To Expand or to Revoke Section 14(4)(b) of the *Expropriations Act*: A Critical Analysis of Ontario's No-Scheme Rule

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An established principle of law in virtually all jurisdictions is that property rights can be acquired, pursuant to statutory powers, by the Government or by one of its authorized agencies without the consent of the owner of those rights.[1] This process is known as expropriation and is governed by the *Expropriations Act*[2] in Ontario. Section 1(1) of the Act defines "expropriate" as, "the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers." Once the government, or one of its expropriating authorities, has expropriated land, compensation is to be paid to the owner for the loss of their property rights pursuant to section 13(1) of the Act. Determining the appropriate amount of compensation payable to the owner under the Act is often a difficult task, as land value increases and decreases resulting from the impending development of the subject lands must be addressed. The Ontario Legislature attempted to delineate a scheme to assist in determining appropriate compensation amounts by adopting the British *Pointe Gourde* rule.[3] Reflecting subsequent judicial interpretation, the *Pointe Gourde* rule currently states that in determining compensation amounts upon expropriation, increases and decreases in land value due to the scheme underlying the acquisition cannot be taken into consideration.[4] Although the Ontario Legislature codified the rule at section 14(4)(B) of the *Expropriations Act* as an attempt to clarify compensation determinations, many problems have arisen in applying the section. For instance, the section demands that a "no-scheme world" be constructed by effectively rewriting history. Also, terms in section 14(4)(b) such as "development" and "imminent development" are problematic because they are not legislatively defined and, therefore, call into question how far back one needs to go in time to ignore the development. A final problem with section 14(4)(b) is its relationship to injurious affection, which

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[1] Eric C.E Todd, *The Law of Expropriation and Compensation in Canada* 2nd ed. (Scarborough: Carswell, 1992) at 20.
[2] R.S.O. 1990, c. E.26, ss. 1(1) "expropriate," "injurious affection," 14(3), 14(4)(b), 21, 29(1).
[3] This rule has arose from the decision in *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands* decision [1947] A.C. 565 (C.A.) [*Pointe Gourd*], which was an unreported decision of the Lands Tribunal.
[4] U.K., *Law Reform Commission, Towards a Compulsory Purchase Code: (1) Compensation* (A Consultation Report), [2003] E.W.L.C. 286 (15 December 2003), Law Comm No 286 (2003) at 67, 171.

is another head under the Act upon which compensation is determined. Two remedies have been proposed in an attempt to rectify these problems. The first solution offered is to expand section 14(4)(b) in order that the section would apply to injurious affection claims by adopting a new "with-and-without" approach to determining compensation amounts. Because this solution is single-faceted, the second solution based on British recommendations of "clearing the decks" is the more effective resolution of section 14(4)(b)'s problems because it is multi-faceted and, as such, would remedy all but one of the section's problem at the outset. Thus, it is time for to the Ontario Legislature to "clear the decks" by revoking section 14(4)(b) and to enact a new section that would cease the inconsistent and confusing operation of Ontario's no-scheme rule.

Because Ontario's no-scheme rule is "directly linked with the British railway boom of the mid-nineteenth century,"[5] it is necessary to examine the history of Britain's no-scheme rule. As a result of "the scramble by railway promoters to obtain statutory powers, including the power of expropriation," [6] which at one time almost brought the House of Parliament to a stand still, two Acts, the *Land Clauses Consolidation Act*[7] and the *Railways Clauses Consolidation Act*,[8] were enacted in Britain in 1845. Both Acts, however, "contained very little substantive law. In particular they did not specify, either expressly or impliedly, the measure of compensation or the criteria by which it should be computed."[9] Thus, absent legislative guidance, the judiciary was left to "establish the criteria by which such compensation should be measured."[10] In *Re Lucas and Chesterfield Gas and Water Board*,[11] the British courts initially devised the "value to the owner" approach for determining compensation. At issue in this case before the Court of Appeal was the

[5] Todd, *supra* note 1 at 3.
[6] *Ibid*.
[7] 1845 (U.K.), 8 & 9 Vict., c.18.
[8] 1845 (U.K.), 8 & 9 Vict., c. 20.
[9] Todd, *supra* note 1 at 4.
[10] *Ibid*. at 110.
[11] [1909] 1 K.B. 16 (C.A.) [*Re Lucas*].

acquisition of land for a reservoir and, whether the suitability of the claimant's land for the purpose of constructing a reservoir could be taken into account for determining compensation.[12] Lord Justice Fletcher Moulton set out the "value to the owner" approach as follows:

> The owner receives for the lands…their equivalent, i.e. which they were worth to him in money…the equivalent is estimated to be the value to him, and not the value to the purchaser.[13]

Once the "value to the owner" approach gained popularity in Britain, several problems with the method began to emerge. The primary problem of this approach was that it was subjective in nature, which made the "value to the owner" method highly uncertain and, as such, often forced parties to litigate the issue of what the value to the owner actually was.[14] Additionally, the "value to the owner" approach was highly criticized for resulting in exorbitant awards of compensation.[15] In response to these problems, the British Parliament established the Scott Committee to "consider and report upon the defects in the existing law of expropriation and to recommend changes."[16] The Scott Committee made two pertinent recommendations. First, "the measure of value to be paid to the expropriated owner is the market value of the property as between a willing seller and a willing buyer."[17] Second, "the owner should not be entitled to any increased value for his land which can only arise, or could only have arisen, by reason of the suitability of the land for a purpose to which it could only be applied under statutory powers."[18] These recommendations were adopted in the *Acquisition of Land (Assessment of Compensation) Act*,[19] which effectively

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[12] *Ibid*. at 16-20.
[13] *Ibid*. at 29.
[14] Ontario, *Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation* (Toronto: Department of the Attorney General, 1967) at 11-12.
[15] Todd, *supra* note 1 at 5.
[16] *Ibid*.
[17] *Ibid*. at 6.
[18] *Supra* note 4 at 181.
[19] 1919 (U.K.), 9 & 10 Geo. 5, c. 57.

"changed the basis of compensation from 'value to the owner' to 'open market value.'"[20] A legislative no-scheme rule was set out in Rule (3) of the Act, which stated:

> The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department of any local or public authority.

Developing alongside of the legislative no-scheme rule was an at times conflicting common-law version of the rule and the relationship between these forms of the rule was ultimately considered in the 1947 Court of Appeal decision of *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands*.[21] This case involved a quarry in Trinidad that was to be acquired to establish a United States Naval base.[22] The Lands Tribunal awarded a total amount of $101,000 and the only amount that was at issue was whether or not the included amount of $15,000 as compensation for the land's increased value would form part of the landowner's compensation pursuant to Rule (3).[23] In delivering the unanimous decision of the Privy Council, Lord MacDermott found that the legislative Rule (3) had no application because it was concerned with the use of the land itself, not of the products of the land.[24] In the alternative, however, it was argued by the appellants that the $15,000 should be disallowed under the common law no-scheme rule.[25] In allowing this argument, Lord MacDermott stated what now has become known as the *Pointe Gourde* rule: "it is well settled that compensation for the compulsory acquisition of land cannot include an increase in value, which is entirely due to the scheme underlying the acquisition."[26] Therefore, Lord MacDermott held, "the value was

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[20] Todd, *supra* note 1 at 6.
[21] *Supra* note 3. This case was on appeal to the Court of Appeal from an unreported decision of the full Court of the Supreme Court of Trinidad and Tobago on June 23, 1945.
[22] *Ibid*. at 566.
[23] *Ibid*. at 567-568.
[24] *Ibid*. at 572.
[25] *Ibid*. at 570, 573.
[26] *Ibid*. at 572.

enhanced by the scheme of the party acquiring the land, and that is not a factor for which additional compensation may properly be awarded."[27] Case law prior to *Pointe Gourde* was only concerned with disregarding the increases in value of expropriated lands and this is the basis upon which Lord MacDermott narrowly established the *Pointe Gourde* rule.[28] This one sided nature of the *Pointe Gourde* rule was addressed by the Privy Council in *Melwood Units Pty. Ltd. v. Commissioner of Main Roads*.[29] In this case, Lord Russell of Killowen expanded the *Pointe Gourde* rule by assuming that disregarding decreases was "simply the other side of the same coin,"[30] and stated, "neither relevantly attributable appreciation nor depreciation in value is to be regarded in the assessment of land compensation."[31] This holding lead to the present day form of the no-scheme rule, which is stated as, "increases in value to the expropriated property due to the scheme or development, but also decreases in value of the property due to the scheme or development"[32] are to be excluded in determining compensation.

Canada closely followed Britain's history of determining compensation upon expropriation by first adopting its own *Railway Clauses Consolidation Act*[33] in 1851. This Act reflected the same drawbacks of the British Acts, as it merely provided for the payment of "compensation" or "full compensation" for the value of expropriated land.[34] As in Britain, the Canadian judiciary was left with the task of interpreting the legislation and, in fact, followed Britain's lead by adopting the "value to the owner" approach in *Cedars Rapids Manufacturing &*

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[27] *Ibid*. at 572-573.
[28] *Supra* note 4 at 199.
[29] [1979] 1 All E.R. 161, [1979] A.C. 426 (P.C.) [*Melwood* cited to All ER]. This case concerned a site of thirty-seven acres of land that was severed by an expressway (p. 162-163). This severance resulted in reducing the possibility for development of a shopping center to the lands only twenty-five acres north of the road (p. 164). Compensation in this case was assessed under the no-scheme rule on the basis that but for the road-scheme, planning permission for the shopping center would have been granted for the whole of the owner's lands (p. 164). Since this was a decrease in value to the land, the Privy Council held, "compensation is to be assessed without reference to any decrease in value of the subject property cause by the scheme of which expropriation forms an integral part" and held that the *Pointe Gourde* rule operates in reverse (p. 164).
[30] *Supra* note 4 at 69.
[31] *Supra* note 29 at 165.
[32] John A. Coates & Stephen Waqué, *New Law of Expropriation*, loose-leaf (Don Mills: De Boo, 1984) at 10-100.
[33] 1851 (U.K.), 14 & 15 Vict., c.51. This Act was enacted while Canada was still a province under British reign.
[34] Todd, *supra* note 1 at 110.

Power Co. v. Lacoste.[35] At issue in this case was expropriated land for the development of waterpower on a site that was adjacent to the St. Lawrence River in Quebec.[36] In delivering the unanimous decision of the Privy Council, Lord Dunedin held "that the law of Canada concerning the principles upon which compensation for expropriated property was to be awarded as the same law of England, which encompassed the value to the owner principle."[37] Despite the eradication of the "value to the owner" approach in England as a result of the Scott Committee's 1919 recommendations, Canada continued to embrace the "value to the owner" method well beyond this time. For instance, in the 1949 decision of *Diggon-Hibben Ltd. v. R.*,[38] the Supreme Court of Canada reaffirmed *Cedars Rapids* and yet again endorsed the "value to the owner" approach. In this case, Justice Estey maintained, "it is the value to the owner and not market value or value to the purchaser that must be determined."[39] Eventually, the British problems with the "value to the owner" approach began to arise in Ontario. As in Britain, the Ontario judiciary also struggled with the subjective nature of the approach, which often resulted in uncertain and problematic judgements or exorbitant awards of compensation. One final criticism of the approach stemming from the *Diggon-Hibben* decision was that that the "value to the owner" method often awarded the owner a lump sum,[40] "as opposed to a 'built up' [amount] (i.e. attributing a specific figure to each item of loss)."[41] Such lump sum awards, "obscured what items in addition to market value of the land the owner might justly claim as damages and conversely for what items of

[35] [1914] A.C. 569, 16 D.L.R. 168 (P.C.) [*Cedars Rapids* cited to AC].
[36] *Ibid*. at 569-571.
[37] *Ibid*. at 576.
[38][1949] S.C.R. 712, [1949] 4 D.L.R. 785, 1949 CarswellNat 82 (S.C.C.) (WLeC) [*Diggon-Hibben* cited to SCR]. This case was appealed from an unreported decision of the Exchequer Court of Canada, in which the complainant was awarded $120,000 in compensation for his expropriated lands. The Claimant appealed for an increase in compensation as he felt he should be awarded $232,165.34 even though the Crown's original offer was only that of $99,670 (p. 713).
[39] *Ibid*. at 717.
[40] *Ibid*. at 720. In this case, the Supreme Court of Canada awarded the Appellant $130,000.
[41] John W. Morden, "An Introduction to the Expropriation Act, 1968-69 (Ontario)" (Paper presented to the American Right of Way Association, Ontario Chapter, February 17, 1969) [Toronto: Canadian Law Book Limited, 1969] at 38.

damages the expropriating authority should be expected to pay."[42] These problems with the "value to the owner" approach led to a report by the Ontario Law Reform Commission ("OLRC") in which it examined expropriation law in Ontario.

In 1967, the OLRC released its report entitled "The Basis for Compensation on Expropriation."[43] The report was an examination of the then *Expropriation Procedures Act, 1962-63*,[44] and focused primarily on assessing compensation. The report first noted that the *Expropriation Procedures Act, 1962-63*, unified compensation law because prior to the statute's enactment, Ontario's expropriation law was "unevenly spread throughout over thirty statutes, each one of which contained powers of expropriation"[45] and individual procedural provisions.[46] In terms of compensation, however, the *Expropriation Procedures Act, 1962-63*, still only contained one section that specifically addressed compensation. Section 6(1) of the Act stated, "the expropriating authority shall make due compensation to the owner of the land for the land expropriated or for any damage necessarily resulting from the exercise of such powers." In determining what constituted "due compensation" under the Act, Ontario courts still resorted to the problematic "value to the owner" approach.[47] Among its many recommendations, the OLRC advocated that "the 'value to the owner' test…should be abandoned in favour of a formula by which compensation is arrived at by the making of separate assessments of (1) the market value of the interest expropriated; and (2) the damages attributable to the expropriation."[48] The OLRC additionally recommended the inclusion of the terms "willing seller" and "willing buyer" into a definition of market value to ensure that the "value to the owner" concept was clearly abandoned

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[42] *Supra* note 14 at 9.
[43] *Ibid*.
[44] S.O. 1962-63, c. 43, s. 6(1).
[45] Morden, *supra* note 41 at 3.
[46] Dennis H. Wood, "Expropriation without Compensation? Property Rights vs. Governmental Control," online: Wood Bull LLP Barristers & Solicitors, <http://www.woodbull.ca/pub/Expropriation_without_Compensation.pdf> at slide 12.
[47] *Ibid*. at slide 15.
[48] *Supra* note 14 at 64.

once and for all.[49] Finally, the OLRC made the recommendation, which, in effect, advocated the continued use of the *Pointe Gourde* rule in Ontario, by declaring that in determining market value, "no account be taken of any increase or decrease in the value of land resulting from the planned development or from any prospect of expropriation."[50]

As a result of the OLRC's recommendations, Ontario's *Expropriations Act, 1968-69*,[51] came into force on December 20, 1968,[52] and replaced the old *Expropriation Procedures Act, 1962-63*. The significant change in this statute was "the insertion in the Act of a black letter code of compensation law to supplant a body of law found principally in judicial decisions."[53] Section 13(1) of the new Act conferred a duty upon expropriating authorities to pay compensation, stating, "where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act." Section 13(2) further stated that compensation payable to an owner where land is expropriated shall be based on "(a) market value of the land; (b) the damages attributable to disturbance; (c) damages for injurious affection; and, (d) any special difficulties in relocation." Furthermore, one of the most notable changes of the Act, and again directly following the OLRC's recommendations, was the inclusion, for the first time in Ontario's legislative history, of a definition of "market value."[54] Section 14(1) of the Act defines "market value" as, "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer." By the insertion of "willing seller" and "willing buyer," into this

[49] *Ibid*. at 19.
[50] *Ibid*. at 26.
[51] S.O. 1968-69, c.36, ss. 13(1), 13(2), 14(1), 14(4)(b).
[52] Morden, *supra* note 41 at 2.
[53] *Ibid*.
[54] Frank J. Sperduti, "Proving Market Value: Legal Issues for Appraisers" (Paper Presented to the Ontario Association of the Appraisal Institute of Canada, October 21, 2005) [unpublished] at 2.

definition, the Ontario Legislature, as the OLRC recommended, expressly departed from the subjective "value to the owner" approach towards an objective standard.[55]

A final significant change based on the OLRC's recommendations in the 1968-69 Act was the inclusion of section 14(4)(b). The insertion of this section into the Act reflected the Legislature's intention to continue the British *Pointe Gourde* rule's operation in Ontario.[56] The OLRC made the recommendation to include the no-scheme rule into the new legislation because it recognized the possibility of land prices becoming depressed and argued that in these circumstances, the decrease in market value of an owner's land "should not have to be borne by the owner."[57] The owner, according to the OLRC, "should be paid compensation on the basis of what the market value would have been if the plan had not affected it."[58] The OLRC equally recognized the impact of land value increases and explained:

> An increase in market value should be treated in the same way. There is no equitable justification for the owner receiving the increase resulting from the announcement of the scheme. This increase would be a windfall to him. The principle is to indemnify him from his loss. He should be put into a position to acquire comparable premises elsewhere, disregarding the benefits that the scheme will pay.[59]

Thus, the addition of section 14(4)(b) was "founded upon fundamental fairness"[60] to "prevent owners from taking advantage of (or being disadvantaged by) the very project or scheme that gave rise to the acquisition."[61] It is important to understand the background to and the rationales for including section 14(4)(b) in the *Expropriations Act, 1968-69*, because the compensation portions

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[55] *Ibid*.
[56] Coates and Waqué, *Supra* note 33 at 10-100.
[57] *Supra* note 14 at 24.
[58] *Ibid*. at 24-25.
[59] *Ibid*. at 25.
[60] Robert M. Robson, "The Appraisal Quandary 'Ignoring the Scheme' In Accordance with Section 14(4)(3) Ontario *Expropriation Act*" in *Don't let Your Clients Get Taken: Expropriation Law for the General Practitioner"* (Paper presented to the Canadian Bar Association – Ontario, Continuing Legal Education, September 23, 1998) [Toronto: Canadian Bar Association, 1998] at 2.
[61] Sperduti, *supra* note 54 at 6.

of this statute, including section 14(4)(b), form what is now the law of expropriation in Ontario today.[62]

> Section 14(4)(b) of the *Expropriations Act* currently reads as follows:[63]
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> In determining the market value of land, no account shall be taken of,
> …
> (b) any increase or decrease in the value of land resulting from the development of the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation.

This section is unique to expropriation law and has proven to be one of the most challenging concepts to implement in the determination of compensation.[64] The first problem that section 14(4)(b) creates is that it forces a construction of a hypothetical "no-scheme world," which often times involves the exercise of "rewriting history."[65] This problem arises due to the wording of section 14(4)(b), which directs that any increase or decrease in the value of land resulting from the development or the imminence of the development is to be ignored in determining compensation. Thus, appraisers and decision-makers are regularly "required to embark upon a hypothetical and often speculative analysis of the 'what if?' variety"[66] by considering "the state of affairs which would have existed, if there had been no scheme of acquisition."[67] Although stated in the British Court of Appeal case of *Myers v. Milton Keynes DC*,[68] Lord Denning's criticisms of the British no-scheme rule are equally applicable to Ontario's section 14(4)(b). In determining compensation for the expropriation of dairy farmland for the development of a new town, Lord Denning expresses his disapproved of the no-scheme rule and stated:

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[62] *Expropriations Act*, *supra* note 2.
[63] Section 1(1) of the *Expropriations Amendment Act, 1972*, S.O. 1972, c. 24, made a minor amendment to section 14(4)(b). Prior to 1972, part (b) of section 14(4) read as follows: "any increase or decrease in the value of land resulting from the development of the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation."
[64] Sperduti, *supra* note 54 at 6.
[65] *Supra* note 4 at 70.
[66] Sperduti, *supra* note 54 at 6.
[67] *Fletcher Estates (Harlescott) Ltd. v. Secretary of State for the Environment*, [2000] 2 A.C. 307, [2002] 2 W.L.R. 438 (H.L.) [*Fletcher Estates* cited to AC].
[68] [1974] 1 W.L.R. 696, [1974] 2 All E.R. 1096 (C.A.) [*Myers* cited to WLR]. This appeal was from an unreported decision of the Lands Tribunal.

> The valuation has to be done in an imaginary state of affairs in which there is no scheme. The valuer must cast aside his knowledge of what has in fact happened in the past eight years due to the scheme. He must ignore the developments which will in all probability take place in the future ten years owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town, but where there is to be supposed the old order of things continuing.[69]

A second problem arising from the requirement of ignoring the scheme in section 14(4)(b) is the section's undefined scope of the terms "development" and "imminent development." Although the Ontario Legislature attempted to move away from the complicated British term of "scheme" by replacing it with the term "development,"[70] the legislation again proved to be deficient by not defining the scope of the term "development." As such, courts were again left with the task of interpreting the problematic term. Discerning what constitutes an "imminent development" under section 14(4)(b) is equally problematic as it leaves open the question of how far back in time one is required to go to "re-write history" to ignore the development. This uncertainty typically arises in situations where a future public work is announced several years before the subject lands are actually expropriated.[71] For example, in *Runnymede Development Corporation v. Ontario (Ministry of Housing),*[72] the Federal and Provincial Governments jointly announced a major airport development in 1972 but the land for the project was not expropriated until 1974.[73] At the Divisional Court, Justice Southey upheld the then Land Compensation Board's decision[74] and stated, "in determining market value, it should take no account of any increase in the value of the subject lands resulting from the announcement of the project

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[69] *Ibid*. at 704.
[70] Todd, *supra* note 1 at 160. The Divisional Court decision in *Salvation Army* (See note 111) has rendered this distinction moot, as Justice Anderson held that "the word 'development' in clause 14(4)(b) was…synonymous with the word 'scheme' in the older cases."
[71] Sperduti, *supra* note 54 at 8.
[72] (1978), 20 O.R. (2d) 559, 14 L.C.R. 289 (Ont. Div. Ct.) (QL) [*Runnymede* cited to OR].
[73] *Ibid*.
[74] Ontario had a Lands Compensation Board from December 1, 1970 to July 15, 1983, when the *Expropriations Amendment Act, 1983*, S.O. 1983, c.47, transferred the board's jurisdiction to the Ontario Municipal Board.

[in]…1972."[75] Thus, Justice Southey rejected the argument that the words "the development" in section 14(4)(b) referred only to the development that had in fact occurred as opposed to the whole of the development from the first announcement to its completion.[76] The Court of Appeal[77] upheld Justice Southey's finding that one was to go back in history two years to determine the appropriate compensation amount for the expropriated land.[78] The term "imminent development" was further extended in *Torvalley Development Ltd. v. Metropolitan Toronto & Region Conservation Authority*.[79] This case involved the 1987 expropriation of a City of Toronto Brickyard property.[80] The Divisional Court upheld the Ontario Municipal Board's decision ("OMB"),[81] which interpreted the term "imminent development" quite liberally,[82] by finding that the ongoing publication of the authority's intention to expropriate for a period of twenty-eight years rendered the expropriation "imminent" throughout that period.[83] The holdings in these two cases demonstrate the inconsistent outcomes that section 14(4)(b) can produce and the additional possible danger that, "the further back in time one goes, the more likely it is that one assumption as to what would have happened must follow on another and the more difficult it is likely to reach a conclusion in which anybody can have confidence."[84]

A third problem with section 14(4)(b) is its relationship to injurious affection claims. "Injurious affection," which is defined in section 1(1) of the *Expropriations Act*[85] as another

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[75] *Ibid*.
[76] *Ibid*.
[77] (1979), 26 O.R. (2d) 288, 18 L.C.R. 65, 1978 CarswellOnt 1508 (Ont. C.A.) (QL) [*Runnymede* cited to OR].
[78] *Ibid*.
[79] (1988) 40 L.C.R. 81 (O.M.B.) [*Torvalley*]. This decision was varied at the Divisional Court, see (1989), 61 D.L.R. (4th) 172, 7 R.P.R. (2d) 165, 1989 CarswellOnt 605 (WLeC).
[80] *Ibid*. at 83.
[81] The OMB is authorized to adjudicate expropriation arbitrations in Ontario pursuant to section 29(1) of the *Expropriations Act*.
[82] Stephen Waqué, "New Principles/New Language: Coping with not Being Able to Ignore the Scheme in Making Injurious Affection Claims," online: Borden Ladner Gervais, Expropriation Law, <http://www.expropriations.com/Cases/AssociationPaperJan3004.pdf> at 3-4.
[83] *Supra* note 79 at 160.
[84] *Supra* note 4 at 79.
[85] Section 1(1) defines "injurious affection" as:

> (a) where a statutory authority acquires part of the land of an owner,

head of determining compensation upon expropriation, may arise in three situations. Firstly, injurious affection claims may occur when part of an owner's land has been expropriated and the taking has resulted in a decreased value to his or her remaining lands.[86] An example of such severance damage includes the expropriation of a strip of land from a larger whole for the construction of a highway, pipeline or railway.[87] Secondly, compensation may also be sought when an owner's land is expropriated and the remaining piece or pieces, "become less valuable as a result of the actual or intended use made of the portion expropriated."[88] Thirdly, injurious affection claims may additionally occur when none of the owner's lands are expropriated, but rather "lawful activities of a statutory authority on a neighbouring land" are interfering with the owner's property.[89] For example, injurious affection could arise when a municipality[90] raises or lowers the street grade and thereby impairs or prevents access to abutting lands and buildings.[91]

(i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
(ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(b) where the statutory authority does not acquire part of the land of an owner,
(i) such reduction in the market value of the land of the owner, and
(ii) such personal and business damages,
resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired.

[86] Todd, *supra* note 1 at 331.

[87] *Ibid*. at 331-332. These types of injurious affection claims are referred to as "pure injurious affection" claims and an example of an "pure injurious affection" claim can be seen in *Allcross Enterprises Ltd. v. Guelph (City)* (1973), 4 L.C.R. 259 (Ont. L.C.B.).

[88] *Ibid*. at 332. For example, in *Edwards v. Minister of Transport*, [1964] 2 Q.B. 134, [1964] 1 All E.R. 483 (C.A.) [*Edwards* cited to QB], the claimant was the owner of a dwelling house and an adjacent grazing field (p. 135-136). The Minister of Transport had constructed a by-pass trunk road on an embankment passing the claimant's lands (p. 135). In order to construct the road, the Minister acquired two small triangular pieces of land from the claimant who then pursued a claim for compensation for the land expropriated and for injurious affection to his remaining lands (p. 136). In an unreported decision of the Lands Tribunal, the claimant was successful in both of his claims and was awarded £4,000 in total for both claims (p. 136). Prior to the Lands Tribunal decision, both parties agreed that if the claimant was only allowed recovery for the lands taken, his compensation would only have been £1,600 (p. 136). The Minister appeal this decision Lord Justice Harman of the Court Appeal varied the Tribunal's decision and reduced the award to £1,600 (p. 156). The reason for Lord Justice Harman's decision was his assertion that, "where damage arises partly on the claimant's land and partly off it, he cannot claim the whole damage which has arisen but only that part of it which he can attribute to activities on what formerly was his own land" (p. 155).

[89] *Ibid*. at 233.

[90] A municipality authorized to expropriate lands pursuant to section 6 of Ontario's *Municipal Act*, S.O. 2001, c. 25.

[91] *Supra* note 1 at 333.

Further, a claim for injurious affection could also be made when lands that are not taken fall under the category of "obnoxious uses" of neighbouring lands.[92] For example, "the construction and use of schools, parking lots, hospitals, fire-halls, sewage lagoons and airports will almost always 'injuriously affect' neighbouring properties."[93] Regardless of which type of injurious affection has been suffered, section 21 of the *Expropriations Act* confers the right of compensation to the owner. The "before-and-after" approach is the process for determining the appropriate amount of compensation for injurious affection claims and is codified at section 14(3) of the Act. In using this method, the amount of compensation for injurious affection is calculated by "determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking."[94]

The relationship between section 14(4)(b) and injurious affection claims was often called into question in Parkway West Belt Areas designations under the previous *Parkway Belt Planning and Development Act, 1973*.[95] The purpose of this legislation was to create "a buffer zone between the settled areas of the Metropolitan Toronto and other developing areas beyond."[96] To achieve this goal, the Act gave the "the Treasurer of Ontario the authority to control land use"[97] in the designated areas to "accommodate future linear facilities such as hydro transmission lines, highways and public transit lines, as well as to provide public and private open-space and recreational uses."[98] Historically, when these types of cases were brought before the OMB, the Board routinely "screened out" Parkway West Belt Plans in assessing compensation for injurious affection claims to remaining Belt lands in accordance with section 14(4)(b). For example, in

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[92] *Ibid.*
[93] *Ibid.*
[94] s. 14(3).
[95] R.S.O. 1990, c. P.3. The *Ontario Planning and Development Act, 1994*, S.O. 1994, c.23, Sched. A., s. 22.1(1), repealed this statute on January 1, 1995.
[96] *Salvation Army, Canada East v. Ontario (Minister of Government Services)* (1984), 48 O.R. (2d) 327, 7 O.A.C. 81, 1984 CarswellOnt 546 (Div. Ct.) (WLeC) [*Salvation Army* cited to CarswellOnt].
[97] *Ibid.*
[98] *Supra* note 32 at 10-101.

Pfundt v. Ontario (Minister of Government Services),[99] an easement within the Parkway Belt was acquired to accommodate a high-voltage electrical transmission line for Ontario Hydro.[100] In applying section 14(4)(b), the Land Compensation Board found that the Plan itself was the "development," and the effect of the inclusion of the claimant's lands within the Parkway Belt should be "screened out" in determining the owner's compensation for loss.[101]

Section 14(4)(b)'s application to injurious affection claims radically changed as a result of the final outcome in *Salvation Army, Canada East v. Ontario (Minster of Government Services).*[102] In this case, owners of a rectangular piece of property in the Township of Vaughan, just over ninety-eight acres in size, had their lands designated as "Parkway Belt Area."[103] Five years after the designation, the owners had approximately twenty-nine acres of their land expropriated for the installation of a hydro transmission line.[104] This expropriation left just over eighteen acres of land in a triangular shaped parcel lying south and east, and just over fifty acres lying north and west.[105] The owner pursued a claim for the value of the expropriated land and for injurious affection to the remaining lands.[106] The OMB held that the value per acre excluding the Parkway Belt Plan and the hydro line was $62,391.[107] The Board concluded that the value of the approximate fifty acres of land remaining to the north and west of the acquired property was $10,000 after the expropriation and awarded the owners the difference of $52,391 per acre.[108] In determining the value of the parcel north and west of the hydro line, the Board concluded that the Parkway West Belt Plan was, in fact, the "development" under section 14(4)(b) of the *Expropriations Act* and

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[99] (1979), 20 L.C.R. 283 (Ont. L.C.B.) [*Pfundt*].
[100] *Ibid*. at 284.
[101] *Ibid*. at 298.
[102] (1983), 29 L.C.R. 193 (O.M.B) [*Salvation Army*].
[103] *Ibid*. at 195.
[104] *Ibid*.
[105] *Ibid*. The OMB compensated the owner for the remaining eighteen-acre section of land in the amount of $49,913 per acre for a total of $903,575 (p. 205). This award of compensation was not in dispute at the Divisional Court or at the Court Appeal.
[106] *Ibid*. at 194.
[107] *Ibid*. at 205.
[108] *Ibid*.

"screened out" the entire Plan from the determination of compensation.[109] Thus, the OMB followed *Pfundt* and ignored the Parkway Belt West Plan in its entirety in assessing the owner's damages for the remaining fifty-acre parcel at $4,747,426.[110]

The OMB's decision was appealed to the Divisional Court[111] to address the following two issues: "(1) if the Parkway Belt West Plan was the "development" in respect of which the expropriation was made? [and] (2) If the Plan was the "development," did the award include compensation for elements of loss or damage for which no compensation is payable under the [*Expropriations*] Act?"[112] Justice Anderson, for the majority, allowed the appeal in part by holding that the OMB erred in finding that the Parkway West Belt Plan was the "development."[113] Contrarily, Justice Anderson held that the term "development" in section 14(4)(b) referred to a taking that was "directly and necessarily related"[114] and found that only the hydro line constituted the "development" which was to be "screened out" of compensation determinations.[115] Therefore, Justice Anderson held that the OMB erred in basing their compensation award on a loss in the land's value due to the entire Parkway West Belt Plan.[116] Furthermore, because the Legislature failed to mention "injurious affection" in the opening words of section 14(4), this section, according to Justice Anderson, therefore only applied to "determining market value of land" and not to injurious affection claims.[117] Therefore, as a result of this finding, injurious affection claims were effectively confined to section 1(1) of the *Expropriations Act*. The Divisional Court calculated damages for the remaining fifty-acre parcel at $2,096,808.20, with a possible amount to

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[109] *Ibid*. at 203.
[110] *Ibid*. at 206.
[111] *Supra* note 96.
[112] *Ibid*.
[113] *Ibid*.
[114] *Ibid*.
[115] *Ibid*.
[116] *Ibid*.
[117] *Ibid*.

be assessed for injurious affection to the same parcel by referring the matter back to the OMB.[118] Because the Divisional Court's decision resulted in a decrease in compensation of just over two million dollars, the landowners appealed.[119] Justice Finlayson, writing for the majority of the Court of Appeal, ultimately upheld Justice Anderson's holding that the OMB misused section 14(4)(b) of the *Expropriations Act* by agreeing that this section only applied to lands taken and it does apply to the determination of compensation for injurious affection.[120] Justice Finlayson also upheld the Divisional Court's finding that injurious affection was a matter to be dealt with separately under section 1(1) of the Act.[121]

In the opinion of Frank J. Sperduti,[122] a Partner at Borden Ladner Gervais LLP and one of Ontario's leading lawyers in the law of expropriation, the holding in *Salvation Army* created a problem for section 14(4)(b) because "the Court of Appeal misunderstood the definition of injurious affection in section 1(1) of the Act and its interaction with section 14(4)(b)."[123] To

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[118] *Ibid*. The owners appealed a decision of the OMB that denied a motion to amend their statement of claim by holding that although the claimants could amend their statement of claim up to the end of a compensation case, there was no right to restructure the claim [See *Salvation Army, Canada East v. Ontario (Ministry of Government Services)* (1988), 40 L.C.R. 241 (Ont. Div. Ct.) at 241, 248]. Justice Steele delivered the unanimous judgment of the Divisional Court by allowing the appeal and remitted the matter back to the OMB (p. 252). At the OMB [See *Salvation Army, Canada East v. Ontario (Ministry of Government Services)* (1990), 44 L.C.R. 302 (O.M.B.)], the Board again set out to determine compensation for the injurious affection claim for the approximate fifty acres of lands lying north and west of the expropriated portion (p. 308). Using its best judgment, the Board found that twenty percent of the loss in value of the northerly fifty acres was attributable to the expropriation and not part of the effects of the Parkway West Belt Plan (p. 317). In the end, the OMB awarded the owners $530,100 in compensation for injurious affection suffered by the remaining lands (p. 317).

[119] (1986), 53 O.R. (2d) 704, 12 O.A.C. 283, 1986 CarswellOnt 692 (C.A.) (QL) Finlayson J.A. [*Salvation Army* cited to OR].

[120] *Ibid*.

[121] *Ibid*. A concurring opinion was also provided by Justice Grange at the Court of Appeal. Justice Grange felt that it did not matter whether the development was the whole plan as the OMB found, or simply the hydro transmission line as the majority of the Divisional Court found because Justice Anderson at the Divisional Court based his findings on an additional ground. Justice Anderson also based his decision on the fact that if the Parkway West Belt Plan was considered the "development," then the award by the OMB did include compensation for elements of loss or damage for which no compensation is payable under the *Expropriations Act*. Justice Finlayson took issue with Justice Grange's reasonings and delivered his own concurring judgment.

[122] Frank J. Sperduti is a contributing author to the leading loose-leaf text on expropriations law in Canada, the *New Law of Expropriation*, which deals with government acquisitions of real estate and business interests and this text has been quoted from and approved by courts and tribunals since its publication. Sperduti has had several articles published and is also a lecturer for the Appraisal Institute of Canada the Ontario Expropriation Association, and the Alberta Expropriation Association, and is a member of the Board of Directors of the Ontario Expropriation Association.

[123] Frank J. Sperduti, E-mail (25 October 2005). The OMB decision in *Mikalda Farms Ltd. v. Ontario* (2001), 75 L.C.R. 274, 2001 CarswellOnt 5105 (O.M.B.) (WLeC) [*Mikalda* cited to CarswellOnt], has provided further guidance in how the decision in *Salvation Army* should be applied but *Salvation Army* remains good law in Ontario. This case involved partial takings of farmlands for the construction of Highway 407 (now Highway 403) (para. 1) and the issue before the OMB was whether or not the Highway 407 construction would be "screened out" of the compensation determination for the lands injurious affected (para. 66). The OMB held that although they were bound by the decision in *Salvation Army* that decision did not say that "the subject lands are

alleviate the problem of section 14(4)(b)'s non-application to injurious affection claims, Sperduti argues that section 14(4)(b) should be expanded by revising the current "before-and-after" test at section 14(3) of the Act to a "with-and-without" approach. The "before-and-after" method is best described as taking the "value of the whole parcel before expropriation and subtracting that sum from the value of the remaining lands."[124] Stephen F. Waqué,[125] a colleague of Sperduti's, cautions that using the "before-and-after" approach "in a case where the scheme is to be ignored under section 14(4)(b) for determining market value, but not to be ignored in determining injurious affection, is…problematic."[126] Waqué explains his concerns by stating, "because the before and after approach blends the calculation of the impact of the loss of the market value of the land taken, and the loss in the market value of the land remaining, it is difficult to correctly apply section 14(3) to cases where section 14(4) applies."[127] Thus, "in an effort to distinguish between the type of examination which takes place when ignoring the scheme under section 14(4)(b), and the type of examination which takes place in measuring injurious affection," Waqué feels that the alternative terminology of "with-and-without" is the best solution to this problematic feature of section 14(4)(b).[128] Waqué explains that the "with-and-without" method would calculate injurious affection damage by determining the impact with the expropriation or public work in place, and then comparing that to the situation without the public work or expropriation in place but still including all of the planning history as a consideration.[129] This approach, according to Waqué,

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automatically excluded from a claim for injurious affection" (para. 108). In their holding, the OMB reduced the amount of compensation by twenty-five percent due to the impact of the Parkway West Belt Plan (paras. 120, 124). Therefore, the scheme was not ignored in this case and, as such, the decision in *Salvation Army* did not defeat the injurious affection claim, but only affected the total amount of compensation.

[124] *Supra* note 14 at 45.

[125] Stephen F. Waqué is also a Partner at Borden Ladner Gervais LLP and is the author of the loose-leaf text, *New Law of Expropriation*. Waqué has also been published by *Insurance Law Journal*, *Canadian Underwriters Magazine* and *The Appraisal Institute Magazine*, among prestigious law journals and was the founding director and a past President of the Ontario Expropriation Association.

[126] *Supra* note 82 at 13.

[127] *Ibid*.

[128] *Ibid*.

[129] *Ibid*. at 14.

would greatly assist in determining compensation amounts for injurious affection claims because it would, "show a properly measured and empirically proven loss."[130]

The solution offered by Sperduti and Waqué of expanding section 14(4)(b) of the *Expropriations Act* by revising the current "before-and-after" method to a "with-and-without" approach is a helpful start but falls short of resolving all of the problematic features of section 14(4)(b). For instance, the "with-and-without" approach does not address section 14(4)(b)'s problematic requirement of "rewriting history" to construct a "no-scheme world." Additionally, the "with-and-without" approach does not assist in defining the problematic terms of "development" or "imminent development" contained in section 14(4)(b). Therefore, because the "with-and-without" approach is a single-faceted solution and as a result can only resolve the relationship between section 14(4)(b) and injurious affection claims, an alternative multi-faceted solution of "clearing the decks" should be considered.

Arising from the inconsistent development of the legislative and common law no-scheme rules, the Law Reform Commission ("Commission") in Britain proposed the "clearing the decks" approach in its report entitled, "Towards a Compulsory Purchase Code: (1) Compensation (A Consultation Report)."[131] The Commission's proposal centred on revoking the current British legislation and enacting a new code that would "espouse a single set of statutory rules to govern the determination of compensation upon expropriation."[132] The Commission found additional support for their solution in the 2003 British decision of *Pentrehobyn Trustees v. National Assembly for Whales*,[133] where the President of the Lands Tribunal stated:

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[130] *Ibid*.
[131] *Supra* note 4.
[132] *Ibid*. at xv, 69.
[133] [2003] R.V.R. 140 (Lands Trib.). This case addressed the situation of a landowner seeking compensation for his lands that were expropriated for the development of a highway scheme. The claimant sought a greater amount of compensation by claiming that they were intending on developing the land for light industrial or leisure uses despite a negative certificate that had been issued regarding the lands. The issue before the Land Tribunal was "whether the prospect of planning permission for

> The extreme complexity of the issues that I have had to consider, the uncertainty in the law, the obscurity of the statutory provisions, and the difficulties of looking back over a long period of time in order to decide what would have happened in the no-scheme world demonstrate, in my view, that legislation is badly needed in order to produce a simpler and clearer compensation regime. I believe that fairness, both to the claimants and to acquiring authorities, requires this.[134]

Essentially, the aim of the Commission's proposed new code is to preserve the underlying principles of the existing expropriation law while disposing of its confusing conflicts and to ultimately arrive at a modern code that has cleared away the "dead wood."[135] To achieve their goal, the Commission first sought to ensure that all prior no-scheme rules were done away with by recommending the following provision: "all previous rules, statutory or judge-made, relating to disregard of 'the scheme' will cease to have effect."[136] Such a rule, according to the Commission, would give effect to their "clearing the decks" solution by eradicating all prior conflicting versions of the no-scheme rule.[137] If the Ontario Legislature were to follow Britain's recommendation and expressly declare a fresh legislative and common law beginning, many of the inconsistent holdings of earlier cases would cease to be relied upon as precedents and the path would become clear for the creation of one unified method for determining compensation upon expropriation in Ontario. The second relevant recommendation from the Commission was a change in terminology to consolidate all prior confusing and inconsistent terms used to describe the "development." Terms such as "scheme," "project," "undertaking," and "purpose" would be disregarded because they were, according to the Commission, too imprecise and carried too much historical baggage.[138] The

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development should be assessed on the basis that the proposed scheme for development had never been considered, or on the basis that the scheme had been cancelled on the valuation date." The Lands Tribunal held that compensation would be based on existing use because there was no evidence that planning permission would have been granted to any other land use purpose. Further, there was nothing in the legislation that would signal that the claimant would have been given permission for land development if the scheme had been cancelled. Finally, the Lands Tribunal held that the correct approach of the Tribunal to assessing the prospects of planning permission in the light of a negative certificate was to have regard to the opinions expressed by the appropriate planning authority and its reasons.

[134] *Ibid*.
[135] *Supra* note 4 at 9, 71.
[136] *Ibid*. at 96.
[137] *Ibid*.
[138] *Ibid*. at 75.

