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March 17.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

JOHN GEORGE McCARTHY, LOUISA C. McCARTHY, WIDOW OF THE LATE W. G. WARNER, AND JAMES M. McCARTHY,

DEFENDANTS.

Expropriation—Agreement of sale—Authority of Minister—Jurisdiction—Arbitration—Compensation—Shipyard—Earning capacity—Market value—Abandonment—Damages—Severance.

The Dominion government, for the purposes of its shipyard at Sorel, Quebec, expropriated some shipyard property on Richelieu and St. Lawrence rivers. The owners, claiming compensation, set up an agreement for the purchase of the property on behalf of the Crown entered into by the Minister of the Public Works, providing that payment therefor should be established by arbitration, and they contended that the Exchequer Court had therefore no jurisdiction to hear and determine the matter of compensation.

Held, that as the agreement failed to comply with the requirements of art. 1434 of the Quebec Code of Civil Procedure it was invalid as submission to arbitration, and as no time was fixed the submission was revocable, by virtue of art. 1487, at the option of either party, and under the English common law at any time before the award.

2. The King has the undoubted right attached to his prerogative of suing in any court he pleases.

3. The Minister had no power, unless authorized by an order-in-council or statute, to bind the Crown with such agreement.

4. In fixing compensation for the expropriation of such property its "earning capacity" cannot be taken as the basis of the market value; the best test is what similar property sold for in the immediate neighbourhood.

5. In the valuation of the wharves regard must be had to their present condition and allowance made for their depreciation.

6. Where part of the land expropriated was abandoned by the Crown, *held* that the owners were entitled to compensation for the use and occupation of the land for the period held by the Crown; but that they could not claim any damages for injurious affection or severance of the land, inasmuch as the severed portion did not form a unit of the land expropriated, and was in fact severed by a highway, apart from the fact that the abandoned land was sufficient for a shipyard at Sorel.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Montreal, January 8, 9, 10, 11, 28, 29 and 30.

E. Lafleur, K.C., *E. H. Godin,* K.C., and *F. Lefebvre,* K.C., for plaintiff.

D. R. Murphy, K.C., *A. Perrault,* K.C., and *P. St. Germain,* K.C., for defendants.

AUDETTE, J. (March 17, 1919), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby certain lands at Sorel, P.Q., were taken and expropriated, by the Crown, for the purposes of "The Sorel Government Shipyard", by depositing, on the 18th December, 1915, a plan and description of such lands in the office of the Registrar of Deeds for the City of Sorel, P.Q., in which Registration Division the lands are situate.

Under such plan and description, as set forth in the information, the lands taken were composed of:

	Area.
Parcel No. 1—Eastern part of Lot 82	98,000 Sq. ft.
Parcel No. 2—Eastern part of Lot 84	114,400 " "
Parcel No. 3—Lot.....No. 85	280,000 " "
Parcel No. 4—South-east part of..86	32,300 " "
Making in all.....	524,700 " "

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together with wharves and all *constructions* on such land erected both by the Crown and the suppliants.

During the pendency of the trial, namely, on the 24th January, 1919, the Crown, under the provisions of sec. 23 of the *Expropriation Act,* abandoned the whole of

Parcel No. 1—Eastern part of Lot 82	98,000 Sq. ft.
together with an area of lot 85 of....	45,163 " "
making in all.....	143,163 " "

which being deducted from the total area of 524,700 square feet, leaves, as admitted by the parties, a total area expropriated of 381,537 square feet.

The Crown, by the information, offers the sum of $30,000 for the total area expropriated in 1915, and the defendants claim by their plea the sum of $378,400, made up as follows:

Land.....	$272,630.40
Buildings.....	19,500.00
Wharves.....	40,823.00
Erections, jack screws, etc.....	1,046.60
	$334,000.00
Adding 10%.....	33,400.00
Preparation of case, costs of plans, experts' services, expert witnesses and Counsel.....	11,000.00
Grand total.....	$378,400.00

The pleadings, either on behalf of the plaintiff or the defendants, have not been amended since the abandonment.

The sum of $1,046.60 has not been proven and has been abandoned by counsel for the defendants.

As a preliminary plea to the present proceedings, by information under the *Expropriation Act,* the defendants set up the agreement of the 5th September, 1898, filed herein as Exhibit No. 24, whereby, among other things, the defendants promised to sell and the then Minister of Public Works promised to buy the property in question upon the payment of a sum to be established by arbitration—and they contend that the Exchequer Court is not the proper forum to hear and determine this matter, but that it should be submitted to a tribunal of arbitration.

