where the exercise of the power is apparently directed at or applies to a particular piece of property or area which is the subject of the expropriation. Difficulties may however be encountered where the exercise of a power affects other land besides the expropriated land and applies generally to a district involving many parcels.

The judgment of the Supreme Court of Canada in the *Kramer* case indicates that a general zoning by-law which applies to an entire municipality is not to be considered as part of an expropriation scheme. In the *Kramer* case, the zoning by-law was passed by the City of Regina, whereas the land was expropriated by the Wascana Centre Authority, which was created under an Act of the Legislature which provided for three particular parties: the city; the province; and the university. By comparison, in the *McKee* case⁵¹ the "freeze" order issued by the province under the *Public Works Act* applied only to that part of the City of Edmonton where the University of Alberta wished to expand. Although the "freeze" order and the subsequent expropriation were action taken on behalf of the university, both steps were performed by the Province of Alberta and Milvain, J., found that the zoning restriction was part of the scheme to expropriate for the purposes of university expansion.

Mr. Abercrombie delineated some of the factors which distinguished the various cases, and by recognizing these factors, even if the cases cannot be rationalized, a logical argument can be advocated before the relevant tribunal. It should be noted that Mr. Abercrombie considered that the determination of whether a scheme should or should not be ignored in assessing compensation is a matter of fact, and perhaps to the extent that the trier of the fact must give weight to the various factors, it is indeed such a matter. However, in the writer's opinion the factors which the tribunal must consider is a matter of law, and therefore a clear understanding of these factors is essential. Mr. Abercrombie considered:

(a) Whether the exercise of power is directed to a particular piece of land which is the subject of expropriation;

⁴⁹ *Supra*, footnote 17.

⁵⁰ *Supra*, footnote 48, at p. 389.

⁵¹ *McKee v. The Queen* (Supreme Court of Alberta, Trial Division T.D.E. #51315, Jan. 27th, 1967) reviewed in this decision, *ibid.*, at p. 385.

(b) whether various levels of government have acted in concert.

The Board concluded that the recommendation of densities was all part of the scheme, and that the increased density allowed on the part of the parcel not expropriated would not have been granted in the absence of the expropriation. The Board determined that it could not value the land on square footage or acreage or comparables, and accepted the appraiser's value based on R-3 zoning (medium-density residential).

In *Whittier Park Development Corp. v. City of Winnipeg*,⁵² we again find the principles of *Gibson*, *Teubner* and *Interfaith* being cited with approval but, in the writer's opinion, the facts of this case make it obvious that failure of a municipal authority to change zoning will not likely be considered bad faith except under the most exceptional of circumstances. Here the claimant appealed from the award of the arbitrator,⁵³ and the city cross-appealed. The city had expropriated a tract of land situated on the Red River and prime for high density residential development. The land was zoned light industrial and flood plain under the City of St. Boniface Town Planning Scheme, 1957, with no residential uses permitted. The claimants acquired the land in 1958 for \$300,000.00. In 1963 the draft development plan for Metro was introduced and contemplated rezoning from industrial to medium density residential. In September, 1964, a draft by-law was introduced to rezone the lands in accordance with the draft development proposal. It soon became clear that Metro did not intend to proceed expeditiously with the passage of the rezoning.

Whittier first applied to rezone the land in April, 1965, but within about a week of this first application he found that there would be undue delay in the processing of the application as Metro had indicated that it was studying major thoroughfare improvements in the area. Whittier's representative wrote to Metro in April, 1965, submitting that the technical work necessary for rezoning was complete and that work done on the development and redevelopment in contiguous areas made any land use other than that in the proposed by-laws impossible. Notwithstanding, the Metro finance committee, reporting in May, 1965, that an expressway which would require lands had not been formally approved in principle, wrote to the Minister requesting such approval. Soon after, the Minister of Public Works responded favorably. In June, 1965, a sub-committee of the planning committee recommended to

⁵² (1974), 6 L.C.R. 322.