Commission favoured the new term of "statutory project," and recommended the following provision: "in this Code, 'the statutory project' means the project, for a purpose to be carried out in the exercise of a statutory function, for which the authority has been authorized to acquire the subject land."[139] In this respect, the Commission asserts, "attention is focussed on the particular project for which the acquisition is authorized, and of which the activities on the subject land will be an integral part, rather than on a wider 'underlying scheme.'"[140] Therefore, if the Ontario Legislature modified its current problematic terminology to "statutory project," less confusion would exists as to what should be "screened out" of compensation determinations because the Commission's proposed legislation also incorporated a more detailed test of an "integral part." The enactment of such a section may also allow the equally problematic phrase of "imminence of development" to be removed from section 14(4)(b) because the term "statutory project" appears on its face to be broad enough to include what was intended by the Ontario Legislature to be "screened out" of compensation determinations.

The Commission's proposed new code was centred on a third recommendation, which was the implementation of a "cancellation assumption." The Commission developed the "cancellation assumption" based on the House of Lords decision of *Fletcher Estates*,[141] where Lord Hope of Craighead set out the foundations for the principle by preferring a determination of compensation based on the circumstances if the project had been cancelled at the time of the acquisition (not as if there had never been a project)."[142] This approach was more favourable, according to Lord Hope, because "no assumption has to be made as to [what] may or may not have happened in the past."[143] Additionally, the Commission favoured this principle because the "cancellation assumption" would

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[139] *Ibid*. at 97.
[140] *Ibid*.
[141] *Supra* note 67.
[142] *Ibid*. at 322.
[143] *Ibid*. at 323.

protect the acquiring authority from "any increase in value to the lands to be acquired by the relevant project."[144] In support of this principle, the Commission proposed the following section entitled "Disregarding the Project" for the new code:

> In valuating the subject land at the valuation date:
>
> a. it shall be assumed that the statutory project has been cancelled on that date;
> b. the following matters shall be disregarded:
>
> i. the effects of any action previously taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;
> ii. the prospect of the same, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function, or by the exercise of compulsory powers.[145]

If the Legislature of Ontario were to adopt the "cancellation assumption" as a new approach based on the Commission's proposed model legislation, this move would effectively remedy section 14(4)(b)'s problematic requirement of constructing a "no-scheme world" and the act of "re-writing history." The Commission asserts that the "cancellation assumption" would rectify this problem because it would affirm "that circumstances are taken as they are in the real world…it makes it clear that the 'no-scheme world,' which is a familiar but confusing feature of the current law, has no part in the new Code."[146] One possible drawback of the "cancellation assumption" approach, however, is that Commission advocated that the principle would not apply to retained lands.[147] In other words, despite the many proposed legislative changes, the Commission still held the view that the new "cancellation assumption" would not be applicable to injurious affection claims.

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[144] *Supra* note 4 at 71.
[145] *Ibid*. at 99.
[146] *Ibid*. at 102. At first glance, it may appear that the landowner's interests are not reflected in the new code because the "cancellation assumption" is centred on the protection of the acquiring authority. The Commission, however, did not neglect to protect the land owner and recommended the following provision, "No account shall be taken of any depreciation (not attributable to diminished planning prospects) in the value of the relevant interest which is attributable to the land being blighted land, or to any indication (whether by way of particulars in a development plan, or otherwise) that the subject land, or any land in the vicinity, is likely to be acquired by a public authority" (p. 93). Thus, this new rule would denote a disregard for any decreases and reduced profits caused by the relevant project or by any advance indication of the project in determining compensation amounts. The Commission expressly stated that the purpose of having a separate sub-rule pertaining to decreases in value of land upon expropriation is to demonstrate that the owner's interests are not just the other side of the coin to the *Pointe Gourde* rule, but rather that the sub-rule "has a distinct purpose for the protection of property rights" (p. 103).
[147] *Ibid*. at 85.

Since this British proposal of "clearing the decks" does not advocate expanding a new section 14(4)(b) to include injurious affection claims, this solution, therefore, on its face does not remedy all of the problems created by section 14(4)(b). Nevertheless, the effect of this drawback would be mitigated by the opportunity for proponents of the expansion view, such as Sperduti and Waqué, to present their position during the consultation portion of the legislative reform process.

Determining compensation amounts for expropriated lands in Ontario has made significant developments from its earliest link to the British railway boom, to the value to the owner approach and now to section 14(4)(b). Although section 14(4)(b) may appear at first glance to be relatively straightforward, considerable problems have resulted from its application. First, section 14(4)(b) requires an illusory "no-scheme world" to be created which requires a "re-writing of history" to determine what public works are to be "screened out" of compensation calculations. Second, because the Ontario Legislature failed to define the terms "development" and "imminent development" contained in section 14(4)(b), the section's application has often lead to unpredictable and entirely contradicting results. Lastly, legal experts who are of the view that the holding in *Salvation Army* was incorrect have called into question the non-application of section 14(4)(b) to injurious affection claims. In response to the growing complexity of problems presented by section 14(4)(b), two solutions have been offered. The first solution put forward was to expand section 14(4)(b) to apply to injurious affection claims by adopting a new "with and without" approach in determining compensation amounts for injurious affection claims. The single-faceted nature of this solution, however, confines its success to only being able to remedy one problem that section 14(4)(b) creates. Therefore, the more effective solution to the problems presented by section 14(4)(b) is to "clear the decks" and revoke section 14(4)(b) to set down a new rule to govern compensation calculations in Ontario. By following the British recommendations,

eradicating section 14(4)(b) and developing a new rule provides hope for more consistent and predictable judicial outcomes. A change in the section's terminology, which this solution calls for, would also assist in achieving more uniform decisions because a change to "statutory project" and the test of an "integral part" is an improved move away from the vague notion of "development." Additionally, by employing the "cancellation assumption" method, the Ontario Legislature would be remedying the most problematic aspect of section 14(4)(b) of having to construct an imaginary "no-scheme world" by "rewriting history." An additional advantage of the "clearing the decks" solution is that it would force the Ontario Legislature to revisit section 14(4)(b) which has not radically changed since coming into force in 1968. This revisit would enforce the notion that expropriation law must not remain static in order to adequately address the ever-increasing complexity of land development situations. Although at its outset the solution may not resolve the totality of the problems created by section 14(4)(b), the Ontario Legislature should nonetheless "clear the decks" and develop a new section 14(4)(b) based on British recommendations because as a multi-faceted solution, this result would provides the best possibility of remedying the inconsistent and confusing nature of the current section 14(4)(b).

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