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BETWEEN:

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

1944  
June 15 & 16  
June 19  
—

AND

THE EASTERN TRUST COMPANY, a body cor-  
porate, with head office at Halifax, in the Province  
of Nova Scotia,

DEFENDANT.

*Expropriation—Owner of expropriated property to be compensated by receiving its money equivalent in value—Fair market value to be based upon most advantageous use for which property is adapted and might in reason be applied, but only present value of such advantages to be taken into account—Evidence of assessment value admissible as check against excessive valuations—Evidence of sales of comparable property made near the time of expropriation useful—*

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*Evidence of awards in other expropriation proceedings or settlements in such proceedings made to avoid litigation not admissible—Valuation of subdivision lands on lot by lot basis subject to substantial reduction.*

Plaintiff expropriated certain property in the City of Halifax, Nova Scotia, for a wartime housing project. The land had been subdivided into lots for building purposes. The action is to determine the value of the expropriated property.

*Held:* That the former owner of expropriated property is to be compensated for the property taken from him by receiving its money equivalent in value; he had no right to make any profit out of the expropriation; neither is he obliged to suffer any loss of value; the form of his property is changed by the expropriation, but its total money value should remain the same. He loses his land and all his rights in it, but, in its place, he receives its money value, which is its fair market value. *The King v. W. D. Morris Realty Limited* (1943) Ex. C.R. 141, followed.

2. That the market value of the expropriated property should be based on the most advantageous use for which it is adapted and to which it might in reason be applied, present or prospective, but it is only the present value, as at the date of the expropriation of such advantages that may be taken into account. *The King v. Elgin Realty Company Limited* (1943) S.C.R. 49 at 52, followed.
3. That while evidence of assessment value is admissible its usefulness is often confined to the check which it affords against excessive valuations.
4. That evidence of sales of property near the expropriated property affords an excellent basis for arriving at its fair market value, provided such sales were of property comparable with the expropriated property and were made at a time near the date of the expropriation.
5. That evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements in such proceedings made with a view to avoid litigation.
6. That in determining the value of expropriated property subdivided into lots for building purposes a valuation made on a lot by lot basis is subject to substantial reduction; account must be taken of such items as interest on the investment involved, taxes paid, expenditures for improvements, cost of installing water and sewer services and making street improvements, selling costs such as advertising and commissions and a proportion of the owner's overhead, and regard must be had to the probable length of time it would take to sell the property in lots.

INFORMATION by the Crown to have certain property expropriated in the City of Halifax, Nova Scotia, for a wartime housing project, valued by the Court.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Halifax.

*F. D. Smith, K.C.* and *J. G. Fogo, K.C.* for plaintiff.

*C. B. Smith, K.C.* for defendant.

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

THE PRESIDENT, now (June 19, 1944) delivered the following judgment:

The expropriated property involved in these proceedings is situate in the northwest part of the City of Halifax. There were three expropriations completed by the deposit of the necessary plans and descriptions in the office of the Registrar of Deeds for the County of Halifax, in accordance with the provisions of Section 9 of the Expropriation Act, the first on September 2, 1942, the second on October 23, 1942, and the third on October 28, 1942. On the deposit of such plans and descriptions the lands covered by them became vested in His Majesty the King.

The parties have been unable to come to an agreement as to the amount of compensation money to which the defendant is entitled and these proceedings have been brought for an adjudication thereon. The plaintiff tendered \$45,000 and interest on April 13, 1944, but this tender was refused by the defendant. The offer was repeated in the information herein which was filed on April 28, 1944. By its statement of defence the defendant claims the sum of \$75,000 with interest. There is, therefore, a wide discrepancy between the parties as to the amount of compensation money to which the defendant is entitled.

The principal grounds upon which an award of compensation should be made are well settled. They were stated by this Court in *The King v. W. D. Morris Realty Limited* (1) and need not be restated in detail. In that case I held, following a number of leading English authorities, that 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 value 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 estimated by its fair mar-

(1) (1943) Ex. C.R. 141.

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ket value as it stood at the date of its expropriation. The former owner of expropriated property is to be compensated for the property taken from him by receiving its money equivalent in value. He has no right to make any profit out of the expropriation; neither is he obliged to suffer any loss of value; the form of his property is changed by the expropriation, but its total money value should remain the same. He loses his land and all his rights in it, but, in its place, he receives its money value, which is its fair market value.

