1966

Ottawa Sept. 13-16, Sept. 19-21.

Sept. 28

BETWEEN:

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

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Agreement to compensate subject—Exchequer Court Act, s. 18(1)(g)—Loss of rail services on redevelopment of capital area—Calculation of amount of compensation—Estoppel—Interest on award—When payable by Crown.

In 1964 suppliant paper company, which carried on a waste paper processing business in a building in Ottawa leased from the other suppliant, lost the use of a private railway siding pursuant to an order of the Board of Transport Commissioners made on the application of the National Capital Commission (which was redeveloping the area). The National Capital Commission agreed to pay suppliants compensation to be fixed by the Exchequer Court under s. 18(1)(*g*) of the *Exchequer Court Act* and offered to sell them land in an industrial park which it owned at a price 20% less than market value. The suppliants purchased land in the industrial park and erected thereon a new up-to-date waste paper processing plant. Under suppliant's agreement

with the National Capital Commission compensation was to be calculated on the following basis: if the Exchequer Court determined that suppliant paper company was required to relocate its business as a result of the loss of rail services it should be paid the amount which a prudent owner would pay rather than be forced to relocate, but if the court determined that suppliant paper company was not required to relocate it should be paid the amount a prudent owner would pay rather than lose the rail services on the assumption that it would have the use of the rail services for 10 further years. The court found that the only sensible business decision for suppliants was to remain where they were and that they decided to relocate for reasons unrelated to the loss of railway services. The court also determined that the amount of compensation payable if suppliants had remained where they were would be $91,300.00, but that compensation determined on the basis that they were required to relocate would be $152,802 00.

Held: (1) The amount of compensation payable was $91,300.00.

(2) The National Capital Commission was not estopped from disputing suppliants' decision to relocate because it offered to sell them land: it had made no representation to them of an existing fact, it did not intend to induce them to act upon its representation, and suppliants did not act upon its representation.

(3) Suppliants were not entitled to interest on the amount of the award from the date of their petition to the date of judgment. Interest is only allowed against the Crown if there is an express or implied contract to pay interest or by virtue of a statute. *The King v. MacKay* [1930] S.C.R. 130, applied.

ACTION to determine compensation payable by respondent pursuant to section 18(1)(*g*) of the *Exchequer Court Act*.

Roydon A. Hughes, Q.C. and *R. J. Kealey* for suppliants.

K. E. Eaton for respondent.

GIBSON J.:—This is an action to determine the compensation payable by the respondent to the suppliants pursuant to paragraph (*g*) of subsection (1) of section 18 of the *Exchequer Court Act* based on an Agreement between the parties dated May 5, 1964.

The suppliants are companies incorporated under the *Ontario Corporations Act* with common shareholders. The suppliant company, Florence Realty Company Limited, owns and at all material times owned a six storey building built about 1918, and adjoining land on Boteler Street in the City of Ottawa; and the suppliant, Florence Paper Company Limited, leased at all material times the subject lands and premises from it and carried on a business as a

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dealer in waste paper, being a business which included the procuring, sorting, grading and selling of graded paper to paper mills, and it also leased at all material times from the Canadian Pacific Railway Company certain other lands contiguous to the said building which they said were essential to the business operation. This waste paper plant of the suppliant company, Florence Paper Company Limited, was serviced by a private siding under an agreement in writing with the Canadian Pacific Railway Company.

In connection with its programme of redevelopment of part of lower town Ottawa involving among other things the construction of the Macdonald-Cartier Bridge connecting that area with part of the City of Hull, the National Capital Commission and the Canadian Pacific Railway Company made an application to the Board of Transport Commissioners for an Order permitting the abandonment of that part of the Canadian Pacific Railway Company's Sussex Street sub-division from Beechwood Avenue, mileage 5.6 to the end of the said sub-division, mileage 6.7 and an Order was so made on April 21, 1964 and the same was abandoned on June 15, 1964. As a result, the suppliant company, Florence Paper Company Limited, along with other businesses ceased to enjoy a private railway siding and rail service to its plant.

At the time of the said proceedings before the Board of Transport Commissioners, the National Capital Commission offered to enter into an agreement with any person whose business would cease to have a railway siding and rail service by reason of the Order resulting from such proceedings. A *pro forma* draft of that agreement was prepared and made available to such persons, of whom the suppliant company, Florence Company Limited was one, and they were invited to enter into such an agreement if they wished to do so. A copy of this *pro forma* agreement was filed as Exhibit P-69 at this trial.