As between subject and subject, under art. 1434 of the Code of Civil Procedure, the submission must state the names and additions of the parties and arbitrators and the delay within which the award of the arbitrators must be given. If this agreement or promise of sale on the one hand, and promise to buy on the other, can be treated as a submission, it fails to be valid under the provisions of the Code. Then under art. 1437 of the Code, "if the delay is not fixed, either of the parties may revoke the submission when he pleases",—and that is what was done in the present case. If the subject has the right to avail himself of these provisions, why would the Crown not have the same privilege?

Under the English common law a submission to arbitration was always revocable at any time before the award was made. *Gauthier v. The King.*[1]

Then the King, from time immemorial, has the undoubted privilege attaching to his prerogative of suing in any court he pleases.

[1] (1915), 15 Can. Ex. 444, 33 D.L.R. 88; (1917), 40 D.L.R. 353, 56 Can. S.C.R. 176.

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Chitty on Prerogatives (1820), at p. 244, dealing with actions "by the King and Crown", says:

"In the first place, though his subjects are, in many "instances, under the necessity of suing in particular "courts, the King has the undoubted privilege of "suing in any court he pleases . . . . The Crown "possesses also the power of causing suits in other "courts to be removed into the Court of Exchequer "where the revenue is concerned in the event of the "proceeding, or the action, touches the profit of the "King, however remotely, and though the King be "not a party thereto."

Moreover, there is the important question as to whether the Minister of Public Works could under the circumstances, and without valid authority, bind the Crown. Unless authorized by order in council or by statute, a Minister of the Crown cannot bind his Government. The Minister of Public Works, in the matter in question, has obviously no power to enter into such an agreement as set forth in Exhibit No. 24, without proper authority, and without the same he cannot bind the Crown in that respect. The question is so elementary that I shall confine myself in that respect to citing a few cases establishing that proposition, although the authorities are very numerous: *Quebec Skating Club v. The Queen;*[1] *Jacques-Cartier Bank v. The Queen;*[2] and *The King v. The Vancouver Lumber Company,*[3] affirmed on appeal to the Supreme Court of Canada on the 4th December, 1914.

[1] (1893), 3 Can. Ex. 387.
[2] (1895), 25 Can. S.C.R. 84.
[3] (1914), 17 Can. Ex. 329, 41 D.L.R. 617.

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Therefore the plea to the legality of the present proceedings in *that respect* is set aside.

Coming now to the question of compensation.

The property in question is situate at St. Joseph de Sorel, P.Q., on the south-east side of almost the mouth of the Richelieu River, where it meets with the St. Lawrence, at about 1000 feet from the St. Lawrence. It originally formed part of the seigniory granted to Monsieur de Saurel, on the 29th October, 1672, where he had built, in 1665, a fort for the protection of the inhabitants from the incursion of the Indians. Then the seigniory was, under the English regime, in 1781, bought for the Government by Sir Frederick Haldimand, the then Governor and Commander-in-chief.[1]

From Bouchette's "*Description Topographique de la Province du Bas Canada*", published in 1815, we find that while the "*magasins, casernes et batiments du Gouvernment*" were on the south-east side of the river, that the lots in question, on the west side of the river, were even at that early date used as a shipyard. See pp. 224 and 227. The predecessors in title of the present defendants, their father and uncle, and the Molsons before Confederation, were also using the property as such. Witness Beauchemin says that the McCarthys, to his knowledge, were building at Sorel, from 1858 to 1870 or 1872. They were at Sorel when he arrived there in 1856,—and adds, he does not know how long before his arrival they had been building there. Therefore, it may be almost said that these lands were, from time immemorial, used as private shipyards.

[1] *Tenure Seigneuriale, Pieces & Documents, 272; Bouchette (ubi supra); Archives Canadiennes—1759, 1791, Messrs. Short & Doughty. 539.*

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While this property is a shipyard with many obvious advantages, it is not to my mind the paragon shipyard which seems to exist in the minds of some of the witnesses called for the owners, who, actuated with the desire of proving overmuch, prove nothing which would have the effect of leading the court to a fair assessment of compensation herein.

Up to the time of the expropriation it was a shipyard with a somewhat limited capacity, where no very large vessels were ever constructed. Among the largest vessels built there were the *Acadia,* 225 feet long, the *Fielding,* and on lot 82 the *Quebec* of a length of 288 feet. The main works of the yard really consisted mostly in yearly repairs to the several crafts wintering in the River Richelieu, and the construction of comparatively small boats and tugs. To build vessels up to 400 feet, the ways now in existence would be of no use. New ways would have to be built diagonally, and some of the buildings removed to allow of it, as established by the evidence.