⁵³ *Whittier Park Development Corp. Ltd v. Metropolitan Corporation of Greater Winnipeg* (1974), 5 L.C.R. 39.

council that there be no change in zoning pending study of use of the land for park and thoroughfare. The planning committee, however, asked the director of planning to prepare the by-law for rezoning, and recommended passage of the by-law to Council in October, 1965. In December, 1965, the finance committee recommended that expropriation procedures begin, and the executive director of Metro, summing up the various proposals for the land, advised council to defer decision. In April, 1966, council refused to rezone and in May, 1966, the Minister of Highways advised Metro he was in favor of the proposed thoroughfare plan. The property was expropriated on June 17th, 1969. As late as April, 1968, an urban renewal study for St. Boniface stated the area was logical for future high density residential use.

There was basic agreement among the parties to the expropriation that, but for the scheme, it was highly probable that the zoning would have been changed to high density residential, and that in the determination of compensation the circumstance of the subject property being required for roads should have been ignored.⁵⁴ The court stated:⁵⁵

On [the possibility of rezoning] the learned arbitrator, after reviewing the efforts to rezone, had this to say (5 L.C.R. 39, at p. 44):

"It appears clear that from October, 1965 until the date of expropriation in June, 1969, Metro Council expressly blocked any consideration of the claimants' application for rezoning on the basis of proper planning, while it proceeded to take all necessary steps to expropriate the whole of the subject property, and I find that Metro Council should have seriously considered draft By-law 892 (ex. 9) on its merits (as recommended by its planning director)."

The arbitrator does not either expressly or by implication attribute bad faith to Metro; nor does he find that its failure to rezone the property was motivated solely by its own desire to secure it. Saying that Metro should have seriously considered draft By-law 892 does not mean necessarily, that the by-law ought to have been enacted. If the comment of the learned arbitrator is construed as a finding that Metro refused to effect rezoning for merely ulterior purposes it is our opinion that the finding is not supported by the evidence . . . [Whittier] argued that where the expropriating body artificially has used its powers to deny the utilization of land for its highest and best use for the ulterior purpose of depressing compensation, the lack of the zoning wrongfully denied is eliminated as a factor in determining the amount of compensation. To do otherwise would amount to condonation of expropriation without due compensation. The power to rezone is given for the purpose of ensuring zoning in accordance with proper planning principles and not to deny fair compensation on Expropriation. . . .

The above quoted portion of the decision is *obiter* because the court goes on to say immediately following:

⁵⁴ *Supra*, footnote 52, at p. 337. The Metro appraiser came to these conclusions and certainly they would hardly be opposed by the claimant. *Quaere* whether Metro should have argued otherwise?

⁵⁵ *Ibid.*, at pp. 338-339.

In any event, compensation has been determined, in this case, not on the basis of an industrial zoning, but on the basis of high density residential use.⁵⁶

The fascinating aspect of this decision is the evaluation of the property. The arbitrator found compensation on the basis of the

⁵⁶ Some of the cases cited in support of the Gibson Principle were *Re Lucas and Chesterfield Gas & Water Board*, *supra*, footnote 2; *Re Gibson and City of Toronto*, *supra*, footnote 17; *Re Nanaimo-Duncan Utilities Ltd*, *supra*, footnote 17; *Pawson v. City of Sudbury*, [1953] O.R. 988, at p. 994, [1954] 1 D.L.R. 10; *Teubner v. Minister of Highways (Ontario)*, *supra*, footnote 40; *City of Calgary v. Interfaith Housing*, *supra*, footnote 48; *Marvin v. Town of Dieppe* (1977), 11 L.C.R. 136, at p. 139 (N.B.C.A.).

Pursuant to powers under The Department of the Environment Act, S.A., 1974, c. 24, Orders in Council were passed purporting to create a restricted development area around the City of Edmonton. Although the Act appeared to give to the Lieutenant Governor in Council power to pass regulations intended to protect the environment, it was clear from the regulations passed and certain statements of the Minister that the restricted development area was created for the purpose of pipeline and utility corridors.