There was no legal requirement for the National Capital Commission to enter into such an agreement with the persons who would lose private railway sidings and rail services, and therefore, except for such an agreement, none of these persons would have had a claim for compensation of the kind that is the subject matter of this action.

The suppliants executed such an Agreement with the National Capital Commission and it is dated May 5, 1964 and is substantially in conformity with the said *pro forma* agreement, but it is tailored in certain minor ways to meet the requirements of the businesses of the suppliants. The particular clauses in this Agreement which are especially relevant in determining the compensation payable in this action are clauses 1, 3, 4, 6, 7 and 8 of paragraph numbered 4 which read as follows:

4. . . .

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.

. . .

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 damage 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.

. . .

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.

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The National Capital Commission made available to any industry that prior to April 21, 1964 was "served by private siding trackage which [was] to be removed as a result of the [National Capital Commission] Relocation Plan," the opportunity:

a. to purchase, for its re-establishment only, land owned by the Commission. The price for this land to be 20% less than the market value as set by the Commission; or

b. to lease land owned by the Commission at a rental based on the market value less 20%.

The National Capital Commission also offered to provide "to the National Railways, the Pacific Railway or the Terminal Railway private siding trackage for the use of those industries whose private siding trackage is removed as a result of the Relocation Plan". In that offer, it also stated that "The new trackage will be of equal serviceable capacity to that which the industries previously enjoyed and will be provided at no installation cost to the industries or the Railways."[1]

The suppliants decided to take advantage of the offer of the National Capital Commission to purchase land on which to relocate their business and by letter dated May 14, 1964 (Exhibit P-71(*f*)) from their solicitors to the National Capital Commission advised the latter that the shareholders and directors of the suppliant company, Florence Realty Company Limited, had decided to purchase certain lands from the National Capital Commission in the Sheffield Road district which was being set up as an industrial park area by the National Capital Commission; and subsequently the National Capital Commission sold to the suppliant company, Florence Realty Company Limited, six acres for $36,000 by deed dated January 4, 1965 which was registered in the Registry Office for the Registry Division of the County of Carleton on May 7, 1965 as instrument number 65081. The suppliant company, Florence Realty Company Limited, built a new up to date waste paper processing plant on these lands occupying three acres of the six; and the National Capital Commission at its cost built a railway siding into this plant which occupied part of another acre of the six. This new plant according to the

[1] (See Statement of Policy, National Capital Commission, 1962, attached as Schedule A to *pro forma* Agreement, Exhibit P-69).

evidence cost about $300,000. It was built after investigation was made of how up to date plants in Canada and the United States were built and was designed by architects.

The suppliant, Florence Paper Company Limited, moved into this new plant in the early part of 1965 and completely vacated the Boteler Street plant about the end of 1965. The suppliant company, Florence Realty Company Limited, still owns the building at Boteler Street.

Prior to moving into its new plant, for some months in 1965, the suppliant, Florence Paper Company Limited operated from a so-called team track at the yards of the Canadian Pacific Railway Company, on Broad Street in the City of Ottawa, after their private siding and the rail facilities were no longer available to it. This was about five miles from its Boteler Street plant, and to load and unload into railway cars, it had to truck paper over this five miles.

The determination of the quantum of compensation payable to the suppliants in this matter is predicated in the main on the true interpretation of clauses 1, 3 and 4 of paragraph numbered 4 of the said Agreement between the parties dated May 5, 1964.

The suppliants claim the following sums and they categorize the same in the manner following:

A. The sum of $862,656.21 particulars of which are as follows:

(a) The sum of $450,000.00 for the depreciated loss of the building and improvements;

(b) the sum of $8,709.43 to defray the cost of moving stock and equipment;

(c) the sum of $1,128.42 to cover the cost of disconnecting and installing nine machines from Boteler Street to Sheffield Road;

(d) the sum of $8,015.00 to cover moving, dismantling and re-assembling five balers plus work performed and parts delivered re an elevator;

(e) the sum of $187,355.72 for additional costs of operating from the new site as compared to the old site based on an outlay of certain costs for a period of ten years, which are calculated at a rate of 6% in order to arrive at a present worth;

