THE CITY OF SAINT JOHN .....APPELLANT;

AND

IRVING OIL COMPANY LIMITED .....RESPONDENT.

1966

*May 30, 31
June 28

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Arbitration—Expropriation—Application to set aside or remit back arbitrators' award—Governing principle—Whether Appeal Division justified in examining proceedings before arbitrators or interfering with award—Whether opinion evidence of qualified appraiser inadmissible on ground it was hearsay—Arbitration Act, R.S.N.B. 1952, c. 9.

The appellant City, acting under the powers conferred upon it by the *City of Saint John Urban Renewal Expropriation Act*, 1960-61 (N.B.), c. 129, expropriated a property on which a service station belonging to the respondent company was located offering $20,500 "as compensation for the fair value of the land". This offer was refused by the company and the parties being unable to "reach agreement as to the amount of compensation", arbitrators were appointed pursuant to s. 9(1) of the Act. The company claimed $36,516, and after a prolonged hearing the arbitrators made an award of $22,816. The company proceeded by way of notice of motion before the Appeal Division of the Supreme Court of New Brunswick for an order that this award be set aside or, in the alternative, remitted to the arbitrators with a direction to award the amount indicated by the evidence in accordance with correct legal principles. By the judgment of the Appeal Division the award was ordered "to be remitted to the arbitrators for reconsideration on admissible evidence and in accordance with correct legal principles".

Held: The appeal should be allowed and the award of the arbitrators restored.

The hearing of the application to set aside or remit back the award was *not* an appeal. The principle governing such applications was that a Court will not look at anything to induce it to review the decision of an arbitrator on any matter submitted to him for his decision, except it be something appearing on the face of the award, or, on a document forming part of the award. *(Holgate v. Killick* (1861), 31 L.J. Ex 7.)

The mere allegation that the arbitrators apparently had acted upon evidence which was not admissible did not justify the Appeal Division in examining the evidence in order to consider whether some of it was admissible or not. Nor was the failure of the arbitrators to explain the reasons for their award a circumstance which entitled the Appeal Division to examine the record.

There was no allegation that the award was improperly procured or that it was ambiguous or uncertain and as there did not appear to be any error in law on its face, no legal grounds had been disclosed to justify the Appeal Division in examining the proceedings before the arbitrators or interfering with their award.

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

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The contention that the opinion of the expert appraiser called by the City to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with persons who had been parties to sales of land in the area was rejected.

City of Vancouver v. Brandram-Henderson of B.C. Ltd., [1960] S.C.R. 539; *Ramage v. City of Vancouver* (1957), 6 D.L.R. (2d) 236, distinguished; *Kelantan Government v. Duff Development Co.*, [1923] A.C. 395; *Walford, Baker & Co. v. Macfie & Sons* (1915), 84 L.J.K.B. 2221; *Doyle v. City of Saint John* (1964), 44 D.L.R. (2d) 378; *Scotia Construction Co. Ltd. v. City of Halifax*, [1935] S.C.R. 124; *Re Confederation Coal and Coke Ltd. and Bermingham et al.*, [1939] O.R. 157; *Chamsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.* (1923), 92 L.J.P.C. 163, referred to.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, whereby an arbitration award was ordered to be remitted to the arbitrators for reconsideration. Appeal allowed and award of arbitrators restored.

John P. Palmer, Q.C. and *John W. Turnbull,* for the appellant.

A. B. Gilbert, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick whereby an award made by arbitrators appointed pursuant to the provisions of the *City of Saint John Urban Renewal Expropriation Act,* c. 129 of the Acts of Assembly of the Province of New Brunswick 1960-61 (hereinafter referred to as "the Act") was ordered "to be remitted to the arbitrators for reconsideration on admissible evidence and in accordance with correct legal principles".

The circumstances giving rise to the appeal are that the City of Saint John, acting under the powers conferred upon it by the Act, expropriated a property on which a service station belonging to Irving Oil Company Limited was located offering $20,500 "as compensation for the fair value of the land". This offer was refused by the Company and the parties being unable to "reach agreement as to the amount of compensation", arbitrators were appointed pursuant to s. 9(1) of the Act which provides that the Common Council of the City of Saint John and the owner of the

property shall each appoint one arbitrator and that the two thus appointed shall select a third. The task required of such arbitrators and the manner in which it is to be conducted are governed by the provisions of ss. 12 and 13 of the Act which read as follows:

> 12. The reference shall then be conducted under the provisions of the Arbitration Act.
>
> 13. The arbitrators shall determine the fair value of each parcel of the land as of the date of the recording of the Council order; and the owner or owners thereof shall be entitled to be paid the sum awarded by the arbitrators, together with interest at the rate of five per centum per annum from the time when the land was acquired, taken or injuriously affected to the date of payment of compensation; the decision of the arbitrators shall be final and not subject to appeal except on a matter of law.

