ROBERT A. KRAMER, HILLSIDE SHOPPING CENTRE LIMITED and McCALLUM HILL & CO. LIMITED (*Claimants*) ..... APPELLANTS;

AND

WASCANA CENTRE AUTHORITY (*Respondent*) ..... RESPONDENT.

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*Nov. 24, 25, 28, 29
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McCALLUM HILL & CO. LIMITED (*Claimant*) ..... APPELLANT;

AND

WASCANA CENTRE AUTHORITY (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Expropriation—Compensation—Public authority given power to expropriate—Municipal by-law limiting use of lands taken to "public service use"—Determination of valuation.

The appellants held varying interests in certain lands in the City of Regina. The said lands, situated in the vicinity of the provincial Legislative Building and constituting an area described as one of unique attractiveness for development, were governed by a general subdivision by-law, No. 2356, which provided for use thereof for single detached dwellings. Subsequent amending by-laws permitted a limited amount of local business use. A proposed development plan for the area, involving high density residential, commercial and other development, was submitted to the municipal authorities by the appellants, McCallum Hill & Co. Ltd. Although this proposed subdivision was approved in principle, no amending by-laws were enacted to carry it into effect. Rather, by-law No. 3506 was enacted, adopting a community planning scheme which called for the use of the lands for "parks and public open spaces". This was followed by a by-law, No. 3618, which repealed the previous zoning by-law 2356 and provided that the lands would be designated for "public service".

Under *The Wascana Centre Act, 1962,* (Sask.), c. 46, the respondent was given power to expropriate lands, and on September 18, 1962, notice was given to the appellants of expropriation of the lands in question. Following hearings on the question of compensation for the expropriation, the arbitrator fixed such compensation upon the basis of use for

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*PRESENT: Cartwright, Abbott, Martland, Ritchie and Spence JJ.

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"parks and public open spaces" at $506,500. On appeal by the appellants to the Court of Appeal, it was unanimously determined that the award should be increased to $669,840.

The majority in the Court of Appeal affirmed the opinion of the arbitrator that the value must be determined on "public service use", *i.e.*, the use permitted by by-law 3618 which was in effect at the time of the expropriation, but they were of the opinion that the arbitrator had fixed the value for such "public service" use at too low an amount. Brownridge J.A. agreed with the majority, although for different reasons, that the award should be increased to $699,840. He accepted the contention of the appellants that for the purpose of finding the value of the lands expropriated, by-laws 3506 and 3618 and *The Wascana Centre Act* should all be considered not to have been enacted, and that, therefore, the valuation should be fixed on the basis of the use permitted by the repealed by-law, No. 2356, as amended by subsequent by-laws permitting local business use, with whatever added value the possibility of development in accordance with the proposed plan of subdivision of the area would have given the lands.

On appeal to this Court, the appellants sought to have the award further increased.

Held: The appeal should be dismissed.

Per Cartwright, Abbott, Martland and Ritchie JJ.: On the basis of the views expressed by the majority in the Court below, the appeal should be dismissed. The arbitrator held on the evidence that by-law 3618 was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings—although passed with knowledge of the Wascana Centre scheme. He held therefore that this by-law, in limiting the use of the land expropriated to "public service use", was a determining factor in assessing the amount of compensation. These findings were confirmed by the majority in the Court of Appeal, and on the present appeal the appellants failed to establish that they were wrong.

Per Spence J.: Brownridge J.A., in his calculations, arrived at his award by the consideration of the proper and well-recognized principle. He took the proper starting point—what a prudent man would pay rather than be evicted. He considered the permitted land use under the general subdivision by-law, excluding the latter by-laws which were, as he found, part of the expropriation proceedings, and he calculated the present value of the potentiality for development discounted by the appellants' opportunity to carry out the proposed but never authorized scheme of subdivision of the area. *Diggon-Hibben Ltd. v. The King*, [1949] S.C.R. 712; *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan, allowing, in part, an appeal from an arbitrator's award of compensation for lands expropriated. Appeal dismissed.

W. Z. Estey, Q.C., and *A. Enplander*, for the appellants.

E. J. Moss and *C. R. Wimmer*, for the respondent.

The judgment of Cartwright, Abbott, Martland and Ritchie JJ. was delivered by

ABBOTT J.:—The relevant facts and the legal principles which are applicable in this appeal are clearly set forth in the reasons of my brother Spence which I have had the advantage of considering. I agree with him that the appeal should be dismissed but, with respect, I prefer to do so upon the basis of the views expressed by Wood and Maguire JJ.A., in the Court below.

