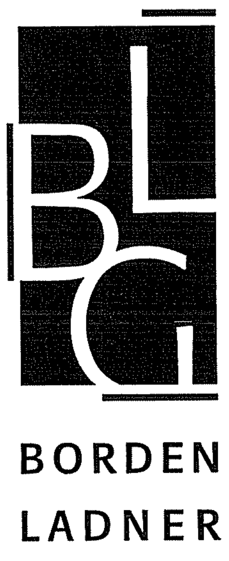

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FINDING SALVATION AFTER *SALVATION ARMY*
Coping with not Being Able to Ignore the Scheme in Making Injurious Affection Claims

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NEW PRINCIPLES / NEW LANGUAGE:
Coping with not Being Able to Ignore the Scheme in Making Injurious Affection Claims

Relevant Provisions

The statutory provisions relevant to this discussion are the "ignore the scheme" sections: Section 14(4)(b) of the Ontario *Expropriations Act*, and Section 33 of the British Columbia *Expropriations Act*, and the sections which allow compensation for injurious affection, namely Section 21 and Section 1 in Ontario and Section 40(b) in B.C. Excerpts from the relevant sections are attached hereto as Appendix "A."

The Policy Background in Ontario

Arising out of the Toronto Centred Region Plan, the Government of Ontario in the early 1970s developed an ambitious design for a green, or parkway, belt. A principle stated purpose for the Parkway Belt West Plan was to provide an urban separator between the rapidly expanding urban communities in the Greater Toronto Area. The vision of a green belt was boldly stated and failed in due course with equal absoluteness.

By the mid-1990s the flesh of the Parkway Belt had fallen away, revealing as its bones, new controlled access highways and hydro corridors. While north/south river valleys and other conservation lands that were included within the parkway belt system remain green, most of the east/west routes of the parkway belt had succumbed to urban development pressure. First, by means of deeming orders, which deemed industrial development at 40% coverage as complying with the parkway belt objectives, and later by whole scale deletions. These deletions have now been demonstrated, at least in a number of specific instances, to have been directly related to the Crown securing its requirements for east-west linear corridors, principally Highway 407.

In two recent decisions, experts we retained proved four volumes of documents demonstrating the history of exemption. One letter from the Crown, addressed to a landowner seeking deletion from the Parkway Belt, actually purported to make the deletion conditional on the right-of-way

requirements being provided. An exhibit which provides an overview of the massive deletion exercise involving over 10,000 acres in one Regional Municipality alone is attached as Appendix "B."

Owners who felt in the early 1970s that their lands were being confiscated without expropriation, felt doubly betrayed when the Province sold Highway 407 to be operated as a toll highway, and boasted of the profit it had made. On February 20, 1998, about 25 years after the first policy announcement respecting the Parkway West Belt plan and 20 years after the passage of the Parkway Belt West plan by Order-in-Council, the Government of Ontario concluded the sale of Highway 407 for $3.1 billion. The Government proudly stated that Ontarians had received double their original investment in the highway. One might infer that it was the opportunity to acquire the land base necessary for Highway 407 cheaply, as a consequence of Parkway Belt regulation, that enabled the profit to be made. It is certainly not the case that pundits are of the view that the purchasers overpaid. The press in Ontario has picked up the fact, for example, that one Highway 407 buyer in public filings reported that the value of its investment had grown four-fold shortly after it participated in the transaction.

The feelings of betrayal were compounded by a decision in the early 1980s which severely restricted the compensation landowners were able to obtain, commonly referred to as the *Salvation Army* decision. In truth, the owners who had part of their property expropriated and suffered minimal compensation for the balance because of the *Salvation Army* case, were the relatively lucky ones. Many owners in the down markets of the early 1980s took advantage of the Province's distress purchase option, because they could find no other market for their down-zoned lands. Some of these lands were used for highway development, others are still owned by the Province, and represent an opportunity for further significant profit, now that they have highway access and the habit of Parkway Belt exemption, or release, is established.

With a proper understanding of the *Salvation Army* series of cases, the exemption history also creates an opportunity to claim back much of the ground previously thought of as lost, in terms of the quantum of injurious affection claims. As a matter of fairness and morality, if nothing else, this seems an appropriate result.

Relevance of the Ontario Debate to British Columbia

Ontario Section 14(4)(b) and British Columbia Section 33(d) and (e) are very similar. The points of comparison and distinction are outlined, if I can be forgiven the reference, in Volume 2 of our textbook at pages 35-109 to 35-121. There, we suggest that subsection (e) is largely overkill, and if subsection (d) is properly interpreted, in our respectful view, will add little.

Both Ontario sections 14(4)(b) and 33(d) are rooted in the common law principle of ignoring the scheme. The common law root still has importance as it can weigh into the question of statutory interpretation. This follows the principle that reform legislation ought not to be interpreted as taking away from established common law rights. This principle was applied by Spence J. in *Laidlaw* v. *Metropolitan Toronto (Municipality)*[1], when construing Section 18(1)(a)(ii) of the *Ontario Expropriations Act*. There, he said "a remedial statute should not be interpreted, in the event of ambiguity, to deprive one of common law rights unless that is the plain provision of the statute … ."

It is clear that the B.C. Law Reform Commission intended to improve on the wording of the Ontario legislation by eliminating what they saw in the Ontario language as a pre-condition of imminence. In addressing what evidence should be required to trigger the operation of the provision, the Commission stated at page 131: "Each case should be judged on the basis of whether the prospect of the planned development had an effect on market value. Whether it did or not is simply a matter of evidence, which should not be restricted (as in Manitoba and Ontario) to the threat of the development taking place immediately."

As it turns out, the Ontario Municipal Board which adjudicates expropriation arbitrations in Ontario, has interpreted imminence very liberally. For example, in the *Torvalley*[2] case, it interpreted the intention of a public body, expressed in policy documents 20 years before the taking, to be imminent for that whole 20 year period. Their interpretation in that regard was confirmed

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[1] *Laidlaw* v. *Metropolitan Toronto (Municipality)* (1978), 15 L.C.R. 24 (S.C.C.) at page 31

[2] *Torvalley Development Limited* v. *Metropolitan Toronto Region Conservation Authority* (1988), 40 L.C.R. 81 (OMB)

by the Divisional[3] Court when it rejected the appeal of the expropriating authority on this and other points.

I will have to leave it to the wisdom and imagination of local counsel as to how to apply the Ontario law to fact circumstances in British Columbia, but undoubtedly it has application.

The Salvation Army Cases

One of the great difficulties in understanding how the law is developed by the *Salvation Army* cases, is the fact that that can only be understood by reading together five separate decisions. Before I attempt to break those down to basics, I offer a modest bit of drama. In a recent case, when we were advancing our position that the Parkway Belt has broken down as an urban separator, it struck me to have our appraiser re-attend at the *Salvation Army* site to see what had happened with that property. Remarkably, when the appraiser attended in 2002, he found a major retail store under construction. Photographs of the site are attached at Appendix “C.” Admittedly, more than 20 years had passed since the Court had been told that the lands were to be, among other things, preserved as a sea of green to separate the growing urban communities of the Greater Toronto Area. Coming as it did late in the hearing, it seemed to have a dramatic effect in punctuating the point of how far the breakdown of the green belt policy had gone.

The Salvation Army Cases Made Simple

The Claimants in *Salvation Army* were the owners of property which comprised approximately 98.683 acres fronting on the east side of Dufferin Street approximately 1½ miles north of Steeles Avenue, in the Township of Vaughan. The property was rectangular in shape extending easterly to the midpoint between Dufferin Street and Bathurst Street. By registration of a plan of expropriation on March 13, 1980, the Ministry of Government Services, on behalf of Ontario Hydro, expropriated a permanent limited interest over a band of land of uniform width (500 feet) which diagonally traversed the property. Approximately 29 acres were expropriated, and the

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[3] *Torvalley Development Limited* v. *Metropolitan Toronto Region Conservation Authority* (1989), 42 L.C.R. 101 (Ont. Div.Ct.)

expropriation created a separation between a triangular shaped parcel of land lying to the south and east, comprising approximately 18.103 acres, and the balance of the property lying to the north and west, comprising approximately 50.593 acres, having frontage on Dufferin Street. A copy of the diagram of the land that is included in the original Parkway Belt West Plan regulating map is attached as Appendix "D."

In calculating the compensation payable to the Claimants, the Board considered the value of the entire holding before the expropriation, excluding the impact of the Parkway Belt West Plan and the hydro line, of $62,391 per acre. The Board concluded that the value of the 50.593 acre parcel remaining to the north and west of the hydro line was $10,000 per acre after the expropriation, and awarded the Claimants $52,391 per acre, the difference in value between $62,391 per acre and $10,000 per acre, as compensation.[4]

In determining the value of the parcel north and west of the hydro line, the Board concluded that the Parkway Belt West Plan was, in fact, the "development" within the meaning of that word as used in Section 14(4)(b) of the *Expropriations Act*. After all, it was the Parkway Belt West Plan which provided the planning shelter for that linear project and others like Highway 407. The "after" value of the 50.593 acre parcel included a component of the decrease in market value attributable to the inclusion of the property within the Parkway Belt West Plan.

The Board's decision was appealed to the Divisional Court, which remitted the matter to the Board for the sole purpose of determining the amount of injurious affection to the 50.593 acres north and west of the lands taken for the hydro transmission line.[5] There was no issue taken with ignoring the Parkway Belt West Plan scheme for the purpose of determining market value. However, the majority of the Divisional Court concluded that the Board erred in concluding that the "development" included the Parkway Belt West Plan itself. On the basis of evidence led at the hearing before the Board that the location and planning for the hydro corridor was a process separate and distinct from the planning for the Parkway Belt West Plan, the majority of Divisional Court concluded that the "development" (as the word is used in Section 14(4)(b) of the *Expropriations Act*) encompassed only the hydro transmission line and not the entire Parkway Belt West Plan itself.

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[4] *Salvation Army, Canada East v. Ontario (Ministry of Government Services) (1983), 29 L.C.R 193 (O.M.B.)*
[5] *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1984), 31 L.C.R. 193 (Div. Ct.)

