1967
*June 16, 19, 20
Oct. 3

FLORENCE REALTY COMPANY LIMITED and FLORENCE PAPER COMPANY LIMITED .... APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Agreement to pay compensation for closing railway siding—Calculation of amount of compensation—Whether income tax should be deducted—Land offered by Crown for relocation at low price—Whether Crown estopped from denying need for relocation—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 18(1)(g), 47(b).

Pursuant to an order of the Board of Transport Commissioners, the appellant company, which carried on a used paper business in a building in the City of Ottawa leased from a related company, the

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

other appellant, lost the use of a private railway siding which it had under an agreement with the C.P.R. The order to abandon the siding had been obtained by the National Capital Commission as part of its program of redevelopment of the City of Ottawa. It was agreed between the National Capital Commission and the appellant that compensation for the loss of the siding would be fixed by the Exchequer Court of Canada pursuant to s. 18(1)(*g*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98. If the Court determined that the appellant was required to relocate its business as a result of the removal of the railway services, the compensation to be paid would be an amount which the appellant, as a prudent owner, would pay rather than be forced to relocate. On the other hand, if the Court determined that the appellant was not required to relocate its business, then the compensation would be an amount which a prudent owner would pay rather than lose such rail services, it being agreed that the appellant would have had the use of the siding for a further ten years. The National Capital Commission also offered the appellant land in an industrial park it owned at 20 per cent less than the market price. The appellant carried on business without the siding at the old location for several months, but eventually took advantage of the offer of land and relocated its business.

The Exchequer Court, which was seized of the matter by a petition of right, found that if the appellant were forced to relocate, the prudent owner would have paid a sum of $152,802.63 rather than be forced to relocate and that, on the other hand, if it were not forced to relocate then the prudent man would have paid $91,300 rather than lose the rail services. It also found that if the appellant had closed down its business entirely its loss would have been $225,000. It also found that it was not physically impossible to carry on the enterprise without the railway siding services and concluded that the prudent owner would take the least costly of these three alternatives. He therefore fixed the compensation at $91,300, after having deducted a sum for income tax. The company appealed to this Court.

Held: The appeal should be dismissed.

In fixing the amount of compensation, the trial judge used a sound method and applied the proper principles. Moreover, the trial judge was right to reduce the compensation by an amount to cover the income tax. The prudent owner would calculate the income tax when determining the sum he would be prepared to pay rather than lose the railway siding services.

As found by the trial judge, the Crown was not estopped from alleging that the appellant was not required to relocate simply because it had offered land to relocate. This was not a case in which the 10 per cent allowance should be made. Section 47(*b*) of the *Exchequer Court Act* was a complete answer to the claim for interest.

Couronne—Promesse de payer une indemnité pour la fermeture d'une ligne de chemin de fer de service—Calcul du montant de l'indemnité—Doit-on déduire un montant pour l'impôt sur le revenu—Terrain offert par la Couronne à un bas prix pour déménager l'entreprise—La Couronne est-elle empêchée de nier le besoin d'un déménagement—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, arts. 18(1)(g), 47(b).

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Selon les termes d'une ordonnance de la Commission des Transports du Canada, la compagnie appelante, qui exploitait une entreprise de papier de seconde main dans un édifice à Ottawa qu'elle louait d'une compagnie parente, l'autre appelante, a perdu l'usage d'une ligne de chemin de fer de service qui desservait son entreprise. Cette ordonnance avait été obtenue par la Commission de la Capitale Nationale dans les termes de son programme de développement de la cité d'Ottawa. Il fut entendu entre la Commission de la Capitale Nationale et l'appelante que l'indemnité pour la perte du chemin de fer serait fixée par la Cour de l'Échiquier du Canada en vertu de l'art. 18(1)(*g*) de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, c. 98. Si la Cour en venait à la conclusion que l'appelante serait obligée de déménager son entreprise à la suite de la perte du chemin de fer, l'indemnité à être payée serait un montant que l'appelante, comme propriétaire prudent, serait prête à payer plutôt que d'être forcée de déménager. D'un autre côté, si la Cour en venait à la conclusion que l'appelante ne serait pas obligée de déménager son entreprise, l'indemnité dans ce cas serait un montant qu'un propriétaire prudent serait prêt à payer plutôt que de perdre la ligne de chemin de fer de service. La Couronne et l'appelante s'accordent pour dire que l'appelante aurait eu l'usage du chemin de fer pour un autre dix ans. La Commission de la Capitale Nationale a aussi offert à l'appelante un terrain situé dans un parc industriel à un prix de 20 pour-cent de moins que sa valeur marchande. L'appelante a continué son entreprise pendant quelques mois sans le chemin de fer à son ancien endroit, mais éventuellement elle a accepté l'offre du terrain et a déménagé son entreprise.