The claim of the respondent Company, as included in the Statement of Claim which was filed before the arbitrators, was made up as follows:

Land and building	$23,000.00
Loss of business due to expropriation	10,000.00
	33,000.00
Add 10% for forcible taking	3,300.00
Add moving costs	216.00
	$36,516.00

After a prolonged hearing at which eleven witnesses testified on behalf of the Company and eight on behalf of the City, the arbitrators made the following *unanimous* award:

> The undersigned arbitrators in the above expropriation, having met together and having perused the evidence and having considered the arguments made by Counsel for the expropriating authority and the owners, have unanimously agreed the losses suffered to the owners are as follows:
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> | | |
> |---|---|
> | (*a*) Land and buildings | $19,600.00 |
> | (*b*) Moving expenses | 216.00 |
> | (*c*) Depreciation of equipment | 500.00 |
> | (*d*) Business disruption and loss | 2,500.00 |
> | | $22,816.00 |
>
> We therefore conclude that the fair value of the lands taken and injuries arising therefrom is in the amount of $22,816.00.
>
> This amount, plus the usual 5% from the date of taking falls under the Provisions of the Act, and since the award exceeds the offer made by the City under Section 7 of the Act, the owners shall be entitled to costs to be taxed.

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The respondent proceeded by way of notice of motion before the Appeal Division of the Supreme Court of New Brunswick for an order that this award be set aside or, in the alternative, remitted to the arbitrators with a direction to award the amount indicated by the evidence in accordance with correct legal principles.

The following provisions of the *Arbitration Act*, R.S.N.B. 1952, c. 9, are relevant in considering the circumstances under which the Supreme Court of New Brunswick is empowered to review an arbitrator's award:

> 5.(i) The award made by the arbitrators or a majority of them or the umpire shall be final and binding on the parties and the persons claiming under them respectively; . . .
>
> 16.(1) In all cases of reference to arbitration, the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
>
> (2) Where an award is remitted, the arbitrators or umpire shall, unless the order so remitting otherwise directs, make their award within three months after the date of the order.
>
> 17.(1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.
>
> (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.
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> 25. Any . . . arbitrators . . . may, at any stage of the proceedings under a reference, and shall, if so directed by the Court, state in the form of a special case for the opinion of the Supreme Court, Appeal Division, any question of law arising in the course of the reference.

In the case of *Doyle v. City of Saint John*[1], Chief Justice McNair, speaking on behalf of the Appeal Division of the Supreme Court of New Brunswick, after referring to ss. 16 and 17 of the Act, went on to say:

> The authority to remove an arbitrator, or set aside or remit back an award, vested by the *Arbitration Act* in the Supreme Court is an original jurisdiction which can be exercised by this Division, sitting as a Court of first instance. Any appellate jurisdiction, however, which we possess in relation to such matters is, in our view, exercisable only on an appeal to us from an order made by a Judge of the Supreme Court in the exercise of his co-ordinate original jurisdiction under the Act.

In making its application to the Appeal Division the respondent invoked the provisions of Order 64, Rule 14 of the Rules of the Supreme Court of New Brunswick which read as follows:

> An application to set aside an award may be made at any time before the last day of the sitting of the Court of Appeal next after such award

1 (1964), 44 D.L.R. (2d) 378 at 381.

has been made and published to the parties. Provided that the Court or a Judge may by order extend the time either before or after the same is elapsed.

The making of such an application under this rule is the procedure which was expressly approved in the *Doyle* case, *supra*, and this interpretation of its own rule by the highest Court in New Brunswick is, of course, binding on the Courts of that Province but nothing herein contained should be taken as endorsing it.

It is, however, clear that the hearing of such an application is *not* an appeal. Chief Justice McNair was careful to point this out and in so doing referred to the reasons for judgment of Locke J. in *City of Vancouver v. Brandram-Henderson of B.C. Ltd.*[1] (hereinafter referred to as the "*Brandram-Henderson* case") where he said:

> This is not an appeal from the award and the proceedings upon a motion such as this are not in the nature of a rehearing, as was the case in *Cedar Rapids v. Lacoste* . . . This fact is noted in that portion of the judgment of the Judicial Committee in the second appeal in that matter, to which we were referred on the argument. We cannot in the present proceedings weigh the evidence or interfere with the award on any such ground as that it is against the weight of the evidence.