Anderson, J., in his reasons, went on to conclude that the provisions of Section 14(4)(b) are referable only to the market value of land taken, and not to the determination of injurious affection, on the basis that the opening words of Section 14(4) make the section applicable "in determining the market value of land" without reference to "injurious affection". Reed J., an experienced administrative law judge and author, supported the Board's decision and dissented.

The Divisional Court directed the Board to reconsider the determination of injurious affection to provide compensation to the owners for the loss caused by the acquisition, construction and/or use of the works on the land taken.

The decision of the majority in the Divisional Court was upheld in the Court of Appeal, (1986), 34 L.C.R. 193. Finlayson, J.A. at the Court of Appeal[6] quoted from policy documents that emphasized the urban separator. He agreed that with the Divisional Court that the "development" was the Ontario Hydro project, and not the Parkway Belt West Plan. He also, in typically direct language, emphasized that Section 14(4)(b) refers to the land taken only, and cannot be relied upon to address an injurious affection claim at all. That is the law as it stands in Ontario. However, respectfully I note that the only reference in Section 14(4)(b) is to market value, and that loss of market value is one aspect of injurious affection. The application of the rule to ignore the scheme for injurious affection in the nature of market value, and take it into account when assessing damages in the nature of injurious affection, was another option available to the Court of Appeal. For Ontario lawyers, the thought of advancing that argument will have to wait for a turn at the Supreme Court of Canada on these issues.

In his reasons, it appears that Grange J.A. was impressed by what I will refer to later in this paper as the *Hartel Principle*. Referring instead to the B.C. case of *Tener*[7] His Honour appears to have founded his main policy rationale on the concept that there can be no compensation for down-zoning, and that allowing injurious affection claims to be founded on the principle of ignoring the scheme risked allowing compensation for down-zoning. Respectfully again, I note that common law prohibited public authorities from acquiring land more cheaply by down-zoning it before acquisition, and this is part of the genesis for the rule for ignoring the scheme. A proponent of the respondent's position might suggest that ignoring the scheme when assessing

[6] *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1986), 34 L.C.R. 193 (C.A.)
[7] *British Columbia v. Tener et al*, [1985] 1 S.C.R. 533

the value of the land taken is also, in effect, allowing compensation for down-zoning; and in fact, that is in a sense true.

With the direction of the Divisional Court and the Court of Appeal, the Claimants sought to amend their Statement of Claim by pleading that if the hydro transmission line had not been taken, then the Claimants could have successfully applied for amendments to the Parkway Belt West Plan to relocate the utility strip so that it would be next to Highway 407 and have the balance of the "general complimentary use area" removed from the plan for development as residential lands. In doing so, the Claimants were attempting to direct their claim to the calculation of injurious affection caused by the imposition of the hydro transmission line under the definition of injurious affection in the *Expropriations Act*. The Ontario Municipal Board initially refused the proposed amendments on the basis that the amendments constituted a complete restructuring of the Claimants' case. The Claimants appealed the proposed pleading amendments to the Divisional Court,[8] which allowed the amendments. In doing so, the Divisional Court stated:

> "In my opinion, the Board misdirected itself by refusing the amendment on the basis that the Claimant was restructuring its case. It was desirable that the Claimant restructure its claim to conform to this Court's decision. The amendment should have been allowed unless the Board concluded that any prejudice could not be compensated for in costs or by adjournment."

With the double barrelled direction of the Divisional Court and that of the Court of Appeal, the Board[9] set out again in 1990 to consider the issue of compensation to the Claimants for damages for injurious affection to the 50.593 acres north and west of the lands taken for the hydro transmission line. The Board considered the Claimants' evidence about the value of the land "before" the acquisition without the effect on value of the Parkway Belt West Plan and the acquisition for construction and use of the hydro line, which supported a value of $62,391 per acre. The Board also had evidence about the value of the land after the acquisition, with the restriction of the Parkway Belt West and the hydro corridor in place.

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[8] *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1988), 40 L.C.R. 241 (Ont. Div. Ct.)
[9] *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1990), 44 L.C.R. 302 (O.M.B.)

However, in assessing the extent of injurious affection to the north/west lands, the Board was presented with little evidence by the Claimants about the decrease in value caused by the hydro corridor acquisition. Using its best judgment, the Board found that 20% of the loss in value of the northerly 50.593 acres (from $62,391 to $10,000 per acre) was attributable to the acquisition for use of the hydro line, quite apart and distinct from the effects of the Parkway Belt West Plan. In the result, the Board awarded $530,100 as compensation for injurious affection to the remaining lands of the Claimants because of the acquisition and use of the hydro right-of-way. While the scheme was not ignored in determining injurious affection, the loss was still determined to be substantial.

The Development of the Law Since Salvation Army

In Ontario, it has taken more than a decade for an understanding to develop of how to employ the principles derived from the *Salvation Army* line of cases. We know from our practice that the limited number of reported decisions does not mean that the issue is not continually addressed. We had, for example, one substantial expropriation claim for injurious affection where *Salvation Army* was applied, that was arbitrated for 28 days before settlement. Using the "with" and "without" approach I will describe later, it produced a finally agreed award of $10.9 million. However, while the claimant obtained his just reward, there was no reported decision to demonstrate the application of legal principles. Two significant reported decisions, one which the Crown chose to appeal and lost, and one which the Crown has not chosen to appeal, but promises to appeal a companion case, are what we have on the arbitral record. These are the *Parks* and *Mikalda* cases. So that these cases are also more easy to understand and apply, I break them down in some detail below.

