

1945

BETWEEN:

Jun. 6 & 7

Sep. 27

HIS MAJESTY THE KING on the Information of the Attorney-General of Canada } PLAINTIFF;

AND

IRVING OIL COMPANY LIMITED... DEFENDANT.

Expropriation—Owner compensated for loss of value of property by receiving its equivalent value in money—Such equivalent to be estimated on value to owner—Basis of valuation is its fair market value at date of expropriation—Fair market value to be based on all potentialities including special good purpose to which land can be put—Owner not entitled to loss of profit of business carried on—Evidence as to income derived is not material except in so far as it throws light on the fair market value.

Plaintiff expropriated a service station in the City of Saint John, New Brunswick. The action is to determine the value of the expropriated property and the claim of the defendant for loss of profits caused by the closing of the filling station.

Held: The owner of expropriated property is compensated for the loss of the value of the property by receiving its equivalent value in money; the value of the property is the value to the owner. The value must be measured by its fair market value at date of expropriation, but all potentialities of land must be taken into account in arriving at the fair market value. The King v. W. D. Morris Realty Ltd., (1943) Ex. C.R. 140; In re Lucas and Chesterfield Gas and Water Board (1909) 1 K.B. 16 followed.

2. That the owner is not entitled to a claim for loss of profits. The King v. Richards 14 Ex. C.R. 365, and Dussault v. The King (1929) Ex. C.R. 8 followed.

INFORMATION by the Crown to have certain property expropriated in the City of Saint John, New Brunswick, for public purposes valued by the Court.

The action was tried before the Honourable Mr. Justice O'Connor, at Saint John, N.B.

P. J. Hughes, K.C., and R. D. Keirstead for plaintiff.

C. F. Inches, K.C., and H. A. Porter, K.C., for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J., now, (September 27, 1945), delivered the following judgment:—

The information exhibited by the Attorney General herein, shows that the property of the defendant described in the information was taken under the provisions and authority of the Expropriation Act, R.S.C. 1927, Chapter 64, for the purposes of the public works of Canada and that a plan and description thereof were deposited on the 8th day of July, 1943, with the Registrar of Deeds for the City of Saint John, Province of New Brunswick.

The information shows that His Majesty the King was willing to pay the defendant the sum of \$4,750.00 in full satisfaction for the property and in discharge of all its claims for damage occasioned by the expropriation. The defendant by its statement of defence claimed the sum of \$16,544.30 by way of compensation and amended the same by adding a claim for \$5,000.00 for loss of five years' business at \$1,000.00 per year.

The evidence for the defendant showed that it had paid \$3,000.00 for the lot and had erected the building used as a service station thereon at a cost of \$3,947.58. Evidence was given showing that the 1943 replacement cost, less depreciation of the building, would be approximately \$5,000.00. No record had been kept of the cost of moving the equipment but it was estimated that this would cost \$120.00 and the equipment would depreciate in value by reason of the move in the sum of \$300.00, and the cost of re-installing the equipment elsewhere was estimated at \$313.00. No evidence was given by the defendant as to the fair market value of the property at the time of the expropriation.

The evidence on behalf of the defendant consisted of assessed values of adjoining lands and of sales by adjoining owners to the Department of National Defence. In addition one Lawton, a real estate agent in Saint John, valued the lot in 1943 at \$1,000.00, estimated the cost of making the necessary fill at \$200.00, and valued the building at \$3,000.00, and placed the cost of removing the equipment at \$400.00.

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It was clear from the whole of the evidence that the area, in which the property in question is situated, had, over a period of years, depreciated in value, and a portion has been taken over by the City of Saint John for taxes.

It was submitted by counsel for the plaintiff that the company had paid \$3,000.00 for the lot because of absurd competition between oil companies. The location had some advertising value and one of the company's competitors had already erected a service station nearby.

The compensation to be paid has been set out by Thorson J., President of the Exchequer Court, in *The King v. W. D. Morris Realty Ltd.* (1) at p. 147 as follows:—

The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

and he quotes with approval the words of Fletcher Moulton L. J. In *re Lucas and Chesterfield Gas and Water Board* (2).

