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Oct. 20-24, 31, Nov. 1, 4

BETWEEN:

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..... } PLAINTIFF;

AND

VICTOR LOUIS POTVIN ..... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, s. 9—Exchequer Court Act, R.S.C. 1927, c. 34, s. 47—Value to be estimated on basis of most advantageous use—Evidence of sales made after date of expropriation inadmissible—Value of farm measurable by productivity—Claim for severance although remaining lands not contiguous to expropriated property—Allowance for compulsory taking denied.

The plaintiff expropriated property near Uplands Air Port on which the owner had operated a farm. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That the most advantageous use that could be made of the property was its use as a farm.

2. That in proceedings to determine the amount of compensation to which the owner of expropriated property is entitled evidence of sales made after the date of expropriation is inadmissible.

3. That it is a sound approach to the determination of the value of an expropriated farm to its former owner to ascertain its productivity by computing the average annual gross revenues from its crop yields and deducting therefrom the appropriate costs of their production and to capitalize the net value of the production so ascertained at the appropriate rate.

4. That the defendant had a claim for damages because of severance although some of his remaining lands were not contiguous to the expropriated property.

5. That there are no uncertainties in the present case within the meaning of *The King* v. *Lavoie*, unreported, and the defendant is not entitled to an additional allowance for compulsory taking.

INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

The action was tried before the President of the Court at Ottawa.

J. J. McKenna and *K. E. Eaton* for plaintiff.

R. A. Hughes Q.C. and *J. P. M. Kelly* for defendant.

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

THE PRESIDENT, on the conclusion of the trial (November 4, 1952), delivered the following judgment:

The Information exhibited herein shows that the lands described in paragraph 2 thereof, belonging to the defendant, were taken by His late Majesty under the Expropriation Act, R.S.C. 1927, chapter 64, for the purposes of the public works of Canada and that the expropriation was completed by filing a plan and description of the said lands and other lands in the office of the Registrar of Deeds for the Registry Division of the County of Carleton in Ontario, in which the lands are situate, on September 7, 1950, pursuant to Section 9 of the Act. Thereupon the lands became vested in His Majesty and the defendant ceased to have any right, title or interest therein or thereto.

The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are brought for an adjudication thereof. The plaintiff by the amended Information offers the sum of $40,000, but the defendant by his statement of defence claims $100,000. There is thus a wide spread between the parties.

The expropriated property is the major portion of the farm formerly operated by the defendant, consisting of approximately 109 acres in Lot 15, Concession II, Rideau Front, in the Township of Gloucester, and 37 acres about 1½ miles away. The land taken on the expropriation has an area of 105 acres, leaving the defendant with 4 acres of low land at the southwest corner of his main farm and the 37 acres. The defendant thus has two claims for compensation, one for the value of the lands taken and the other for injurious affection of his remaining lands through their depreciation in value as the result of the severance.

The buildings on the expropriated property consisted of a substantial dwelling house, a large barn, a granary with a root house underneath and a lean-to implement shed, a machinery and wood shed, a hen house and a chicken coop.

The property is conveniently located about one and a half miles from the new limits of the City of Ottawa and about 8 miles from the By-ward market. It had a frontage of over 2,900 feet on a good road and had telephone, electricity and daily mail services.

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There was a variety of soils on the property, the high land being of sandy gravelly loam suitable for potatoes and corn and the low land of clay loam suitable for grain and hay. There were also from 20 to 25 acres of bush. In addition to growing potatoes, sweet corn, oats and hay the defendant kept from 20 to 35 head of Holstein cattle, a few hogs and some chickens.

The Court took a view of the expropriated property and the surrounding vicinity in the presence of counsel for the parties.

Opinion evidence of the value of the expropriated property or portions of it was given for the defendant by the defendant himself, Mr. A. Genier, Mr. B. Flood, Mr. A. M. Scarfe, and Mr. M. Quinn and for the plaintiff by Mr. J. A. Marois, Mr. E. R. Petry, Mr. A. Gagnon and Mr. L. H. Newman.