La Cour de l'Échiquier, qui a été saisie de cette affaire par une pétition de droit, a jugé que si l'appelante était obligée de déménager, le propriétaire prudent aurait payé une somme de $152,802.63 plutôt que d'être forcé de déménager et que, d'un autre côté, si l'appelante n'était pas forcée de déménager, l'homme prudent alors aurait payé $91,300 plutôt que de perdre le chemin de fer. Elle a aussi jugé que si l'appelante avait mis fin à son entreprise elle aurait accusé une perte de $225,000. Elle a de plus jugé qu'il n'était pas physiquement impossible de continuer l'entreprise sans le chemin de fer, et a conclu que le propriétaire prudent aurait opté pour la moins onéreuse de ces trois alternatives. Il a donc fixé l'indemnité à $91,300, après avoir déduit un montant pour l'impôt sur le revenu. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Dans la détermination du montant de l'indemnité, le juge au procès s'est servi d'une bonne méthode et a appliqué les principes appropriés. De plus, le juge a eu raison de réduire l'indemnité par un montant représentant l'impôt sur le revenu. Le propriétaire prudent aurait calculé l'impôt sur le revenu en établissant le montant qu'il serait prêt à payer plutôt que de perdre le chemin de fer.

Tel que jugé en première instance, la Couronne n'était pas empêchée d'alléguer que l'appelante n'était pas obligée de déménager son entreprise pour la seule raison que la Couronne avait offert un terrain dans ce but. Il ne s'agit pas ici d'un cas où une indemnité de 10 pour-cent doit être ajoutée. L'article 47(*b*) de la *Loi sur la Cour de l'Échiquier* est une réponse complète à la réclamation des intérêts.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], sur une pétition de droit. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

B. J. MacKinnon, Q.C., and *W. I. C. Binnie*, for the appellants.

Keith E. Eaton, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of Gibson J. in the Exchequer Court of Canada[1] by which he fixed the compensation to be paid to the appellants at the sum of $91,300 and provided that the appellants should have their costs of the action up to February 21, 1966, on which date the respondent filed a Confession of Judgment in the amount of $100,000 pursuant to rule 104 of the Exchequer Court Rules, with a set-off in favour of the respondent of the costs of action subsequent to the said February 21, 1966.

The litigation in the Exchequer Court of Canada arose under the following circumstances.

The (suppliants) appellants Florence Realty Company Limited for very many years owned a building in the City of Ottawa with frontages on Boteler, Bolton and Dalhousie Streets, and had leased that building to its related company the Florence Paper Company Limited for the purpose of carrying on a used paper business. From 1918 on, the Florence Paper Company had leased from the Canadian Pacific Railway Company certain other lands contiguous to the said building which the company said was essential to its business operations, and the paper company was also serviced by a private railway siding under an agreement in writing with the C.P.R.

As an integral part of its programme of development of the Lower Town Ottawa area, and particularly the construction of the MacDonald-Cartier Bridge connecting

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[1] [1967] Ex. C.R. 226.

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Ottawa with Hull, the National Capital Commission and the C.P.R. determined that the railway siding should be abandoned. That abandonment could only be effected if the Board of Transport Commissioners gave an order permitting the same. The National Capital Commission obtained the consent of the suppliants-appellants to such order of the Board of Transport Commissioners by entering into an agreement with the suppliants-appellants and with others whose businesses would cease to have railway siding and rail service by reason of the abandonment.