The respondent's notice of motion is based on the following five grounds:

> 1. That the said Arbitrators misdirected and misconducted themselves by admitting and apparently acting upon evidence which by law was not admissible.
>
> 2. That the said award is bad on the face of it in that it does not show that the item of $19,600.00 for land and buildings was the value to the owner and such amount is not supported by the evidence and established principles of law.
>
> 3. That the award is bad on the face of it in that the item awarded for 'business disruption and loss of $2,500.00' is not supported by the evidence and the established principles of law.
>
> 4. That the said award is bad on the face of it as the findings of fact therein are not supported by the evidence and the established principles of law.
>
> 5. That the said Arbitrators misconducted and misdirected themselves by failing to allow the claimant, Irving Oil Company, Limited, proper compensation for loss of business and compulsory taking in accordance with established principles of law.

The elaborate reasons for judgment delivered by Ritchie J.A. on behalf of the Appeal Division, containing as they do a detailed review of much of the evidence taken before the arbitrators, make it apparent that in his opinion the mere reference in the award to the arbitrators "having

[1] [1960] S.C.R. 539 at 555.

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perused the evidence..." had the effect of incorporating the whole of the proceedings in the award itself so that the Appeal Division was entitled to re-examine and reassess all the evidence and to treat any error which it found in the conduct of the proceedings as an error appearing "on the face of the award". In expounding this opinion the learned judge said:

> To grant the application we must find the award is bad on its face, as involving an apparent error either in fact or in law. In the circumstances with which we are dealing, the face of the award includes the transcript of the proceedings. *City of Vancouver v. Brandram-Henderson of B.C. Limited,* [*1960*] S.C.R. 538 at 544 and 550.
>
> In the absence of any contrary declaration, it is an implied term in every reference to arbitration that the arbitrators will make their decision in accordance with the ordinary rules of law and with regard to the admissible evidence presented to them. When, as is the case here, it is submitted the award is not supported by admissible evidence and contravenes established principles of law, we may examine the transcript of the proceedings for the purpose of determining whether or not there is admissible evidence to support the findings of the arbitrators. *City of Vancouver v. Brandram-Henderson of B.C. Limited (supra); Ramage v. City of Vancouver* (1957) 6 D.L.R. (2d) (B.C.C.A.) at 241. If there is no admissible evidence on which the award could properly have been arrived at, it must be set aside. *Lacoste v. Cedar Rapids Manufacturing & Power Company* [1928] 2 D.L.R. 1 at 11, cited with approval in *City of Vancouver v. Brandram-Henderson of B.C. Limited (supra).*

As has been indicated, this is not an appeal from the arbitrators. The limited jurisdiction of a court in considering an application to set aside or remit back an award under such circumstances was considered in this Court by Sir Lyman Duff in *Scotia Construction Co. Ltd. v. City of Halifax*[1], where he said:

> An award can be set aside, (1) when it has been improperly procured, and (2) on the ground of misconduct of the arbitrator. 'Misconduct' is in this relation a term of very comprehensive denotation, and includes ambiguity and uncertainty in the award, as well as manifest error of law on the face of the award. The appellants have not established the existence of any of these grounds.

The principle governing such applications which has long been established at common law, was referred to by Masten J. A. speaking on behalf of the Court of Appeal of Ontario in *Re Confederation Coal and Coke Ltd. and Bermingham et al.*[2], where he said:

> I find nothing in any of the cases at variance with the statements of Wilde B., in *Holgate v. Killick* (1861), 31 L. J. Ex. 7, where he says:
>
> "The principle to be collected from the later cases is very plain, and it is, that the *Court will not look at anything to induce it to*

[1] [1935] S.C.R. 124 at 129. [2] [1939] O.R. 157 at 169.

review the decision of an arbitrator on any matter submitted to him for his decision, except it be something appearing on the face of the award, or, on a document forming part of the award."

The italics are my own.

The meaning to be given to the phrase "error in law on the face of the award" in such cases is described by Lord Dunedin in *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.*[1], where he said:

> An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated therein, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and you can then say that it is erroneous . . . Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made.

This test was expressly adopted by Locke J. in the *Brandram-Henderson of B.C. Limited* case, *supra*, at p. 549.