The expropriated property may fairly be considered in two portions; firstly, that which lies to the west of Connolly Street and is bounded on the south by Berlin Street, on the north by Bayers Road for a portion of it and by Young Street for the remainder, and on the west by Connaught Avenue; this portion was covered by the first two expropriations which included the so-called streets; and, secondly, that which lies to the east of Connolly Street and includes four blocks bounded on the south by Summit Street, on the north by Edinburgh Street and on the east by property facing on the west side of Oxford Street; this portion was covered by the third expropriation.

The expropriated property formerly belonging to the defendant forms part of what has been called by the defendant the "Ardmore Subdivision". The Ardmore property was acquired by the defendant in 1912 and 1913 as security for advances made by it to one D. Lorne McGibbon of Montreal. The deeds to the defendant although absolute in form were in reality mortgages. These were subsequently foreclosed and the defendant acquired title to the foreclosed property in 1928. The defendant has been in possession of the property for a long time. In 1913 it subdivided the whole of the Ardmore property including the expropriated property but this 1913 subdivision was merely on paper. In 1929 the portion of the Ardmore subdivision east of Oxford Street was re-subdivided into 40 foot lots. This re-subdivision did not include any of the expropriated lands involved in this action. In 1938, however, the expropriated property was re-subdivided and a plan of the subdivision was registered in the Halifax Registry Office on June 4, 1942, a few months

prior to the expropriation. According to this plan there were 87 lots in the 4 blocks to the east of Connolly Street and 149 lots in the remainder to the west of Connolly Street.

At the time of the expropriation the land between Connolly Street on the west and Oxford Street on the east was fairly level and regular in its contour. The land west of Connolly Street was rougher; it sloped to the west and north; there were a number of valleys in it and a gulch; what was called Almon Street was really a valley and what was called Edinburgh Street was a hill; it could fairly be said to be pasture land. As to the whole of the expropriated property, no streets had actually been laid out; sewer and water were available to the lots on the north side of Edinburgh Street between Oxford and Connolly Streets; there was also sewer and water on Oxford Street which was a graded street with curb and gutter; there was only a travelled way on Connolly Street, on which the City of Halifax in 1934 had constructed a sewer as an unemployment project, from Bayers Road south along Connolly Street almost to Almon Street; apart from these improvements all of the expropriated property of the defendant was unimproved with no streets laid out and no sewer or water installed.

The defendant contended that its policy had been to sell the portion of the Ardmore property east of Oxford Street first, before selling the portion west of Oxford Street; that by 1940 the lots east of Oxford Street had all been sold; and that the time had arrived when there was a reasonable prospect of the lots west of Oxford Street being sold in the very near future. It is in the light of this situation that the Court must view the property and ascertain its money value. In doing this, well-known principles must be applied. While the property was not improved otherwise than I have mentioned, its future possibilities and its possible sale in lots must be taken into account, but there again it is only the present value as at the date of the expropriation that is to be considered. In the *W. D. Morris Realty Limited* case (*supra*), which I have mentioned, I quoted with approval the statement made by Nichols on

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Eminent Domain, 2nd Edition, paragraph 219, page 665, which reads as follows:—

Market value is based on the most advantageous use of the property. In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes present and prospective, for which it is adapted and to which it might in reason be applied, must be considered and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

This is sometimes spoken of as the assessment of market value based upon best use of the property. I also referred to the statement made by Taschereau J. of the Supreme Court of Canada in *The King v. Elgin Realty Company Limited* (1), where he said:

The value to the owner consists in all advantages which the land possesses, present, or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value.

While, therefore, a considerable portion of the expropriated land was in fact pasture land at the time of the expropriation, it is not fair to value it solely as such, but its present value for building purposes in the future must also be ascertained. That is part of the money value of the land.