The learned arbitrator found that the Community Planning Scheme adopted by by-law 3506, passed by the City Council of Regina on December 5, 1961, represented the state of mind of the city authorities at that time. That Planning Scheme was crystallized in the zoning by-law 3618 adopted on December 28, 1962, of which public notice had been given some months before, and which affected the whole City of Regina. The arbitrator held on the evidence that this by-law was an independent zoning enactment, part of an overall city plan and not part of the expropriation proceedings—although passed of course with knowledge of the Wascana Centre Scheme. He held therefore that the bylaw 3618, in limiting the use of the land expropriated to "public service use", was a determining factor in assessing the amount of compensation. These findings were confirmed by the majority in the Court of Appeal. The Appellants failed to satisfy me that they are wrong and I would therefore dispose of the appeal as proposed by my brother Spence.

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan delivered on May 19, 1965. By that judgment the Court of Appeal for Saskatchewan allowed, in part, an appeal from an award made by His Honour Judge J. E. Friesen, sitting as an arbitrator, who had fixed the compensation at $506,500. The Court of Appeal increased that award to $669,840 and added interest at 5 per cent from September 19, 1962, until the date of payment. The appellants seek to have the award as so amended further increased.

The arbitration is to fix the compensation for the expropriation by the respondent of lands totalling 86.15 acres in the City of Regina composed of Blocks H, J, K and L on a

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plan known as the Hillsdale Commercial registered as No. 60R13698. The appellants Robert A. Kramer, Hillsdale Shopping Centre Limited, and McCallum Hill & Company Limited, all of the City of Regina, hold varying interests in the said lands and, under an agreement between the parties, the compensation for the expropriation should be fixed in two amounts—one to cover parcels H, J and L, and a second to cover parcel K, as the latter alone has improvements thereon. The total amount so fixed is then subject to an application before the Saskatchewan Court of Queen's Bench for distribution between the appellants.

The lands in question which are depicted on ex. C, a copy of the said registered subdivision plan for the area, No. 60R13698, are grouped in an area immediately to the east of the Legislative Building grounds in the City of Regina and the south of but bordering upon Wascana Lake. The Regina campus of the University of Saskatchewan is to the immediate south-east. It was said to be one and one-third miles from the lands in question to the centre of the business district of Regina. Immediately to the south of the lands in question, the present appellants, and others, have developed and sold large residential subdivisions. The lands in question, therefore, were described as an area of unique attractiveness for development and, in fact, the sole undeveloped close-in area in Regina.

The lands were governed by a general subdivision by-law of the City of Regina, No. 2356, which provided for use thereof for single detached dwellings. That by-law had been amended by subsequent by-laws which permitted a limited amount of local business use. The appellants McCallum Hill & Company Limited, hereinafter referred to as McCallum Hill, were engaged in a series of plans to develop the area and were in continuous negotiation with municipal authorities for that purpose. A series of proposals similar in the main but with individual differences were submitted. On November 5, 1959, a Proposed Development Plan for North Hillsdale which had been submitted to the City Commissioner, was made the subject of a report to the city council, and on that date the city council having before it the report of the city commissioner and the report of the Community Planning Commission under date October 25, 1959, resolved to endorse the proposals of the development plan as set out on the said plan, sheet No. 2, and approved

in principle the proposed shopping mall. The said sheet No. 2 was produced at trial and marked as ex. 30. That proposed plan of subdivision called for the use of Block L, 18.90 acres, for high density residential development; 5.9 acres along New Broad Street for business (small office) buildings development; the use of Block J, 37.87 acres, for office and institutional development; and the use of Block M (not subject to the expropriation here in question), 26.41 acres, for a shopping centre. It will be seen that such a proposal extended very considerably the use permitted by the old subdivision by-law 2356 and its amending by-laws.

Although the proposed subdivision was approved in principle, no amending by-laws were enacted to carry it into effect. Rather, under circumstances to which reference will be made hereafter, by-law 3506 was enacted on December 5, 1961, adopting the Community Planning Scheme prepared by the Community Planning Association. This scheme called for the use of the lands with which this expropriation is concerned for "parks and public open spaces". That by-law was followed by by-law 3618 enacted on December 28, 1962. It was a zoning by-law which repealed the previous zoning by-law, No. 2356, and provided that the subject lands would be designated for "public service".