The defendant put the value of his high land at $600 per acre for 80 acres, his low land at from $200 to $300 per acre for 8 acres and his bush at $300 per acre for from 20 to 25 acres, but did not attempt a valuation of his buildings. Mr. Genier valued the high land at $400 per acre for 80 acres, the low land at $200 per acre for 4 acres and the bush at $300 per acre for 25 acres, making a valuation of $40,300 for the land, to which he added $24,000 for the buildings, making a total valuation of $64,300. But when he was asked what, in his opinion, a willing purchaser in a position similar to that of the defendant would have been willing to pay for the property in order to obtain it he said that such a person might have been willing to pay from $50,000 to $55,000 and a person wanting it as a farm would have been willing to pay about $40,000 for it. Mr. Scarfe valued the land at $500 per acre for 80 acres of high land, $150 per acre for 4 acres of low land near the bush and $300 per acre for 25 acres of bush. Mr. Flood considered the defendant's bush a very good one and said that $250 per acre would have been a good price for the right to cut it. Mr. Quinn also considered the defendant's bush a good one.

For the plaintiff, Mr. J. A. Marois put a valuation of $23,099.57 on the buildings. Mr. Petry appraised the buildings at $21,647.47 and the land at $14,700, being $140 per acre for 105 acres, making a total valuation of $36,347.47.

And Mr. Gagnon valued the defendant's farm at $170 per acre for 72 acres of high land and $110 per acre for 33 acres of low land and bush, making a total of $15,870 for the land, to which he added $20,700 as his estimate of the value of the buildings, making a total valuation of $36,570. Mr. Newman considered that Mr. Gagnon's figures for the value of the land were pretty close to the mark.

There was little difference of opinion about the value of the buildings. The most careful appraisal of them was that made by Mr. Marois, the particulars of which appear in his report, Exhibit 18. He took off the actual quantities in each building and applied the costs of material and labour that were current in Montreal in 1950, with an addition of the increase in prices of materials in Ottawa over those prevailing in Montreal but without any deduction in labour costs although these were lower in Ottawa than in Montreal. This gave him the reconstruction cost of the buildings as at the date of the expropriation. He then, after a careful consideration of the condition of the buildings, deducted what he considered an appropriate percentage of depreciation and arrived at his estimate of the actual value of the buildings as at the date of the expropriation. I am satisfied that Mr. Marois did his work carefully and that his valuation is very nearly correct.

The real dispute in this case is as to the value of the land and here there was a sharp divergence among the experts partly due to differing opinions as to the best use to which the property could have been put. It is well established that the value of expropriated property should be estimated on the basis of the most advantageous use that could have been made of it, whether present or future. This principle, frequently enunciated in this Court, is correctly stated in Nichols on Eminent Domain, 2nd edition, at page 665, where the author says:

> 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.

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But it must be remembered that, while consideration must be given to the future advantages and potentialities of the property, it is only the present value as at the date of the expropriation of such advantages and possibilities that falls to be determined: *The King* v. *Elgin Realty Company Limited* (1).

Mr. Genier and Mr. Scarfe based their valuations on two possible uses of the property, one as a farm and the other as a site for subdivision into small holdings. Mr. Genier thought that the property could have been subdivided into 5-acre or 3-acre lots. He put his valuation of $400 per acre for the high land on the assumption that such a subdivision was feasible, but was led on cross-examination to reduce his valuation to around $300 per acre if there was no subdivision possibility. Mr. Scarfe also put his valuation of the high land at $500 per acre on a similar basis. He said that he would have advised the defendant to break up his 80 acres into lots of from 2 to 10 acres each and stated that these could have been sold at from $500 to $1,000 per acre. On the other hand, Mr. Petry did not agree with the view that the property was suitable for subdivision purposes. He did not think that it would have been saleable in small lots at anywhere near $500 per acre. In his view, it could not have been developed with success for such purposes for there were many other properties in the Ottawa area available for subdivision that were better located than the expropriated property. Mr. Petry's opinion on this point is preferable to the assumptions of Mr. Genier and Mr. Scarfe.

