BETWEEN: 1959 Feb. 2, 3, 5 June 4, 5

STANDISH HALL HOTEL INC. .....SUPPLIANT;

AND 1960 March 15

HER MAJESTY THE QUEEN .....RESPONDENT.

*Crown—Petition of Right—Expropriation—Abandonment of part of expropriation—Compensation—Expropriation Act R.S.C. 1952, c. 106, ss. 9, 23, 24(1)(4).*

Respondent expropriated suppliant's property consisting of a hotel and a house in Hull, Quebec, and nearly two years later abandoned the expropriation of the major portion. Prior to the date of the expropriation the buildings on the property had been severely damaged by fire. By its petition of right suppliant seeks recovery from the respondent for loss suffered by reason of the abandonment and the alleged value of the land which remained expropriated. Suppliant also claims damages for the deprivation of a registered servitude consisting of a right of passage over neighboring land acquired by respondent who erected a building thereon which blocked suppliant's right of way. During the period title to the property was held by respondent the suppliant, while remaining in undisturbed possession of it, was restricted in effecting substantial repairs to the property and in the operation of it. Claims for loss of goodwill and patronage, for loss of potential profits and additional profits, for recovery of expenditures on temporary repairs, for architect's bill for preparation of plans for a new structure which were never used, for additional costs of works executed and for expert valuator's and legal fees are also put forth by suppliant.

*Held:* That there was insufficient evidence to justify any allowance for loss of good will.

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2. That there is no assurance that had suppliant been permitted to make earlier the expenditure it laid out in restoring the pre-fire earning capacity of the suppliant profits similar to those of the pre-fire era would have been realized.

3. That there is no evidence to justify an award for loss of additional profits since it was not established that but for the expropriation proceedings suppliant would have proceeded with the erection of a larger structure.

4. That the cost of temporary repairs was too remote a claim and in any event the suppliant had the benefit of them.

5. That the matter of expert valuator's and legal fees are to be considered as parts of the taxable costs and not for the Court to award.

6. That the claim for damages due to deprivation of the use of the right of way should be based on injurious affection provided for in s. 23 of the *Expropriation Act*.

7. That the respondent cannot be held responsible in tort for deprivation and subsequent abandonment because it was acting within its statutory powers. Compensation should consist of the value of the property to the suppliant at the time of the expropriation compared with such value on revesting, bearing in mind the reduced earning capacity due to the fire.

PETITION OF RIGHT to recover the alleged value of property expropriated by the Crown.

The action was tried before the Honourable Mr. Justice Kearney at Ottawa.

*John Ahern, Q.C.* and *Harold Maloney, Q.C.* for suppliant.

*Guy Favreau, Q.C., T. Labbé, Q.C.* and *Paul Ollivier* for respondent.

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

KEARNEY J. now (March 15, 1960) delivered the following judgment:

This action concerns a claim for compensation made by the suppliant and arising out of expropriation proceedings taken by the respondent but which were later in a large measure abandoned.

By deed of sale in notarial form dated September 29, 1925, the suppliant became the registered owner of a property situated in ward 2, District of Hull, Que., consisting of part of lot 304, lot 306 and part of lot 307, having a total area of 86,536 square feet, on which had been erected a house bearing civic number 16 Montcalm Street and a hotel known as the Standish Hall Hotel.

On July 19, 1952, the respondent caused to be deposited in the Registry Office for the District of Hull a notice of expropriation, together with a plan and description which included among properties belonging to others, the said property of the suppliant, the whole in conformity with the *Expropriation Act*, R.S.C. 1927, c. 64, s. 9 (now R.S.C. 1952, c. 106, s. 9), whereupon the said property became vested in the respondent.

On May 18, 1954, twenty-two months later, the respondent, in the manner contemplated in s. 24 of the Act, caused to be registered in the aforesaid Registry Office a declaration in writing that the expropriation in question, except in respect of a portion of lot 304, comprising 2007 square feet of vacant land, was abandoned, whereupon title to the abandoned portion became revested in the suppliant.