(f) the sum of $60,000.00 for demolition of the building;

(g) the sum of $82,351.16 being the re-financing charges of the bank loan and a mortgage in the amount of $260,000.00 at a present worth calculated on an interest rate of 6%;

(h) the sum of $25,000.00 for experts, consultants and legal fees;

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(i) the sum of $40,096.48 for extra costs and losses in operating the plant from June 15, 1964 until May 20, 1965 made up as follows:—

(i) team track operation	$ 9,159.73
(ii) cost of dual operation at two sites	25,486.76
(iii) re-lettering trucks	450 00
(iv) loss of executive time	5,000.00
	$40,096.49

(j) the sum of $10,000.00 for loss of rental income.

B. Interest on the said sum of $862,656 21 from June 1, 1965 until the date of Judgment.

C. Costs of this action.

The interpretation of clause 1 of paragraph numbered 4 of the said Agreement of May 5, 1964 is basic to the determination of the compensation payable in this matter.

The suppliants had two leasehold interests, one a private siding and the other of certain lands adjoining their plant premises, from Canadian Pacific Railway Company. The siding Agreement (Exhibit P-18) provided for cancellation of it on two months' notice, subject to leave being granted by the Board of Transport Commissioners; and the lease of land (Exhibit P-19) provided for cancellation on one month's notice. Neither gave the suppliants any right of renewal. The land leased was vital to the business operation of the suppliants. Both leasehold interests therefore, could be terminated readily within the ten year period after March 24, 1964.

The suppliants' reasonable expectation of continuing in possession or of having this siding agreement and lease renewed is not a legal interest in them that can be considered in assessing compensation in this matter. (See *Sunderland v. Municipal Corporation of Town of Brockville*[1]; and *Gagetown Lumber Co. Ltd. v. Her Majesty The Queen*[2]).

The effect therefore, in my view, of clause 1 of paragraph numbered 4 of the said Agreement is to give the suppliants a legal interest in the said siding agreement and the said lease for ten years, that is until March 24, 1974, for the purposes of assessing the compensation payable to them, whether the same is payable pursuant to clause 3 or clause 4 of paragraph numbered 4 of the said Agreement of May 5,

[1] [1961] O R. 660 [2] [1957] S.C.R. 44.

1964, or otherwise. Except for clause 1, the legal interest in the same would be for a much lesser period. And, as stated, except for the fact that the agreement was entered into, the suppliants would have no claim at all against the Crown.

In interpreting clauses 3 and 4 of paragraph 4 in relation to the facts in this case, it is necessary to decide whether or not in the circumstances of this case the suppliant company, Florence Paper Company Limited was required to relocate its plant by reason of the loss of this railway siding and railway services to the Boteler Street plant.

The significant words in clauses 3 and 4 of paragraph 4 of the said Agreement of May 5, 1964 are as follows:

Clause 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,"..."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."

Clause 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."

This language of clauses 3 and 4 indicates that the parties had in mind the principles in expropriation jurisprudence. But this was not an expropriation matter, and the problem therefore is to what extent expropriation principles are to be applied in interpreting clauses 3 and 4.

It is conceded that it is value to the owner that must be considered in this matter.

In an expropriation matter where all the owner's land is taken, or where part is taken and no damage is sustained to the balance, the leading case is *Woods Manufacturing Company v. The King*[1]. In that case, Rinfret C.J., delivering the unanimous judgment of the Supreme Court Bench

[1] [1951] S.C.R. 504.

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of Seven Judges, reviewed certain of the earlier decisions, including *Diggon-Hibben Ltd. v. The King*[1] and concluded (p. 508):

> . . . 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."

Clause 6 of paragraph 4 of the said Agreement dated May 5, 1964 provides that in determining the compensation payable the two suppliant companies are to be treated as one, in that the suppliant, Florence Paper Company Limited, for such purpose is to be considered to be "the absolute owner of the lands and premises upon which the business operations are being carried on".