The *Parks*[10] case involved eight appeals by property owners in the City of Nepean, in the Regional Municipality of Carlton, for the construction of Highway 416 from Queensway in the City of Ottawa to Highway 401.

The properties were bounded by Moodie Drive on the west, Cedarview Road on the east, Fallowfield Road on the north, and Jock River of the south. The expropriated parcels comprised

a corridor 100 metres wide running north-south at a point between Cedarview Road and Moodie Drive.

One of the significant issues before the Ontario Municipal Board, and subsequently on appeal to the Divisional Court, was the likely location of the urban boundary for Nepean in the absence of Highway 416. In other words, as stated by the Respondents and summarized in the decision of the Divisional Court, the issue was "when would the land west of Cedarview Road have been urbanized in the absence of Highway 416".

In order to determine the market value of the lands west of Highway 416, the Ontario Municipal Board examined and reviewed the events leading up to the date of the expropriation as though there had been no prospect of expropriation and on the basis that the proposed location of Highway 416 had not been taken into account in determining market value. All of the planners who testified before the Ontario Municipal Board were of the opinion that the lands westerly from Cedarview Road to Moodie Drive would have developable, the question being the length of holding period for development of those lands.

The Ontario Municipal Board determined that it was appropriate to consider what might reasonably have happened to the Subject Lands in the absence of Highway 416. The Board concluded that, on the balance of probabilities, in the absence of Highway 416, there was more than a 50% probability that the Subject Lands would have been included as part of the urban boundary. Applying Section 1(1) of the *Expropriations Act*, the Board accepted that Highway 416 would form a barrier to further urban development west of Highway 416, causing a diminution in the value to that part because of servicing and access constraints which would make it difficult, if not impossible, for the owners to obtain services and a change in designation. The Board's methodology was approved by the Divisional Court[11], and the Ministry of Transportation's appeal on that ground failed.

The most recent decision of the Board in relation to claims for compensation due to the Highway 407 construction is the decision of Mr. Beccarea in *Mikalda Farms*.[12] In *Mikalda Farms*, the

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[10] *Parks* v. *Ministry of Transportation* (1995), 56 L.C.R. 166 (O.M.B.)
[11] *Parks* v. *Ontario (Ministry of Transportation)* (1997), 62 L.C.R. 252 (Div. Ct.)
[12] *Mikalda Farms Ltd. v. Ontario (Management Board of Cabinet)* (2002), 75 L.C.R. 274 (O.M.B.)

Board gave further guidance as to how the principle set out in *Parks* and *Salvation Army* should be applied.

In the *Mikalda Farms* case, the Board allowed the Claimants' claim for injurious affection on exactly the same theory as was being advanced in the *Parks* case. The Board accepted the Claimants' evidence that, but for the acquisitions and/or construction of Highway 407, the urban boundary would have been set at a large woodlot north of the highway. It also accepted that as a result of the acquisitions and/or construction of Highway 407, the lands between it and the woodlot had no reasonably foreseeable development potential. The factual situation is Mikalda is further understood by reference to another Parkway Belt West Plan map extract attached at Appendix "E."

As a result, the Board awarded the Claimants the difference between the value of the land that had been identified for lands in the urban boundary and the actual value of the land as it was, outside of the urban boundary, but with one significant qualification. The Board recognized the impact of the Parkway Belt West Plan on the "without Highway 407" value of those lands, and deducted 25% from the unencumbered value to reflect the cost and risks associated with deleting the lands from the Parkway Belt West Plan. Thus, the scheme was not ignored. In fact, the negative impact of the scheme was specifically addressed. Thus, the rule that the scheme is not to be ignored did not defeat the injurious affection claim being made on a planning impact basis; it only affected the quantum of the claim.

Two cases parallel to *Mikalda* in geography and fact have been heard by the O.M.B. and are under reserve. They will no doubt further inform on the development of the law. However, it seems now well established in Ontario that it is appropriate to make claims for injurious affection and consider planning impacts. The rule, however, is that the planning history up to the valuation date cannot be artificially or hypothetically altered by the application of the rule in Section 14(4)(b), or any other legal theory. One must cope with the planning regime as it exists as of the valuation date, and only ask how it would be impacted if the expropriation and the public work proposed on the expropriated land did not occur. Of course, addressing injurious affection claims requires hypothetical analyses, although of a less sophisticated nature than exercises that require the scheme to be ignored. In undertaking that hypothetical analysis, an appraiser must, of necessity, consider whether there would be any opportunity for planning

amendments or changes without the expropriation and the public work, and what would the probability be of obtaining those changes or amendments, and whether that would impact highest and best use.

Do the *Hartel Holdings* Principles Apply?