The agreement between the appellants and the N.C.C. dated May 5, 1964, was produced at trial as exhibit P-29. By that agreement, the parties agreed upon principles to be applied in awarding the compensation for the loss of the railway siding services in the following terms:

1. For the purposes of this agreement the Commission acknowledges that but for the Memorandum of Understanding between the Commission, the Canadian Pacific Railway Company and the Canadian National Railway Company dated the 17th day of October, A.D. 1963, the siding agreements or leases which the Company has with the Canadian Pacific Railway would have been renewed from time to time and the Canadian Pacific Railway Company and/or the National Capital Commission would not have made an application to the Board of Transport Commissioners to abandon the operation of that part of its Sussex Street Subdivision from mileage 1.2 to the end of the Subdivision at mileage 6.7, and/or for abandonment of railway sidings used by the Company in connection therewith for ten years from the 24th day of March, A.D. 1964.

2. The Commission on behalf of the Crown and the Company and the Landlord agree that the amount, if any, to be paid to the Company pursuant to the principles hereinafter mentioned shall be determined by the Exchequer Court of Canada pursuant to paragraph (*g*) of sub-section (1) of Section 18 of the Exchequer Court Act.

3. In the event that the Court determines that the Company is required to relocate its business as a result of the removal of the railway services, including the cancellation of the lease of land, if any, and other agreements with the Canadian Pacific Railway Company relating to railway services on the Sussex Street Subdivision, then the compensation to be paid shall be an amount which the Company, as a prudent owner, would pay rather than be forced to relocate and shall include all damages suffered by the owner by reason thereof.

4. If the Court determines that the Company is not required to relocate its business then the compensation shall be an amount which a prudent owner would pay rather than lose such rail services and shall include business disturbance (which includes the cost of re-adapting the plant) and the present value of any anticipated loss of profits.

5. The parties agree that if the Company has no private siding agreement with the Canadian Pacific Railway Company relating to rail-

way services on the Sussex Street Subdivision, then no compensation shall be payable pursuant to the terms of this agreement unless:

(*a*) there is a team track located immediately adjacent to the lands and premises upon which the Company carries on its business operations; and

(*b*) substantially all of the freight shipped or delivered by the Company is shipped or delivered by the Canadian Pacific Railway Company and is loaded or unloaded at the team track referred to in subparagraph (*a*) hereof; and

(*c*) the freight shipped or delivered to or from the Company's plant located on the said lands and premises is loaded or unloaded into and from the railway cars to the plant located on the said lands and premises without the necessity of loading or unloading into a truck or other vehicle;

then, notwithstanding the provisions of paragraphs 3 and 4 hereof the amount of compensation payable pursuant to the terms of this agreement shall be the amount which the Company, as a prudent owner, would pay rather than to lose the use of the team track and shall include increased costs of operating.

6. The compensation, if any, shall be determined on the basis that the Company was the absolute owner of the lands and premises upon which the business operations are being carried on, and the amount of compensation so determined shall be apportioned by the Court as to the portion payable to the Company and the portion payable to the Landlord.

7. The parties hereto agree that the compensation shall be determined as of the 24th day of March, A.D. 1964.

8. The Commission on behalf of the Crown agrees to pay the Company and the Landlord the amount, if any, so determined.

9. The parties hereto agree that costs, including those of expert witnesses, shall be at the discretion of the Court.

It will be noted that in para. 2 above, the parties agreed that the compensation should be determined by the Exchequer Court pursuant to para. (*g*) of s. 18(1) of the *Exchequer Court Act*. In order to obtain a fixation of such compensation the appellants issued a Petition of Right.

The agreement by which the appellants held the private railway siding rights was subject to cancellation on two months' notice if leave were granted by the Board of Transport Commissioners, and the lease of lands held by the appellants from the railway company provided for cancellation on one month's notice.

The learned Exchequer Court judge held, therefore, that the appellants' reasonable expectation of continuing possession of the said lands or of having siding agreement continued was not a legal interest that could be considered in assessing compensation and, therefore, that clause 1 as recited above had the effect of creating such legal interest

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in both the siding agreement and the lease of lands, and fixing it with a duration of ten years, i.e., until March 24, 1974. Although it was submitted in argument that there was no basis for such a finding and that on the other hand the appellants might have continued to enjoy such siding rights and lease of lands for an indefinite period, I am of the opinion that, with respect, the learned Exchequer Court judge was correct and that it would be impossible to conceive of the appellants continuing their industry on the site which is the subject matter of this appeal for a period beyond March 1974. It would appear indeed that the provisions of the said para. 1 are generous.