Counsel for the defendant suggested that in estimating the value of the property consideration should be given to the possibility of it being required for airport extension but there was no evidence to support this. Mr. Petry said that he had not taken this possibility into account in his valuation. It should be noted, of course, that if the property was to be subdivided or its value assessed on the basis of the possibility of its being required for extension of the Uplands Air Port, which was the reason for its expropriation, the value of the buildings could not be added to the value of the land.

(1) (1943) S.C.R. 49.

The weight of evidence supports the view that the most advantageous use that could be made of the property was that which the defendant actually made of it, namely, as a farm and I so find. The Court must, therefore, estimate its value to the defendant on that basis.

The defendant acquired the farm, including the 37 acres, from his father on November 19, 1943, for $3,000, which is a far cry from the $100,000 claimed by him in 1952 for the expropriated portion of it, but explained that this consideration was paid pursuant to an agreement for sale made in 1933 and that prior thereto he had been working for his father for a long time. The amount of the purchase price is thus no test of the value of the property as at the date of the expropriation.

The defendant did not attempt to support his claim of $100,000 for his property and could not point to any sale of other property as a basis of his valuation of his high land at $600 per acre and his low land at from $200 to $300 per acre but sought to justify it by giving particulars of his returns from his crops of potatoes, corn, oats and hay and his sales of cream, cattle and chickens. His figures are subject to serious question by reason of the fact that he kept no records of his receipts or expenditures. Moreover, even if he could have verified his figures they would not have supported his valuations and I reject them.

Two approaches to the valuation of the expropriated property as a farm were made by the experts. One was an attempt to ascertain its market value by reference to the sales of farms and other property in the vicinity. There was a good deal of evidence of such sales. Many of these were at low prices due to special circumstances and give no aid in the establishment of market value. Other sales were of property that was not comparable with the expropriated property. There were no sales of comparable property that afforded any justification for the valuations of the defendant's experts. But some of the sales were used by Mr. Petry to support his valuation. He considered that there were three farms that were comparable to the defendant's and relied on the prices paid for them as tending to establish market value. The first was a sale on January 27, 1949, of 100 acres without any buildings by L. N. Potvin,

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the defendant's uncle, to S. Froman for $9,500, or $95 per acre; the second a sale on September 15, 1949, of 100 acres with buildings on it by J. E. Moodie to K. C. Moodie for $9,500 and the third a sale made subsequently to the date of the expropriation. I excluded evidence of this sale. I ruled that in proceedings to determine the amount of compensation to which the owner of expropriated property is entitled evidence of sales made after the date of expropriation is inadmissible. After careful consideration I have reached the conclusion that this view is preferable to that expressed in *The King* v. *Edwards* (1). There I referred to the serious doubts expressed by Taschereau J. of the Supreme Court of Canada in *The King* v. *Halin* (2) as to the legality of proof of sales made after the date of expropriation. In expressing these doubts Taschereau J. spoke also for Rinfret J., as he then was, and Rand J. I am now of the view that these doubts were well founded and that effect should be given to them, notwithstanding the opinion expressed by Anglin J. in *Toronto Suburban Railway Company* v. *Everson* (3). Section 47 of the Exchequer Court Act, R.S.C. 1927, chapter 34, directs the Court to estimate the value of the expropriated property as at the date of the expropriation. If the Court is to obey this statutory direction it must focus its attention on the situation as it stood on the date of expropriation and put itself in the same position as if it were trying the action immediately thereafter. In that case there could not be any evidence of subsequent sales. Why should the fact that the trial is held later let in evidence that did not then exist? Surely the determination of the market value of the property as at the date of its expropriation ought not to be made on differing sets of facts depending on when the trial is held. It should be made on the same set of facts regardless of when it is held. The contrary view invites the introduction of a dangerous element of confusion into what is a sufficiently difficult task without it. Moreover, it is, in my opinion, more consistent with principle to exclude evidence of sales made after the date of the expropriation than to admit it.

(1) (1946) Ex. C.R. 311.
(2) (1944) S.C.R. 119 at 125.
(3) (1917) 54 Can. S.C.R. 395 at 411.

Mr. Petry was therefore left with only the Froman and Moodie sales. The latter is of little help because the property was 3 miles away. As to the Froman farm the defendant explained that his uncle had sold it because of family reasons. The evidence establishes that while the soil on this farm was similar to that on the defendant's it had not been worked as well and was consequently not as fertile. This was Mr. Petry's reason for appraising the defendant's land at $140 per acre as compared with the $95 per acre which Mr. Froman had paid. Mr. Petry's valuation is open to criticism on the ground that there is no sound basis for measuring the amount of the additional allowance of $45 per acre for the greater fertility of the soil other than his own opinion. His valuation is thus, to some extent, a guess.

The other approach to the valuation of the defendant's farm was to measure its value by its productivity. This was the approach made by Mr. Gagnon, head of the Economic Science Department of the Agricultural College at Oka in Quebec. He has been on the staff of this college for approximately 30 years and has had wide experience in appraising farm lands. He inspected the expropriated property in June, 1951, while the defendant was still in possession of it and made his valuation subsequently. His view was that the farm was worth what it produced. He therefore sought to ascertain the gross receipts from its crop yields and then deduct the appropriate expenses. The net balance was regarded as the return on the capital involved as if it were interest. This was then capitalized at the appropriate rate. Mr. Gagnon explained in detail what he did. On his inspection of the farm there were no crops on the expropriated property but oats and hay were growing on the 27 acres. He ascertained that the high land of the expropriated property contained 72 or 73 acres, which figure of acreage I accept, and that then there was a slope to the west to the bush and that in addition to the bush there was low land to the extent of about 10 or 12 acres. He ascertained that the crops on the high land had consisted of potatoes, sweet corn, oats and hay in a four-crop rotation. He examined the soil, which he described in his report as sandy with a gravelly sub-soil, and found it well suited to the production on it having

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regard to the nearness of the Ottawa market. He then referred to information as to the yields of potatoes, grain and hay published by the Experimental Farm operated by the Department of Agriculture at Ottawa. He could not find any information there as to the yield of sweet corn and therefore referred to a study on corn production made in the west section of Quebec. Mr. Gagnon then estimated the average annual returns from the crops of potatoes, sweet corn, hay and oats with the appropriate prices and reached a gross return of $147.50 per acre. He then set out in detail the various items of cost of this production based on a bulletin called "Cost of Producing Crops in Eastern Canada" published by the Department of Agriculture, using the figures established for the Experimental Farm at Ottawa. These came to a total of $139 per acre, leaving a net return of $8.50 per acre. This amount represented a return of 5 per cent on a capital of $170 per acre and Mr. Gagnon valued the high land accordingly. He followed a similar course in arriving at his valuation of the lowland at $110 per acre and attributed a similar value per acre to the bush.

Mr. Gagnon's valuation is preferable to Mr. Petry's in that it does not depend on individual opinion but rests on the scientific basis that the value of a farm to its owner depends on its earning power, measured by its actual crop production, a fact that lends itself to reasonably precise ascertainment in cases where there is reliable information as to crop yields, prices of produce and costs of production.

This is the first case before me in which the valuation of an expropriated farm has been made on the basis used by Mr. Gagnon. While this method of appraising the value of farm property is comparatively new it is gaining acceptance: vide McMichael's Appraising Manual, 3rd edition, page 281. It is easy to appreciate why this should be so. It is, in my opinion, a sound approach to the determination of the value of an expropriated farm to its former owner to ascertain its productivity by computing the average annual gross revenues from its crop yields and

deducting therefrom the appropriate costs of their production and to capitalize the net value of the production so ascertained at the appropriate rate.