The *Brandram-Henderson* case and the case of *Ramage v. The City of Vancouver*[2], (hereinafter referred to as the "*Ramage* case") are the two cases chiefly relied upon as authority for the proposition that the Appeal Division was entitled to examine the record of the proceedings before the arbitrators when considering the application made by the respondent in its notice of motion.

In both these cases the City of Vancouver was seeking to set aside certain portions of the arbitrators' award on the ground that the property owner had not proved any damage whatever in respect of the items complained of and accordingly that nothing should have been awarded for these items. This amounted to a clear challenge of matters appearing on the face of the award on the legal ground that there was "no evidence" and the question so raised could only be resolved by the Court examining the proceedings to see if there was in fact any evidence. It was on this ground that the Court found itself entitled to look at the evidence.

In the present case it is not the City but the property owner which seeks to have the award set aside and it appears to me to be quite unrealistic to suggest that the grounds set forth in the notice of motion are to be read as meaning that the claimant, which called evidence in support of the various heads of compensation, was seeking to

[1] (1923), 92 L.J.P.C. 163 at 166.
[2] (1957), 20 W.W.R. 157, 6 D.L.R. (2d) 236.

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have the award set aside on the ground that there was no evidence whatever to support one or more of the items found by the arbitrators.

The suggestion that the respondent's notice of motion raised the legal question of "no evidence" which formed the basis of the decision in the *Brandram-Henderson* and *Ramage* cases is also clearly inconsistent with its alternative request that the award be remitted to the arbitrators with a direction to *award the amount indicated by the evidence.* The last four grounds set forth in the notice of motion must, I think, be taken as questioning the amounts awarded by the arbitrators rather than their right to make any award at all on the evidence before them, and such a complaint does not raise any question of law.

I am therefore of opinion that the *Brandram-Henderson* and *Ramage* cases are distinguishable from the present case and afford no authority to justify the Appeal Division in examining the proceedings before the arbitrators on the reference here in question.

The first ground in the notice of motion alleges that the arbitrators admitted and apparently acted upon evidence which by law was not admissible but this is a very different thing from saying that there was no admissible evidence at all. In the course of his reasons for judgment, however, Ritchie J.A. said that:

> If arbitrators proceed illegally as for instance by deciding on evidence which was not admissible or generally speaking on principles of construction which the law does not countenance there is on the face of the award an error in law which may be ground for setting it aside. *Kelantan Government v. Duff Development Co.* [1923] A.C. 395 (H. of L.), *McCain v. City of Saint John.*

If the learned judge is suggesting an error in law on the part of the arbitrators which can only become apparent after an examination of the evidence is to be treated as an error in law on the face of the award, then with all respect I disagree with him. What was said by Viscount Cave in the *Kelantan Government* case was that where the reference was a reference as to construction:

> ...it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it;

and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. *If it appears by the award* that the arbitrator has proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award.

The italics are my own.

In the same connection Ritchie J.A. also refers to the case of *Walford, Baker & Co. v. Macfie & Sons*[1] and he cites that portion of the judgment of Lush J. where he said that:

...when it appears that an umpire allows to be given, and acts upon, evidence which is absolutely inadmissible, and which goes to the very root of the question before him, this Court has ample jurisdiction to set the award aside on the ground of legal misconduct on the part of the umpire.

I think it desirable to point out that that was a case which was referred to arbitration under the terms of a contract of sale dated May 14, 1914 which was incorporated by reference on the face of the arbitrators' award and where the arbitrators found that the sellers were "entitled to suspend delivery under this contract". The very short judgment of Lush J. is predicated upon the following statement:

When one observes that the contract of May 14, 1914 which was the only matter before the umpire, contains no clause providing for the suspension of deliveries by the sellers, it is manifest that the umpire, in making his award, looked to some other document.

It was accordingly manifest on the face of the award in that case that an error had been made.

If it is alleged to be apparent on the face of an award that any part of it is wholly based upon evidence which was not properly admitted before the arbitrators, then, as has been indicated, there may be cases where it is permissible to examine the evidence, but the general rule, and the one which in my opinion applies in the present case is that stated in Russell on Arbitration, 17th ed. at p. 179, where it is said:

In deciding as to admissibility of evidence tendered, the arbitrator must act honestly and judicially, and if while so acting he decides erroneously that evidence is or is not admissible, that is not in itself misconduct, and (as with other mistakes) his award will not be set aside on that ground, unless the error appears on its face.

[1] (1915), 84 L.J.K.B. 2221.