One cannot leave a discussion of compensation claims which relate losses to planning decisions without addressing the principles in the *Hartel Holdings*[13] case. In that decision, the Supreme Court of Canada held that an owner who was subject to a green belt-type planning regime could not compel an expropriation in Alberta, and fundamentally that there was no right of action for losses caused, however validly demonstrated those losses were, by good faith exercise of proper planning authority.

The temptation the respondent has to rely on *Hartel Holdings* is strong. Governments have saved millions of dollars in acquiring land by establishing green belts in which lineal public works can be located. In an era where these lineal works can be sold to reap billions of dollars, the concept of green belts to frame the acquisition of new lineal works, for example new super highways, would seem to be financially compelling.

One limited bulwark against abuse requires the injured landowner to directly expose the wrongly based motive of the government in establishing a green belt. This is a tremendous challenge for an owner adversely affected, and only rarely can the required legal tests be met. If it happens, it happens very late in the process, and benefits few. Some of the challenges that exist in succeeding in a civil action are demonstrated in a recent set of Alberta cases[14]. In confirming that the arbitrator in that case was correct to find the Government liable on the tort of abuse of public office, the Court of Appeal of Alberta emphasized the heavy onus on the owner, including, on review, the pre-condition that the questioned Government action is not authorized by statute, and that the Government proceeded nonetheless with at least wilful blindness of its lack of authority.

[13] *Hartel Holdings Co. Ltd. v. Council of the City of Calgary*, [1984] 1 S.C.R. 337

[14] *Alberta (Ministry of Public Works, Supply & Services) v. Nilsson* (1999), 67 L.C.R. 1 at 51-54, 57-59 (Alta Q.B.), aff'd (2002), 5 R.P.R. (4th) 156 (Alta C.A.); *Columbus Investment Corp. Ltd.* v. *Alberta (Ministry of Public Works, Supply and Services)* (2000), 69 P.C.R. 81 at 88 (Alta Q.B.)

Clearly, the opportunity to prove bad faith or abuse of public office can only be a small part of a set of appropriate constraints on mercenary actions of government. An appropriate and well tested constraint is to require full and fair compensation to be paid to land owners who are adversely affected. The result is that principles of full and fair compensation lie dormant during the planning process, but are triggered in the event of an expropriation. Governments, it seems, may profit from good faith planning actions, but not at the specific expense of landowners whose property made the opportunity for profit possible.

Standing in the debris of the Parkway Belt West plan, and unashamed of the toll road profit, we argued that the Crown in the *Mikalda* case sought to rely on its opportunity to impose losses based on good faith planning. In denying that argument, the Board need not invent any novel or unique response. These arguments of the Crown were tried and failed in the *Dell Holdings* case.[15]

As noted above, the Supreme Court of Canada in *Dell Holdings* provided compensation for losses caused by delay presumed to result from a good faith planning exercise as to where on a plan of subdivision was the appropriate location for a new GO station. In that case, the Government argued that compensation should not follow for good faith planning actions, further, that allowing expropriated owners to be compensated for such losses would be unfair when other participants in the planning process received no such recompense, and finally, that it was not at fault.[16]

These arguments were determined to be ill-founded by the Supreme Court of Canada in *Dell Holdings*. The Court held:

1. It does not matter that a claim is being made by an expropriated owner which would not lead to compensation if the owner had not been expropriated. Once the expropriating authority decides to proceed with an acquisition, it must address all the claims it has in fact caused, even if those claims resulted from the exercise of proper planning authority.

2. The argument that an award of compensation creates an unfair situation between expropriated and non-expropriated owners fails. The argument proves too much in that it

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[15] Toronto Area Transit Operating Authority v. Dell Holdings Ltd. (1997), 60 L.C.R. 81 (S.C.C.)
[16] *Dell supra*

> would undermine most claims for disturbance damages and injurious affection. Further, it would establish a fault or liability test when liability is not an issue in an expropriation, only the assessment of damages.

Accordingly, it is my respectful view that the *Hartel* principle does not prevent an award of compensation being made, arising out of the assessment of the impact of an expropriation in limiting the planning potential of land which is adversely affected by the physical barrier created by an expropriation or the public work constructed on the expropriated land. The rigorous parallel principle, however, is that Section 14(4)(b) cannot be relied upon directly or indirectly to ignore the planning history up to the valuation date. That must be accepted as a given, and the claim based on the impact of the expropriation in terms of diminution it causes in the planning potential of the remaining lands, which must be assessed from that point with that history as a necessary and complete backdrop to an assessment of the claim.

New Principles / New Language

1. New Language

In an effort to distinguish between that type of examination which takes place when ignoring the scheme under Section 14(4)(b), and that type of examination which takes place in measuring injurious affection with and without the expropriation or the public work, the author has found that alternative terminology is helpful. In many scheme cases, the before and after language is used. Utilizing 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 obviously problematic. 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. Acknowledging this, the alternative term, the with and without approach is applied. Utilizing this term recognizes that the injurious affection is being measured by determining the impact with the expropriation or public work in place, and comparing that to the situation that obtained without the public work and expropriation in place. Using the term with and without to measure injurious affection in a case where Section 14(4)(b) has been applied to increase the

level of compensation for damages, clarifies that a before and after type thought process is involved, without a prohibited blending.