The building is within 100 yards of Sussex Drive, a main driveway along the Ottawa River in this part of Ottawa. There are very many public buildings in the area including the National Research Council and the new City Hall. It is proposed, and reference thereto was made in the evidence, to erect other prestige government buildings in the immediate area. The site is now covered by the provisions of By-law AZ-64 of the General Zoning By-laws of the City of Ottawa which restricts the use of the site to residential purposes and therefore the company was occupying it as a non-conforming use.

In all of the circumstances, therefore, the fixing of the ten-year period for the ascertainment of the compensation which would be due to the appellants was a proper decision.

The learned Exchequer Court judge conceived it as his task to determine whether the compensation would be payable under the provisions of para. 3 or of para. 4 aforesaid, and, with respect, correctly determined that in approaching the problem he should use the formula stated by this Court in *Diggon-Hibben Ltd. v. The King*[2], as approved in *Woods Mfg. Co. v. The King*[3]. In the former case, Rand J., said at p. 715:

> . . . 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.

The learned Exchequer Court judge, therefore, addressed himself to the task of determining whether compensation should be paid on the basis that the company was required

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[2] [1949] S.C.R. 712, 64 C.R.T.C. 295, 4 D.L.R. 785.

[3] [1951] S.C.R. 504, 67 C.R.T.C. 87, 2 D.L.R. 465.

to relocate its business as a result of the removal of the railway siding in which case such compensation would be the amount that a prudent man would pay rather than be forced to relocate, or whether the compensation would be payable the company not being required to relocate its business, in which latter case the amount would be what the prudent owner would pay rather than lose such rail service. The learned Exchequer Court judge found that if the company were forced to relocate the prudent owner would have paid rather than be forced to relocate the sum of $152,802.63 and that, on the other hand, if the appellants were not forced to relocate then the prudent man would have paid rather than lose the rail service the sum of $91,300. He also found that if the appellants had closed down their business entirely their loss would have been $225,000 which included goodwill and all other assets but no land and buildings. It was not physically impossible to carry on the enterprise without the railway siding services. Therefore, the learned Exchequer Court judge said the prudent owner would take the least costly of these three alternatives and the prudent owner not being required to relocate, the compensation would be payable in accordance with para. 4 of the agreement. Therefore, such compensation should be fixed at $91,300.

In argument on the appeal, it was submitted most forcefully that the learned Exchequer Court judge could not decide in this fashion whether or not the appellants were required to relocate but had to determine apart from the question of costs whether or not the appellants were required to relocate considering (a) the physical impossibility of carrying on their enterprise in the site without the siding, or equally (b) the additional cost of carrying on without the siding being such that the operating profit would be so reduced that no prudent owner would continue to operate its business under such circumstances.

I am of the opinion that this criticism of the method used by the learned Exchequer Court judge is not sound. Certainly there was no physical impossibility in carrying on the business without the siding. It was, in fact, carried on without the siding for months after the abandonment of the same on June 15, 1964. If, as it was inevitable, the costs of operation of the business without the siding were increased then the present value of that increase in costs

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was the subject of the compensation which was to be fixed and was fixed by the Exchequer Court. Under such circumstances, the prudent owner, it is true, would receive a smaller net operating profit in each of the ten years between 1964 and 1974, but he would have to credit the net operating revenue with a portion of the compensation which he received. Therefore, the true return upon his investment would be not the $12,000 odd per year which the evidence accepted by the learned Exchequer Court judge proved it would be after the abandonment of the siding, but $12,000 odd per year plus the appropriate instalment from the compensation to make up the same net profit on the investment which had accrued during the six years prior to the abandonment of the siding.