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It should be noticed also that the terms of s. 25 of the *Arbitration Act, supra,* provide for a reference at any stage of the proceedings in the form of a special case for the opinion of the Supreme Court, Appeal Division, on any question of law arising in the course of the arbitration and if one of the parties seeks to have evidence excluded on the ground of its inadmissibility, application can be made to the arbitrator to state a case for the Appeal Division under this section and if the application is refused the proceedings can be adjourned so as to allow for an application to the court for an order directing a case to be stated. Procedure is thus afforded under the Act for settling the question of whether certain evidence is to be admitted or not before the arbitrators make their award.

With all respect for the conclusion reached by the Appeal Division, I do not think that the mere allegation that the arbitrators apparently had acted upon evidence which was not admissible justified that Court in examining the evidence in order to consider whether some of it was admissible or not.

Ritchie J.A., however, in the course of his reasons for judgment, found that there was another ground upon which the Appeal Division was entitled to examine the record and in so doing he said:

> As the board chose not to explain the reasons for their award, we have, with one exception, no precise knowledge of just what considerations did determine the amount of the individual items comprising the compensation they considered the company should receive. In such circumstances the record also may be examined for indications of the attitudes with which the members of the Board approached the problem entrusted to them.

It is clear that one of the grounds upon which the Appeal Division granted the present application was that the arbitrators had failed to be more explicit in the terms of their award.

After having stated that the effect of certain of the respondent's evidence was not challenged "by any admissible contrary evidence" Ritchie J.A. went on to say:

> If the board saw fit to reject the testimony of those four witnesses they should have done so explicitly and should not have left open to conjecture the principle on which they determined the amount of compensation for the land and building and how such compensation was computed.

I am, with respect, unable to agree with the reasoning of the learned trial judge in this regard and I would on the contrary adopt the following passage from Russell on Arbitration, *supra*, at p. 322 as applicable to the circumstances here in question:

> There is no reason why an arbitrator who has not been asked to state an award in the form of a special case should on the face of his award give any reasons for any part thereof, whether the substantive part or the costs part.

Accordingly, I do not think that the failure of the arbitrators to explain the reasons for their award was a circumstance which entitled the Appeal Division to examine the record.

In the present case there is no allegation that the award was improperly procured or that it is ambiguous or uncertain and as there does not appear to me to be any error in law on its face, I have reached the opinion that no grounds have been disclosed to justify the Appeal Division in examining the proceedings before the arbitrators or interfering with their award and I would allow the appeal on this ground.

It would be unnecessary to say more than this were it not for the fact that it was strenuously contended in the course of the argument before us that the opinion of the expert appraiser called by the City to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with forty-seven persons who had been parties to sales of land in the area. In this regard, Ritchie J.A. made the following finding:

> Based on the study he had made of market conditions in the area as represented by forty-six unidentified and one identified transactions, Mr. de Stecher applied a unit value of $40 per front foot...Opinion evidence as to the value of land based on such a foundation was inadmissible. It was admitted by the Board despite strong objections of counsel for the Company. The validity of an opinion such as expressed is only as good as the validity of the information on which it is based. The precise information obtained in respect of all forty-seven transactions, including price and the dimensions and physical characteristics of each property should have been submitted to the Board.

This opinion was in accordance with a decision rendered by the same judge on behalf of the same bench of judges in

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respect of evidence of the same witness in *McCain v. City of Saint John*[1], where he said:

> Much of his (Mr. de Stecher's) opinion evidence was founded on hearsay information obtained from sources not always disclosed.
>
> In the course of making his appraisal, Mr. de Stecher compiled a market survey covering sales of as many properties in the area during the preceding four years as he could obtain information on. ...The report indicates the market survey rests on a foundation of hearsay and is restricted mainly to sales by trustees of estates to public bodies. When an appraiser elects to rest his valuation of real estate on sales of comparable properties, he should testify he has examined each of them.
>
> The greater part of the de Stecher evidence, including the appraisal report, was inadmissible.

Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called. To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.

The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision.

I have not found it necessary to deal with all the questions raised in the very exhaustive judgment of the Court of Appeal, but I think it desirable to say that I do not think it to be apparent from the face of the award or otherwise that the arbitrators considered anything other than "value to the owner" in reaching their award.

[1] (1965), 50 M.P.R. 363.

In view of all the above, I would allow this appeal and restore the award made by the arbitrators. The appellant will have his costs in this Court and in the Court of Appeal.

Appeal allowed and award of arbitrators restored.

Solicitors for the appellant: Palmer, O'Connell, Leger & Turnbull, Saint John.

Solicitors for the respondent: Gilbert, McGloan & Gillis, Saint John.