Three valuations were given, two on behalf of the defendant and one on behalf of the plaintiff. The onus of proof of value is on the defendant. Mr. Stephens, the real estate officer of the defendant, valued the land on a lot by lot basis, that is, 236 lots, on November 26, 1942, shortly after the expropriation, at \$96,000, the detail of which is given in exhibit "N". He allowed a deduction of approximately one-third of this amount for the sale of the property en bloc and arrived at a final valuation of \$65,000. His opinion was that the lots in the expropriated property could all be sold within 10 years. Mr. Clark and Mr. de Wolf joined in a valuation on a lot by lot basis. This amounted to \$86,900. They allowed a 20 per cent reduction for a sale en bloc and Mr. Clark expressed the opinion

that the land could all be sold within 5 years. The final valuation arrived at by Mr. Clark and Mr. de Wolf was \$69,520. Their valuation was made sometime in April, 1943, for Wartime Housing Limited which had done a considerable amount of work on the expropriated property. On the other hand, Mr. Minshull, for the plaintiff, valued the 87 lots to the east of Connolly Street at \$17,600. He regarded these lots as being marketable at the date of the expropriation or in the near future. He valued the land west of Connolly Street on an acreage basis at \$800 per acre for 20 acres or \$16,000, making a total valuation of \$33,600. His valuation, even on the basis used by him, is subject to increase since the acreage is somewhat in excess of 22 acres. Mr. Minshull was strongly of the view that the land could not be sold in lots within 10 years, but thought the period of time it would take would be closer to 20 years. There is also evidence of the assessment of the property at \$16,000, on an average basis, but assessment value is not the same thing as fair market value. While evidence of assessment value is admissible, its usefulness is often confined to the check which it affords against excessive valuations. There is thus a great discrepancy between the valuations offered to the Court. This is not an unusual situation in expropriation proceedings. Experts vary in their opinions and it becomes the duty of the Court to assess the weight which should be attached to their opinions in any case.

Fortunately, in the present case there is evidence which affords a check upon the opinions given by the experts. A good deal of evidence was given of sales of property near the expropriated property. Evidence of such sales affords an excellent basis for arriving at fair market value, provided the sales are of property comparable with the property whose value is being ascertained by the Court and were made at a time near the date of expropriation. Mr. Stephens gave a long list of sales of property the details of which are shown by exhibit 11. These run from 1930 to 1940 and there were as well some sales in 1943. These run as high as \$600 per lot but, with few exceptions, they are sales of lots east of Oxford Street where, generally speaking, the installation

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of water and sewer and street improvements preceded the sale of the lots, although Mr. Stephens did say that some lots had to be sold on a street before improvements on it were made. An improved lot on a graded street, with sewer and water available to it, is not comparable with an unimproved lot, where these services are not available, and the evidence of sales given by Mr. Stephens is subject to discount for that reason. At the other end of the scale, evidence was given by Mr. Hubley of sales on the north side of Swain Street in 1937, 1938 and 1939. He thought highly of his lots. He said that he advertised these lots for \$200 each, but the best price he could get for them was from \$100 to \$150 each, even although they were served with sewer and water. These lots are just to the south of the western portion of the expropriated property and, to that extent, are closer to the centre of the city than some of the other lots in it. Evidence was also given of the sale of about 30 lots in 1938 in blocks "O" and "N" just south of the western portion of the expropriated property to Mr. Butler at \$100 per lot. It was contended by Mr. Hubley that these lots, and the lots sold by him, were better than those in the western part of the expropriated property, but it may well be that the value of Mr. Hubley's lots was effected considerably by the zoning regulations that were in effect, for they are in the immediate vicinity of the Halifax Airport. The zoning regulations would, of course, also affect the lots in the western part of the expropriated property on Connaught Avenue, which is the western boundary of the expropriated property and, at the same time, the eastern boundary of the Halifax Airport.

Evidence was not available as to the sale of blocks of land in subdivisions. I ruled that evidence cannot be given in expropriation proceedings of awards made in other expropriation proceedings or of settlements in such proceedings made with a view to avoiding litigation. The latter portion of the rule is well established and is dealt with in the *W. D. Morris Realty Limited* case (*supra*) where I held that an offer to buy property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell property made by the owner



for the same purpose to be regarded as an admission by him as to its value. There is also a sound basis for the former part of the rule. Sales from willing vendors, not obliged to sell, to willing purchasers, not obliged to buy, go to establish market value. An award in expropriation proceedings is a different thing. It is the result of the Court's finding based on the evidence before the Court in that particular case and cannot be used as proof of market value in another case. Each case must stand on its own facts and evidence as to market value.