The suppliant, in its petition of right dated January 7, 1956, sought to recover from the respondent a sum of more than $500,000 for loss suffered by reason of the abandonment and revesting of over 84,000 square feet. Counsel for the respondent pleaded that the suppliant suffered no loss or damage as a result of the abandonment of the expropriation which was made of the major part of its property, as it remained in continuous occupation thereof throughout the twenty-two months in question.

In regard to the 2,000 odd square feet which remained expropriated, the suppliant sought to recover a sum of $36,126, being the alleged value of the land in question. The respondent states that the value of the above-mentioned land did not exceed $5,017.50 and that the suppliant is not entitled to any sum in excess of the said amount for the said land.

During the hearing counsel for the suppliant sought and was granted permission to amend the petition of right by adding thereto a claim of $36,000 for damages arising from the deprivation of a registered servitude consisting of a right of passage over neighbouring land acquired by the respondent who erected thereon a building which blocked the suppliant's right of way. The respondent admits that the suppliant was cut off from its right of way but denies that it thereby suffered any damage.

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Adjudication of the value of the small parcel of land expropriated presents only the usual difficulties encountered in expropriation cases, and the same is true with respect to the claim in connection with the loss of a right of way; but the legal aspects of the larger claims arising out of the abandonment of the expropriation, I find, are many and are rendered more complicated in some instances by the unusual counterbalancing facts and circumstances revealed in the record.

I will deal immediately with the larger claim. It is in the light of s. 24(1) and (4) of the Act that this portion of the suppliant's claim is to be determined.

24(1) 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, or if it is found that a more limited estate or interest therein only is required, 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, or that it is intended to retain only such limited estate or interest as is mentioned in such writing.

(4) The fact of such abandonment or revesting 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. R.S., c. 64, s. 24.

The facts of abandonment and revesting are admitted and I will endeavour to set out in chronological order all further circumstances and factors which, in my opinion, in some measure may be said to be related thereto.

For some time prior to 1949 James Maloney was the president of the suppliant company and the sole owner of 1,483 shares of the capital stock, being all of its issued stock, with the exception of three qualifying shares. On December 25, 1949, by deed passed before Notary Henri Desrosiers at Hull, Que., Mr. Maloney promised to sell to Charles Coulombe who promised to purchase the said 1,486 shares for the sum of $675,000, but by an indenture later entered into between the same parties the sale price was altered to $775,000. The purchase price was payable as follows: $2,000 on February 1, 1951, and a like sum on the first day of each subsequent month for a period of twenty years, at the expiry of which any balance owing was to be paid. The promising purchaser was also required to pay on the first day of each month, beginning February 1, 1951, during the

twenty years, two per cent interest on any unpaid balance of the purchase price. Should the promising purchaser fail to make any payment when due, then the promising vendor could require him by notice in writing to make good the default within thirty days and, in the event of his failure to do so, the agreement would lapse and the promising purchaser would forfeit to the promising vendor as liquidated damages any monies paid on account. During the pendency of the agreement, the endorsed shares were to remain deposited in escrow at the main office of the Banque Provinciale until payment had been made in full, whereupon they would become the property of and be delivered to the promising purchaser, or until a default occurred, whereupon they would be returned to the promising vendor.

Mr. Coulombe took over the presidency of the suppliant company in December 1949 and on August 5, 1951, a serious fire occurred in the hotel, and as a result the buildings alone suffered damages to the extent of almost $200,000. Some time between the date of the fire and the end of the year Charles Coulombe defaulted and under the provisions of the sale agreement Mr. Maloney resumed the presidency of the suppliant company in January 1952.

During the eleven and a half months which elapsed between the fire and July 19, 1952, when the respondent expropriated the property, the suppliant, while awaiting payment of fire insurance benefits, made repairs of a temporary nature which enabled it to retain its liquor licence, but the kitchen and dining room were almost, if not totally, destroyed and most of the bedrooms rendered unusable, with the result that revenues from meals and room rentals were greatly curtailed. A short time prior to receiving the notice of expropriation, the suppliant had caused plans to be prepared for building an enlarged hotel at an estimated cost of $590,000, excluding architects' fees based on two per cent of such cost. This project was later replaced by a less pretentious one, more or less involving a restoration of the original structure which was completed in 1955 at a cost of $175,000.