In my view therefore, the manner of the application of expropriation principles in interpreting clauses 3 and 4 of paragraph 4 of the said Agreement of May 5, 1964, may be stated in this way:

Both suppliant companies as of March 24, 1964 are to be deemed as without a private railway siding and rail services, but all else remaining the same, the question is what would they, as prudent persons, pay for a private railway siding and rail services until March 24, 1974, rather than suffer the consequences of such loss of private railway siding and rail services, whether such consequences involve (a) the necessity of relocating the business, or alternatively (b) operating the business without a private railway siding and rail services for ten years until March 10, 1974, or in the further alternative (c) closing down the business entirely.

In applying this principle to the facts of this case, the test is one of "loss to the owner". The owner in the case of the suppliants is the "prudent owner" in possession.

In other words, it is necessary to determine as accurately as is possible, what the suppliants would pay out in total dollars rather than be deprived of the private railway siding and rail services they had on March 24, 1964 and could expect to have for ten years after. To determine this, it is

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

obvious that all factors have to be considered, and not just certain individual factors; that is all the advantages and disadvantages must be taken into consideration in reaching the decision a prudent person would make.

Having made such a determination, such a prudent person would adopt the course of action that would be least expensive in the net result. It follows therefore, that this might involve (*a*) relocation of the business (as envisaged in clause 3 of paragraph 4 of the said Agreement of May 5, 1964), or (*b*) carrying on at the Boteler Street, Ottawa plant for ten years until March 24, 1974 without a private siding, and rail services (as is envisaged by clause 4 of paragraph 4 of the said Agreement) or (*c*) closing down the business entirely.

Taking the above three alternatives in order, on the evidence I am of opinion that the respective dollar values in each case are as follows:

A. RELOCATION OF THE BUSINESS (AS ENVISAGED IN CLAUSE 3 OF PARAGRAPH 4 OF THE SAID AGREEMENT OF MAY 5, 1964).

The suppliants in their Petition categorize their claim for compensation under this heading by items number (*a*) to (i) as follows, which are now considered seriatim.

(*a*) Building

The suppliants' claim is for $450,000. Mr. Allan Kelly, real estate broker of J. Allan Kelly Realties Ltd. for the suppliants gave evidence of the value of the buildings on Boteler Street, Ottawa. His evidence was addressed to finding the value of the building only and not the land, and he did so by applying various physical depreciation rates to the various parts of the buildings after having obtained the reconstruction cost of the building from Mr. George Edmund Crain of the firm of Geo. A. Crain & Sons Ltd., contractors and engineers, namely the sum of $422,728. In doing so, he found the depreciated value of the buildings alone to be $297,000 (see Exhibit P-37). He was not qualified to speak about the functional or economic obsolescence of the building.

Mr. George A. Crain also gave evidence of the value of the building and also based his evaluation on physical

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depreciation only. He found the depreciated cost to be $302,890 (see Exhibit P-36). He knew nothing about functional or economic obsolescence of the building.

The only expert witness who had made a study and gave evidence and who took in all factors of depreciation was Mr. W. S. Button of C. A. Fitzsimmons and Company Ltd. He considered depreciation in its broad sense, applicable to all influences attaching real estate, both land and improvements that result in a lessening of value and desirability in use, a diminution in price, and similar phenomena, resulting from age, physical decay, a vast array of changing conditions in neighbourhoods, and numerous other causes, all of which are usually categorized as follows:

1. Obsolescence, or economic depreciation.
2. Loss in utility, or functional depreciation.
3. Deterioration, or physical depreciation.

He made his evaluation based on the income approach on the basis of value to the owner in that he assumed the continued occupancy of the premises by Florence Paper Company Limited. He stated, as is obvious, that the rental factor takes into consideration all types of depreciation and the rental figures he used, in my view, are quite reasonable and if anything, on the high side, so that the conclusions he comes to are probably correct and are certainly not on the low side. He found that the value of the lands and buildings as of March 24, 1964, based on the assumption that it could have been used by the Florence Paper Company Limited as a waste paper business until March 24, 1974, as $245,000; and on the assumption that it could not have been used for a waste paper operation after June 15, 1964, he found a value of $108,000 for the land only. He therefore found the value of the building on this basis to be $137,000. He also found the market value of the property for land value as of January, 1966 at $162,000 which is an increment of $54,000. In my view, if the suppliant company is to be compensated for the loss of the building, then there should be a set off based on the increased value of the land depending on whether the building is valued as having a useful life of ten years or whatever number of years is chosen. But for the purpose of these proceedings, I propose to apply such set off against the cost of demolition of the

building which the parties have agreed to be $56,000 and which is hereinafter referred to.

(*b*) Moving Stock and equipment;

(*c*) Disconnecting and installing 9 machines;

(*d*) Moving, dismantling and re-assembling 5 balers.

These claims are in the respective sums of $6,826.88, $1,179.90 and $2,930.00. The accuracy of these sums is not disputed by the respondent but because this claim is made on the basis that the suppliant company, Florence Paper Company Limited, would have to relocate in any event in ten years, then it is not entitled to the full amount of these claims but only to the present value of the same discounted at 6% for nine years which calculated are respectively $3,686.49, $637.00 and $1,420.20.

(*e*) Additional costs of operating from new site for a period of 10 years. Present worth at 6%.

This claim is in the sum of $190,038.11. The evidence of the suppliant on this claim is most unsatisfactory. It is predicated solely on the extra mileage of trucking from the new plant on the Sheffield Road as opposed to the old plant on Boteler Street to and from their sources of supply of paper and their main customer for the sorted paper. This extra mileage was pointed out to Mr. A. W. Quayle, chartered accountant by Mr. Frank Florence, Vice-President of Florence Paper Company Limited and the former made this calculation. Mr. Quayle admitted he did consider any advantages from savings that might accrue from operating in the new plant on the Sheffield Road. It is a reasonable inference in my opinion to assume that there are substantial savings in the handling of paper in the new plant which is modern and undoubtedly in it are employed the latest techniques and automatism generally must have helped to make this operation more efficient. It is also a reasonable inference that with the larger land area, the trucking in and out of the plant is much more efficient and that the new highways, and new streets and throughways contiguous to the new plant joining up most of downtown Ottawa would result in substantial economies and time which far outweigh any additional mileage. It is also a reasonable inference that there is an economy in operating from the new plant on the Sheffield Road because land cost alone to the suppliants is much cheaper.

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Clearly, there was substantial functional and economic depreciation in the Boteler Street plant, which do not exist in the new plant.

In my opinion therefore, no part of this item of additional cost has been established.

(*f*) Demolition of Building

The parties agreed that the cost of demolishing the Boteler Street building is $56,000 but as indicated above, this should be offset by the increased value of the land for the reasons stated, and so I am of opinion that nothing should be allowed under this item of claim.

(*g*) Re-financing charges

The claim is for $75,856.80. First of all the cost of the additional capital to finance the building of the new premises on the Sheffield Road which is undoubtedly superior in so many economic ways to the Boteler Street plant makes it impossible to make any practical comparison. In addition, there is no sound basis for assuming these costs will continue over the ten year period, especially when it is obvious that some monies will shortly come into the hands of the suppliants which will eliminate the necessity of borrowing some of these monies. In any event, adjustment would have to be made because interest only at 6% on this amount for the ten years is possible because the suppliant would have to meet the same problem in ten years. In my view, this item is too remote and no part of it has been proven.

(*h*) Fees, experts, consultants and legal

The claim which is for $25,230.03 which seems has already been paid; and for additional fees of at least $10,000, making a total of $35,230.03.

The claim under this heading is for work done in respect of two matters, namely, for the hearing before the Board of Transport Commissioners concerning the application for the closing of part of the Sussex Street sub-division and in preparation for this hearing. Mr. Quayle said that the solicitor's bill was solely for the matters concluding with the appearance before the Board of Transport Commissioners. He recited the wording of the bill from his firm, Riddell, Stead, Graham and Hutchison which did not tell anything because it consisted of two block bills. Mr. Quayle

was engaged preparing material for the Board of Transport Commissioners hearing and also for this trial.

In my view, none of the fees incurred for the purpose of the hearing before the Board of Transport Commissioners are allowable in these proceedings and any fees of experts that are fees in connection with the preparation for this hearing are properly chargeable only as part of the costs of these proceedings as may be awarded and taxed by the taxing officer in the usual fashion and therefore nothing is allowable under this item.

(*i*) Extra costs and losses in operating

(i) The first claim is for team track operation in the sum of $8,544.28. In my view, it should be reduced by at least 50% because among other things, there should not be required the supervision charges that are built into this item and also because I think that this operation would become more efficient than the two sample operations which were detailed in evidence, were. This results in a figure of $4,272.14.