The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

While the fair market value to any one other than an oil company might be in the neighbourhood of \$4,000.00, the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant. The price that another oil company would pay would certainly be based on the yearly gallonage of gasoline passing through the station and the evidence showed that over a five year period this was small.

The defendant contends that because of the existing oil regulations it could not get a permit to erect a new station and that it is entitled to be compensated for the loss of profits for a period of five years. The only evidence before me as to this was a statement by the Secretary-Treasurer

(1) [1943] Ex. C.R. 140

(2) [1909] 1 K.B. 16 at 30

that the company made a profit of five cents (5c.) on every gallon of gasoline that passed through the outlet. No evidence was given as to how this was arrived at nor were the books or annual statements of the company produced. Some of the business which this particular outlet had would undoubtedly go to other stations of the same company.

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In *The King v. Richards* (1) Audette J. at p. 373, following the decisions in *The King v. London Dock Co.* (2) and *Ricket v. Metropolitan Railway Co.* (3), said:

The damages for loss of business purely and simply are too remote and depend on the commercial ability and industry of the individual, are and not an element inherent to the land.

He points out that the only case where damages for loss of business could be allowed would be where the whole of the defendant's land and property is taken and where a business site which is part of the value of the land is taken away—forcing the owner to abandon a locus upon which he had established a business—as in the cases of *The King v. Rogers* (4), *McCauley v. City of Toronto* (5), and *The King v. Condon* (6). But he points out that in this latter class of cases it must be noticed that it is not damages of a personal nature that is allowed, but damages for the loss of a good business site, having its market value over and above the inherent value of the land itself, taking into consideration the special good purposes to which it can be put.

While damages are included in the definition of "land" under Section 2 (d) of the Act, this is clearly damage for land injuriously affected set out in Section 23.

Evidence as to the income derived is not material except in so far as it throws light on the market value. In *Dussault v. The King* (7) Audette J., in approving the statement at p. 662 of Nichols on Eminent Domain (Second Edition) said:

If the owner of a property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes

(1) [1912] 14 Ex. C.R. 365.

(2) [1836] 5 Ad. & E. 163

(3) [1867] L.R. 2 H.L. 175

(4) [1907] 11 Ex. C.R. 132

(5) [1890] 18 O. R. 416

(6) [1909] 12 Ex. C.R. 275

(7) [1929] Ex. C.R. 8 at 11

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no test of the value of the property. It is accordingly well settled that evidence of the profits of a business conducted upon land taken for public use is not admissible in proceedings for determination of the compensation; but evidence of the character and amount of the business conducted upon the land may, however, be admitted as tending to show one of the uses for which the land is available.

O'Connor J. And at p. 10 he said:

The land is looked upon as so much land, entirely apart from the personality of its owner and care must be taken to distinguish between income from the property and income from the business conducted upon the property. It might be that two rival farmers held adjacent farms, of the same nature of soil and buildings, similar in all respects, upon which they cultivated. One of them, by reason of his shrewdness, foresight and good fortune might be deriving a large return and would doubtless be unwilling to sell for a sum considerably in excess of its market value—while the owner of the adjacent farm may find himself losing money and hardly making a living on it, and he would be pleased to dispose of it at a sacrifice. Yet if the two farms were taken by eminent domain or expropriation, the measure of damages would be the same in each case.

For these reasons I make no allowance to the defendant for loss of profits.

I find that the amount of compensation money to which the defendant is entitled is the sum of \$6,000.00.

There will therefore be judgment declaring that the property described in paragraph 2 of the information is vested in His Majesty the King and that the defendant is entitled to the sum of \$6,000.00 together with interest at the rate of 5 per cent from the 8th day of July, 1943, to the date of judgment, subject to the usual conditions as to all necessary releases and discharges of claims.

The defendant will also be entitled to its costs of these proceedings throughout.

*Judgment accordingly.*