1949

April 28-29

June 15

BETWEEN:

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

AND

CONSOLIDATED MOTORS LIMITED, ..... DEFENDANT.

*Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(b)—Right to compensation for damage by severance—Measure of damages is depreciation in value of remaining property—Physical contiguity of lands or unity of actual use not necessary if there is unity of ownership conducing to advantage or protection of property as one holding or possession and control enhancing its value as a whole.*

Plaintiff expropriated part of the defendant's property in the City of Winnipeg. The action was taken to obtain the adjudication of the Court as to the amount of compensation payable to the owner for the property taken and the damage to the remaining property by the severance of the expropriated part.

*Held:* That property may be injuriously affected within the meaning of section 19(b) of the Exchequer Court Act by the severance of other property from it by expropriation and the measure of damages is the depreciation in value of the remaining property in consequence thereof.

2. That where part of an owner's property has been expropriated and he makes a claim for damage to his remaining property on the ground that it has been injuriously affected by the severance of the expropriated property he need not show that the expropriated property and his remaining property were in physical contiguity or that there was unity in their actual use; it is enough if he can show that the unity of their ownership conduced to the advantage or protection of the property as one holding or that the possession and control of each part gave an enhanced value to the property as a whole, and that the severance of the expropriated property prejudiced him in his ability to use or dispose of the remaining property or otherwise depreciated its value.

3. That where an owner of property at or about the time of the expropriation has stated or declared the value of his property he ought not to be allowed to contend in proceedings taken to determine the amount of compensation payable to him that his property was of much greater value at the date of the expropriation either by itself or as conducing to the advantage or protection of his property as one holding or as giving an enhanced value to his property as a whole.

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

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

*C. B. Philp K.C.* and *A. H. Laidlaw* for plaintiff.

*W. A. Johnston K.C.* for defendant.

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

The PRESIDENT now (June 15, 1949) delivered the following judgment:

The Information exhibited herein shows that the defendant's lands described in paragraph 2 thereof were taken for the purposes of the public works of Canada by His Majesty the King under the Expropriation Act, R.S.C. 1927, chap. 64. The expropriation was completed on April 26, 1948, by depositing a plan and description of the lands in the Land Titles Office for the District of Winnipeg, being the office of the registrar of deeds for the registration division in which the lands are situate, as required by section 9 of the Act. Thereupon the said lands became vested in His Majesty and all the right, title or interest of the defendant thereto or therein was extinguished and converted by section 23 of the Act into a claim to compensation money therefor.

The parties have not been able to agree upon the amount of compensation money to be paid and these proceedings are brought for an adjudication thereof. The plaintiff offers the sum of $6,005 but the defendant claims $25,000 together with interest.

At the trial the defendant obtained leave to amend its statement of defence *inter alia* by adding thereto paragraph 14A reading as follows:

> The defendant says further that it owns additional lands in close proximity to the said lands being expropriated, which additional lands will be greatly reduced in value to the defendant by reason of this expropriation and the loss to the defendant of the lands now being expropriated and the defendant is thereby entitled to compensation in respect of such reduced value.

The defendant thus makes two claims for compensation, one for the value of the expropriated property and the other for the depreciation in value of its other lands by reason of the severance of the expropriated parcel therefrom.

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The expropriated property is on the east side of Main Street just a short distance north of York Avenue, with a frontage of 54·7 feet on Main Street and a depth of 120 feet to a paved lane at the rear between it and the Canadian National Railway embankment. The defendant purchased it from the City of Winnipeg in the spring of 1946 for $4,387, the city having acquired it at a tax sale many years previously. Prior to such purchase and since 1938 the defendant had been a lessee from the city. It had never used the property, which was vacant land, for its own purposes but had sub-let or let it to others, first in 1938 to Breen Motors Limited who gave up their sub-lease during the war, then in 1943 and 1944 to an auto wrecking company which used it for storing or parking their own cars, and finally in 1945 to Mr. N. D. Peters who used it for the display and sale of his own used cars. After the defendant became the owner of the property it let it to Mr. Peters, the tenancy being terminable on 30 days' notice and the rent reserved being $50 per month. At the date of the expropriation Mr. Peters was in occupation of it under this lease.

The defendant's claim for the value of the expropriated property presents no difficulty. It is just a few feet north of the property referred to in the case of *The King* v. *City of Winnipeg and George Hirtle and Robert Miller,* in which I gave judgment on May 6, 1949. It was agreed between counsel that all the evidence adduced in that case, except that of George Hirtle, should be considered as applicable in this one. Under the circumstances, the reasons for judgment in that case are, *mutatis mutandis,* applicable here and are incorporated herewith. In view of the fact that the properties in the two cases are only just a few feet apart I find no justification for ascribing a higher value per foot for the one than for the other. I, therefore, estimate the value of the expropriated property in this case as at the date of its expropriation at $150 per foot of frontage on Main Street or a total of $8,205.