On behalf of the defendants five witnesses were heard, who respectively valued the land alone as follows, viz.: Witness Fraser, at 60 cents; witness Swan, at 50 cents; witness Noble, lots 84 and 85 at 75 cents, and lot 86 at 56 cents; witness Bishop, at 50 cents, and witness St. George at 74 cents.

On behalf of the Crown, witness Giroux valued the same lands at 2½ cents and witness Couture at 2½ to 3 cents.

How can we resolve this equation and reconcile such gap and difference in this valuation, if not by analyzing on the one hand the basis of such opinion, and on the other by the comparison of the prices paid in sales of properties in the neighbourhood,—a most

cogent manner to arrive at the real market value of such property.

Let us now consider upon what basis these several valuations were arrived at. Witness Fraser, when valuing the land at 60 cents (a valuation which would give for the 524,700 ft.—$314,820), says the way he arrived at that price is by considering that he would have to pay that sum for the land at any other site that had labour and deep water. He values, he says, the shipyard on its earning capacity. While on some occasions property has a special value attached to the locality within which it is situate, the fallacy of valuing it on its earning capacity is too obvious. "The land is looked upon merely as so much land, "entirely apart from the *personality* of its owner. "It might well be that two rival tradesmen held "adjacent lots of land on the same street, similar in "all respects, upon which they maintained their "respective shops. One of them, by reason of "shrewdness, foresight and good fortune, might be "deriving a large return from his business and "would doubtless be unwilling to sell his land, and "thus break up his established trade, for a sum con-"siderably in excess of its market value,—while the "owner of the adjacent store, who found himself "losing money from day to day, might be glad to dis-"pose of his property at considerable sacrifice. If, "however, the two stores were taken by eminent "domain, the *measure of compensation would be the "same in each case* . . . . The productive value of "land, or the value of the land to its owner, based on "the income he is able to derive from his use of it, "is not the measure of compensation and is not "material except so far as it throws light upon the "market value. In other words, what is sometimes

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"called the '*value in use*' is everywhere repudiated "as the test. So also the compensation cannot be "measured by the value of the property to the party "condemning it, or its need for that particular prop- "erty.[1] Market value, and market value alone, is the "universal test."

It would indeed be fallacious to increase or decrease the market value of a property by reason of the large or small business carried on upon the same by a particular individual, or to arrive at a conclusion upon the conjecture or surmise of such a consideration.[2]

Indeed, the "earning capacity" of a property depends materially, if not exclusively, upon the industry, business energy, capacity of the individual, and upon the capital at his disposal, who carries on his trade or business upon the property. It might, however, apply to a lesser degree in respect of a farm used for agricultural purposes. This property for years back has returned to its owners, under leases, $1600 a year for a while, and in latter years $1200. Should this be the exclusive test? This witness proceeded upon a wrong basis, and his evidence is of no avail to a court desirous of arriving at a just and fair market value of these lands.

Witness Swan says he does not know the value of property at Sorel; but to get at his valuation, he adds up all the *values* and finds that the land in question is worth 50 cents a foot. He assumes the McCarthy property has railway communication, while the spur runs only on Government property.

[1] *Nichols on Eminent Domain,* (1909), pp. 662, 663.

[2] *Pastoral Finance Ass'n., Ltd., v. The Minister,* [1914] A.C. 1083; *Lake Erie & N. Ry. Co., v. Schooley* (1916), 30 D.L.R. 289, 53 Can. S.C.R. 416.

Witness Noble, who values lots 84 and 85 at 75 cents, and lot 86 at 56 cents, bases his price on what a shipyard can do and can produce. The same observations made as to witness Fraser will equally apply to this witness, who would in the result make as part of the market value the prospective profits which might be derived from the property. He takes into consideration the fact that the land is sheltered and that there is no trouble from ice. This last point is, however, qualified in the evidence.

Witness Bishop, who values the land at 50 cents, lived most of his life in the United States. He examined the McCarthy property on the 7th January, 1919, and since the month of April, 1917, has been engaged in purchasing and designing the construction of shipyards at Portland, Tacoma, New Jersey, Savannah, Georgia, New Orleans, Port Huron, Michigan and in British Columbia. He arrived at his valuation by taking into consideration the amounts that were paid for land either upon rental basis or purchases at these several places. The danger of such basis is that while the value of land at the places above mentioned might be worth that amount, he entirely overlooks the market price of property at Sorel.

Witness St. George, who values the land alone at 74 cents a foot, has a way of his own in arriving at that conclusion. He tells us that in arriving at that valuation, he is not basing himself at all upon the market price of real estate in that vicinity,—stating it has nothing to do with it. But he takes the adjoining Government property to the north of the McCarthy property, forming the corner at the meeting of the Richelieu and the St. Lawrence, which he

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says is "very low land", *not a very suitable* site for a shipyard, and calculating the cost of putting this adjoining property in the same condition as that of the defendants, he arrives at his estimate of 74 cents, notwithstanding that he considers he would have on that property, to build crib-work, wharves on the St. Lawrence to protect it, to prevent the ice breaking in and damaging the vessels moored in front, besides piling, filling and dredging. He says the figures he has made with respect to this Government property are higher than they would have been had he taken the Sincennes-McNaughton property as the object of comparison. This mode of arriving at the value of property at Sorel would be rather amusing if it were not so illogical. Were the court to adopt this witness's figures and allow 74 cents a foot, which for the land alone would amount to $388,398, perhaps from no one more than from this witness, when off the witness stand, would it readily evoke an exclamation of astonishment. There is no parity between the two properties. It is of no help or assistance. Why was not such parallel established between the defendants' property and the several pieces of land going up the River Richelieu. It would have been more consonant, and from the McCarthy property travelling south-east up the river there are a number of properties available for shipyards, both below and above the bridge. Witnesses might be competent to pass upon the desirability and the selection of a site for the purposes of a shipyard, and choose its equipment and plant, and yet might prove wanting in the necessary knowledge of the local market value of the land required for the same. The engineering and mechanical knowledge does not necessarily carry within its sphere the knowledge to properly appre-

ciate the local market value of real estate, approached with the consideration of proper elements freed and untrammelled from the consideration of the value of land in other localities that have no common basis of comparison.

On behalf of the Crown, two witnesses, Giroux and Couture, were heard in respect of the value of the land, the former placing a value of 2½ cents per square foot, and the latter 2½ to 3 cents a square foot. These two witnesses, to arrive at this conclusion, compare the property in question with properties similarly situated at Quebec, Levis, Lauzon and Sorel. Indeed, the prices paid at Sorel in the several cases mentioned by them is, in a number of cases, most apposite and most cogent evidence. Among the sales at Sorel, mentioned by witness Giroux, is that of lot 81, to Sincennes-McNaughton, composed of 4 arpents and 33 perches, on the 17th January, 1905, and immediately adjoining lot 82, for $3000—around two cents a foot. Lot 56, above the bridge, of an area of 8 arpents and 88 perches, sold on the 7th June, 1918, for $3100—used as shipyard—which is less than one cent. Then lots 76 and 81, composed of 10 arpents, were offered to witness, on the 8th or 9th December, 1918, for $30,000, which is equal to about eight cents a foot. Witness Larocque also offered this property to Dr. McCarthy, a couple of years ago, for $30,000 or $35,000, reserving, however, the right to winter and moor his vessels in the front.

Witness Couture, while valuing the defendants' property at so much a foot, as above mentioned, valued it as a whole at $22,000, and in that price he includes everything, not having the intention, he says, to make the Government pay for the wharves it (the Government) has built. I think, upon this

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argument, he is somewhat astray, because while the Government has built some wharves, the defendants or their predecessors in title, had also built some which are still in existence and which go to increase the value of the property. This witness says he based his valuation upon, first, its annual revenue; second, upon sales in the neighbourhood and elsewhere of similarly situated properties. And, among others, he cites the following sales, at Sorel: On the 9th May, 1883, the defendants, the McCarthy estate, sold to the St. Lawrence Pulp & Paper Co., 229,804 feet in superfices, part of lot 86, shown on plan Exhibit No. 1, for $4,500—about two cents a foot. Then he takes in consideration the offer, which he saw advertising the sale of the Canada Steamship Co.'s property at 3½ cents a foot. Other sales mentioned by this witness are that of the 22nd June, 1881, by Allan to Sincennes-McNaughton of lots 76 and 81, containing 233,610 square feet, for $4,500, a little less than two cents a foot. On the 29th May, 1918, the Leclerc Shipbuilding Company purchased at less than a cent a foot lot 56, having an area of 368,060 feet, for $3100, including a house, with some reservation in respect of the same. On the 26th May, 1918, the Leclerc Shipbuilding Co. leased from H. Paul part of lot 55, containing 149,149 feet, actually occupied with the construction of vessels, with a frontage of 500 feet on the Richelieu, at an annual rental of $300. If that lease is capitalized at 5½%, it would be equal to 3 2-3 cents a foot. The evidence of these two witnesses for the Crown upon the value of land, especially when based upon sales of similarly-situated properties at Sorel, is most cogent. However, while the owner's evidence is most exaggerated, I find that the Crown's evidence, based upon such sales

in the neighbourhood, is the best and the only safe starting point,—yet I also find due consideration has not been given to the comparison of the McCarthy property with these Sorel properties. For instance, witness Giroux says that the Sincennes-McNaughton property, is like the McCarthy property, worth 2½ cents a foot. I fear he overlooks the clear and obvious fact that the McCarthy property is higher, its topography is better, and the lands are improved, while the same cannot be said of the other properties.