Certain portions of one of the restricted development areas were expropriated by the City of Edmonton for a power transmission corridor. The Minister of the Environment had indicated to Edmonton Power that the transmission line was to be placed along the restricted development area rather than elsewhere. The claimant applied to the Land Compensation Board to have compensation determined, claiming that the *caveat* on title registered by the Minister of the Environment should be ignored in the determination of compensation. The Board recited s. 43(e) of the Expropriation Act (see *supra*, footnote 12) and cited *Kramer*, *Burkay*, *Cunard*, *Teubner* and various other cases all referred to in this article. The Board determined in its unreported decision of Friday, June 10th, 1977 that:

"In order for section 43(e) to become operative, there must be a connection between the action of the one authority imposing a land use classification or analogous enactment and the other authority carrying out the expropriation . . . The nature of any such connection in the present case is tenuous at most and on the weight of the evidence is the result of fortuitous coincidence rather than any calculated joint intention or plan entered into by the City on the one hand and the Provincial Government on the other hand. The Board therefor finds that section 43(e) does not apply in the present case. . . ."

An appeal was brought before the Supreme Court of Alberta on a stated case, the facts being identical: see *Romaniuk et al. v. The City of Edmonton*, dated June 28th, 1977, an unreported decision of Chief Justice Milvain. The Chief Justice determined that the restricted development area regulations must be ignored and said (at p. 8):

"I am satisfied that one of the functions of the Edmonton R.D.A. is to protect a transportation and utility corridor in the area. The process under which the R.D.A. came into existence surely amounts to analogous enactment made with a view, among other things, of the passage of a power line over part of the area comprised in the area. Such being the case, the decrease in value which resulted shall not be taken into account in determining value for the purpose of fixing compensation under the Expropriation Act. . . ."

Note that Mr. Justice Milvain rendered the decision in *R. v. McKee* (see *supra*, footnote 51). We can expect further developments of the law as a result of the imposition of the restricted development areas in Alberta and the placement of pipelines and utility corridors along the same. For a more complete description of the events arising out of the imposition of these restrictions, see *Controlling the Ministers*, to be published in 1978 in the *Alberta Law Review*.

land residual method⁵⁷ to be \$1,580,000.00. One of the claimant's appraisers valued it at \$2,120,000.00. The court accepted the gross value of the land as determined by the arbitrator but said the arbitrator erred in limiting the deductions from the figure necessary for proper application of the land residual approach.⁵⁸ The factor which is of most relevance to this article (and also of great importance to the outcome of the case) is the discount factor, discussed by the court as follows:⁵⁹

We refer to three examples where a discount factor was used to take into account a balancing of possibilities or probabilities of rezoning as against actual existence of requisite zoning at the date of expropriation.

In *Valley Improvement Co. Ltd. v. Metropolitan Toronto and Region Conservation Authority*, [1961] O.R. 783, 29 D.L.R. (2d) 593, Kelly, J.A., for the Court, said at pp. 800-01:

"What presents serious difficulty, however, is the determination of the reduction to be made from that figure on account of the uncertainties and delays implicit in the necessity of obtaining appropriate rezoning. . . . Bearing in mind the nature of the uncertainties to be resolved before best utilization could proceed, I consider that justice will be done to both parties if 33 $\frac{1}{3}$ % is deducted to represent those uncertainties, . . ."

On appeal to the Supreme Court of Canada 35 D.L.R. (2d) 315, [1963] S.C.R. 15, the decision of the Court of Appeal was reversed, in part on jurisdictional grounds.

In *Teubner v. Minister of Highways*, *supra*, Roach, J.A., in giving judgment for the Court, said at p. 234:

" . . . In estimating the compensation you value the lands taken in their then state with all the advantages or potentialities they have. 'In their then state', of course includes their then existing disadvantages."