Between the notice of expropriation of July 19, 1952 and the notice of abandonment of May 18, 1954, the respondent filed an information in this Court which was served upon

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the suppliant on September 24, 1953, wherein the respondent offered to purchase the property expropriated, free and clear of all encumbrances, for the sum of $300,000 in full payment thereof including any real or pretended damages which the suppliant might claim; and wherein, failing acceptance, the Court was asked to declare either that the said sum constituted a just indemnity or, if not, that it determine the amount payable to the suppliant. No further proceedings were taken under the information which was withdrawn by consent and replaced with proceedings under the instant petition of right.

Throughout the twenty-two months during which the respondent retained title to the property, the suppliant remained in undisturbed possession of it. On the other hand, while it is true that the original cause of any alleged loss of earnings and goodwill was the fire, its effects were aggravated and prolonged because so long as the respondent retained title to the property the suppliant dared not expend the monies required to restore its earning capacity.

The suppliant claims that, as a direct result of the expropriation and its inability to rebuild throughout the period of nearly two years during which the respondent retained title to the property, it suffered damages described under various headings; but the petition of right omits to set forth to what extent, if any, these claims when considered alongside counter-claims had the effect of diminishing the value of the property to the suppliant on revesting. Undoubtedly this Court has wide powers to deal with a case of this kind. Chief Justice Fitzpatrick in the leading case on revesting, *Gibb v. The King*[1], made the following pronouncement concerning s. 23(4), R.S.C. 1906, c. 143, which corresponds to s. 24(4) of the present Act:

> The power conferred upon the Minister by this section is a very exceptional one since it enables him to vest the land in a person even against his will. We might expect that the rights of persons affected by this arbitrary power would be carefully safeguarded by the legislature and that is what in fact we do find, for I do not know that protection in a wider form could be afforded to their interests than it is by subsection 4 of section 23. This gives the court the most ample and general authority by simply providing that in estimating the compensation to be paid for the land taken the fact of the abandonment is to be taken into account.

[1] (1916) 52 Can. S.C.R. 402, 407.

A question arises as to the proper form of approach and, for reasons which appear later, I think it is expedient, if not essential, in this case to make an estimate of the value of the property to the suppliant at the time of expropriation compared with such value on revesting. This is what was done in the case of *Mathys v. The King*[1] which is a case of revesting not unlike the present one. In the *Mathys* case it was the market value of the property which went down but in the present instance it is the value to the owner which, I think, should govern, and Mr. Maloney testified that its value to the suppliant had diminished on revesting. Before making the above-mentioned estimate I will enquire whether and to what extent the items claimed under the following headings are justified by the proof.

(1) Loss of goodwill and patronage.

While conceding that goodwill is an intangible asset and difficult to evaluate, counsel for the suppliant submitted that between $35,000 and $40,000 should be allowed under this heading, based on ten per cent of the average yearly gross revenue or sales over a five or six year period of operations. In the first place, the inconveniences, lack of facilities, services and unsightliness of the hotel, which were the result of the fire (see Ex. O) and which had existed for nearly a year prior to expropriation, could not do otherwise than adversely affect goodwill and patronage.

Evidence was led for the purpose of showing that other hotels in the vicinity, because of the expected demolition of the Standish Hall, hastened to expand their premises, making it all the more difficult for the suppliant to regain its former popularity. Mr. Maloney stated in evidence that several hotels in the vicinity were enlarged, even doubled in size, during the time of the expropriation and he mentioned five such places. From the testimony of Mr. Adéodat Lambert, Inspector of Buildings for the City of Hull, it would appear that only three building permits were issued to hotels during that period, including one for $4,000 to cover repairs to a vestibule; and the other two for a total of some $31,500.

[1] [1934] Ex. C.R. 213, 215.

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It is because public patronage is fickle, particularly where service accompanied by entertainment is sought, and because revenues in this field are so dependent on costly expenditures, such as $80,000 and $47,000 spent by the suppliant in 1951 (Ex. H), that goodwill, if mentioned at all, is usually carried on a company's books at a nominal figure. Kohler in *A Dictionary for Accountants,* second edition, p. 238, speaking of goodwill, states:

> . . . Various methods exist for computing goodwill on the basis of earning power. