

Total Expropriation of Commercial Premises

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What is the meaning of the word "value" and by what yardstick is value to be assessed? Is the yardstick always the same regardless of the attendant circumstances? Is there a legal principle to be applied when determining the meaning of the word in any or all circumstances? The same questions are met daily in the law of succession duties, taxation, corporations and wills. There is no such thing as "value in the air". Before the word can mean much to us, we must know who is to assess the value. We must also know the object we desire to value. Value thus must be in relation to some thing.

I intend to deal here only with one small facet of the vast law of assessment, to discuss the method by which a court is to determine the value of land expropriated under the provisions of the Ontario Municipal Act.¹

This article is predicated upon certain assumptions, which should be clearly understood at the outset, and they are as follows:

(1) The premises here discussed are commercial and not residential or other premises. It is probable that considerations which determine the value of residential premises may not be applicable when determining the value of commercial premises.

(2) Where part only of an owner's premises is expropriated, the considerations that determine the compensation payable to the owner differ greatly from those where all the owner's premises have been expropriated.² In a partial expropriation we assume that the owner remains in possession of the remaining premises and in a total expropriation we assume that he must move. For obvious reasons the losses in one case are not necessarily the same as in the other.

¹ R.S.O., 1937, c. 266, s. 347.

² "Owner" by s. 342(d) "shall include mortgagee, lessee, tenant, occupant. . .".

(3) The considerations that determine the compensation payable for the expropriation of premises, the injurious affection to them and incidence of severance, differ vastly. Expropriation is the taking itself. Injurious affection is the diminution of the selling or leasing value of the part of the premises left after part is expropriated. The incidence of severance are the direct losses that result from the expropriation of part of a premises. The injurious affection and incidence of severance are often confused. Let us take an example of an owner who owns a plot of land 100 feet by 100 feet upon which is situate a departmental store. The city, desiring to widen the street upon which this store faces, expropriates the frontage of the store by a depth of 10 feet. The taking of the 10 feet is an expropriation. What is left of the store has diminished in value — it has been injuriously affected. The owner must build a new front wall and this expense is an incident of the severance.

(4) The compensation payable upon most expropriations in Ontario is determined by the provisions of section 347 of the Ontario Municipal Act. Up to 1927 the relevant section was 325. In 1927 it was renumbered 342 and later in the same year amended.³ In 1937 the section became number 347, and this number is used throughout this article. Because the precise wording of the section is of great importance, it is set forth here:

347 (1) Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated *and for any damage necessarily resulting from the expropriation of the land*, or where land is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

(2) The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

(3) Where fencing or additional fencing will become necessary owing to land having been expropriated the cost of it shall be included in the compensation.

(4) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damages directly resulting from severance.⁴

Before 1927, section 347 as just set out did not contain the words in italics. Before the amendment in 1927 the courts gener-

³ 17 Geo. V., c. 61, s. 30.

⁴ The words in italics were the words introduced in the section in 1927.

ally held that section 347 provided for compensation based upon three considerations:

- (1) value of the land taken;
- (2) losses from severance;
- (3) losses from injurious affection.

I consider (1), (2) and (3) constituted a formula that was to be applied in all expropriations before the amendment.

In the example given, where the front 10 feet of the land are expropriated, the owner would have been paid the following hypothetical amounts:

- (1) Value of the land — \$10.00 a foot
Amount to be paid — \$1,000.
- (2) Loss from severance — a new wall and store front
Amount to be paid — \$4,000.
- (3) Loss from injurious affection — decrease in market value of remainder, etc.
Amount to be paid — \$6,000.

The owner is therefore paid \$11,000 for the loss of 1/10th of his land.

Let us transfer the same formula from a partial to a total expropriation. The city expropriates all the owner's land. He would have received compensation based on the same formula:

- (1) Value of the land — \$10,000.
- (2) Incidence of severance — nil. There is no severance so there can be no incidence.
- (3) Injurious affection — nil. There is no land remaining. There can be no injurious affection in the air.

The owner is paid \$10,000 for the loss of all his land. The court's interpretation of section 347 before 1927, therefore, leads one to conclude that an owner will be paid much less if he loses much more. This result is neither equitable nor logical.

In what I submit was an effort to correct this anomalous result and to broaden the effect of the section, the Ontario Legislature in 1927 added the words in italics to the section. Those words were, "and for any damages necessarily resulting from the expropriation of the land". The amendment seemed to provide a separate formula to be applied *re* the land expropriated.

In 1932 the Ontario Court of Appeal appeared to approve the two-formula interpretation of section 347. In 1937 a judge in chambers held that the amendment meant nothing and that the law was as it had been before the amendment. In 1947 the Court of Appeal appeared to approve the 1934 judgment.

In considering the effect of section 347, let us first look at the section before the amendment and see precisely how it was interpreted by the courts. Subsection one of the section provided compensation for (1) the land expropriated, and (2) injurious affection to the land remaining. Subsection three provided for a specific loss from severance. Subsection four provided for compensation for severance generally.

In *Re Powell and City of Toronto*,⁵ a case of a partial expropriation, Middleton J.A. held that the proper interpretation of section 347 was that unless a claimant could bring his losses under any one of the headings

- (1) value of the land
- (2) injurious affection, or
- (3) incidence of severance

he could recover no compensation. No objection can be taken to the use of headings (2) and (3) by the learned judge. With reference to (1) he had this to say: "I desire to emphasize the exact words of the Statute and to point out how widely it differs from other statutes which direct that there shall be due compensation to the owner for the taking of his land or due compensation to the owner for the loss sustained by the exercise of the powers of expropriation. *All it has given is due compensation to the owner for the land expropriated.*"⁶

There are four distinct arguments against this statement of the learned judge. *Firstly*, in effect it ignores the word "due" in the phrase "due compensation" and emphasizes the word "land". *Secondly*, the section when read as a whole did not lend itself to such an interpretation. When read as a whole it provided for reasonably full compensation to an owner who had only part of his land expropriated. But where there has been a total expropriation, the interpretation of Middleton J.A. is unsatisfactory. The section is reduced to an absurdity, and it is the responsibility of the courts to avoid an absurdity if they can, which Middleton J.A. failed to do.⁷ *Thirdly*, Middleton J.A. points out that the wording of the section differs from the examples he used and concluded that the meaning differed. But he does not say how or in what manner. He does not cite any authority with the exception of *Re Macdonald and City of Toronto*,⁸ which is not an authority for his conclusion at all. *Fourthly*, he does not refer to

⁵ (1925), 56 O.L.R. 541.

⁶ At p. 547. The italics are mine.

⁷ *Grey v. Pearson* (1857), 6 H.L. Cas. 106; *McNair v. Collins* (1912), 27 O.L.R. 44; Maxwell on Interpretation of Statutes (9th ed.) 5.

⁸ (1912), 27 O.L.R. 179.

several reported decisions (discussed later) which are contrary to his conclusions.

The formula the Ontario courts developed to determine the compensation payable in the circumstances of partial expropriation was quite adequate so long as it was confined to partial expropriations. But without realizing the absurd result, the courts applied the formula to total expropriations, for which it was not designed and which it does not fit. I conclude therefore that the formula was not well founded in the first place, and submit that Middleton J.A. in *Re Powell* erred in his interpretation of section 347. That learned judge in effect held that an owner should be paid compensation for the *land* expropriated — the *value of the land*. It was open to the learned judge to hold that an owner was to be paid *due compensation* for the expropriation of his land. The emphasis was placed upon the word “land” rather than the word “due”. Thus the courts before 1927 laid down a fundamental rule that *re* the land expropriated the owner could recover only the value of that land. Moving costs, loss of business and other attendant losses were disregarded *re* the land expropriated.

Even if we could approve such an interpretation of section 347 before the amendment, what did the court mean by “the value of the land” and where did Middleton J.A. find the word “value” in the section? The learned judge in *Re Powell* considerably weakened his argument, and therefore his judgment, by making two obviously inconsistent statements. He stated at one point of his judgment that compensation should not go beyond an amount equal to *the value to the claimant* of the land taken⁹ and then at other points made contradictory statements to the effect that the compensation should equal the value of the land rather than the value put upon the land by the claimant. What then are we to conclude he meant by “the value of the land”?

Is the claimant to be paid compensation equal to the market value of the land or the value *he* puts upon the land? Whose value is to be accepted in a given case? The owner will consider that the property value includes the cost to move elsewhere, loss of profit during the move, loss of goodwill after the move, depreciation of equipment, the cost of new fixtures, and the like. The expropriating municipality does not want to pay compensation which will include the owner's considerations. The municipal assessment commissioner will assess the premises at a low figure for purposes of taxation, lower than the market value. The succession duty department would assess the property closer to the owner's own

⁹ (1925), 56 O.L.R. 541, at p. 545.

value than to the value of the assessment commissioner, if the owner died before selling it. A junk-yard proprietor might consider the premises to be worth one-half the municipality's value, and then only if the land was vacant. An apartment builder might value the property highly, until he learned that a municipal by-law provided that only houses could be built in the area. A steel mill might put a high value upon the premises if it was near water, road and rail communications. Rocky land might be valuable for a gravel pit but valueless for a lawn-bowling club.

To fortify his reasons for judgment in *Re Powell*, Middleton J.A. referred to *Re Macdonald and City of Toronto*. *Re Macdonald*, however, does not assist greatly because the report of that case contains only the following statement with reference to this matter, by Mr. Justice Garrow: "The only subjects of such pecuniary loss are: (1) the lands actually taken; and (2) the injury to the leasing or selling value of what is left. . .".¹⁰ Mr. Justice Garrow has, like Middleton J.A., limited the compensation payable upon the expropriation of all an owner's land to "the lands actually taken", since there can be no incidence of severance or injurious affection in such circumstances. We are apparently to conclude that "the lands actually taken" means the value of the lands taken, but still we have no idea whose value is to be considered. The words of Mr. Justice Garrow, "the lands actually taken", do not advance the discussion in any direction.

After close scrutiny of the judgments in *Re Powell* and *Re Macdonald*, it is indeed difficult, for the reasons discussed, to conclude that either case points to any principle of law that should effect or bind an arbitrator or a court when determining the compensation to be paid to an owner upon the expropriation of all his land. Nevertheless, both cases are heavily relied upon by expropriating municipal corporations. If either case is not well decided when applied to a total expropriation, then it is submitted that neither is well decided when applied to a partial expropriation.

In *Re Dixon and City of Toronto*¹¹ and *Re Letros and City of Toronto*,¹² both total expropriation cases, the Ontario Court of Appeal vascillated between two diametrically opposed views. In the former case Masten J.A. clearly indicated that the compensation payable to an owner before the 1927 amendment was the value the owner placed upon the land for purposes of the business he conducted there, whereas in the latter case the same judge

¹⁰ (1912), 27 O.L.R. 179, at p. 182.

¹¹ (1924), 56 O.L.R. 167.

¹² (1924), 56 O.L.R. 175.

abandoned this view and considered the elements that determine "market value".

It is difficult to understand how one group of cases, including *Re Macdonald*, *Re Letros* and *Re Powell*, could so vastly differ in their interpretation of the meaning of the word "value" from another group of cases, including *Re Dixon* and *Commissioners of Inland Revenue v. Glasgow and South-Western Railway Company*.¹³ One would conclude from the former group that the value of the land is a quantum, uninfluenced by the character of the owner's use of the land, whereas in the latter not only is the owner's use a prime consideration but his most *advantageous* use. In the *Commissioners of Inland Revenue* case, Lord Watson, when discussing the compensation payable to an owner, concluded that the value of the land should include a sum for the loss of his business.¹⁴ Masten J.A. in *Walkerville v. Walkerville* had this to say: "The court was of the opinion that the claimant was entitled to have these lands considered and the compensation assessed with reference to all advantages which would give to the lands their greatest value". He went on to add: "The Court approved the rule as stated in *Cripps on Compensation*, 7th ed., at p. 164, thus: 'All advantages which the land possesses, present or future, in the hands of the owner may be taken into consideration, and the owner is entitled to have the price assessed in reference to those advantages which will give the land the greatest value. The value of an owner's interest is not properly compensated by assessing the amount of pecuniary benefits obtained by past user in disregard of possible benefits in the future. The probability of a more profitable future use is one such advantage which may be taken into consideration. Thus land which may probably be used for building purposes must not be valued on the same basis as purely agricultural land.'"¹⁵

It is impossible to pay an owner compensation in an amount equal to "the value of the land". There is no such thing as the value of the land. "Value" of land cannot be measured. There is such a thing as the value of bonds, a motor car or radio but not of land. The courts have invented the "value" yardstick for measuring compensation but they cannot apply it without further improvising. The quantum of the compensation has been based upon a wrong foundation. The losses of the owner should have been the foundation of the quantum. Losses are real, they are

¹³ (1887), 12 App. Cas. 315.

¹⁴ *Ibid.*, at p. 322.

¹⁵ (1932), 41 O.W.N. at p. 235.

facts, they can be accurately estimated and, so long as the compensation is commensurate with the public good, it is most proper to predicate it upon the owner's real damages, which flow directly from the expropriation.

Does it matter if the school of thought represented by the judgment of Middleton J.A. in *Re Powell* is correct or not today? The answer to that question depends upon whether the amendment in 1927 altered the meaning of section 347 or not. If the amendment accomplished nothing then the law today is as Middleton J.A. indicated. If the amendment did make a change, the Middleton judgment has served its purpose and should be forgotten.

The amendment added the following words: "and for any damage necessarily resulting from the expropriation of the land" after the words "due compensation for the land expropriated". If "due compensation for the land expropriated" meant only the market value of the land actually taken, the addition of the words "and for any damage necessarily resulting from the expropriation of the land" would seem to contemplate including in the compensation many losses that are beyond the market value of the property. The amended section seems on the face of it to provide for:

- (a) compensation for the land expropriated; and
- (b) any damages necessarily incurred by the owner as a result of the *expropriation* of the land.

Since the amendment, only three cases that touch upon the interpretation of section 347 have been reported, and unfortunately they are not consistent. The first of the three was *Walker-ville Lumber Company v. Walkerville*.¹⁶ In giving judgment for the court, Masten J.A. indicated that compensation, as determined by section 347, would include:

- (a) the value of the lands taken;
- (b) the injury to the claimant by way of severance to the lands remaining; and
- (c) the *general damage* necessarily resulting from the expropriation, including disruption of business.¹⁷

Masten J.A. under heading (a) followed the interpretation given to the words "due compensation for the land expropriated" in such cases as *Re Powell*. Under (b) he gave relief for severance or injurious affection as provided by subsection 4 and the concluding words of subsection (1) of section 347. Under (c) he gave

¹⁶ (1932), 41 O.W.N. 114.

¹⁷ *Ibid.*, at p. 115.

a meaning to the words introduced by the amendment. He clearly separated heading (b) from heading (c). The *Walkerville* case was in fact one of partial expropriation but, in effect, of total expropriation, because not enough land was left to the owner to carry on his business. It is submitted that the court considered that the amendment permitted it to increase the compensation payable by the type of losses it has grouped under heading (c), all of which were obviously not regarded as incidents of severance or injurious affection, since these losses are included under (b). In the result it is submitted that general damages from the expropriation of the land, directly connected with it, are allowable.

Halsbury's Laws of England has this to say: "The right to receive compensation for land taken or injuriously affected depends upon the provisions of the statute or order which authorizes the taking or injurious affection, and upon the terms of such statute or order will also depend the basis upon which the compensation is to be assessed".¹⁸ However, if section 347 is as broad as indicated by the *Walkerville* decision, and it is submitted it is, then it is not inappropriate to refer, among others, to compensation cases such as *Re Reid and Brown*,¹⁹ which were not founded upon the Municipal Act, because such cases discuss in detail the elements that should be considered when determining the quantum of *general damages* whenever general damages are an element to be considered.

Bearing in mind that the amendment appeared to broaden section 347 and considering that the *Walkerville* case lent judicial authority to such a view, it is surprising indeed to find that Kerwin J., in chambers, in *Re Conger Lehigh Coal Company Limited and City of Toronto*²⁰ held that the amendment had not altered the law as enunciated by Middleton J.A. in *Re Powell*. Henderson J.A. in *Lafferty et al. v. The Public Utilities Commission of Trenton*²¹ had this to say about the judgment of Kerwin J: "The section as so amended, as it now stands, was considered . . . by Kerwin J., who held that the insertion of these words had not changed the law as set out in *Re Powell and City of Toronto* . . .".²²

Kerwin J. in *Re Conger Lehigh* reverted to the narrow pre-amendment interpretation of section 347 by stating: "So far as the arbitration is under the Municipal Act, *Re Powell and City of Toronto* (1925), 56 O.L.R. 541 left no doubt on the legal point, but

¹⁸ (1st ed.), Vol. 6, para. 32.

¹⁹ [1934] O.W.N. 709.

²⁰ [1934] O.R. 35, at p. 41.

²¹ [1947] O.R. 307.

²² *Ibid.*, at p. 317.

it is contended that the amendment to the Act by 17 George V., Chap. 61, Sec. 30, which adds the words 'and for any damage necessarily resulting from the expropriation of the land' after the word 'expropriated' in the eighth line of subsec. 1, of sec. 342 of the Act, changed the law and in fact it is suggested was introduced as a result of the *Powell* case. *But the amendment is restricted to damage resulting from the expropriation of the land and does not cover any damage beyond what that case had determined might be allowed as an incident of the severance.*"²³

The following are some comments that might be made on the judgment of Kerwin J. and in particular on the italicized words:—

1. The learned judge states: "the amendment is restricted to damage resulting from the expropriation of the land". There is a suggestion in this language that the amendment means something, that the section has been broadened, but in the same sentence the learned judge concludes with words which in effect hold that the amendment means nothing beyond what has already been decided. The words of Kerwin J. in italics mean that the damages suffered from the expropriation of the land are the equivalent of the damages allowed as an incidence of severance. But that is not correct. It cannot be said that in all cases the damages suffered from the expropriation are actually the incidence of severance because where total expropriation is had there is no severance; therefore there can be *no incidence* of severance, and yet damage has been suffered. And, further, upon what judicial authority does the learned judge rely for such a statement? Kerwin J. has in four lines determined an issue upon which Cripps wrote a lengthy treatise²⁴ and he has done so without citing any authority or setting forth any reasons.

2. The amendment was inserted at a point in the subsection where compensation *re* the taking and not *re* what is left is provided for. One would expect consequently that the amendment was intended to cover the damages to the owner *re* the land taken rather than *re* the land remaining. If Kerwin J. is correct, the amendment would have to provide "and for any damage necessarily resulting from the expropriation of the land, *to the land remaining*".

3. If Kerwin J. is correct, the amendment was directed towards compensation for the incidence of severance. But subsection 4 already adequately provided for the incidence of severance and, if the learned judge is correct, both the amendment and sub-

²³ [1934] O.R. 35, at p. 41. The italics are mine.

²⁴ Cripps, Compensation (9th ed.).

section 4 provide for the same contingency.²⁵ The Ontario Legislature cannot have intended the amendment to be redundant.

4. If the amendment refers only to the damages resulting from severance, why did not the legislature merely strike out the word "directly" in subsection 4 of section 347?

5. Perhaps the learned judge intended to imply, or even state, that the amendment was directed towards the injurious affection resulting from the expropriation. But such an implication or statement would have been no more correct than the one made, because the concluding words of subsection (1) already adequately provided for injurious affection.²⁶

6. There are four and only four categories under which the losses sustained by an owner of expropriated land can fall. They are: (1) loss of price of the land taken where there is a partial or total expropriation; (2) incidence of severance resulting from the separation of two pieces of property, where there has been a partial expropriation; (3) injurious affection to the land remaining, where there has been a partial expropriation; and (4) general losses accruing to an owner, where there has been a total or partial expropriation.²⁷ The words of the amendment do not refer to (1), that is clear. They do not refer to (2) because subsection 4 covers (2). They do not refer to (3) because the concluding words of subsection 1 cover (3). Thus they must refer to (4). One can be driven to no other conclusion. An often repeated canon of statutory interpretation is that a section should be read as a whole.²⁸ It is respectfully submitted that Kerwin J. could not have reached the conclusion he did reach had he read the section as a whole.

7. The words inserted by the amendment are not separated by punctuation or otherwise from the previous words of the subsection. The previous words clearly outline the compensation payable upon expropriation and it is reasonable to assume that the amendment also refers to the expropriation and not to the severance or injurious affection. Had the amendment been intended to

²⁵ "(4) Where part only of the land of an owner is expropriated, there shall be included in the compensation a sum sufficient to compensate him for any damage directly resulting from severance."

²⁶ "Where land is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected."

²⁷ Such as the losses contemplated by the *Walkerville* case, and those referred to *infra*.

²⁸ Maxwell, *op. cit.*, p. 30; Co. Litt. 318a; *Lincoln College* case (1845), 3 Rep. 596; *Tureaud v. Board of Trade* (1836), 55 L.J.Q.B. 417; *A. G. v. Brown*, [1920] 1 K.B. 773, at p. 791.

deal with damages resulting from severance some punctuation or break would have separated it from what went before.

8. The judgments in *Re Dixon*, *Re Letros* and *Re Powell* referred to the narrowness of section 347(1). The amendment came very shortly after these cases and it is fair to assume that the proximity of the dates is more than a coincidence.

9. Kerwin J. stated that "*the amendment does not cover any damage beyond what [Re Powell] had determined might be allowed as an incident of the severance*".²⁹ The suggestion in such a statement is that *Re Powell* decided *what might* and *what might not be allowed as an incident of severance*. But *Re Powell* did not decide what might or might not be allowed as an incident of severance. Middleton J.A. in *Re Powell* decided that certain losses *were referable to the land expropriated, for which the owner could not be compensated*. Loss of business he held not to be so referable but rather to be an injurious affection to the land remaining. He directed the bulk of his remarks, firstly, at what elements might determine the value of expropriated land and, secondly, at his reasons for concluding that the value of the land taken did not include "business loss". He concluded that business loss was in fact, in a partial expropriation, injurious affection to the land remaining.

10. Any statements of Kerwin J. with reference to the meaning of the amendment were *obiter dicta*. He decided that the loss before him was properly injurious affection to the land remaining rather than an incident of severance or an element affecting the value of the land taken, and there was therefore no need for him to digress. What he discussed and what he held were not connected. He stated: "The uncertain loss here claimed is one flowing not from the taking of the hereditament but from the injurious affection of the remaining land".³⁰ But even this quotation indicates some misunderstanding of the law involved. The uncertain loss referred to truly *did* flow from the taking of the hereditament and *not* from the injurious affection. A loss cannot flow from the injurious affection. The injurious affection itself is a group of losses that flow from the expropriation. The important point is that the uncertain loss to which Kerwin J. referred *did* flow from the taking *but* it could not be considered when determining the compensation payable for the land taken, because it was referable to the injurious affection.

11. The learned judge did not refer to, nor did he follow

²⁹ [1934] O.R. 35, at p. 41. The words in italics are mine.

³⁰ *Ibid.*

Walkerville Lumber Company v. Walkerville, but it may be that this decision of the Court of Appeal was not brought to his attention. The *Walkerville* case was decided squarely upon the amended section and certainly is not consistent with the statement of Kerwin J.: "But the amendment is restricted to damage resulting from the expropriation of the land and does not cover any damage beyond what that case had determined might be allowed as an incident of the severance". Masten J.A. in the *Walkerville* case allowed many losses that were not included in any cases before the amendment and certainly not in *Re Powell*. The *Walkerville* case was a decision of the Court of Appeal whereas the *Conger Lehigh* case was a decision of a judge in chambers.

In brief, it is submitted that Kerwin J. erred in his judgment, or in any event in the portion of it that refers to the interpretation of the amendment in 1927 to section 347, subsection 1.

The only other reported case that refers to the amendment of 1927 is the decision in *Lafferty et al. v. The Public Utilities Commission of Trenton*.³¹ In that case Henderson J.A. had this to say: "The section as so amended and as it now stands was considered in *Re Conger Lehigh Coal Company Limited and City of Toronto*, [1934] O.R. 35, [1934] 1 D.L.R. 476, by Kerwin J. who held that the insertion of these words had not changed the law as set out in *Re Powell and City of Toronto* . . .".³²

The judgment of Henderson J.A. is unsatisfactory for five reasons:

(1) it neither specifically approves nor disapproves the conclusions of Kerwin J.;

(2) it neither specifically approves nor disapproves the line of cases that include *Re Macdonald*, *Re Dixon*, *Re Letros*, and *Re Powell*;

(3) it does not indicate or attempt to indicate what the amendment means, why it was made or what it was intended to cure (if anything);

(4) it does not refer to either of the two reports of the *Walkerville* case;³³

(5) it is not consistent within itself for reasons now to be discussed.

It would appear that Henderson J.A. gave his tacit approval to the judgment of Kerwin J. and therefore to that learned judge's interpretation of the amendment. If that is so, the law would ap-

³¹ *Supra*.

³² *Ibid.*, at p. 317.

³³ (1932), 41 O.W.N. 114 and 235.

pear to be what it was before the amendment. Henderson J.A. appears also to have approved the decision in *Re Powell*. In light of this, the learned judge made a most unusual statement: "I am of the opinion, however, that where land is expropriated from a private owner for the benefit of a public undertaking, something should be allowed for the forcible taking".³⁴ Such an allowance does not come within the ambit of the judgement of Middleton J.A. in *Re Powell* or the narrow interpretation given to section 347 before the amendment. What was his authority for such a statement? The Middleton judgment in *Re Powell* and the Garrow judgment in *Re Macdonald* pointed out specifically that section 347 differed considerably from any other compensation section elsewhere, and that the section must be strictly interpreted. Both judges also pointed out that the allowance must go to the value of the land taken or left. The allowance permitted by Henderson J.A. goes to neither.

By granting the allowance Henderson J.A. went beyond the interpretation given to the section before the amendment. He must have concluded that the section had been broadened by the amendment sufficiently to include the allowance, since there was no case law upon which he could rely. If *Re Powell* and analogous decisions are good law today in Ontario, then with respect it can only be said that Henderson J.A. erred in granting an allowance for the compulsory taking. If, on the other hand, Henderson J.A. did not err in making such an allowance, *Re Powell* and analogous decisions are not today good law.

Let there be no misunderstanding: such an allowance is permitted under *most* acts and it is submitted that it should be granted under section 347 as amended, but it was not permissible as the section was interpreted before the amendment.

In light of the previous discussion it appears reasonably clear that it is, at present, impossible to predict with any degree of certainty either the quantum of due compensation or the elements upon which it would be based. It is submitted that the Ontario Court of Appeal should be asked to conclude that Kerwin J. erred in his interpretation of the 1927 amendment. An interpretation should be given to the section that will not result in an owner who loses all his land being paid less than an owner who loses only part of his land. An interpretation should be given to section 347 that would permit a court, in the case of a *total* or *any* expropriation, to consider the following losses amongst others:³⁵

³⁴ *Supra*, at p. 319.

³⁵ Where a case is based upon the Ontario Municipal Act, it will be so indicated.

(1) *The cost to move to another location.* When there is a total expropriation the owner of the land must move if he wishes to stay in business. The owner has not asked to move, but nevertheless he must. Moving expenses are specific damages that result from the expropriation of the land and the owner should be recompensed. Such a loss is not necessarily a tenant's loss since he would likely have to move in any event at the end of his term! Consider the cost to move the Steel Company of Canada to a location ten miles from the expropriated site. Costs to move may be very large. Consider the cost to move a clothing or dry-goods business. Consider the cost to move a greenhouse business. Most cases based on acts other than the Municipal Act have decided that moving costs are to be included in the compensation payable. See *Rex v. Montgomery*,³⁶ *Rex v. Goldstein*,³⁷ *De Keyser Royal Hotel v. Rex*,³⁸ *Re Reid v. Brown*.³⁹ *Re Perram v. Hanover*⁴⁰ was a case based upon section 347 before the amendment, in which the judge allowed moving costs. This case, although never disapproved or overruled, seems to have been completely ignored in the reported cases that bear upon the interpretation of section 347. It is submitted that the decision in *Re Perram* points to the liberal interpretation that should be given the section.

(2) *The loss of goodwill.* If the owner must move he will lose goodwill which he has taken years and spent dollars to build up. Loss of goodwill is a general damage. It is difficult to estimate but that should not be an obstacle to allowing it. *Re Letros* was decided upon section 347 and included loss of goodwill in the compensation payable, as did *McCauley v. Toronto*,⁴¹ *Rex v. Goldstein*,⁴² *Rex v. Condon*,⁴³ and *Rex v. Jalbert*.⁴⁴

(3) *The cost to dismantle and reassemble machinery and equipment.* The machinery, if there is any, must be dismantled and later reassembled on the new location. An owner should not have to bear this loss. *Re Reid v. Brown* specifically allowed this loss.

(4) *The depreciation to machinery which is dismantled, moved and reassembled.* No machinery or equipment can be broken up and hauled about without depreciating. *Re Reid v. Brown* specifically allowed this loss.

³⁶ (1917), 17 Ex. C.R. 32; 40 D.L.R. 147.

³⁷ [1924] Ex. C.R. 55.

³⁸ [1919] 2 Ch. D. 197.

³⁹ [1934] O.W.N. 709.

⁴⁰ (1916), 36 O.L.R. 582.

⁴¹ (1889), 18 O.R. 416.

⁴² [1924] Ex. C.R. 55.

⁴³ (1909), 12 Ex. C.R. 275.

⁴⁴ (1916), 18 Ex. C.R. 78.

(5) *Decrease in value of machinery or equipment which will not fit or suit the new location.* Equipment as presently installed may be worth \$10,000 to an owner, but once ripped out may not be worth more than scrap. Two examples might be: (1) air conditioning equipment, and (2) restaurant booths and equipment. Further, the cost to buy and instal equipment which would fit the new location might have doubled since the owner equipped the expropriated location. This cost must be taken into consideration. *Re Reid v. Brown* is authority for the allowance of the decrease in value of machinery or equipment.

(6) *Loss because there is no suitable similar location in the neighbourhood.* Wise owners are careful to select the location in the neighbourhood best suited to their intended use. If that location is expropriated they must move elsewhere. Some businesses are so well located that it is not possible to move them to as satisfactory locations in the same neighbourhood. In *Re Meyer and City of Toronto*⁴⁵ the court gave additional compensation equal to three years profits because a similar location could not be found in the neighbourhood. The *Re Meyer* decision has often been approved. The case is consistent with the *Walkerville* case, but certainly not with the pre-amendment interpretation of section 347. If *Re Meyer* is a sound decision, then *Re Powell* is not good law and *Re Conger Lehigh* never was.

(7) *Loss because of the increase in cost of the new location.* Because an owner had been paid \$10.00 a foot for the expropriated land, he will not necessarily be able to procure another location at \$10.00 a foot. The courts have consistently considered the difference between the old and new price of the land, or the old and new rent, when determining the compensation to be paid to the owner or tenant. Clearly this difference should be considered. It is interesting to note, however, that if *Re Powell* and *Re Conger Lehigh* are correct, there is no authority upon which any court can grant an increase in the allowance for such a reason as the increase in the price of the new land. The increase certainly does not affect the value of the old land expropriated. It does, however, affect the value the owner places on the old land.

(8) *Loss of profit because of business dislocation while moving.* No business can move from one location to another without losing some income. Some businesses might lose more than others, for example, a business that took a long time to move or reassemble. Some compensation should be given for business dislocation and

⁴⁵ (1913), 30 O.L.R. 426.

was given in the *Walkerville* case. *Re Dixon* also allowed compensation for this type of loss.

(9) *Loss because of the compulsory taking.* I have found dozens of reported cases that grant an allowance of from one to ten per cent for compulsory taking but not one, with the exception of *Re Lafferty*, is an Ontario case dealing with section 347 of the Municipal Act. Such an allowance is indeed common, and should be given under a broad interpretation of section 347. However, every forcible taking does not require an allowance,⁴⁶ though Henderson J.A. in *Re Lafferty* intimated otherwise. It is equally clear that the allowance should not always be ten per cent.⁴⁷

Nearly all municipal expropriations in Ontario come under the purview of section 347 and it is of cardinal importance that more than insouciant consideration be given to the section. It is to be hoped that the Ontario Court of Appeal may, in the near future, see fit to re-examine its interpretation of the section. The "value of the land" yardstick, by which the courts and arbitrators have unsuccessfully attempted to fix compensation in the past, is inelastic, unsatisfactory and inadequate. It is an interpretation resulting from the torture of section 347. The "reinstatement" yardstick, which satisfies the plain meaning of section 347, may seem too liberal to many, but it at least has the merit of being logical and, in addition, is based upon the losses actually suffered by the owner

Recent Judicial Appointments

His Honour James Arthur McGeer, a judge of the County Court for the County of Cariboo, in the Province of British Columbia, to be a judge of the County Court for the County of Vancouver and also a local judge of the Supreme Court of British Columbia.

Henry Castillou, Esquire, K.C., of the City of Vancouver, in the Province of British Columbia, to be a judge of the County Court for the County of Cariboo and also a local judge of the Supreme Court of British Columbia.

⁴⁶ (1903), 8 Ex. C.R. 319.

⁴⁷ (1917), 32 D.L.R. 331. See also *North and South-Western Railway v. Brentford Union* (1883), 13 App. Cas. 592, at p. 594; *G. P. Central Railway v. Bembery*, [1909] A.C. 78, at p. 85; *Dodds v. Rex* (1906), 38 S.C.R. 149; *Rex v. Condon* (1919), 12 Ex. C.R. 275, at p. 282.