The learned Judge found that the land in question, adjoining a highway, which was originally zoned agricultural and residential, was ripe for rezoning to commercial and that the expropriated owner had a right to be compensated on that basis. But, to take into account the need for a permit under the *Highway Improvement Act*, R.S.O. 1960, c. 171, s. 34(2)(a), which the Minister had refused, the Court discounted valuations of appraisers by 35%.

Finally, in *Re Burkay Properties Ltd. and Wascana Centre Authority*, *supra*, Maguire, J.A., in delivering judgment for the Court, said at p. 22:

"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."

On appeal to the Supreme Court of Canada, Martland, J., in giving judgment for the Court, said at p. 60:

⁵⁷ For a description of this method, see *Whittier*, *supra*, footnote 52, at pp. 339-340.

⁵⁸ *Ibid.*, at pp. 347-348.

⁵⁹ *Ibid.*, at pp. 349-352. There is a collection of relevant cases in this decision bearing on future possibilities and the discount factor.

"Mr. Justice Maguire, delivering the judgment of the Court of Appeal of Saskatchewan, said (at p. 19):

'... 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.'

Notwithstanding that conclusion, the Court disposed of the case on the footing that the zoning required by Burkay Properties Limited to permit its suggested development probably would have been granted by the city. Value to the owner was calculated on the basis of a development for commercial, multi-family, and single residence use."

In our view, with respect, the Court erred in resting its judgment upon an event which it had concluded would probably not arise.

In the case at bar, we are of the opinion that a realistic assessment of the circumstances requires, first, a reduction to offset the risk of not obtaining rezoning and, secondly, assuming rezoning would have been attained, a more substantial reduction to counterbalance timing and conditions of the rezoning. We assess these factors at 15% of \$2,100,000, *i.e.* \$315,000.

The discount factor is a strong tool which can be used to reduce compensation in cases where it is clear that the claimant's land is close to development, or for other reasons should be valued at a use other than that for which it is, at the time of expropriation, being used.

In the conclusions to this article, the factors used by the court to determine whether schemes or plans should be ignored, and to determine the application and the size of the discount are enumerated. However, before a more complete understanding of the issues can be realized, it is essential to define highest and best use. The determination of highest and best use is one of the essential steps in deciding compensation, and as the steps are interrelated, a brief discussion of highest and best use follows.⁶⁰

III. *Highest and Best Use.*

Prior to the passing of the new expropriation Acts which attempted to restate the law and repeal the principle of value to the owner, and to substitute the concepts of market value and "highest and best use", there was not the same pressing need to determine the highest and best use of land. The term highest and best use, however, became embodied in the various Expropriation Acts,⁶¹ and consequently it has become more common in the cases. In any case,

⁶⁰ Presently being litigated in Alberta is a case on the abuse of statutory power where the Department of the Environment has created restricted development areas purportedly for environmental purposes and has insisted that pipeline and transmission rights of way travel in these areas.

⁶¹ S.13 of the Ontario Act, and ss 39 and 41 of the Alberta Act are applicable. In the Alberta Act, the term highest and best use appears in s. 41.

simple reliance could no longer be placed upon "due compensation" or other ambiguous expressions or a simple evaluation of the future possibilities or potential of the land. The new concepts require judicial consideration of the highest and best use, and it is accepted now that determination of this use is one of the steps in deciding compensation. This use is closely interrelated with urban renewal schemes and other types of municipal plans. The *Farlinger* case⁶² is a good example of this interrelation, as in that case the events leading up to the expropriation determined the highest and best use and these events had to be considered in deciding on such use. Therefore, a brief discussion of some of the court decisions bearing on this issue is necessary to complete an understanding of the problems described earlier in this article. This is not intended to be a complete analysis of cases in which the highest and best use is discussed, because this article is restricted to those cases in which the added factor of some sort of development scheme is present.

The generally accepted definition of highest and best use is:

... the most profitable and likely use to which a property can be put, *i.e.*, that use of land which may be reasonably expected to produce the greatest net return to the land over a given period of time.⁶³

Despite the recent changes in the legislation, some of the principles applied in former cases are still useful.

In *St. John Priory of Canada Properties v. City of St. John*,⁶⁴ the lands expropriated were in the middle of an area in which all the other lands needed by the city had been previously acquired by purchase or option. The city intended to erect a city hall complex on these lands, and it expropriated this last parcel which had been used by the appellant as a head office to carry on its activities.

The Court of Appeal accepted a valuation based upon the highest and best use to which the property could be put as that for which the appellant was then using it, with the eventual use being

⁶² *Supra*, footnote 4.

⁶³ *Re Farlinger Developments and Borough of East York*, *supra*, footnote 4, at p. 122; *Whittier Park Development Corp. v. City of Winnipeg*, *supra*, footnote 52. For American jurisprudence, see *Words & Phrases*, Vol. 19A (1970), p. 59. See *Rams, op. cit.*, footnote 21, pp. 62-65: "The appraisal terminology book of the American Institute of Real Estate Appraisers is perhaps the most frequently quoted and defines the highest and best use as follows: 'The most profitable likely use to which a property can be put.' The opinion of such use may be based on the highest and most profitable continuous use to which the property is adapted and needed, or likely to be in demand in the reasonably near future. However, elements affecting value which depend upon events or a combination of occurrences which, while within the realm of possibility are not fairly shown to be reasonably probable, should be excluded from consideration. Also if the intended use is dependent on an uncertain act of another person, the intention cannot be considered."

⁶⁴ (1972), 2 L.C.R. 1.

for redevelopment. The appellant argued that the Court of Appeal should have made a finding that the highest and best use was for the city hall complex.

The situation appeared unique to the court because all the other lands had been acquired prior to the expropriation proceedings and thus, in the absence of legislation to the contrary, the premises had clearly acquired a new potential which had to be considered as part of the value. The majority of the Supreme Court allowed the appeal and increased the award from \$43,000.00 to \$65,000.00. Pigeon J., in a dissenting judgment which seems to indicate his preference for the legislation to come⁶⁵ states:

In Kraft Construction C. Ltd. v. Metropolitan Corp. of Greater Winnipeg (October 5, 1971, not yet reported) (1971), 1 L.C.R. 135, 21 D.L.R. (3d) 677, this Court accepted the principle that in the determination of compensation, the expropriated owner should not be permitted to suffer from a diminution in value caused by what is known as "planning blight", due to prior expropriations of property in the immediate area and the general knowledge that further expropriations might take place. It seems to me equally unfair that an owner should obtain a windfall at the expense of the expropriating authority, by obtaining not what his land is worth in itself or for him, but what it is worth for the purposes of the project undertaken. This would work a hardship towards the expropriating authorities who are obliged to make their plans known in advance or choose to do so, and favour the authorities with unlimited expropriation powers who proceed to expropriate large areas first and make plans later, with the result that sometimes they make resales at a profit (*Protestant School Commissioners of Montreal v. Royal Trust Co. et. al.*, [1965] Que. Q.B. 249).

The rule in many expropriation authorizing legislations that compulsory taking is permitted only after definite plans are made and approved is, in my opinion, very desirable because the taking is thus limited to what is strictly necessary. This method should not result in obliging the expropriating authorities to pay greater compensation. To penalize authorities who proceed in this way by making them pay on the basis of what the land is worth for their project, would tend to encourage indiscriminate expropriation for avoiding the consequence.

It should be noted that according to Hall J., counsel in the Supreme Court were "in agreement that the highest and best use to which the property could be put was a part of the urban renewal scheme . . .".⁶⁶

In view of the new legislation, and the many existing cases ruling that the increase in value of land resulting from the effects of a plan of expropriation are not to be considered in establishing compensation, the outcome of this case seems inexplicable, and should be applied with some caution.⁶⁷

⁶⁵ *Ibid.*, at p. 8.

⁶⁶ *Ibid.*, at p. 5.

