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BETWEEN:

FRANCIS B. MATHYS..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1933  
Oct. 4, 5, 6.

1934  
Mar. 14, 15.  
July 9.

*Expropriation—Abandonment—The Expropriation Act—Compensation—Interest.*

In March, 1929, land belonging to the suppliant in Montreal was expropriated for a public purpose, and became vested in the Crown; the amount of compensation was not agreed upon. After the expropriation, suppliant was permitted to continue in occupation of his

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property, and was authorized to receive and collect rents. In March, 1932, the Crown abandoned the expropriation. The suppliant claims *inter alia* as compensation the difference between the value of the property at the date of expropriation, and its value at the date it reverted back to him.

*Held:* That the value of the land at the time of taking, and at the time of the reversion, must be taken into account in connection with all the other circumstances in determining the amount to be paid. *Gibb v. The King* (1914) Ex. C.R. 157; (1915) 52 S.C.R. 402; 1918 A.C. 915, followed.

2. That suppliant is entitled to interest upon any compensation allowed, from the date of the abandonment of the expropriation.

PETITION OF RIGHT by suppliant claiming compensation arising out of an expropriation of certain land by the Crown, which was subsequently abandoned.

The case was heard before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

*F. A. Beique, K.C.* and *W. R. Henry* for suppliant.

*A. R. Holden, K.C.* and *C. T. Ballantyne* for respondent.

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

THE PRESIDENT, now (July 9, 1934) delivered the following judgment:

This is a petition of right brought by the suppliant, Mathys. In March, 1929, the Crown expropriated, for the use and benefit of the Canadian National Railways and for the purposes of a Railway Terminal Scheme, under the provisions of The Expropriation Act, a property owned by the suppliant located at the southeast corner of McGill College avenue and Burnside street, in the City of Montreal, consisting of three lots of land, comprising in all approximately, 7,186 square feet, together with the buildings thereon. This property was purchased by the suppliant in 1913-14, paying therefor the sum of \$85,000, and he subsequently expended upon the buildings by way of improvements, some \$30,000. The buildings were, I think, originally erected as three separate dwelling houses, but may here be regarded as one building. At the time of the expropriation the building had been altered so as to contain some small stores on the ground floor, and apartments on the upper floors. The area in the vicinity of the expropriated property was being rapidly commercialized,

though still a residential area, and this was particularly true of both sides of McGill College avenue, between St. Catherine street and Burnside street. It had been decided in December, 1929, to widen Burnside street on the northerly side, and this, I think, would tend to enhance the value of the property taken, but the project apparently has been postponed for the present. When the suppliant purchased this property, it was with the intention of erecting sometime a large building thereon, a project which would appear prudent in view of the fact that the land had a substantial market value over and above the building on it; the property is within a growing shopping district, and within a few hundred feet of perhaps the most highly developed shopping street in Montreal, St. Catherine street, which street runs parallel to Burnside street and connected by McGill College avenue. All the properties facing on McGill College avenue, between St. Catherine and Burnside streets, were expropriated for the same purpose, and were eventually taken over by the Crown, excepting the suppliant's property, and, I think, one other.

After the expropriation, the suppliant was permitted to continue in occupation of his property, and was authorized to receive and collect the rents, and to grant leases for a limited period but not exceeding three years, from May 1, 1929. In March, 1932, the Crown abandoned the expropriation, and the suppliant was so notified by the proper authorities, and thereby the legal title to the property taken reverted to the suppliant, the title to the property having been in the Crown for precisely three years, and three days. Broadly speaking, the suppliant by his petition claims by way of compensation or damages, the difference between the value of the property at the date of expropriation, and its value at the date it reverted back to him. The suppliant also claims compensation for legal and other expenses incurred by him in the preparation and prosecution of his claim for compensation, following the expropriation, altogether nearly \$10,000. The suppliant claims, in his petition, the sum of \$350,000 with interest less the net amount received from rentals during the period the title to the property was in the Crown, amounting to almost \$27,000, or about \$9,000 per year, and altogether.

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including the special claim mentioned, the total amount of compensation claimed in the petition is over \$403,000.