2. Appraisal Techniques

Applying the “with” and “without” language, an example of how an appraiser would proceed is to first determine the highest and best use with the fact of the expropriation in mind, and the fact of the physical imposition of the public work before him. If this results, for example, in the fact of isolating the remaining lands, and this adversely impacts on the opportunity to develop these lands in the future, them obviously that will impact the appraiser’s assessment of highest and best use and his selection of comparables in the “with” scenario.

Having completed this exercise, the appraiser then assesses what the circumstances would be if the highway were not there. In the “without” scenario, all the planning history that may have, for example, identified the urban boundary as coincident with the highway, is considered to be in place. With the highway removed for the purpose of the analysis of injurious affection, the question then becomes whether the highest and best use is impacted by a potential or opportunity to expand the urban boundary or the nature and character of the uses without the highway in place. A conclusion of a different highest and best use in the “without” scenario, leads necessarily and appropriately to a different set of comparables and a different value conclusion.

Comparison of the value conclusions in the “with” and “without” scenarios should show a properly measured and empirically proven loss.

Looking Forward

The Crown Law Office in Ontario, , fought for over a decade to establish the Salvation Army principle; that is that the rule of ignoring the scheme does not apply to injurious affection. However, after some time for thought and reflection, the claimants bar has found that the loss of the opportunity to ignore the scheme does not eliminate the opportunity to claim for injurious

affection. Indeed, there are likely many situations where the principle of not ignoring the scheme for determining injurious affection will likely come back and haunt public authorities.

Consider for example, circumstances where the scheme provides rights and opportunities that the claimants did not have without the scheme in place, and the expropriation has had the effect of denying to the claimant the opportunity to enjoy those benefits. While the legislation does allow set offs for betterment, it does not prohibit claims for the losses of opportunities that result from the scheme, insofar as they affect the remaining lands. The continuing interface between expropriation and planning principles will continue to produce new and challenging legal and appraisal questions for consideration by the expropriation professions.

Acknowledgment:

In developing the arguments set out in this paper, the author has worked closely over the past several years on a number of cases with his colleagues Sean L. Gosnell and Frank J. Sperduti, whose contribution of intellectual capital is gratefully acknowledged.

APPENDIX "A"

Ontario Section 14	British Columbia Section 33
S. 14 MARKET VALUE (1) … (2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner genuinely intends to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement. (3) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting there from the market value of the owner's land after the taking. (4) In determining the market value of land, no account shall be taken of, (a) the special use to which the expropriating authority will put the land; (b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health. CO-OPERATIVE DEVELOPMENTS (5) Where two or more expropriating authorities, including Her Majesty the Queen in right of Canada, participate in a development or a number of related developments, the Lieutenant Governor in Council may, by regulation, designate such development or developments as a co-operative development and	S. 33 EXCLUSIONS FROM MARKET VALUE 33. In determining the market value of land, account must not be taken of (a) the anticipated or actual purpose for which the expropriating authority intends to use the land, (b) an increase in the value of the land resulting from a use that, at the date of expropriation, was capable of being restrained by a court, (c) an increase in the value of the land resulting from improvements made to the land after the expropriation notice under section 6(1)(a) or order under section 5(4)(a) has been served, but not including improvements that are necessary to preserve the value or state of the land, (d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which the expropriation is made, (e) an increase or decrease in the value of the land resulting from any expropriation or prospect of expropriation, (f) an increase or decrease in the value of the land due to development of other land that forms part of the development for which the expropriated land is taken, or (g) any increase or decrease in value of the land that results from the enactment or amendment of a zoning bylaw, official community plan or analogous enactment made with a view to the development in respect of which the expropriation is made.

<table>
<tr><td>subsection (4) shall apply to the determination of the market value of any land expropriated by any of the participating provincial expropriating authorities for any aspect or part of the co-operative development as if the entire co-operative development was a single development being carried out by that expropriating authority.</td><td></td></tr>
<tr><th>Ontario Sections 1 and 21</th><th>B.C. Section 40</th></tr>
<tr><td>S. 1

(1) In this Act,

…

“injurious affection” means,

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

(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 owners, 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 is the</td><td>S. 40

PARTIAL TAKINGS

(1). Subject to section 44, if part of the land of an owner is expropriated, he or she is entitled to compensation for

(a) the market value of the owner’s estate or interest in the expropriated land, and

(b) the following if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired:

(i) the reduction in the market value of the remaining land;

(ii) reasonable personal and business.</td></tr>
</table>

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. S. 21 COMPENSATION FOR INJURIOUS AFFECTION 21. A statutory authority shall compensate the owner of the land for loss or damage caused by injurious affection.	

BRAMPTON URBAN AREA

RICHMOND HILL URBAN AREA

MILTON EAST FUTURE URBAN AREA

MISSISSAUGA NORTHWEST URBAN AREA

MISSISSAUGA INDUSTRIAL AREA

MILTON WEST FUTURE URBAN AREA

BUILT-UP AREA

METROPOLITAN TORONTO URBAN AREA

BUILT-UP AREA AT MARKHAM

OAKVILLE URBAN AREA

MISSISSAUGA URBAN AREA

BURLINGTON URBAN AREA

HAMILTON - DUNDAS URBAN AREA

LAKE ONTARIO

Amt.No. 120 consists of 18 areas. For view them see Map 2 of this book.