The Wascana Centre Authority had been created by the *Wascana Centre Act* which had been enacted by the Legislature of the Province of Saskatchewan, receiving Royal Assent on April 14, 1962. By the provisions of s. 72 thereof, the Act was deemed to have come into force on April 1, 1962. That statute gave to the Wascana Centre Authority the power to expropriate lands, and on September 18, 1962, notice of expropriation of Blocks H, J and L was given to the appellants Kramer and McCallum Hill, and of Block K to McCallum Hill.

The learned County Court Judge, as arbitrator, considered the question of compensation for the expropriation at hearings which extended for many days and, in lengthy and carefully drafted reasons for judgment, fixed such compensation upon the basis of use for "parks and public open spaces" at $506,500. Both appellants appealed to the Court of Appeal of Saskatchewan and the Court unanimously determined that the award should be increased to $669,840.

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Maguire J.A., with whom Woods J.A. concurred, affirmed the opinion of the learned County Court Judge that the value must be determined on "public service use", *i.e.*, the use permitted by by-law 3618 which was in effect at the time of the expropriation, but he was of the opinion that the learned County Court Judge, as arbitrator, had fixed the value for such "public service" use at too low an amount. Maguire J.A., considering the possibilities of the lands for such public service use, arrived at a total valuation of $669,840.

Brownridge J.A., considering the value based on other possibilities to which I shall refer immediately, arrived at a computation, nevertheless, of almost exactly the same amount, so that the members of the Court of Appeal of Saskatchewan were, for different reasons, agreed that the award should be increased to $669,840. Brownridge J.A., accepted the contention of the appellants that for the purpose of finding the value of the lands expropriated, by-laws 3506 and 3618 and the *Wascana Centre Act* should all be considered not to have been enacted, and that, therefore, the valuation should be fixed on the basis of the use permitted by the repealed by-law, No. 2356, as amended by subsequent by-laws permitting local business use, with whatever added value the possibility of development in accordance with the proposed plan of subdivision of Hillsdale North (ex. 30) would have given the lands.

With respect, I have come to the conclusion that the view of Brownridge J.A., is to be preferred to that of Maguire J.A., with whom Woods J.A. concurred. The standard of valuation in such cases is firmly fixed. It might perhaps be best stated in the words of Rand J. in *Diggon-Hibben Ltd. v. The King*[1]:

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

A prudent man would pay for the property rather than be ejected from it, the present value of the possibilities for the eventual development of the property for its highest and best use. There is no doubt that the highest and best use of the subject property was that shown on the proposed plan of subdivision of North Hillsdale (ex. 30) which had

[1] [1949] S.C.R. 712 at 715.

been drafted by the combined efforts of McCallum Hill and other very able and experienced developers retained by it for such purpose.

The submission of the appellants to the Court of Appeal of Saskatchewan and to this Court was that in considering the possibilities for the highest and best use of the lands the tribunal should exclude any limitations on the development of the lands which were in fact mere steps in the expropriating machinery. The appellants cited *Re Gibson and City of Toronto*[1] and particularly Hodgins J.A., who said at p. 28:

> If that was its sole purpose, then, I think, it became part of the general scheme and should be so treated. If it is not part of the expropriating machinery as such, it is part of the plan adopted, of which it and the valuation of the lands by arbitration were essential factors. I see difficulties in the way of holding that by-law No. 5545 should be treated as part of the expropriation proceedings. But in this case it makes little difference in the result.
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> It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation.

In considering whether the doctrine outlined by Hodgins J.A., applies to the circumstances of this case, one must keep in mind that in order to be found to be part of the expropriating machinery one does not need to determine that the limiting by-laws were in any sense the result of a fraudulent conspiracy to deprive the owner of an award to which he was entitled. It should be noted that the appellants, in their factum to this Court, submit:

> 7. The Appellants do not allege any bad faith on the part of the council of the City of Regina in passing the community planning scheme by-law and preparing the zoning map for proposed zoning by-law 3618 in contemplation of the passage of the Wascana Centre Act. The Appellants need go no higher than to state that the evidence is sufficient to demonstrate that the City did cooperate with the Government of Saskatchewan in laying the groundwork for the Wascana Centre development.

It would appear that, on the other hand, the concept of the Wascana Centre scheme was in every way a commendable proposal in the development of a very attractive area to surround the Legislative Buildings, one of which the citizens of Regina and indeed of Saskatchewan could well be

[1] (1913), 28 O.L.R. 20.

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proud. The creation of that concept and its execution, however, should not result in depriving an owner of the valuation of his lands expropriated for the purpose of carrying out the concept, based on the potential development of those lands prior to the creation of the scheme. In the light of this principle, the series of events should be considered.