⁶⁷ In an editorial note, it was emphasized that not only is the decision arguable on the existing case law, but the new expropriation Act deals directly with it. The

In a later case, *A. M. Souter & Co. Ltd. v. City of Hamilton*,⁶⁸ an urban renewal development plan including the property owned by the claimant was conceived in about 1962 or 1963. This scheme placed the claimant's property in the civic square redevelopment. A consultant was commissioned in 1964, and his report on the subject was published in the local newspaper in 1965. In 1968 the claimant's property was expropriated presumably as part of the redevelopment scheme. The claimant had leased the property to tenants until approximately the date of the report being made public, but was unsuccessful thereafter. There was no real evidence presented linking this lack of success to the scheme. The Land Compensation Board stated:⁶⁹

The evidence indicated that from 1963 to the date of expropriation there was development in downtown Hamilton in every direction from the corner of Main and James Sts. (the north-east corner of the City Hall property) except in the quadrant designated for redevelopment as the Civic Square development in the centre of which was the claimant's property.

Counsel for the claimant argued that the debilitating effect of the announcement of 1965 on the property should be ignored pursuant to the terms of the Ontario Expropriation Act, and that comparables to establish value had to be found outside the development area. Counsel for the city, on the other hand, argued that the redevelopment scheme had not affected the value as the area was depreciating in any case (the typical urban blight symptoms).⁷⁰

The appraisal evidence was contradictory; the appraiser for the claimant when using the comparative approach ignored sales in or adjacent to the development area and established a value of \$284,000.00. The city appraiser, on the other hand, using such sales established the value of \$200,000.00.⁷¹

The decision of the Board with respect to the first preliminary issue, namely whether the market value of the property was adversely affected by prospects of the plan released in 1965, was answered in the affirmative. Whether the release of the study in

federal and Ontario Acts are quoted, but the absence of the word "imminence" in the former is not referred to. The issue under discussion in this article is not met head on, but Mr. Justice Pigeon clearly feels that even without legislation, the development is closely enough linked to the expropriation that the increase in value due to the expropriation must be ignored.

⁶⁸ (1972), 2 L.C.R. 167, appeal dismissed (1974), 5 L.C.R. 153 (Ont. C.A.).

⁶⁹ *Ibid.*, at p. 170.

⁷⁰ The Board did not refer to any argument being raised by counsel for the city to the effect that the public announcement did not form part of the development scheme, and that expropriation was not "imminent" until shortly before it occurred. The outcome may have been different had these arguments been raised.

⁷¹ The other method used was the income approach which also gave considerably different values. *Ibid.*, at pp. 176 and 178.

1965 was imminent to the development was not argued. The decision of the Board on the second preliminary issue, namely the highest and best use was quite unusual. The Board was of the opinion, that even though there did not appear to be too much difference between the evidence of the appraisers as to the highest and best use, there was in reality a significant difference which the Board described as follows. The city's appraiser stated that his opinion of the highest and best use was for some interim commercial or caretaker use pending the possibilities of redevelopment of the area. The claimant's appraiser stated his opinion that the highest and best use was for retail furniture business pending possibilities of redevelopment based on increased land values. He therefore calculated that value based solely on the lease of the building by the claimant, and also on a comparable property also rented for that use. The Board found that:⁷²

... the highest and best use of the property as of the date of expropriation, April 2, 1968, was for the carrying on of a furniture store business for a period of 20 years or such lesser period as might be determined by a redevelopment of the area based on an increase in real estate values.

Unfortunately the claimant's appraiser made so many errors in his calculations on the comparable approach that the Board rejected his evidence on the income approach, the loss to the claimant for the errors being about \$36,000.00. The city's appraiser had valued the land at \$200,000.00 on the income approach and \$170,000.00 on the comparable approach. It appears that the city's appraiser was completely discredited, and the claimant's appraiser was not considered much better by the Board. Nevertheless, by accepting the claimant's appraiser's approach to the highest and best use, his evidence could then be applied to come to the decision the Board finally reached. This matter was appealed to the Ontario Court of Appeal and both the appeal and cross-appeal were dismissed.⁷³

In the *Farlinger* case,⁷⁴ the Ontario Court of Appeal dealt at some length with the concept of the highest and best use, and in that court's view.⁷⁵

In an expropriation there are really two fundamental steps. The first is to determine the highest and best use of the property expropriated and the second is to fix the compensation to be awarded to the owner based on such use.