It is appropriate at this time to note that the learned Exchequer Court judge fixed this compensation after a lengthy trial at which he heard a very large number of witnesses who gave both factual and opinion evidence and that he was called upon to weigh and assess that evidence. The learned Exchequer Court judge, with respect, carried out that task and in his reasons for judgment, said:

> Mr. Quayle's estimate was predicated in the main on two test railroad car unloadings done by Canadian Pacific Railway Company in 1964. These unloadings were obviously staged for the purpose of preparing for this hearing (see Exhibits P-2 to P-17). No care was taken to make either of them a representative sample of what might occur if the team track was regularly used for loading and unloading, and in my view, all the evidence predicated thereon is unreliable and I do not accept the conclusions from the calculations made thereon by Mr. Quayle. I also do not accept any conclusions from calculations made by Mr. Quayle from hearsay evidence of the operations of Florence Paper Company Limited given to him by officers of Florence Paper Company Limited. And in so far as the same is based on the evidence of Mr. Frank Florence given in the witness box, I say it is also unreliable, because he exaggerated the difficulties of the operation, and made extravagant and unconscionable claims for compensation, and minimized the obvious greater efficiency of the new plant on Sheffield Road.

This Court as long ago as 1890 in *Vezina v. The Queen*[4] said:

> It must be an exceptional case in which, on a mere estimate of damage depending on appreciation of the evidence and the exercise of judgment, this court can be expected to interfere with the amount settled by the tribunal primarily charged with the inquiry, and which has facilities for arriving at a correct conclusion that are not possessed by the appellate court. Where the tribunal of first instance has proceeded on correct

[4] (1889), 17 S.C.R. 1 at 16.

principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate court can be shown.

That statement was quoted with approval by Taschereau J., as he then was, in *The King v. Elgin Realty Co. Ltd.*[5].

In the decision of this Court delivered on January 24, 1967, in *Robert A. Kramer v. The Wascana Centre Authority*[6], I had occasion to say:

> 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.

It is, therefore, my duty to consider the reasons of the learned Exchequer Court judge only for the purpose of determining whether he applied proper principles and not to attempt any recalculation of amounts, especially when the learned Exchequer Court judge's calculations depended on the weighing of the probative value of the evidence given before him.

As I have said, the learned Exchequer Court judge determined that the compensation which would be payable if the appellants were required to relocate was $152,802.63. If any of the submissions made in argument as to the appropriate costs had the appellants been required to relocate were successful they could only have the effect of increasing that amount and therefore making the discrepancy between that amount and the amount of compensation which the learned Exchequer Court judge found was payable, if the appellants were not required to relocate, the larger, and therefore make it even clearer that the appellants were not entitled to compensation on the basis of being required to relocate as outlined in para. 3 of the agreement. Therefore, it is my intention to consider the compensation which the learned Exchequer Court judge found to be payable on the basis of para. 4 of the said agreement the appellants not being required to relocate their business.

That amount was $91,300 which the learned Exchequer Court judge determined as follows. Upon consideration of

[5] [1943] S.C.R. 49 at 51, 55 C.R.T.C. 262, 1 D.L.R. 497.
[6] [1967] S.C.R. 237.

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the evidence adduced he accepted the estimate given by one James Ross, a chartered accountant called by the respondent who had been practising in the City of Ottawa and had been a chartered accountant since 1932. That evidence was that the additional cost due to the loss of the railway siding services would be $16,100 per year including an amount of $5,000 per year for additional supervision, which amount would cover only incidental expenses not readily ascertainable in detail. He fixed the present value at 6 per cent of $16,100 annually for ten years at $118,500, and therefore found that the gross compensation would be that sum of $118,500. That compensation, however, had it come into the appellants' hands in the form of larger gross profits in each year would have been subject to income tax. Therefore, the learned Exchequer Court judge reduced the sum by an estimate of $27,200 so that he found the net compensation payable should be $91,300.

It was submitted by counsel for the appellants that this method of procedure was contrary to the decision of this Court in *The Queen v. Jennings*[7]. It is true that there Judson J., giving judgment for the Court upon the issue, expressly refused to follow the majority decision in *British Transport Commission v. Gourlay*[8], and held that in fixing compensation for physical injuries sustained by a plaintiff which affected his earning capacity there should not be any deduction made on account of income tax which the plaintiff might have been called upon to pay on the income which he might have received had he not sustained the injuries.

I am not of the opinion that the decision of this Court in *The Queen v. Jennings* is applicable to exclude the deduction of income tax liability from the compensation payable to the appellants herein.