The defendant's claim for compensation for the damage resulting from the severance of the expropriated property from its other lands is not as simple. The facts on which it is based were given by Mr. C. D. Roblin, the defendant's president and general manager, as follows. The defendant

acquired its first property on the east side of Main Street, being the most northerly 100 feet of its holdings, about 1920 and erected a two-storey building on it, which may be called its main premises. On these premises to which it moved about 1921 it had its office and carried on its retail sales of Studebaker and Willys cars and operated its service garage. A short time later it bought 50 feet immediately south of its main premises on which it erected an additional two-storey building with a party wall between it and the first one. In this building it operated its wholesale parts division, dealing in automotive parts and supplies for all makes of cars, which it ran as an independent operation separate from its retail sales. The wholesale parts division was really a business within a business under a separate manager and with its own accounting. In this second building some space on the ground floor was rented to Consolidated Industries Limited, a subsidiary company dealing in household appliances, and part of the second floor was used as a paint and fender shop. The two buildings had a continuous frontage of 150 feet on Main Street with a communicating door between them, while at the same time there was a desirable separation for the parts division which catered to the automotive trade generally, including customers who dealt in cars of makes other than those for which the defendant had its agency. The defendant is also the owner of other additional property with a frontage of 250 feet on Main Street immediately south of its wholesale parts division building. It had this under lease as far back as 1928 or 1930 and purchased it in 1939, the northerly 50 feet (lot 19) from the Hudson's Bay Company for $110 per foot and the southerly 200 feet (lots 15-18) from the City of Winnipeg for $12,800. Finally, the defendant acquired the expropriated property, as already explained, first by lease in 1938 and then by purchase in 1946. Between the southern limit of the 250 foot property and the northern limit of the expropriated property there is a frontage of 70 feet on Main Street on which there are two buildings belonging to persons other than the defendant and in which it has no interest except that its subsidiary, Consolidated Industries Limited, has, since the date of the expropriation, rented the most northerly 15 feet in the building immediately south of the 250 foot property for

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the sale of Austin cars for which it has an agency. At the date of the expropriation the expropriated property was, as already stated, leased to Mr. N. D. Peters.

After the defendant had been in its main premises and its wholesale parts division building for some years it appeared that it might have to expand or change its method of operation. It was its experience and that of other automobile sales companies that from a service aspect the operation of business on more than one floor was uneconomic. The trend in the industry was towards single-storey premises. A change to this type of premises required more land and the defendant, which was not yet ready to make the change, took steps to get control of the necessary land. It was for this purpose that it leased and subsequently purchased the 250 foot property to the south of its buildings and later the expropriated property. When it acquired the 250 foot property in 1939 it used the north 50 feet of it for its own purposes and leased the rest. The outbreak of war postponed its plans but when the war was over it proceeded with them and in 1946 built the first unit of its new buildings, a service station with facilities for light repairs. This is a single-storey building, 80 feet long and set back 30 feet from the street. The north end of it is 120 feet south of the wholesale parts division building. Of this the north 50 feet was reserved as a lot for the display of the defendant's own used cars taken in trade and for customers' parking. The rest was kept for the proposed new garage and showroom, all to be on one floor. The 50 feet south of the new service station was used as a parking lot. There was no provision in the defendant's plans for the development of its 250 foot property for a new wholesale parts division building. It intended to put such a building on the expropriated property which it had acquired for that purpose. It would have preferred to secure the frontage immediately south of its 250 foot property but there was not a great handicap in having a separate property for it. Indeed, there would be some advantage in that, since it would give a more separate operation for its wholesale parts business and this would be helpful in dealing with customers who were dealers in competing cars. Obviously, the taking of the expropriated property put an end to the defendant's plan to put a new wholesale

parts division building on it. It contends that it is entitled to compensation for the damage resulting to it therefrom by reason of the severance of the expropriated property from its other lands.

In *The King* v. *Woods Manufacturing Co. Ltd.* (1) I had to consider a claim for damage by severance and was satisfied that such a claim is within the ambit of section 19(b) of The Exchequer Court Act, R.S.C. 1927, chap. 34, which provides as follows:

> 19. The Exchequer Court shall also have exclusive jurisdiction to hear and determine the following matters:
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

While there is no specific mention of damage by severance as a cause of action in either the Exchequer Court Act or the Expropriation Act, there is no limitation of the meaning of the words "injuriously affected" in section 19(b) of the Exchequer Court Act that would exclude it. If an owner's property is expropriated and his remaining property is depreciated in value as the result of such expropriation, surely it has been "injuriously affected" thereby. There is, therefore, no need of any specific mention of damage by severance as a cause of action, since one of the ways in which an owner's property may be injuriously affected within the meaning of section 19(b) of the Exchequer Court Act is by the severance of other property from it by expropriation. That there is a cause of action for damage to property injuriously affected by the severance from it of other property by expropriation and that the measure of damages is the depreciation in value of the remaining property in consequence thereof is established by the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (2).