We have here to deal with a good shipyard, having a limited capacity as to the size of vessels which can be built there. The land, the soil itself, has been improved. The soil has been hardened (*durci*), solidified from year to year by the refuse (*dechets*) thrown upon the ground, says witness Giroux, speaking of the McCarthy property. Witness Boucher says that the nature of the soil is muddy (*vaseux*), but from year to year the ground has been improved by (*machefer*) clinkers and cinders being spread upon the surface. Witness Noble, who examined the shipyard in 1914, says this soil is of hard sand, and he finds the land has been built up, stiffened, piled and graded. Witness Badeux also says the surface has improved with age and usage. Moreover, the last witness, among others, has actually worked in materially improving this property, especially as compared with the Sincennes-McNaughton property, by running in several hundred piles in the land for the purpose of the ways; but he says that at present the heads of the piles are brought up to the surface every spring from the effects of frost and he had to cut them yearly.

A great deal has also been said about the exceptional safety of the shipyards as against the ice; but

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it has, however, in exceptional cases been subjected to such a contingency on a few occasions. Witness Boucher, whose business has had to do, for the last 18 years, with the construction and repairs upon this shipyard, says that in the spring of 1903, in April, at the time of the debacle,—the ice shove,—in the St. Lawrence, the waters rose higher than those of the Richelieu. The ice ran into the entrance of the river and caused considerable damage. Then witness Beauchemin says that every spring, the waters rise and cover a certain portion of the shipyard, and the wharves being low, some of them are covered by water. He further says, he knows of only two inundations or floods at Sorel and that was in 1865 and 1896, lasting from four to five days. He denies or does not remember the flood of 1903. However, under the rule of presumption, "*Magis creditur duobus testibus affirmantibus quam mille negantibus*", it must be found that, besides the yearly spring floods, the place was subjected to these bad inundations followed by serious damages.

Another very important fact to be considered, in respect of the prices paid on sales at Sorel, is, as admitted by defendants' witness Beauchemin, that these lots, on the water front, at St. Joseph de Sorel, between the McCarthy properties and the bridge, can also be turned into shipyards—they are all adaptable, but not prepared. Even above the bridge, the evidence shows there are shipyards in operation to-day.

Therefore, in endeavouring to arrive at a just and fair compensation, one must guard from being carried away by these exaggerated valuations testified to, and to weigh with judicious modifications the plaintiff's evidence. To allow the exaggerated

amounts testified to in the evidence of the defence, based upon such erratic grounds, "would be,"—in the language of Sir Samuel Evans in *Re S. S. Kim*[1]—"to allow one's eyes to be filled by the dust of theory "and technicalities and to be blind to the realities "of the case." The Court has to steer a judicial course between the optimist and the pessimist.

This property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking in consideration any prospective capabilities, potentialities or value it may obtain within the reasonably near future,—provided such capabilities can be foreseen at the date of the expropriation. Such capabilities or adaptability are, after all, but an element in the general value and form part of the market value.[2]

The owners after the expropriation should be neither richer nor poorer than before. It is intended that they should be compensated to the extent of their loss, and that loss should be tested by what was the value of the thing to them, not by what will be its value to the party expropriating it.[3]

From 1874 to 1890 the defendants derived a revenue from the whole property under lease, of the sum of $1600, and thence of the sum of $1200, as set forth in the evidence. Care must be taken to distinguish, as already said, between income from the property and income from the business conducted upon the property. And when the property is vested for the use to which the land is best adapted, for which it had been used for years and for which it is expropriated, it is certainly a safe working test of value which cannot be overlooked in arriving at the value of the

[1] 3 *Lloyd's Prize Cases* 1917.
[2] *Sidney v. North E. Ry. Co.*, [1914] 3 K.B. 629.
[3] *Cripps on Compensation*, 5th ed., 103.

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property.[1] In this case the evidence has somewhat qualified the circumstances under which it was leased at the low rents mentioned. However, low rent and the incidents likely to determine the lease must be regarded.[2] See Exhibit "F." After all, it is the commercial value of the land that is sought and not the capitalized value of the rental.[3]

The defendants, somewhere around the years 1897 or 1898, under special circumstances, offered to the Government for $19,000 this property, the area of which is described in plan Exhibit 25. Subsequently thereto, during the year 1912, as appears in the order in council filed here as Exhibit "G", another price of $150,000 is asked by the owners.

An offer by the owner may at times be made with the object of avoiding controversy, to save the expense of litigation, when in want of money, and under such circumstances it would not be a determining test of the actual value.[4] And the case of *Falconer v. The Queen*[5] is also authority for the proposition that where a claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in the pleadings, the court, while declining to limit the claim to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses.

At the date of the expropriation, namely, on the 18th December, 1915, the war was at its most

[1] *Nichols*, p. 172.

[2] *Halsbury*, Vol. 6, p. 27, *et seq.*; *Browne & Allan on Compensation*, 99.

[3] *Morgan v. London & N. W. Ry.*, [1896] 2 Q.B. 469.

[4] *Nichols*, p. 1195.

[5] (1889), 2 Can. Ex. 82.

momentous period, and if it had an effect upon property in Canada, it was certainly to its detriment, and it was a cause of depreciation which extended in respect of the class of property we are dealing with to the end of 1916 or the spring of 1917. Witness Brown, heard in behalf of the owners, said the Sorel shipyard had been declining and that there was not as much work done there by the Government as in the past. As established by witness Duguide, after the war broke out there was quite a demand for the construction of submarine chasers, but that industry was concentrated at Quebec and Montreal,—none at Sorel, while it might have affected it in the supply of some ancillary materials. The Lusitania was sunk in 1915, and the unrestricted destruction by submarines was resorted to in 1917. In the fall of 1916, came a demand for larger vessels and enquiry for steel carrying vessels. None were constructed at Sorel. In the spring of 1917, when the shipping destruction began on a large scale, the Munition Board was instructed to enquire on behalf of the Imperial authorities as to shipbuilding in Canada. This enquiry gave a stimulus, a spurt in this country in the demand for steel and wooden vessels. The real demand did not start before the spring of 1917. The demand in 1916 amounted to mere enquiries, with perhaps the starting in the construction of a few vessels. This witness Duguide contends that there was a small number of vessels built at the Sorel shipyard, but a large amount of repairs were made there.

Having said so much, and taking into consideration all these circumstances, and more especially the prices paid for lands, and lands almost similarly situated, at Sorel, although not improved and piled

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as the present shipyard, I am of opinion of allowing five cents a foot for the land taken. The prices paid at Sorel afford the best and most cogent test and the safest starting point for the present enquiry into the market value of this property. The best method of ascertaining the market value of property is to test it by sales in the neighbourhood. *Dodge v. The King*[1] —*Fitzpatrick v. Town of New Liskeard*[2], and numerous other cases decided by the Supreme Court of Canada.

The total area expropriated is 381,537 square feet, which, at five cents a foot, will amount to $19,076.85.

BUILDINGS.

The value of the buildings upon these lands has been fixed by agreement at the sum of $18,250, with, however, reservation by counsel for plaintiff, to adduce evidence as to the value of the property as a whole, *en bloc*.

WHARVES.

This leaves the question of the wharves still to be considered. Here the witnesses are very far apart. On behalf of the owners, witness Brown places upon the three wharves a value of $33,887.07; witness Fraser confirms witness Brown's valuation; witness Swan values them at $40,773; witness Noble at $65,000, and witness St. George at $34,104. On behalf of the Crown, witness Badeau values them at $19,797.75; witness Giroux at $8,997.86—allowing nothing for the approaches,—and witness Heroux at $16,354.10.

Witness Badeau is a ship carpenter who has been working at Sorel, on the land in question, since 1874.

[1] (1906), 38 Can. S.C.R. 149.
[2] (1909), 13 O.W.R. 806.

He has worked at these wharves. His valuation is for the price of new wharves, from which he deducted one-quarter of the total price. He further states that while the lumber in the McCarthy wharves was nicer (*plus beau*), he adds that to-day they are gone (*ils sont finis*). Since 1874, he says, we repaired them, but they have deteriorated. Witness Giroux exhibited in court some decayed pieces which he swore he had taken from these wharves. It is perhaps well to mention, *en passant*, that witness Brown, who places upon these wharves a value of $33,887.00, says that the life of such wharves is of about 30 to 40 years,—30 to 35 years. If the wharves were already old in 1874,—25% of their value already gone at that date according to witness Badeau,—they would, according to witness Brown's own view, be too old in 1915 to have any value, yet he values otherwise at $33,887, making no allowance whatsoever for depreciation.

I am of opinion it is unnecessary to say any more upon this point, and taking into consideration all that has been testified to by the witnesses upon that subject, and the deduction that should be made for depreciation, I will accept the valuation of witness Heroux at the sum of $16,354.10.

ABANDONMENT.