Map 1

Parkway Belt West

Parkway Belt West Planning

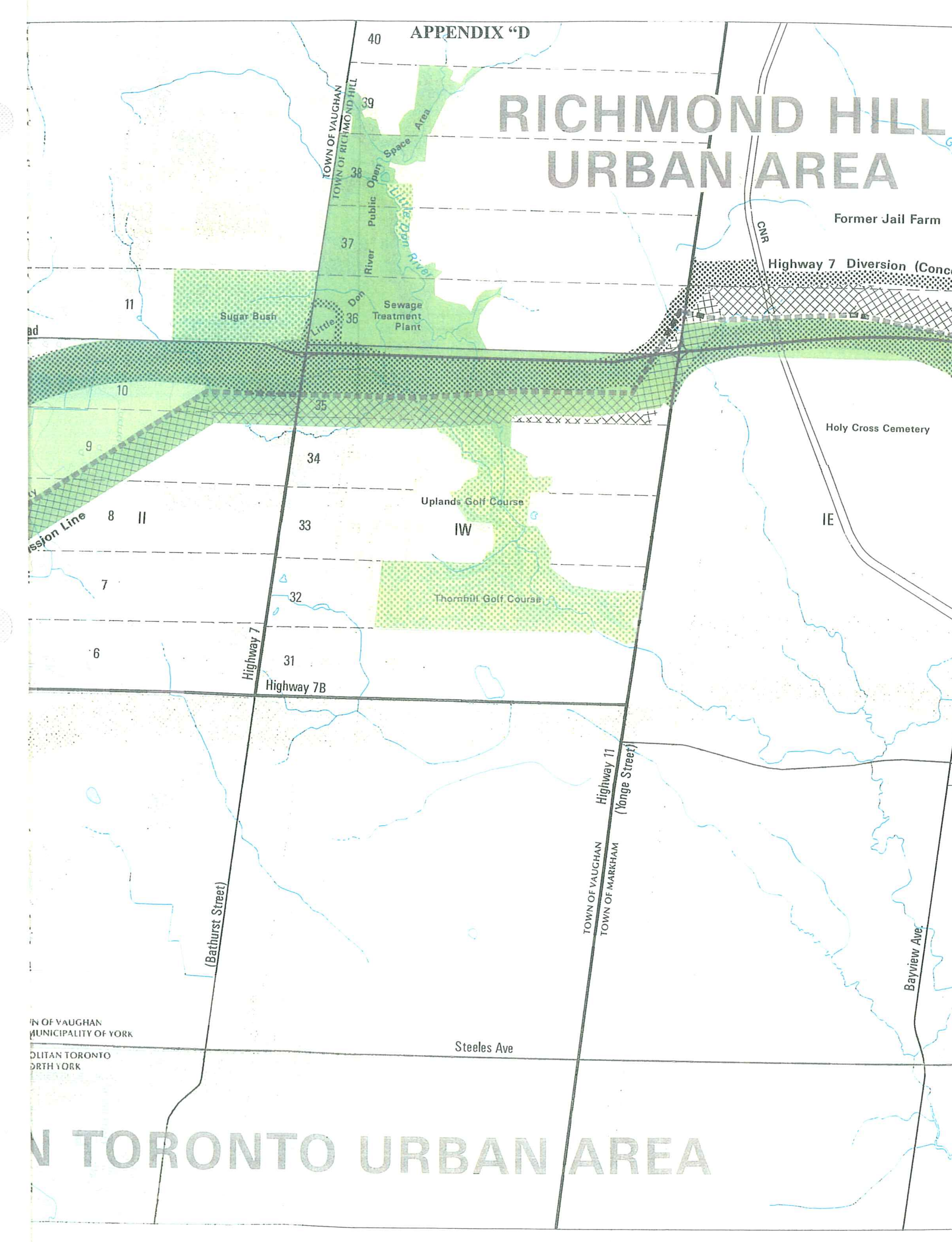
Ministry of Treasury, Economics, and Intergovernmental