Whether in the present case the facts support the defendant's claim presents a question that is not free from difficulty.

There are helpful English decisions under section 49 of the Lands Clauses Consolidation Act, 1845. For example, in *Holt* v. *Gas Light and Coke Co.* (3) it was held that where the lands injuriously affected by the taking of the expropriated property and the expropriated property were

(1) (1949) Ex. C.R. 9 at 20.
(2) (1922) 2 A.C. 315.
(3) (1872) 7 Q.B. 728.

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held for the same common object the owner's right to compensation for damage by the severance of the expropriated property was not affected by the fact that the properties were not held under the same title and were not in physical contiguity. That lands can be "held with" other lands within the meaning of section 49 of the Lands Clauses Consolidation Act, 1945, in such a way as to give their owner a right of compensation for the damage sustained by him by reason of their severance from his other lands, even although the lands were not physically contiguous, was settled beyond dispute by the House of Lords in *Cowper Essex* v. *Local Board for Action* (1). In that case part of the owner's land, which was laid out as a building estate, was taken by a local board under an Act incorporating the Lands Clauses Consolidation Act, 1845, for the purposes of a sewage farm, whereby the value of other parts of the owner's land was depreciated. These other parts were situated near the part so taken but separated from it by intervening land, on which there was a railway, belonging to other persons. The Queen's Bench Division held that the owner was entitled to compensation for the damage to his other lands. The Court of Appeal (2) unanimously reversed this decision mainly on the ground that since the expropriated land was separated from the owner's other lands by the railway there had been no severance of his lands by the expropriation. The House of Lords unanimously reversed the decision of the Court of Appeal and laid down the principles to be applied in determining whether an owner, part of whose lands has been expropriated, has a right to compensation for damage to his remaining lands by reason of the taking of the expropriated land. Lord Halsbury L.C. made it clear that it was not necessary that the expropriated part should have been physically contiguous to the remaining lands. The issue was whether the unity of the estate had been interfered with and in each case this was a question of fact. Lord Watson was of a similar view. At page 167, he said:

> What lands are to be regarded as "severed" from those taken, is, in my opinion, a question which must depend upon the circumstances of each case. The fact that lands are held under the same title is not enough to establish that they are held "with" each other, in the sense of the act;

(1) (1889) 14 A.C. 154. (2) (1886) 17 Q.B.D. 447.

and the fact that a line of railway runs through them is, in my opinion, as little conclusive that they are not. I shall not attempt to lay down any general rule upon this matter.

And then he stated:

But I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation

Lord Macnaghten put the test as follows, at page 175:

Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership conduces to the advantage or protection of the property as one holding. That condition seems to be implied Otherwise the owner could hardly sustain injury by reason of the execution of the works on the lands taken

Although section 49 of the Lands Clauses Consolidation Act, 1845, has no specific counterpart in any Canadian Act the principles laid down in the *Cowper Essex* case (*supra*) to which I have referred are, I think, applicable in determining whether an owner has a right under section 19(b) of the Exchequer Court Act to compensation for damage to his property on the ground that it has been injuriously affected by the severance from it by expropriation of property formerly owned by him. They have been adopted by the Judicial Committee of the Privy Council in two Canadian cases. In *Holditch* v. *Canadian Northern Ontario Railway* (1) Lord Summer, delivering the judgment of the Board, said, at page 542:

The basis of a claim for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

He also gave formal, if indirect, approval of the principles laid down in the *Cowper Essex* case (*supra*) to which I have referred. It had been argued before the Board that the case before it was governed by that case but their Lordships were unable to agree in this view. Lord Summer said of the *Cowper Essex* case (*supra*), at page 543:

In that case the building owner retained such control over the development and use alike of the parcels sold and of the parcels unsold

(1) (1916) A C. 536.

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as made a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of land and his ability to deal as a whole with both it and the land taken before such compulsory taking.

There was also an acceptance of the test used by Lord Macnaghten that it is enough "if the unity of ownership conduces to the advantage or protection of the property as one holding" and a finding that in the case under review the facts did not meet such a test. Finally, the *Cowper Essex* case (*supra*) was expressly followed in *Sisters of Charity of Rockingham* v. *The King* (*supra*). There Lord Parmoor, speaking for the Board, adopted Lord Macnaghten's test and also that of Lord Watson.