I have already cited the zoning applicable to the appellants' lands up to and including November 5, 1961, and the expression by the municipal council, on that day, of approval in principle of a substantial alteration of that zoning to the advantage of the appellants.

On December 22, 1959, a copy of the outlined plan, *i.e.*, ex. 30, was endorsed with the city's approval under signature of its duly authorized officers and that plan was then registered as No. 60R13698. In the spring of 1960, Mr. Whittlesey, the town planner retained by McCallum Hill, was in Regina and then was informed that the city planning commission was preparing a comprehensive study of the entire city, together with community plans which were integral to that comprehensive study. He was later issued a copy of that comprehensive plan which plan showed the property in question had been zoned for park land. Mr. Whittlesey realized that the use of the area in question proposed by McCallum Hill was illogical in the light of the "coming, if not already there, Wascana Authority", and that as a result the possibility of proceeding with the development which McCallum Hill had envisaged was "withdrawn".

Mr. Frederick W. Hill gave evidence on behalf of McCallum Hill that he conferred with Mr. Yamasaki in the summer of 1961 and that he recalls particularly in the fall of 1961 that Mr. Yamasaki, who was the architect and planner retained by the Wascana Centre Authority, showed him a plan of the indicated area that

> they wanted to take in within the Wascana Centre Authority which included these lands which are the subject of this arbitration and these lands were shown on the plan as mandatory to be taken into the authority. They wanted to advise us that this was what they planned to do and asked for our co-operation in any proceeding with any development of these lands, which we agreed to do. From that point on we certainly did not feel that we, either in the public interests or in any way, shape or form, were in a position to undertake any development of the lands or proceed with the plans that we had been developing from these years. As you know, the legislation wasn't finally enacted until the following spring.

Mr. Gilmour, the executive director and secretary of the Wascana Centre Authority, swore that he met Mr. Hill on many occasions, several of which were prior to the time that the Wascana Centre Authority became a legal entity, and that he suggested to Mr. Hill that Mr. Yamasaki in his master plan was recommending that the areas in question be "for government use". Mr. Gilmour swore that this would have occurred in the late fall of 1961 or in the early spring of 1962. During this period, by virtue of special legislation, which need not be considered in detail, the City of Regina had enacted a series of holding by-laws. These by-laws permitted application to a special board for exemption from the provisions thereof limiting developments. No such application was made on behalf of the appellants and Mr. Frederick W. Hill explained that the appellants' co-operation having been requested and granted, there was no purpose in making application to permit a development which obviously could not proceed.

By-law 3506 was enacted on December 5, 1961, and approving the general zoning map for the whole city includes a recital which is, in my view, very significant. This recital was quoted by Brownridge J.A., in his reasons for judgment and is as follows:

> At present these two major areas of public buildings are included in an overall study for the development of Wascana Centre. This study embraces the Provincial Government grounds, the various institutions south of College Avenue, the Douglas Park Sports area, the future University site and other lands around Wascana Lake. Participants in this study are the Provincial Government, the University of Saskatchewan, and the City of Regina. The concept of the Wascana Centre development is a magnificent example of foresight and should provide a stimulus and example to other agencies when programming for public buildings and institutions.

Proceeding with the Wascana Centre scheme, the municipality enacted by-law 3618 about a year later, on December 28, 1962. That was a general zoning by-law for the City of Regina and included the lands in question and all other lands in the municipality. By-law 3506 had limited the use of the lands in question to "parks and public open spaces". By-law 3618 zoned the lands in question for "public service", a designation somewhat more advantageous to the owner than that which had appeared in by-law 3506. It was this permission for more advantageous use which caused the majority in the Court of Appeal to increase the award to the appellants.

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Although both by-law 3506 and by-law 3618 required the consent of the Minister of Municipal Affairs, neither by-law received such approval until January 29, 1963. It is significant that by-law 3618 was enacted and both by-laws were approved after the *Wascana Centre Act* had been enacted. Under that statute, the Wascana Centre Authority was created with three participating parties—the Province of Saskatchewan, the City of Regina, and the University of Saskatchewan. It will be realized that the latter two, although independent legal entities, were in practical fact very much under the control and guidance of the former. Any municipality possesses any power whatsoever only by virtue of the enactments of the provincial legislature and the University of Saskatchewan is, of course, an institution of higher education largely supported by provincial grants. The *Wascana Centre Act* set up a master plan for the Wascana Centre and a detailed scheme for land uses in the area composing the Wascana Centre. As I have said, powers of expropriation were granted and there were special references to expropriation of the very lands in issue on this appeal.

Section 43(1) of the statute as found in R.S.S. 1965, c. 401, provided that upon the acquisition by the Authority of these lands which were designated in Schedule B thereto, the provincial government should pay to the Authority out of the Consolidated Revenue Fund, the total cost to the Authority of such acquisition. Elsewhere, on further expropriations not dealt with in specific sections, the cost of the acquisition was divided 55 per cent to the government of the Province, 30 per cent to the City of Regina, and 15 per cent to the University of Saskatchewan.

I am of the opinion that in view of the circumstances to which I have referred above, one can only come to the conclusion that the enactment of by-laws 3506 and 3618 was simply a step, in so far as these lands are concerned, in the setting up of the Wascana Centre and the acquisition by the Wascana Centre Authority of the lands in question. Counsel for the respondent points out that the two by-laws deal not only with the lands in question but with all lands within the City of Regina and that, therefore, there can be no implication that the enactment of the by-laws was part of a "scheme". To that submission, there are two answers: Firstly, as I have pointed out, no "scheme" in any nefari-

ous connotation need be proved, and secondly, whatever the impact and purpose of the by-laws were as to other lands, the impact and purpose as to the lands in question were very plainly to prevent such a development as had been envisaged by the appellants and instead included them in the limiting, although commendable, design of the Wascana Centre Authority.

I am, therefore, of the opinion that it is the duty of the tribunal fixing the award to consider the situation without regard for the enactment of the limiting use in those two by-laws. That situation apart from those two by-laws is, therefore, that to which we must turn in fixing compensation. It was a zoning for single family residences with some limited business permitted in certain small areas, *i.e.*, the situation under by-law 2356 and amending by-laws. The valuation, therefore, is the valuation for those uses plus the present value of any potential increase in value due to a rezoning. No such rezoning ever occurred until the more limiting zoning of by-laws 3506 and 3618. What were the possibilities of development for the use outlined in the proposed plan of redevelopment of Hillsdale North as shown in ex. 30? It is true that that scheme had been approved in principle on November 5, 1959, but by the time the expropriation occurred the whole Wascana scheme had been developed and even if the by-laws which carried it out had never been enacted, the possibility of the appellants' obtaining, by the time expropriation occurred, the enactment of by-laws to incorporate the scheme in ex. 30 would have been very small.

Brownridge J.A. pointed out that Mr. Robison, giving evidence for the appellants, had put the valuation upon the potentiality of the development under ex. 30 at $1,500,000, but it is clear that such valuation did not discount the fact that development under such scheme was not possible until the zoning by-laws were amended to permit land use in accordance with that scheme and that event was of only slight possibility. Brownridge J.A. noted Mr. Robison's evidence, which he quotes as follows:

> My experience indicates that institutions of a non-profit character have to meet the test of competition in the market.

Brownridge J.A. accepted that statement and, therefore, concluded that the difference in value of the subject lands

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between a modified version of the appellants' proposed subdivision (ex. 30) which envisaged some commercial and high density residential use along with public service on the one hand, and the public service alone, was not as great as it had at first appeared. Brownridge J.A. concluded that the award made by the learned arbitrator was "clearly too small" and that it should be increased. He found that his calculations for increase came very close to the amount found by Maguire J.A., namely, $669,840, and therefore concurred in the increase of the award to that amount.

In my view, it is not the duty of this Court to engage in calculations or to exercise judgment as to land valuation in the Province of Saskatchewan. It is the duty of this Court to consider whether those calculations and assessment of land valuations were made in accordance with the proper and well-recognized principle. I am of the opinion that Brownridge J.A., in his calculations, did arrive at his award by the consideration of the proper and well-recognized principle. He took the proper starting place—what a prudent man would pay rather than be evicted. He considered the permitted land use under the general subdivision by-law, excluding the latter by-laws which were, as he found, part of the expropriation proceedings, and he calculated the present value of the potentiality for development discounted by the appellants' opportunity to carry out its proposed but never authorized scheme, ex. 30.

I would, therefore, dismiss the appeal and affirm the judgment of the Court of Appeal of Saskatchewan. The respondent is entitled to its costs in this Court.

Appeal dismissed with costs.

Solicitors for the appellants: Embury, Molisky, Gritzfeld & Embury, Regina.

Solicitors for the respondent: Moss & Wimmer, Regina.