With that concept in mind, and following a lengthy review of

⁷² *Ibid.*, at p. 183.

⁷³ (1974), 5 L.C.R. 153. Reasons for judgment were rendered on the matter of costs only.

⁷⁴ *Supra*, footnote 4.

⁷⁵ *Ibid.*, at p. 122.

principles outlined earlier in this article,⁷⁶ the court determined the highest and best use as the existing use, notwithstanding the real impediment to a higher and better use was the plan of expropriation itself, the inability to rezone being very much related to that plan.

It is worthwhile to recall two other cases discussed earlier in this article, the *Whittier* and *Teubner* cases. In both cases, the impression given is that the courts were more lenient in their views. In *Whittier* the highest and best use of the land was considered to be for the building of a multi-family high-rise residential development. In *Teubner*, the land was considered appropriate for service station and commercial use. In both cases, however, a discount factor was applied which served to reduce the value of the property to that which the respective courts deemed appropriate.

Conclusions

The *Gibson* principle is now well-established law and has probably been statutorily incorporated into the law of expropriation by virtue of the new Acts. Once the common law has reached a certain stage of development and degree of sophistication, there seems to be a desire, be it public, governmental or private, to perpetuate the existing state of the law by legislation, although there may be sentiments to the contrary among some members of the bar. Like many other common law principles, *Gibson* is common sense justice applied by the courts where there appeared to be a compelling need to prevent abuse of power or inequity, and not applied in other instances where invoking its protective characteristics would drain the public purse or inhibit the proper and beneficial use of municipal or other authority.

In the absence of statutory provisions, one could foresee the judiciary handling the windfall profit situation, utilizing the *Gibson* principle, by refusing to acknowledge the windfall gain to the speculator while allowing the *bona fide* owner to receive due compensation. A minor extension of the common law might have served to compensate owners for the period of effective sterilization of property and resultant loss of income therefrom created by publication of urban renewal schemes. Unfortunately, while the

⁷⁶ Text at footnote 38. The court has used some fascinating approaches to determine highest and best use, particularly where there is vacant land under consideration. For example, in *Aldo Recreational Park Ltd v. Metropolitan Toronto and Region Conservation Authority*, *supra*, footnote 7, the Ontario Land Compensation Board discussed three types of highest and best use, namely (i) holding for future redevelopment; and (ii) holding for the processing of the development; and (iii) zoned and ready to go. This analysis was not referred to by the Ontario Court of Appeal, *ibid.*, although the appeal was basically allowed so tacit approval may have been given.

legislation has granted statutory protection which some consider a significant gain to society, and further has eliminated some of the anomalies of expropriation which at the time of the enactments had not been reasonably or consistently determined by the courts, it has also added an element of rigidity to the law of compensation. In the writer's opinion this rigidity may be detrimental and, in circumstances which are becoming more common today, may negate the real aims of the legislation. The tendency of the courts, relying upon the *Wascana* and *Burkay* decisions, was to favour the expropriating authority and to imbue the expropriating authority and other associated agencies with good faith that may certainly not have been present during the events giving rise to the litigation. But the common law does have a tendency to develop exceedingly rapidly at present, particularly in those areas in which the issues involve substantial monetary concerns and the litigants are property owners. Therefore, the legislators may have moved somewhat too quickly in this area and without the benefit of hindsight available to those presently working in the field. Of course, the existence of a vast number of expropriating authorities in the country, and the lack of proper control over them and their procedure was a strong motivating force in the creation of the legislation. Once having gone to the extent of governing these aspects of expropriation, the job would appear incomplete if compensation did not receive thorough treatment as well.

