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WOODS MANUFACTURING COMPANY LIMITED (DEFENDANT) } APPELLANT;

AND

HIS MAJESTY THE KING, on the information of the Attorney General of Canada (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Expropriation by Crown—Principles Applicable in assessing compensation —Canadian Law same as English Law—Authorities Reviewed—Expropriation Act, R.S.C. 1927, c. 64.*

The principles to be applied in assessing compensation to the owners of property expropriated by the Crown under the provisions of the *Expropriation Act*, R.S.C. 1927, c. 64, and other Canadian statutes conferring powers of expropriation, are those long since settled by the

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

decisions of the Judicial Committee of the Privy Council and of this Court. The laws of Canada as regards such principles are the same as the laws of England and the statements of law as enunciated by the Judicial Committee have been followed consistently in the judgments of this Court. *Vide*: *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 K.B. 16, approved and applied in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* [1914] A.C. 569, followed in *Lake Erie & Northern Ry. Co.* v. *Brantford Golf and Country Club* 53 Can. S.C.R. 416; *Montreal Island Power Co.* v. *Town of Laval des Rapides* [1935] S.C.R. 304 at 307; *Jalbert* v. *The King* [1937] S.C.R. 51 at 71; *The King* v. *Northumberland Ferries* [1945] S.C.R. 458, and *Diggon-Hibben* v. *The King* [1949] S.C.R. 712.

The principles enunciated in the above-cited cases should have been, but were not, applied by the lower court.

Decision of the Exchequer Court [1949] Ex. C.R. 9, reversed.

Definition of "value to the owner", *The King* v. *Thos. Lawson & Sons Ltd.* [1948] Ex. C.R. 44 at p. 80, disapproved.

APPEAL from a judgment of the Exchequer Court of Canada, Thorson J., President, (1) on an Information by the Crown to have the amount of compensation money payable to the owner of a property expropriated for the purpose of a public work of Canada, determined by that Court.

*Gustave Monette K.C., Duncan K. MacTavish K.C.* and *J. C. Osborne* for the appellant.

*J. A. Prud'homme K.C.* and *J. B. Major K.C.* for the respondent.

The judgment of the Court was delivered by:

THE CHIEF JUSTICE:—The appellant was the owner of a large property situated in the City of Hull, on the east side of Laurier Street, and extending to the Ottawa river. The frontage on Laurier street is 456 feet, and the total area is 6·53 acres, of which an unopened street constitutes 0·75 acres leaving a net area of 5·68 acres. The appellant is a Canadian corporation with head office in Montreal, and operates mills at St. Lambert, Toronto, Winnipeg, Calgary, Ogdensburg, Welland and Hull. At the site expropriated is located the clothing and canvas division, where for many years prosperous operations have been carried on, the operating profits before income tax, having been in 1947, $183,435.

(1) [1949] Ex. C.R. 9.

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Pursuant to section 9 of the *Expropriation Act,* the respondent initiated expropriation proceedings on the 19th of May, 1944, and on the 7th of May, 1946. The first covered the vacant land having an area of 4 acres situated to the south, and the second affected a piece of land contiguous to the north, having an area of 1·6 acres, and on which several buildings are erected.

The action was heard before the Exchequer Court, and on the 23rd of December, 1948, the President fixed the compensation at $45,800 for the first expropriated property, with interest at the rate of 5 per cent from the 19th of May, 1944, and at $350,000 for the second expropriated property without interest. The appellant claims that these amounts are inadequate. It is contended that a total amount of $726,262.58 should have been awarded. By the information, a sum of $329,791.73 was offered for total compensation, including all loss and damage, if any, arising out of the expropriations.

While the principles to be applied in assessing compensation to the owner for property expropriated by the Crown under the provisions of the *Expropriation Act,* c. 64, R.S.C. 1927, and under various other Canadian statutes in which powers of expropriation are given, have been long since settled by decisions of the Judicial Committee and this Court in a manner which appears to us to be clear, it is perhaps well to restate them. The decision of the Judicial Committee in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1), where expropriation proceedings were taken under the provisions of *The Railway Act,* 1903, determined that the law of Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England at that time and the judgment delivered by Lord Dunedin expressly approved the statement of these principles contained in the judgments of Vaughan-Williams and Fletcher-Moulton, LL. JJ. in *Re Lucas and Chesterfield Gas and Water Board* (2). The subject-matter of the expropriation in the Cedars Rapids case consisted of two islands and certain reserved rights over a point of land in the St. Lawrence River, the principal value of which lay not in the land itself but in the fact that

(1) [1914] A.C. 569. (2) [1909] 1 K.B. 16.

these islands were so situate as to be necessary for the construction of a water power development on the river. It is in this case that the expression appears that where the element of value over and above the bare value of the ground itself consists in adaptability for a certain undertaking, the value to the owner is to be taken as the price which possible intended undertakers would give and that that price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which make the undertaking as a whole a realized possibility. That decision was followed in the same year by a second judgment of the Judicial Committee in the case of *Pastoral Finance Association* v. *The Minister* (1), where Lord Moulton, in considering a claim for compensation for properties taken by the Government of New South Wales under the Public Works Act 1900 of that State, said that the owners were entitled to receive as compensation the value of the land to them and that probably the most practical form in which the matter could be put was that they were entitled to that which a prudent man, in their position, would have been willing to give for the land sooner than fail to obtain it.

These statements of the law have been followed consistently in the judgments of this Court. In *Lake Erie and Northern Railway* v. *Brantford Golf and Country Club* (2), in proceedings under the Railway Act, R.S.C. 1906, c. 37, Duff J. as he then was, in discussing the phrase "the value of the land to them", after saying that the phrase does not imply that compensation is to be given for value resting on motives and considerations that cannot be measured by any economic standard, said in part:

> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Association* v. *The Minister* (3), has given what he describes as a practical

(1) [1914] A.C. 1083.
(2) (1917) 32 D.L.R. 219 at 229.
(3) [1914] A.C. 1083 at 1088.

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formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

In the same year, in *Lake Erie and Northern Railway* v. *Schooley* (1), Davies J. quoted the passage from the judgment of Lord Moulton above referred to and adopted it as stating the true principle, a statement with which Anglin J. concurred. In *Montreal Island Power Co.* v. *The Town of Laval* (2), Duff C.J. again referred to the formula enunciated by Lord Moulton as accurately stating the principle to be applied where land was compulsorily taken under the authority of an expropriation act, and in *Jalbert* v. *The King* (3); *The King* v. *Northumberland Ferries* (4) and in *Diggon-Hibben Ltd.* v. *The King* (5), the principle so stated was adopted and applied. The proper manner of the application of the principle so clearly stated cannot, in our opinion, be more accurately stated than in the judgment of Rand J. in the last-mentioned case 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.

We are unable to avoid the conclusion that the learned President did not apply these principles in the case at bar. In his reasons for judgment he says:

Where an owner makes a claim for property taken from him section 47 (i.e. of *The Exchequer Court Act*) permits compensation to him only to the extent of the value of such property.

Later, he expresses the following views:

It is only the form of the property that is changed; instead of the land, the owner has its money equivalent. It is also clear that the money equivalent referred to is the *market value of the land,* that is to say, the amount of money the owner could turn it into *if he offered it for sale.*

He also states:

In the case of *In re Lucas and Chesterfield Gas and Water Board* (6), in which Fletcher-Moulton L.J. stated that the money equivalent of the land was estimated on the value to the owner, and not on the value to the purchaser, it was clear that even although the land had special adaptability for a particular purpose its value to the owner was confined to its market value. That means that it cannot be more than it would fetch in the market.

(1) (1916) 53 Can. S.C.R. 416 at 421.
(2) [1935] S.C.R. 304 at 307.
(3) [1937] S.C.R. 51 at 71.
(4) [1945] S.C.R. 458.
(5) [1949] S.C.R. 712.
(6) [1909] 1 K.B. 16.