Here, the task of the tribunal fixing the compensation was to place itself in the position of the prudent owner who would make a payment rather than lose the railway siding services. Any prudent company executive, in calculating the additional profits which his company would obtain if it continued to have the use of the railway siding, would immediately realize that such additional profits

[7] [1966] S.C.R. 532, 57 D.L.R. (2d) 644.
[8] [1956] A.C. 185.

would be subject to income tax and therefore would be willing to pay, in order to continue to obtain those additional profits, only the net return to the company after allowing for such income tax as the company would have been required to pay. Otherwise, the prudent company executive would be making a payment of more than he can hope to recover by the additional profits, which would certainly not be prudent. I am, therefore, of the opinion the situation is not that in *The Queen v. Jennings*, and the course adopted by the learned Exchequer Court judge was a proper course.

In the Exchequer Court, counsel for the appellants advanced the argument that the Crown was estopped from alleging that the appellants were not required to relocate and that, therefore, the compensation must be calculated on the higher basis set out in para. 3 of the agreement. That argument was not advanced in this Court. If it were necessary to do so, I would simply adopt the reasons of the learned Exchequer Court judge who found that there was no representation within the meaning of that term as used in estoppel jurisprudence and that the appellants were free to make their decision to relocate or not and further that there was no intention on the part of the National Capital Commission to induce the appellants to relocate. The National Capital Commission offered to sell land to the appellants and to others who had lost their rail services at 20 per cent less than the market price. The appellants did take advantage of that offer and have relocated but I am in agreement with the view expressed by the learned Exchequer Court judge when he said:

> There are many reasons why the suppliant, Florence Paper Company Limited, herein did not make this choice but, in my view, they are unrelated to the loss of the private railway siding and rail services. For example, they obviously were aware that they could not carry on forever relying on obtaining and using $1.05 to $1.65 labour. The evidence of Mr. Quayle was that there was only one person paid $1.65 and the others' wages ranged from $1.05 to $1.40 and that the wages paid by Florence Paper Company Limited were 23.4% less than those paid in comparable industries in the Ottawa area. They obviously must have considered that they could not rely for too much longer on the "bull gang" as opposed to automation by using lift trucks, conveyor belts and other modern equipment. They knew that their Boteler Street plant could not be adapted to use this modern equipment. They knew that substantial functional depreciation, and economic depreciation had taken place. They also would consider that this cheaper site which they got at a most reasonable price from the National Capital Commission would in the long run effect further economies in rental alone. In addition, they knew

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that more economies would result because of the larger land area resulting in easier manoeuverability of incoming and outgoing trucks. They also knew that they could more efficiently handle paper in a new plant especially when they incorporated the new techniques carried out in other more modern plants in Canada and the United States in their new building and obtained the services of an architect to make certain that they had a modern efficient and more functional building. These are some, but there were undoubtedly many other reasons why they decided to relocate, which again are unrelated to the issue in this action.

The appellants also argue that they should be entitled to a 10 per cent increase of the compensation and that they should be allowed interest on the compensation from the date the appellants vacated the Boteler Street plant, i.e., December 1965. The question of 10 per cent increase of compensation was settled in this Court in *Drew v. The Queen*[9]. That percentage will only be allowed when there are special circumstances, i.e., when the loss suffered by the suppliants cannot be determined with complete accuracy. In this case, in my opinion, the learned Exchequer Court judge has determined the compensation with complete accuracy and therefore the situation in which the 10 per cent allowance may be made does not exist. In so far as the interest is concerned, in my view, s. 47(*b*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, is a complete answer. That subsection provides:

> 47. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow
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> * * *
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> (*b*) interest on any sum of money that the court considers to be due to the claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

The appellants also submit that the Order of the Exchequer Court should have included a specific direction for the payment of the costs of obtaining the services of expert witnesses, and point out para. 9 of the agreement which reads as follows:

> 9. The parties hereto agree that costs, including those of expert witnesses, shall be at the discretion of the Court.

Such a direction is not necessary. The Registrar of the Exchequer Court will tax the costs in accordance with the usual procedure and, in view of para. 9, will consider the

[9] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

appellants' claims for the costs of expert witnesses. In so far as the trial is concerned, the matter has been settled by the decision of the learned Exchequer Court judge as to set-off for costs since the trial occurred after the Confession of Judgment had been filed.

I am of the opinion, therefore, that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Hughes, Laishley, Mullen & Touhey, Ottawa.

Solicitor for the respondent: D. S. Maxwell, Ottawa.