There was, however, some evidence of sales which, in my opinion, was very helpful. In 1938 fifteen lots on the west side of Oxford Street were sold to Piercey Investors at an average of \$425 each. These were immediately adjoining the expropriated property. I take into account that these were sold en bloc. In addition, 6 lots were sold between 1938 and 1942 on the south side of Edinburgh Street just west of Oxford Street. These were served with sewer and water and were on improved streets. Sewer and water costs \$3.50 per front foot or \$140 for a 40 foot lot, and there are also charges which must be made for street improvements of various kinds. These lots, that is, the ones sold to Piercey Investors, on the west side of Oxford Street and the 6 lots on Edinburgh Street were the most valuable lots in the Ardmore subdivision west of Oxford Street. I think this is particularly true of the lots on the west side of Oxford street. There is also evidence given by Mr. Walker of sales of lots on Oxford Street just west of the expropriated property at \$400 and \$450 per lot on an improved street served with sewer and water. In my opinion, these sales afford a valuable check on the valuations tendered by the experts. They are sales made at a time very near the date of expropriation of property very close to the expropriated property. They are, however, sales of improved lots and when any comparison is made between such lots and other lots the cost of installing water and sewer and making other improvements must be taken into account.

In view of these facts, I think it is possible to check the valuations made by the various experts. In my opinion, the valuation made by Mr. Stephens is an excessive

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one. His estimates for the 87 lots east of Connolly Street run from \$350 to \$500 per lot. Only 9 of these lots were served with sewer and water. His total for them comes to \$34,800. His estimate for the lots west of Connolly Street is, in my opinion, even more excessive, for in that part of the expropriated property the lots, according to his estimate, run from \$350 to \$600 per lot, with only two lots going as low as \$300 and one as low as \$250, which makes his estimate for the total area west of Connolly Street \$61,450. The average for all the lots is approximately \$405. It seems somewhat strange to me that the average for the portion west of Connolly Street runs higher than that for the portion east of it. Almost all of the lots are unimproved. This average of approximately \$405 runs against the known sales of lots of superior location, served with water and sewer on improved streets, at \$425 or, at the most, \$475. In my opinion, the valuation made by Mr. Stephens is subject to very substantial reduction. I do not think that it is necessary to estimate the amount of such reduction, but it would not be unfair to reduce it by at least \$100 per lot. Mr. Clark's valuation is, in my opinion, unwarranted by the facts. It is true that he did not make his valuation until April, 1943, after Wartime Housing Limited had done a good deal of work on the expropriated property in the way of grading and levelling. It had cut down the hill to which I have referred and had filled in some of the valleys. Mr. Clark's valuation ran from \$500 per lot on Edinburgh Street, where there were water and sewer which he said he had taken into account, to \$300 for the poorest lots. I think his valuation is subject to substantial reduction for the same reasons as those in the case of Mr. Stephens' valuation. I am not surprised that the valuation made by Mr. Clark and Mr. de Wolf was not accepted by the right of way department of the Canadian National Railways. On the other hand, the valuation given by Mr. Minshull is not entirely sound. He valued the 87 lots east of Connolly Street at from \$200 to \$300 each. While, in my opinion, this valuation is closer to the real market value, having regard to the sales of improved lands nearby, than the other estimates were, I think it is on the low side. As

Mr. Minshull valued the remaining land solely on an acreage basis, in my opinion, he does not sufficiently take into account the possibilities of the sale of the land as lots and, for that reason, I am of the opinion that the valuation made by him should be substantially increased. Mr. Stephens deducted one-third of his total valuation on a lot by lot basis for the sale of the expropriated property en bloc and thought that this was a fair and reasonable reduction to make. He should know, for the reason that he has had experience in handling the other portions of the Ardmore property for a great many years. Mr. Clark deducted only one fifth of the lot by lot valuation for a sale en bloc, but he admitted that this was an arbitrary figure. Some deduction must, of course, be made, and the extent of the deduction that should be made must depend to some extent, at any rate, upon the time that it would take to sell the property on a lot basis. Account must be taken of such items as interest on the investment involved, taxes paid, expenditures for improvements, cost of installing water and sewer services and making street improvements, selling costs such as advertising and commissions and a proportion of the defendant's overhead. The amount of many of these items will depend upon the length of time it would take to sell the property. The defendant held the property both east and west of Oxford Street for a great many years, in one capacity or another, since 1913. It did not sell the lots east of Oxford Street until 1940, and, in respect of the lots west of Oxford Street, it had sold only the lots to the School Board, the 13 lots on Oxford Street to Piercey Investors, and the 6 lots on Edinburgh Street. While the defendant and its witnesses were optimistic about the length of time it would take to sell the property west of Oxford Street when evidence was being given at the trial, it did not show the same optimism about the future when it applied for an extension of time for paying the city sewer charges on Connolly Street. When it made this application it gave as one of the grounds for such extension the fact that the situation in respect to the property was the same as it had been in 1937, namely, that that section was not yet ready for development as they had a considerable number of unsold lots