As already suggested, the suppliant's claim to compensation or damages rests upon the ground that when the property vested in the Crown, the property was worth so much, and that he thereupon became entitled to the agreed or adjudged value of the property as of that date, but that at the date of revestment the value of the property had depreciated, and that the difference was substantially the true measure of compensation or damages. We may now direct our attention to certain relevant provisions of the Expropriation Act. Sec. 9 of the Act is as follows:—

9. Land taken for the use of His Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to His Majesty is made and executed by the person having the power to make such deed or conveyance, \* \* \* a plan and description of such land signed by the Minister \* \* \* shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate, and such land, by such deposit, shall thereupon become and remain vested in His Majesty.

From this it consequently follows that, upon the plan and description of the property taken being deposited as required by the Act, the Crown became the legal owner of the property, and was entitled to exercise over the same all the rights and privileges inherent in that ownership. Though the suppliant was permitted to remain in possession of the property, that did not alter the fact that the suppliant had been deprived of the legal ownership of his property.

Sec. 23 of the Expropriation Act reads as follows:—

23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property \* \* \*

From this section of the Act it was contended, on behalf of the suppliant, that when his ownership in the property ceased and the same vested in His Majesty, the compensation money ultimately to be adjudged, stood in the stead of the property.

Sec. 24 of the Act relates to the abandonment of expropriated property. The relevant provisions of that section are as follows:—

24. Whenever, from time to time, or at any time before the compensation money has been actually paid any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work \* \* \* the minister may,

by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, \* \* \* \*

2. Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall revert in the person from whom it was taken or in those entitled to claim under him.

4. The fact of such abandonment or reversion shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

In the construction of the several provisions of the Act just mentioned, the suppliant relies upon the case of *Gibb v. The King* (1), and it was agreed by counsel that the judgment of the Supreme Court of Canada in this case, which was sustained by the Judicial Committee of the Privy Council, was applicable here.

The facts of the *Gibb* case are briefly the following: For the purposes of the National Transcontinental Railway as a site for a railway station, at Quebec, the Champlain Market, and the property of Gibb and others, had been expropriated. In the Information of the Crown, the sum of \$61,747.75 was tendered Gibb as compensation for the property taken which, in his statement of defence, he accepted. Later, the expropriation was abandoned. Gibb, in the meanwhile, had been allowed to remain in possession of the property. Following the abandonment, Gibb, by a petition of right, claimed as compensation or damages, the difference between the amount tendered and the value of the property at the time of the abandonment, \$30,000, it being alleged that the depreciation was due to the fact that the railway station project had been abandoned, and that the Champlain Market had been demolished, as I understand it. The learned trial judge allowed only the sum of \$3,000, as damages arising from interference with certain tenancies unexpired when the property was taken. The case then went on appeal to the Supreme Court of Canada. Fitzpatrick C.J. observed concerning the judgment of the learned trial judge:—

The learned judge (trial judge) suggests that if the Crown is to bear decrease in the value of the land, it should benefit by any appreciation. He forgets, however, that this is an entirely one sided power and that while the Crown is not obliged to exercise it and presumably would only do so when such exercise would be beneficial to its interests, it would

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(1) (1914) 15 Ex. C.R. 157; (1915) 52 S.C.R. 402; and 1918 A.C. p. 915.

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obviously be impossible to force upon the former owner the property for which he may have no use and which he may not want and at the same time call upon him to pay for getting it a sum in excess of the compensation to which he was entitled on the expropriation.

Again he said:

The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way, but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.

The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer also to sec. 47 of the Exchequer Court Act \* \* \* If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such reversion is an element to be considered in estimating the amount to be paid to him.

Upon appeal from the Supreme Court of Canada the Judicial Committee of the Privy Council held that the judgment of Fitzpatrick C.J. was "in all respects correct." Lord Buckmaster, who delivered the judgment of the Judicial Committee, said:—

Their Lordships are therefore unable to accept the view that the true measure of the appellants' right is something in the nature of a claim for damages for disturbing or injuriously affecting. In fact, so far as the particular piece of land is concerned, the Crown does not appear to have done any act upon the land itself that would either damage or injuriously affect its value. Its advisers have been enabled by virtue of the section to change their mind and give back the property which they originally took, and it is this fact which must be considered with other circumstances in determining the original amount of compensation which they became liable to pay. Their Lordships think, therefore, that the judgment of Fitzpatrick C.J. was accurate in all respects, and that this case should be remitted to the Exchequer Court to determine and assess the compensation payable upon the footing that the fact that the land has been revested shall be taken into account in connection with all the other circumstances in determining the amount to be paid.