In any event, the underlying principles of *Gibson* and his heirs remain with us, with the statutory overlay, available to the courts when and if necessary. The cases seem to defy analysis. The principles of compensation seem to lack definition and are inconsistently applied. Therefore, they are basically used to justify a fair and reasonable conclusion reached by the court through other means, rather than *vice versa*.

In *Burkay*, Abbott J., relied upon the university, a *bona fide* institution of higher learning to offer a fair price and thus determined compensation in that amount. In *Farlinger*, the court undoubtedly felt that no one should make a monumental gain by taking advantage of the inadvertent error of the borough in failing to register notice of intention, when the facts indicated that the purchaser was aware at the time of purchase of the type of development proposed for his land. In *Teubner*, the claimant had previously obtained permits to develop and therefore she seemed to acquire a pseudo-right to obtain the same in the future, but as there were pre-existing restrictions a substantial discount was charged to reduce the compensation. Similarly in the *Whittier* case, although the highest and best use was agreed upon as high density residential, the Manitoba Court of Appeal rectified what was considered to be too high an award by applying the discount factor

necessary for fair compensation. The court felt that the lands were suitable for the high density use, but failure to reduce an award based on the land residual method when the change in zoning was not yet secured would have produced a result too favourable to the owner.

Each of these cases exemplifies the subjective approach of the judiciary, as opposed to a more objective, and therefore more predictable type of approach. It seems that the legislation has given us the rigidity of a statute but has not eliminated the same uncertainty as existed prior to its enactment.

There seems to be three steps involved in determining compensation, and these have been obliquely referred to in the cases, namely:

- (1) Determining which objective factors must be ignored in a factual situation when deciding highest and best use;
- (2) determining highest and best use; and
- (3) determining compensation based upon that use.

However, the court may not necessarily come to its conclusions in that order.

The factors which have been considered as compelling and important in each of these steps are as follows:

- (1) Whether the exercise of power is directed to a particular piece of land which is the subject of the expropriation;
- (2) whether all levels of government have acted in concert;
- (3) whether the expropriating or other authorities have used their powers in the manner in which they were intended to be used;
- (4) whether the property was previously under a restriction, or in the alternative, the restriction is newly imposed;
- (5) whether the owner would seem to acquire a windfall or unusual benefit if the scheme or plan were ignored;
- (6) the time which has elapsed between the promulgation of the scheme and the expropriation of the property;
- (7) whether the owner purchased the property when a general scheme was in preparation and the extent to which that scheme was public knowledge;
- (8) the stage of development of the general plan, and the certainty of its implementation;
- (9) whether the owner had previously applied for a type of use and whether such use had been granted, conditionally or otherwise;
- (10) whether planning reports, outline plans, general or offi-

cial plans or other government documents concerning the area had previously supported a higher use;

(11) whether the planning scheme is, in the opinion of the court, a good one.

One or more of these factors may be utilized by the court at the first, second or third step of compensation determination. For example, in step one, the court may decide that the scheme or plan must not be taken into account in the determination of highest and best use. In step two, the court can then allow a highest and best use based on the most optimistic possibility. But in step three the court may apply a substantial discount (as in *Whittier*).

Similarly, in step one, the court may again decide that the scheme shall not be taken into account, but in step two decide on a lower use and in step three allow a greater amount for future possibilities (as in *Souter* and discussed in *Farlinger*).

Rather than belabour the above by enumerating each and every possibility, it suffices to say that the claimant must fight every step of the way, and cannot allow the likelihood of a positive decision on one aspect of the matter to lure him into a false sense of security and optimism as to the outcome. It is suggested that just as many areas of the law have been immensely improved by the formulation of a logical sequence for decision making, the same may be applied to the determination of compensation in expropriation bearing in mind always that the substantial justice of an award should, if possible, be proved to the court to ensure proper compensation.