On the argument I was rather of the view that since there was no unity of use of the expropriated property and the defendant's other lands at the date of the expropriation the defendant had no cause of action for damage by severance. There is some support for this view in *Holt* v. *Gas Light and Coke Co.* (*supra*) but I have since come to the conclusion from the authorities cited that unity of actual use is not necessary provided that there is the unity of ownership and of possession and control that Lord Macnaghten and Lord Watson referred to. It is established that where part of an owner's property has been expropriated and he makes a claim for damage to his remaining property on the ground that it has been injuriously affected by the severance of the expropriated property he need not show that the expropriated property and his remaining property were in physical contiguity or that there was unity in their actual use; it is enough if he can show that the unity of their ownership conduced to the advantage or protection of the property as one holding or that the possession and control of each part gave an enhanced value to the property as a whole, and that the severance of the expropriated property prejudiced him in his ability to use or dispose of the remaining property or otherwise depreciated its value.

On this view of the law the defendant is, I think, entitled to succeed in its claim. I accept Mr. Roblin's statement that the defendant acquired the expropriated property solely for the purpose of having control of it for use in its new construction programme in the future. It is true that

it could continue to use its present wholesale parts division building, but it is also clear that it would be more advantageous to sell it along with its main premises as one unit. That is what the defendant intended to do and then build a new wholesale parts division building on the expropriated property. This it cannot now do. Under the circumstances, I think that it may fairly be held that the defendant's unity of ownership of the expropriated property and its other lands conduced to the advantage of its property as one holding and that its possession and control of both parts gave an enhanced value to the property as a whole. That being so, it is clear, in my judgment, that the severance of the expropriated property deprived the defendant of an advantage it had had and lessened its ability to use its other lands. It follows, I think, that it thereby suffered a depreciation in their value. The defendant's claim is thus within the scope of the test established by the cases.

Mr. Roblin put the quantum of the defendant's claim at $15,000 which he arrived at on the following basis. The loss of the expropriated property might force the defendant back to a two-storey new building instead of its intended single-storey one; the operation of business in such a building would necessitate the employment of an assistant shop foreman or service superintendent at a salary of $3,000 per year which would be saved if business were done on only one floor; and in five years this would amount to $15,000. I am unable to accept either the amount of Mr. Roblin's estimate or the basis upon which it was made. The measure of the defendant's damages is the depreciation in value of its other lands. This is not easy to fix, but the defendant has itself gone far in establishing the limit of its claim. On December 10, 1947, it wrote the Department of Public Works in reply to an inquiry from it that the price for the expropriated property was $10,940. There was no threat of expropriation at the time and it was then willing to part with its property for that amount. It ought not now to be allowed to contend that it was of much greater value at the date of the expropriation either by itself or as conducing to the advantage or protection of its property as one holding or as giving an enhanced value to its property as a whole. That the statement is admissible against the defendant's contention that it should be

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compensated to the extent of $25,000 is clear. Nichols on Eminent Domain, second edition, puts the rule as follows, at page 1210:

> When the contention is made by an owner of land which has been taken, in whole or in part, or injuriously affected, by the exercise of the power of eminent domain, that his land was of greater value before the taking or injury than the condemning party is willing to concede, the latter may introduce evidence of statements or declarations made by the owner at or about the time of the taking, but not necessarily related to that subject, to the effect that the land was worth a less amount than he now contends to be the case. Such evidence is competent as an admission against interest upon the general principles of the law of evidence as one of the recognized exceptions to the rule against hearsay, and as an owner, simply by virtue of his ownership, is considered to have sufficient knowledge of the value of his property to make his opinion competent in his favour, it is not necessary to show by extrinsic evidence that he was qualified to meet the objection that the statement referred to a matter concerning which the defendant was not sufficiently informed.

The defendant is, however, entitled to some increase over the price of $10,940 which it was willing to take on December 10, 1947, by reason of the increase in land values in 1948 of which the witnesses in the *Hirtle* and *Miller* case (*supra*) spoke. Under all the circumstances I assess the amount of the injury done to the defendant's other lands as a result of the severance at $3,500.

There remains only the question of interest. The defendant has, through its tenant, been left in undisturbed occupation and possession of the expropriated property ever since the date of its expropriation, without payment of any rent for it. In accordance with the long established rule of this Court it is not entitled to any allowance of interest: *The King* v. *Woods Manufacturing Co. Ltd.* (1).

There will, therefore, be judgment declaring that the lands described in paragraph 2 of the Information are vested in His Majesty the King as from April 26, 1948; 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 $11,705 without interest; and that the defendant is entitled to costs to be taxed in the usual way.

*Judgment accordingly.*

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(1) (1949) Ex C.R. 9 at 60.