As already mentioned, during the pendency of the trial the Crown has abandoned, under the provisions of sec. 23 of the *Expropriation Act*, the whole of lot 82, containing..... 98,000 sq. ft.
and part of lot 85, containing..... 45,163 " "

Making in all an area of.....143,163 " "

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The defendants are making claim, as a result of the abandonment, for the value of the possession and usage by the Crown of the whole 143,163 square feet, between the date of the expropriation and the date of the abandonment. They make no claim for depreciation or damage arising out of the abandonment with respect to lot 85; but they claim damages for such depreciation to lot 82, resulting, as alleged in the argument, from the severance of lot 82 from the rest of the defendants' property.

On behalf of the defendants, witnesses Swan, Fraser, and J. M. McCarthy were heard with respect to the claim in connection with the abandonment, while the Crown offered no evidence in that respect.

Witness Swan testified that the damages arise from the fact of not maintaining lot 82 as part of the whole shipyard. He contends that the lot is now deprived of the railway access, in that the railway had access to part of the yard connected with a tram. If lot 82 is detached, it thereby loses access to the railway and is deprived of the use of the machine shops already in the yard. He further contends that on the 400 feet of lot 82 there is not sufficient room to build machine shops and construct vessels. He admits, however, the upper part of lot 82 is owned by the defendants. He considers the cutting off of the access to the railway as the more important reason of the two. If shops were built at the back of lot 82, it would mean duplicating the plant. It is not hurt with respect to skilled labour. He reckons the damages on the basis of 50% decrease in the value of the land, and for the compensation in respect of the occupation, he would capitalize the value of the land and allow yearly rent at 6% upon the same. On

cross-examination he says that lot 82, for the last 15 years, was used for mooring vessels on the front, and for storing materials in connection with the shipyard. Part of 82, back of the 400 feet from the river is vacant. Lot 82 cannot in future be independently used as a shipyard, but it could be used for building small boats.

Witness Fraser contends that lot 82 is now worth less by reason of being separated from the larger part of the yard. He valued the land, as originally taken, at 60 cents, and says that as the result of the abandonment the land of lot 82 is now only worth 36 cents a foot. He would value the compensation for the occupation of the lands on the same basis as the previous witness, at 6% or 8%, adding it was to his knowledge that 8% had been allowed under such circumstances. He says that, as part of the shipyard, it had a share of the water front, and direct railway connection, and contends the cost of a new siding or spur should be set off as against the value of the property. To make a shipyard of it, the building of a carpenter's shop would be needed. On cross-examination he says lot 82 would be "all right for a small proposition."

Having so reviewed the short evidence upon this subject, brings us to the consideration of the merits of the claim.

As compensation for the loss of occupation of these 143,163 square feet,—composed of lot 82 and part of lot 85, I will allow the compensation on the basis mentioned by me at trial. These 143,163 square feet, at 5 cents a foot, would amount to $7,158.15. In addition to this, I am somewhat perplexed as to what sum I should allow to the defendants as compensation for

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their being deprived of the use and occupation of this piece of property. In renting property the owner should get more than 5% upon the value of the land, since out of such revenue he has to find a fair revenue over and above taxes, etc., and other known incidentals. It is often contended that the landlord should at least receive from the tenant 10% on the value of the property leased to allow him a fair return, free of taxes, etc. I am of opinion that if 8% were allowed on $7,158.15 from the 18th December, 1915, to the 24th January, 1919, namely, three years and 38 days, making the sum of $1,777.57, that it would represent a fair and just compensation to the defendants for the loss of use and occupation of their premises during the period in question.

Coming to the question of damage by way of injurious affection, or *severance,* as put by Counsel,—which, coupled with the use and occupation abovementioned, come within sub-sec. 4 of sec. 23 of the *Expropriation Act,* I shall now have to consider and take into account the fact of such abandonment or revesting in connection with all the other circumstances of the case, in estimating or assessing the amount to be fixed for the defendants claiming compensation for the land taken.

That part of lot 82, as described in the information and originally expropriated, is separated from the other lots or premises expropriated, by a street which has been in existence for over a century. It is found in existence on a plan in *Bouchette's Description Topographique de la Province du Bas Canada,* published in 1815, and mentioned as "Chemin de la Traverse", and on the plans filed at trial as Montcalm St. Lot 82 has always been severed by the street from the lots 84, 85 and 86, and the frontage

of 82 cannot be taken, as mentioned by some of the witnesses, as part of a consecutive frontage with these other lots, because it would thereby obstruct the street. It could never be used as a whole with the other lots, placing a vessel partly on 82 and partly on the other lots. While there was bare unity of ownership in title, there was, so to speak, individuality in the lot 82 thus separated from the other lots by the highway, and the frontage on the river always is limited to the actual size without possibility of enlarging it by uniting it with the other lots.