(ii) This is a claim for the extra costs occasioned by dual operations at the two sites in the sum of $10,265.17. It is only the present value discounted at 6% for nine years which should be claimed in this item, namely, $5,544.

(iii) This is a claim for re-lettering trucks in the amount of $450. Again this should be the present value discounted at 6% for nine years or $243.

(iv) This is a claim for loss of executive time and of rental income in the sum of $33,900. The only evidence on this was hearsay evidence. It has not been proven at all. In any event, it is grossly over-inflated and bears no possible resemblance to the truth of the matter. In this connection, it is interesting to note that in the amended Petition which was made in January, 1966 this item of claim was $5,000 only.

In my view, under this heading, there is also no proof of loss of any rental income. In any event, loss of rental over the ten year period is taken into account in the evaluation by Mr. Button when he found the value of the building above referred to.

The total of all these sums is $152,802.63.

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B. CARRYING ON AT THE BOTELER STREET, OTTAWA, PLANT FOR TEN YEARS UNTIL MARCH 24, 1974, WITHOUT A PRIVATE SIDING AND RAIL SERVICES (AS ENVISAGED BY CLAUSE 4 OF PARAGRAPH 4 OF THE SAID AGREEMENT).

Mr. Albert William Quayle, chartered accountant, sometime partner of Riddell, Stead, Graham and Hutchison, for the suppliants, estimated that the yearly increase in direct annual costs to the suppliants if operating from a team track, loading and unloading paper would be $26,200, and that the impact of these additional costs on the suppliants' operating profits (before investment income and income taxes) which averaged $28,192 for the five years 1960 to 1964, would reduce this average to $1,992 for a decrease of 92.9% (See Exhibit P-63).

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.

On the other hand, Mr. James Ross, in my view, gave a realistic and believable estimate of the probable additional costs to the suppliant, Florence Paper Company Limited, of operating from a team track as compared to a private siding, for a ten year period. This evidence I accept. This he estimated at $16,100 per year, after having allowed $5,000 per year for additional supervision and cost of contingencies, which is probably on the high side, or $118,000 being the present value at 6% of $16,100 for ten years (see

Exhibit D-6). Then he assumed that but for this team track expense, the five year average of profits would continue, and the income tax rate on same would continue at about 23%, and therefore with the said additional expense of $118,000 there would be a saving in income tax of approximately $27,200 so that the present value of this ten year additional cost would be reduced to $91,300. It was correct to consider the impact of income taxes in this case, because what we are considering here was a business decision, and no reasonable business man to-day would make any decision without considering the matter of income tax in the course of action decided upon.

The evidence of Mr. Ross is supported in many ways by the evidence of Mr. John Gallagher, Plant Manager of Buscombe & Doods Ltd., Toronto, a waste paper plant, who, *inter alia,* gave evidence that automation had substantially replaced the "bull gangs" of workmen, such as the Florence Paper Company Limited employed at their Boteler Street plant, (but probably not at their new Sheffield Road plant, about which operation they refrained from telling the Court), and the evidence that there were a number of waste paper plants throughout Canada and the United States that operated successfully by using team tracks and did not have private sidings or rail services to their plants.

C. CLOSING DOWN THE BUSINESS ENTIRELY

Mr. James Ross, for the respondent, also computed the value of the business of Florence Paper Company Limited as a going concern, predicated on the five year average of profits (1960-64) of $28,200, before income taxes and any investment income, on the assumption from his knowledge and experience which is substantial, that a purchaser would want a return on his investment of about 12½%. He computed this at $225,000, which figure includes goodwill at about $75,000 and all other assets such as cash on hand, accounts receivable, inventory, but no lands or buildings.

So much for the details of how these three alternatives work out in dollars and cents.

The question is which of these alternatives would Florence Paper Company Limited as a prudent owner, based on the premises earlier stated, choose as of March, 1964. It

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is clear that any reasonable consideration of these proposals would lead them irresistibly to the conclusion that they should remain in the Boteler Street premises for the ten year and operate from a team track. This would be the only sensible business decision.

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 that more economies would result because of the larger land area resulting in easier manœuverability 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.

In my view therefore, the suppliants are entitled to compensation under clause 4 of paragraph 4 of the said Agreement made between the parties dated May 5, 1964 which I find to be in the sum of $91,300.

The suppliants also raise the issue of estoppel in paix against the respondent.

To constitute any estoppel in paix requires certain constituent elements: firstly "in order to constitute a representation on which an estoppel may be founded, the statement must be one of 'existing fact' "[1]; secondly, "There must have been an intention, actual or presumed, on the part of the representator to induce the particular representee, . . . to act upon the representation..."[2]; and thirdly "The onus is on the representee to prove that the belief ultimately entertained materialized in conduct, and caused him to act upon the representation in a manner prejudicially affecting his temporal interest."[3]

In my view, firstly, there is no representation within the meaning of that term as used in estoppel jurisprudence. The National Capital Commission's Statement of Policy on Industrial Relocation Resulting from the Railway Relocation Plan attached to the Agreement dated May 5, 1964 (Exhibit P-29) was supplied to the suppliants long prior to any decision of them to relocate and it does not say anything about the suppliants having to relocate, nor does the Order-in-Council dated March 12, 1964 authorizing the sale to the suppliants at a discount of 20% the six acres on the Sheffield Road industrial area. The suppliants were free to make their decision to relocate or not and the Order-in-Council had nothing to do with the suppliants' decision. The letter of the National Capital Commission under the signature of D. L. McDonald, Director of Planning and Property dated December 12, 1963 to Mr. F. H. Florence of the suppliant company, Florence Paper Company Limited (see Exhibit P-44) does not in my view state that the National Capital Commission was of opinion that the suppliants had to relocate. Mr. McDonald would have no means of knowing whether or not there was any necessity to relocate by the suppliants as he was merely in charge of selling property to persons who made representations to the National Capital Commission that they were required to relocate.

Secondly, there was no intention on the part of the National Capital Commission to induce the suppliants to act. The National Capital Commission was merely selling land at 20% to persons who had lost rail services. The issue of whether it was necessary to relocate or not was not the

[1, 2, 3] (see Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*, Second Edition, Butterworths, 1966, pp. 29, 89, 96)

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subject of any representation on its part in so far as the suppliants were concerned. This is amply proven by the letter from the solicitors for the suppliants Florence Realty Company Limited addressed to the National Capital Commission dated May 14, 1964 (Exhibit P-71 (*f*)) wherein it is unequivocally stated that at the meeting of the shareholders and directors of that company it was at that time decided to purchase certain lands from the National Capital Commission in the Sheffield Road area which was being set up as an industrial area.

Thirdly, there is no evidence at all that the National Capital Commission in any way induced the suppliant, Florence Realty Company Limited, to act and certainly no evidence that that company paid any attention to relocate as a result of the said letter from Mr. McDonald dated December 12, 1963 (Exhibit P-44). The evidence of how the decision was arrived at is again contained in the said letter from the solicitors of that company to the National Capital Commission dated May 14, 1964 (Exhibit P-71 (*f*)). This decision was reached after the execution of the Agreement between the parties dated May 5, 1964 and by reason of the inclusion of both clauses 3 and 4 of paragraph 4 in that Agreement, it is clear that the parties felt that the issue of relocation was still open and was a matter that might subsequently be the subject of a hearing to determine compensation such as is the case in these proceedings.

As discussed earlier in these reasons, why the suppliants relocated was for many other reasons personal to them, and entirely divorced from anything said or done by the National Capital Commission in this regard.

The suppliants also claim interest in the amount of compensation awarded from June 1, 1965 until the date of judgment.

Interest is only allowed against the Crown on the ground of express or implied contract or by virtue of a statute. (See *The King v. Adam B. MacKay*[1]). Neither is present in this case.

In any event, this is a claim for unliquidated damages, and the rule is that interest does not run upon them until they are assessed.

Accordingly, no allowance is made for interest.

[1] [1930] S C R. 130.

The suppliants also claim costs.

In these proceedings pursuant to rule 104 of this Court, the respondent on February 21, 1966 made confession of judgment in the amount of $100,000 in satisfaction of all claims arising out of the said Agreement between the parties dated May 5, 1964. Therefore, the provisions of rule 105 apply.

In the result, therefore, there will be judgment declaring that the suppliants are entitled to compensation in the sum of $91,300 with a set-off for costs in favour of the respondent pursuant to rule 105 of this Court.