It would seem therefore that the *Gibb* case lays down the principle that in a case of this kind, that the value of the land at the time of taking, and at the time of the reversion, must be taken into account "in connection with all the other circumstances in determining the amount to be paid."

Before proceeding further, it might be convenient here to refer briefly to what might be termed the minor issues raised in the case. The abandonment of the expropriation here was due to the temporary or permanent abandonment of the Canadian National Railways Terminal Scheme at Montreal, but while abandoning the expropriation of the suppliant's property, the Crown, as I understand it, concluded subsequently the matter of compensation, by agree-

ment with the owners of other expropriated properties on McGill College avenue, and did not abandon these properties, and it is urged that this fact, in some way or other, strengthens the claim which the suppliant makes here. Now that fact seems to me to be irrelevant to the issue here. It was within the right of the Crown to consummate some of the expropriations made, by amicable arrangements with the owners as to compensation, and to abandon the expropriation of the suppliant's property. Then considerable evidence was offered in an attempt to show that the building foundation and sub-soil of the suppliant's property had been injuriously affected by the excavations made in connection with the Railway Terminal Scheme, some short distance from the suppliant's property. I do not think the evidence sustains that contention, and upon the argument, heard long after the trial, suppliant's counsel did not press this point, and I treat it as having been abandoned. It was urged on behalf of the Crown that when the suppliant purchased the property in question he had in mind the erection of a large and modern building on the lands acquired, and that this project not having been carried out, the value of the property at the time of the expropriation, or the abandonment, was in some way affected by this fact; I am not sure that I properly appreciate the point. In any event, I think, the suppliant had a right to postpone or abandon altogether this project, and I think it is utterly irrelevant to the point to be determined. We may now proceed to a consideration of the question as to whether the suppliant is entitled to compensation, and if so in what amount.

Turning now to the evidence adduced at the trial by both parties. Some witnesses testified as to the value of the land, others the building, and others the combined value of the land and building, at the dates of the expropriation and the abandonment, respectively. I do not propose to discuss in detail the evidence of the witnesses that were called. I am prepared to hold that the market value of the property in question, and property on McGill College avenue, and generally property in the same vicinity, increased gradually in value from the time the suppliant purchased his property and down to the date of its expropriation, and that between 1925 and 1929 the increase was

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probably rather more marked. The suppliant's witnesses placed this increase at anywhere from fifty per cent to one hundred per cent; and briefly stated, they testified that the total value of the suppliant's property, in 1929, was in the vicinity of \$300,000, some placing it below and others above, that figure. The Crown's witnesses put the increase in value of the property, since the purchase by the suppliant, much below the minimum figure mentioned by the suppliant's witnesses, some fifteen per cent more and less, and they placed the value of the land and building, in 1929, by comparison with other sales in the vicinity, and upon other grounds, at figures ranging from \$108,000 up to \$143,000, the latter figure being an estimate made by Mr. Simpson, an experienced real estate broker, a witness called by the Crown. From 1929, down to the date of the revesting, I am inclined to think that the market value of the suppliant's property, and other properties in that immediate vicinity, in fact anywhere in the City of Montreal, had fallen to some extent, although some of the Crown's witnesses testified that there was practically no depreciation in real estate values between March, 1929, and March, 1932, and that no fall in rentals took place until after May 1, 1932.

As to the market value of the suppliant's property, at the date of expropriation, I am disposed to accept the evidence of the Crown's witnesses as affording the best criterion of such value. I think the estimates of market values made by the suppliant's witnesses are much exaggerated, and altogether too speculative. In my opinion, the amount mentioned by Mr. Simpson is a fair and reasonable one, and I am prepared to adopt it as a fair approximation of the value of the property, at that date. It is not, in my opinion, a speculative figure, neither is it one unduly depressed. Up to that date, I think, it may be fairly said, that the value of the land had increased, while the value of the building had decreased. The only sale of the property likely to be consummated within the time material here, would be to a buyer prepared and able to finance the erection of a new building on the land. In March, 1925, the suppliant gave a written option of purchase of this property, in the sum of \$175,000, Eaton & Company being the prospective purchaser, but the



option was not exercised. Whether the option was not exercised because the consideration stated for the property, really the land, was excessive, or whatever the cause, is unknown. The selling price mentioned in the option then represents no more than suppliant's valuation of his own property at that time, or the price which he hoped the prospective buyer might pay for it, and that is all that can be inferred from the option. At the date of the abandonment, the effective market value of the property had no doubt declined, there being little or no demand for real estate properties, although some of the Crown's witnesses thought the decline very little, if any. The difficulty confronting one here is that at that date, 1932, and going back beyond that for a short time, there was no active market demand in Montreal for real estate properties of any kind, at any but sacrifice figures, for causes which were then, and now, well known and applicable to the whole of Canada; all real estate owners in most parts of Canada were then, and are now, in the same position in this regard. How far causes, producing a decline in real estate values, or, effecting practically a total cessation of real estate transactions, and which condition is generally applicable to all real property, should be considered, is perhaps a debatable point, but as it was not specifically raised before me, I refrain from expressing any opinion concerning it. In many instances, real estate values in Montreal, in 1929, were probably elevated above their true market or investment values, they were being given a speculative value, while possibly in 1932, they were perhaps unduly depressed because of the lack of market demands, although I have no doubt many would assert, and with some justification, that the real estate values of 1932, in the area in question, represented their true and normal value in the eyes of experienced and prudent purchasers or investors; in fact that was in effect stated by some of the Crown's witnesses. However, it is a fact, I think, which cannot be disregarded, that the market value of the suppliant's property in March, 1932, was something less than it was in March, 1929. The suppliant was entitled to have the compensation fixed as of the date of expropriation; a sequence of events has made this hardly possible, and on this account, and according to the rule laid

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down in the *Gibb* case, I think, the suppliant is entitled to some allowance or compensation. Taking into consideration every circumstance properly involved in the case, flowing directly and indirectly from the deprivation of the suppliant's title to his property for three years, and the revestment of that title in the suppliant, I think, if I allow the suppliant \$35,000, he shall have been fairly dealt with, and that amount I allow.

There are two other matters which are the subject matter of claims for compensation, in this petition. The suppliant, as I have already stated, made efforts, on two separate occasions, to launch petition of right proceedings, in order to accelerate and conclude the matter of the settlement of the compensation to which he was in fact and law entitled, on account of the expropriation, but in each instance he was refused the fiat. The unexplained delay in submitting the matter of compensation to the court, and the refusal of a fiat in connection with his petitions of right, amply justified, I think, the engagement of the services of a solicitor, by the suppliant. It was agreed by counsel for the Crown, at the trial, that the sum of \$1,000 might be allowed on account of the legal services rendered by Mr. Henry to the suppliant, in this connection. This, I think, is a very reasonable allowance, and I allow it; I understood Mr. Henry to acquiesce in this amount, and I hope I have not misunderstood him. Then the suppliant, with the concurrence of Mr. Clarke, Chief Land Surveyor of the Canadian National Railways, charged with the duty of negotiating with the owners of expropriated properties for an amicable arrangement of the amount of compensation to be paid them, retained the services of several real estate and building experts to assist him in the preparation of his claim for compensation, either in connection with his negotiations for a settlement with Mr. Clarke, or in the preparation of his case before the court. According to the evidence very substantial bills were rendered by such persons to the suppliant, for such services, amounting to some \$7,800. It strikes me that at this stage the suppliant went to unnecessary expense. I see no reason for having incurred such an amount of expense at that time, either to assist him in his negotiations with Mr. Clarke, or, in the preparation of his claim for compensation to be presented

to the court, providing a fiat was granted; this has no reference to the petition now under consideration. Mr. Holden agreed, however, that \$1,000 might be allowed, in this connection, and that amount I allow; and I think it is sufficient in the circumstances.

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The suppliant will therefore have judgment for \$37,000, with interest at five per cent from the date of the revesting of the property upon the sum of \$35,000. I think in a case of this kind it is within the contemplation of The Expropriation Act that the suppliant should have interest from the date of the abandonment of the expropriation, upon any compensation allowed, just as in the case of an expropriation. I know of no authority directly upon the point, but reasoning by analogy, I think interest should be allowed. From the date of the expropriation until the date of the abandonment, the suppliant was in possession of his property and he had the benefit of all the rentals received. In such cases interest, so far as I know, is not allowed upon any compensation agreed or adjudged to be paid the owner of the property expropriated.

The suppliant will have the costs of his petition.

*Judgment accordingly.*