There must be many cases where the value of a farm can be more nearly accurately determined by this method of appraisal than by any other and I am of the view that the present case is one of them. I was favourably impressed with the manner in which Mr. Gagnon gave his evidence and am satisfied that he made a careful study of all the relevant factors. While there may be some criticism of a few items of his cost of production his estimates of the various crop yields were abundantly fair to the defendant. I accept his valuations of the high and low lands of the expropriated property as being very nearly correct. I am strengthened in this view by the fact that such an eminent person as Mr. Newman considered Mr. Gagnon's figures pretty close to the mark.

I am not, however, convinced that Mr. Gagnon was correct in attributing the same value to the bush as he did to the low land. Certainly the method that he used in appraising the latter is not applicable to the bush. There are conflicting statements as to the quality and size of the trees in the bush and its value per acre but the weight of evidence is strongly against Mr. Gagnon's valuation. In my opinion, his valuation of the bush, approximately 25 acres, should be substantially increased.

On the evidence, as I accept it, with some addition in favour of the defendant, I estimate the value of the expropriated property to the defendant as at the date of the expropriation at $42,000. This, in my judgment, amply covers all the factors of value to which the defendant is entitled for the land taken from him and I award this amount accordingly.

I now come to the defendant's claim for compensation for the injurious affection of his remaining lands by reason of their severance from the expropriated property. Although some of these lands, namely, the 37 acres, were not contiguous to the expropriated property I am satisfied that the

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defendant has a claim for damages because of severance on grounds similar to those discussed in *The King* v. *Consolidated Motors Limited* (1). There was, however, a dearth of evidence as to the depreciation in value of the remaining lands, which is the measure of the damages to which the owner is entitled, and I allowed the defendant to re-open his case for the necessary proof on this point. On the resumption of the trial counsel for the defendant had to rely mainly on the evidence of Mr. Petry whom he called as his own witness. Mr. Petry fairly agreed that there had been a 25 per cent depreciation in the value of the 37 acres and there was agreement also that the depreciation in the value of the 4 acres came to 75 per cent. I allow the defendant $1,500 as damages for this portion of his claim.

Counsel for the defendant made a strong plea that this was a case in which there should be an additional allowance of 10 per cent for compulsory taking. I am unable to agree. I dealt with the question of this allowance in *The Queen* v. *Sisters of Charity of Providence* (2) and expressed the view that the leading Canadian case on the subject was *The King* v. *Lavoie*, decided by the Supreme Court of Canada on December 18, 1950. Unfortunately, this case has not been reported. There Taschereau J., delivering the unanimous judgment of the Supreme Court of Canada, laid down the following rule:

> Ce montant additionel de 10% n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter à l'indemnité. (*Irving Oil Co.* v. *The King* 1946, S.C.R. 551; *Diggon-Hibben Ltd.* v. *The King* 1949, S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle.

It seems clear to me that by the phrase "certaines incertitudes" Taschereau J. meant uncertainties of the kind found in the *Irving Oil* and *Diggon Hibben* cases, to which he referred. These do not exist in the present case and the defendant's plea for an additional allowance for compulsory taking must be denied.

(1) (1949) Ex. C.R. 254.

(2) (1952) Ex. C.R. 113.

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There remains only the question of interest. The defendant remained in undisturbed possession of his former property without payment of any rent up to September 2, 1951. Up to this date, in accordance with the settled practice of this Court, he is not entitled to any interest, but since that date he is entitled to interest at the rate of 5 per cent per annum on $43,500 to this date.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in Her Majesty as from September 7, 1950; that the amount of compensation to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $43,500, with interest thereon at the rate of 5 per cent per annum from September 2, 1951 to this date: and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.