Figure 6
Amendments to the Parkway Belt West Plan

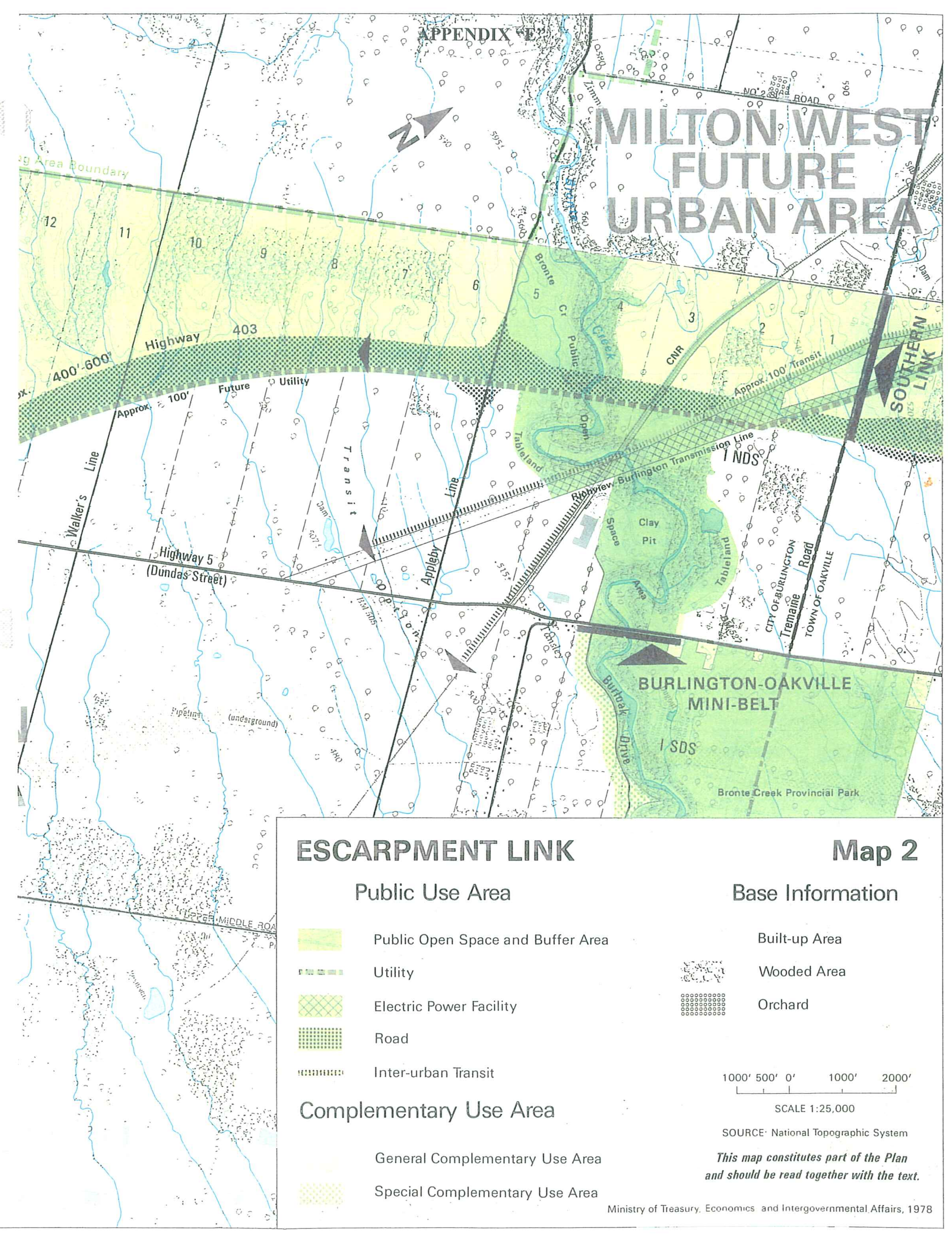
Walker, Nott, Dragicevic Associates Limited
Planning
Urban Design
Environmental Assessment

APPENDIX "C"

APPENDIX "D



APPENDIX "E"



APPENDIX "F" – CASES CITED

Footnote No.

1. *Laidlaw* v. *Metropolitan Toronto (Municipality)* (1978), 15 L.C.R. 24 at page 31

2. Torvalley Development Limited v. Metropolitan Toronto Region Conservation Authority (1988), 40 L.C.R. 81 (OMB)

3. Torvalley Development Limited v. Metropolitan Toronto Region Conservation Authority (1989), 42 L.C.R. 101 (Ont. Div.Ct.)

4. *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1983), 29 L.C.R 193 (O.M.B.)

5. *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1984), 31 L.C.R. 193 (Div. Ct.)

6. *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1986), 34 L.C.R. 193 (C.A.)

7. *British Columbia* v. *Tener et al*, [1985] 1 S.C.R. 533

8. *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1988), 40 L.C.R. 241 (Ont. Div. Ct.)

9. *Salvation Army, Canada East* v. *Ontario (Ministry of Government Services)* (1990), 44 L.C.R. 302 (O.M.B.)

10. *Parks* v. *Ministry of Transportation* (1995), 56 L.C.R. 166 (O.M.B.)

11. *Parks* v. *Ontario (Ministry of Transportation)* (1997), 62 L.C.R. 252 (Div. Ct.)

12. *Mikalda Farms Ltd.* v. *Ontario (Management Board of Cabinet)* (2002), 75 L.C.R. 274 (O.M.B.)

13. *Hartel Holdings Co. Ltd.* v. *Council of the City of Calgary*, [1984] 1 S.C.R. 337

14. *Alberta (Ministry of Public Works, Supply & Services)* v. *Nilsson* (1999), 67 L.C.R. 1 at 51-54, 57-59 (Alta Q.B.), aff'd (2002), 5 R.P.R. (4th) 156 (Alta C.A.); *Columbus Investment Corp. Ltd. v. Alberta (Ministry of Public Works, Supply and Services)* (2000), 69 P.C.R. 81 at 88 (Alta Q.B.)

15. *Toronto Area Transit Operating Authority* v. *Dell Holdings Ltd.* (1997), 60 L.C.R. 81 (S.C.C.)