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on Edinburgh Street and other streets closer to the city. This letter was written, not in 1937, but on January 17, 1942, just a short time before the expropriation. When that letter was written the defendant was not optimistic that the lands would be saleable in lots at any rapid rate of time. While the trend in the expansion of the city, according to the evidence, was westward, the presence of the Airport on the western limit of the expropriated property would, in my opinion, have some adverse effect on the sale of lots near it. I think this is a natural assumption to make. The slope of the land westward and northward made use of the Connolly Street sewer impossible for the western portion of the expropriated land and the rough nature of it, the valleys and the gulch in it, made considerable expense necessary before it could be put into a saleable state. It is impossible to forecast future development. From 1931 to 1941 the census figures for Halifax, strangely enough, show no increase in population. On the other hand, it may well be that the construction of buildings of a permanent nature may result in increased population in Halifax and the future may bring an increase in industrial development. Likewise, available land for building purposes is becoming less. In the future land might appreciate in value but, on the other hand, it has been known from experience in the past that the reverse is possible.

A valuation made on a lot by lot basis is subject to substantial reduction in order to arrive at the true value of the property on the basis of a sale en bloc and I am of the opinion that the percentage allowed by Mr. Clark of 20 per cent, which he admitted was an arbitrary figure, is too low and that the percentage considered as fair and reasonable by Mr. Stephens is a better one, but, in view of the fact that much depends upon the time factor, it is difficult to fix the percentage with any degree of exactness. Having regard to all the facts and the evidence given, the experience of the defendant in the past in selling its lots, the evidence of sales of improved lands, the small number of lots sold in the Ardmore subdivision west of Oxford Street up to the time of the expropriation, the state of the land at the time of its expropriation, its future possibilities and the present value of such possibilities, the opinions given

by the experts, and the other facts affecting the value of the land which I have mentioned, I have come to the conclusion that the sum of \$50,000 would be ample compensation to the defendant, and I find that this is the value of the expropriated property as at the date of its expropriation, and, consequently, the amount of compensation money to which the defendant is entitled. Since this amount represents the value of the land, as at the date of the expropriation, the defendant must pay out of such amount whatever claim the City of Halifax may have in respect of the unemployment relief sewer project on Connelly Street. Counsel have agreed that this amounts to \$4,381.15. I do not think it necessary for me to attempt to decide whether this constitutes a lien or charge upon the land at the time of the expropriation or an inchoate lien or charge, if there is such a thing, but, in any event I wish to make it clear that the sum of \$50,000 is inclusive of whatever amount the defendant must pay to the City of Halifax.

Since the amount of the award exceeds that of the tender by the plaintiff, the defendant will be entitled to interest on the sum of \$50,000 at 5 per cent per annum from the date when the expropriation was completed, namely, October 28, 1942, to this date, that is, the date of judgment. The expropriation took place in three sections, the earliest expropriation having been made on September 2, 1942. It is difficult to fix the amount of compensation money that is attributable to each portion of the expropriated property, but if I were to allow interest on one half of it, that is, interest on \$25,000 from September 2, 1942, to October 28, 1942, in addition to the interest on \$50,000 already mentioned this would be an ample allowance of interest. The defendant will also be entitled to its costs to be taxed in the usual way.

There will, therefore, be the usual judgment declaring that the expropriated lands described in the Information are vested in His Majesty the King as from the various dates of the depositing of the plans and descriptions in the Registry Office for the County of Halifax. There will be a declaration that the amount of compensation money to which the defendant is entitled is the sum of \$50,000, inclusive of whatever charges it may have to pay to the City of Halifax, and that the defendant is entitled to be paid

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such amount on providing the necessary releases and discharges of all claims, liens or encumbrances either in respect of the expropriated lands or in respect of the compensation money, and there will also be an order to the effect that the defendant is entitled to interest as indicated and costs as stated.

*Judgment accordingly.*