And finally, referring to his own judgment in *Thomas Lawson & Sons, Limited* (1), he says:

> I then expressed the opinion that this definition of "value to the owner" is essentially the same as that of "fair market value."

With deference, we are unable to agree with these statements which, in our view, are not the true expression of the law.

With regard to the property first expropriated we think that, applying the principles laid down by the majority of this Court in *Diggon-Hibben Ltd.* v. *The King* (*supra*) an allowance of ten per cent for compulsory taking should be added to the value of the land and buildings expropriated, but that apart from this the appellant has not made out its claim that the compensation allowed in respect of such property was inadequate. In the result the amount allowed should be increased from $45,800 to $48,880.

As to the second expropriation, the learned President valued the land at $9,000 per acre, because in his view, during the period that extended between the two expropriations, the land increased in value and, as the area covers 1·68 acres, he awarded $15,120. He found that the reconstruction cost of all the buildings was $478,032 less depreciation amounting to $188,296, leaving a depreciated value of $289,736. To these items he added $435 for fixtures, making a grand total of $305,291. The appellant produced a statement showing a loss of $76,920.96 plus an item of $2,550 as the depreciation in value of certain chattels, making a total claim for loss by disturbance, amounting to $79,470.96. The learned President was of opinion that even if it were conceded that the owner of the expropriated property had a right to compensation for loss by disturbance of his business, the amount of the appellant's claim under this head was difficult to determine as the appellant was left in possession and continued its operations for the time being. He also took the view that, even if the defendant were entitled to compensation for loss by disturbance, it had no right at the time of the judgment to receive the full amount of its claim for a loss that will happen only in the future, if it happens at all. The learned President, while expressing the opinion that the appellant was not entitled to more

(1) [1948] Ex. C.R. 44.

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than the present value of such prospective loss, reached the conclusion that the evidence supported the claim that the appellant's loss by reason of disturbance, would amount to $79,470.96.

The learned President concluded that the maximum amounts at which he would estimate the various items of the appellant's claim on the second expropriation, if he were required to do so, item by item, would be $15,120 for the land, $289,736 for the buildings and mechanical equipment, $435 for the fixtures, and $79,470.96 for the loss by disturbance of business, making a total of $384,761.96. He held, however, that the valuation should not be made piecemeal, but as a whole, and for the second expropriation he awarded a lump sum of $350,000. It was his view that this amount would adequately cover every factor or element of value, including that of loss by disturbance of business, that could properly be taken into account, and at the same time meet the tests of value to which he referred in his judgment.

It cannot be determined how the $350,000 awarded is distributed amongst the items above set out. Assuming that the whole of the reduction from the total of $384,761.96 was applied to the claim for disturbance the amount would be made up as follows:

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|---|---|
| Land | $ 15,120 |
| Depreciated value of the buildings and mechanical equipment | 289,736 |
| Fixtures | 435 |
| Loss by disturbance | 44,709 |
| | $350,000 |

In determining whether or not the total awarded is adequate it is necessary to consider the evidence in some detail. The buildings on the lands secondly expropriated were four in number, a main factory building of stone and brick construction; a tarpaulin and waterproofing building, a garage and an auto shelter or shed. The main factory building was construced in 1907. It was established in evidence that the building was well suited for the type of manufacturing carried on there and which the company operating also at Montreal and elsewhere in Canada was