Lot 82 cannot consistently be made a unit with the other lots for the purpose of building vessels or moorage on the front; because it is physically separated by the highway from the rest of the property. It can be used in connection with the shipyard for storage, etc., as used in the past by the Crown, just as much as any other parcel of land in the vicinity might be used as a lumber yard for storage purposes. But that does not make it a unit with the yard in such a manner as if separated therefrom it would be damaged. See upon this subject the two leading cases of *Cowper Essex v. Local Board of Acton*[1] and *Holditch v. C. N. Ont. Ry. Co.*[2]

Moreover, the shipyard as a whole was not, and is not, composed exclusively of lands belonging to the defendants at the date of the expropriation, but was, and is, composed in a large measure of both Government lands and defendants' lands, with part of the plant and buildings on Government property.

This lot 82 was never connected with the railway. In fact, the lots 84, 85 and 86 were really never con-

[1] (1889), 14 App. Cas. 153.
[2] [1916] 1 A.C. 536.

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nected with the railway; the railway spur or siding runs only on that part of the shipyard which belongs to the Government, and did so before the expropriation. What induced the witnesses to testify in the manner they did was apparently because the yard, as a whole, had railway connection; but it only had it because the railway ran on the government property, but not on any part of the defendants' land in question herein.

The damages claimed as flowing from the abandonment, and as put by the statute "in connection with all the other circumstances of the case", is entirely a question of fact, and under the circumstances of the case I fail to see any other compensation allowable but that in respect of the use and occupation of such lands as above set forth.

The expropriated part of lot 82 has been all through the evidence and during the trial spoken of as having a frontage, on the River Richelieu, of 400 feet; but if measurements are taken from the plans filed of record, both by the plaintiff and defendants, it will be seen that it has not quite 300 feet frontage. On its extreme southern side it may have a depth of about 400 feet, and on the extreme northern side slightly over 300 feet. However, at the back of that part expropriated and colored red on some of the plans, the defendants own, as part of lot 82, another area of the same width and of a depth of about 300 feet.

In 1865, the steamboat "Quebec", 288 feet in length, was built upon lot 82, upon which there are now two wharves, an old and a new one. The plant used by the government shipyard, at Sorel, is partly on government land and partly on the McCarthy land. So that if the government at any time, had

put an end to their tenancy, the McCarthy shipyard would have been left with an incomplete plant or with less plant. This plant, which belonged to the defendants before the expropriation, is sold to and taken by the government and paid for.

Lot 82 by itself, including the part originally expropriated and that part at the back, is of itself large enough for the purpose of a shipyard at Sorel, especially when it is considered that the size of the vessels that are being and can be built there is limited. It is of a large enough area for a Sorel shipyard when it is considered that in the past the works of this shipyard consisted for a small portion in the building of small vessels and chiefly in repairs.

All of these considerations, coupled with the very important fact that lot 82 is separated from the balance of the shipyard by the highway, led me forcibly to the conclusion that no damage resulted to lot 82 from the fact that lots 84, 85 and 86 have been expropriated and lot 82 abandoned. I have no doubt that the maintenance and development of a large shipyard at Sorel by the government, in all probability will increase as we go on, and would turn out to be of special, general advantage and benefit to lot 82, which should perhaps be taken into account by way of set off under the provisions of sec. 50 of the *Exchequer Court Act*.

Therefore, in the wording of sub-sec. 4 of sec. 23, of the *Expropriation Act*, taking into account the fact of such abandonment or revesting of part of lot 82, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to the defendants, I have fixed the total amount of compensation in that respect at the sum of $1,777.57.

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Recapitulation of the amounts allowed, viz.:—

For lands taken	$19,076.85
For the buildings	18,250.00
For the wharves	16,354.10
From the abandonment	1,777.57
	$55,458.52

The business carried on upon the premises ever since 1874 was not so carried on by the owners, who for a number of years were endeavouring to part with their property. It is not a case where 10% can be allowed for compulsory taking.

Therefore, judgment will be rendered as follows:

1st. The lands and real property expropriated herein are hereby declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the lands and real property so expropriated, with all damages arising out or resulting from the expropriation and the abandonment, as above mentioned, is hereby fixed at the total sum of $55,458.52, with interest on the sum of $53,680.95 from the 18th December, 1915, to the date hereof, and on the sum of $1,777.57 from the 24th January, 1919, to the date hereof.

3rd. The defendants are entitled to recover from and be paid by the plaintiff the said sum of $55,458.52, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, rents and incumbrances whatsoever, the whole in full satisfaction for the land and real property taken and for all damages

résulting from the said expropriation, as fully above set forth.

4th. The defendants are entitled to their costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *F. Lefebvre.*

Solicitors for defendants: *Murphy, Perrault, Raymond & Gouin.*