desirous of continuing. In these premises the company had carried on operations which realized substantial profits, with the exception of the year 1938, during the period 1937 to 1945 inclusive. While the expropriation vesting title in the Crown took place in the spring of the year 1946, the company was permitted to remain in possession and its operations in that year and the year following resulted also in substantial profits. The site on Laurier Avenue, in the residential portion of Hull, possessed for the owner the great advantage of being close to a large and available supply of labour suitable for employment in the company's operations and being not far distant from one of the principal bridges across the river leading to the City of Ottawa. While the company, in anticipation of being required to yield possession of the premises, had endeavoured to find a suitable property in Hull for the carrying on of their operations, they had not been able to find any and, according to Mr. E. S. Sherwood, a real esate broker having a wide experience in this district, no comparable buildings for an operation of the magnitude of the Woods Manufacturing Company were available either in Ottawa or Hull and he considered that it was doubtful that any such property would become available. The company had purchased land for a site in Overbrook in the Township of Gloucester, lying to the east of the city of Ottawa and a distance of six miles from its then location, but upon consideration had concluded that it was too far from a suitable supply of labour and had abandoned the idea of building there. Apparently inquiries in the immediate neighbourhood of Hull had not resulted in the company finding a suitable site there and, while some were available further down the Ottawa River, operations there would be faced with difficulty in getting the necessary help. The company's desire to continue its operations in Hull or its immediate vicinity was made plain.

There was a divergence of opinion among the experts as to the value of the property. For the company, Mr. W. H. Bosley, a real estate agent with wide experience in valuations and real estate operations generally, in answer to a question by the learned trial judge, expressed the opinion that if the owners were desirous of disposing of the property on the market they could have obtained $280,000

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for it. Having said this, however, he said that if he were representing a purchaser he would not feel that the property could have been bought at that figure, assuming the owner wished to continue in business, and expressed his inability to give an opinion as to what amount a purchaser might have paid to obtain it, but said that if such a purchaser needed the property urgently he would advise him to pay ten per cent more than that figure. As to the position of the owner, however, he said that he would advise the Woods Manufacturing Company Limited not to accept such a figure since it could not hope to reinstate itself for that amount. Mr. Sherwood considered that at the relevant time he could have sold the property on the market for $315,000, but said that he would have advised the owner, assuming that it was intended to continue the business, to refuse such an amount "or anything like it". As to a prospective purchaser, assuming the property suited his requirements, he would have advised him to pay ten per cent in excess of this amount but would have advised the appellant to refuse such an offer. Mr. R. B. Moffit, the Vice-President and Comptroller of the appellant, said that in his opinion, having regard to the suitability of the plant for the operations and the profit realized, he would have advised against selling for less than $700,000.

Mr. A. B. Doran, a contractor with some twenty years' experience in building construction, estimated the cost of replacing the buildings on the property at $474,873 on the basis of the prices for material as of the date of the expropriation. The main building had been constructed in the year 1907 but had been very well maintained and he computed the depreciation at the sum of $94,631, expressed otherwise, he said that if his firm had been given the contract to rebuild the plant the new building would be worth about $95,000 more than the building as it stood in May of 1946.

The evidence for the Crown as to the reconstruction cost of the main and subsidiary buildings varied but little from that tendered by the owner. Mr. James Adam, an architect and civil engineer of long experience, estimated the cost of replacement at $478,032 and this figure was accepted by the learned President. While declining to estimate the probable future useful life of the building,

he considered that since its erection it had deteriorated in the neighbourhood of thirty-five per cent. Mr. J. A. Coote, an assistant professor of mechanical engineering at McGill University, and a consultant for a firm of engineers in Montreal, had examined the buildings at the request of the Crown. Accepting the reconstruction cost at the amount of the estimate of Mr. Adam and others employed for the purpose by the Crown, he considered that the depreciated value of all the buildings was $287,736. Mr. Coote had never constructed or tendered on the construction of a building and, admittedly, did not have experience with industrial plants of the kind operated by the company and his evidence as to the extent of the accumulated depreciation and of the future useful life of the building appears to have been based upon theories expressed by others on the subject. When counsel for the Crown directed questions to him to establish his qualifications as an expert on the question of depreciation, he said that he had been studying the theory for twenty-five years, that he had lectured to students in accounting and engineering and had read widely on the subject and considered that a useful life of sixty years was the utmost that could be assigned to the main building. He, however, also said that although the building was practically forty years old in 1946 it was as a structure in excellent condition, that it was an "extra good building", well constructed and in general very well maintained, and then said in part:

> The question is: how many more years is it good for? Now nobody can tell, sir; I want to agree with the sentiment expressed here yesterday that nobody can tell how long a building is good for.

a statement which he repeated later, saying that "nobody knows what the useful life of that building is going to be". On cross-examination, when asked his opinion as to what condition the building would be in when it had reached sixty years of age, he said that:

> As a structure, I should say it would probably be pretty fair.

but that the maintenance cost then would be much higher and that obsolescence would become an increasingly important factor. He did not say, however, that it would cease to be an effective building for the company's purposes at that time. In answer to a question by the learned trial judge he made it clear that his opinion on this point was

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not based upon his own experience, saying that he wished to emphasize that nobody could tell what conditon the building was going to be in at age sixty but that:

> relying upon recorded experience, the experience of other people with buildings of that age, I say that I could not honestly give this building as a piece of productive equipment a life beyond sixty years.

It will be observed that expressed in percentages the depreciation in the main building in the opinion of Mr. Coote was 43·8 per cent, in that of Mr. Adam 35 per cent, and in that of Mr. Doran 22·3 per cent. There appears to be considerable support for the appellant's submission that the learned President was in error in placing the depreciation at the highest of these figures, in view of Mr. Coote's admission that his whole calculation was based on the assumption that the useful life of the building was limited to sixty years.

For the Crown the evidence, in so far as it related to the buildings as distinct from the land, was limited to the cost of replacing them. Replacement cost is, of course, a material factor for consideration in determining the value to the owner. In some circumstances it may well represent that value while in others it may greatly exceed it or be materially less. In the present case we are satisfied upon the evidence that the value of the property to the owner was in excess of the value of the land, plus the depreciated value of the buildings. In endeavouring to come to a conclusion as to what amount the owner, presumably directed by prudent business men, would have been prepared to pay for the property in May 1946 rather than to be forced to give up title and possession, the situation in the business world at that time is to be considered. The second World War had terminated and in consumers' goods of all kinds there existed what is commonly described as a seller's market, due to various factors including accumulated shortages during the war. The Woods Manufacturing Company during the years 1940 to 1945 both inclusive had made an average annual operating profit before income taxes in their Hull plant slightly in excess of $213,000. As there were available then no suitable factory buildings in Ottawa or Hull or the vicinity, and the company, if it was to continue in business, was faced with the necessity of constructing new suitable buildings on an appropriate site,

there can be no doubt in our opinion, that had the buildings now under consideration then been situated on a site one or two miles down the Ottawa River and available for purchase at the depreciated value of the buildings, plus the value of the site, the company would have purchased without hesitation. To fail to do so under such circumstances would indicate a lack of ordinary business judgment. A substantial further value to the owner is to be attributed to being permitted to remain in undisturbed possession of its property in Hull, with its added advantage of immediate proximity to an adequate labour supply.

The learned President has allowed only the bare value of the land, the lowest depreciated value placed upon the building by any witness and a portion of the proven claim for disturbance. He has declined to consider the value to the owner as distinguished from the market value or to allow 10 per cent, or any amount, for compulsory taking. We are all of opinion that on the evidence the amount awarded is clearly inadequate. The amount to which the appellant is entitled cannot be determined with mathematical accuracy. Keeping in mind the principles stated above and after a careful consideration of all the evidence we are of opinion that the amount of compensation for the property secondly expropriated inclusive of any allowance for compulsory taking should be fixed at the sum of $450,000.

There is this to be added. It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

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The appeal will be allowed with costs. The amount of compensation for the property first expropriated will be fixed at $48,880 with interest at the rate of 5 per cent per annum from the 19th of May, 1944. The amount of compensation for the property secondly expropriated will be fixed at $450,000 without interest.

*Appeal allowed with costs.*

Solicitors for the appellant: *Gowling, MacTavish, Watt, Osborne and Henderson.*

Solicitor for the respondent: *F. P. Varcoe.*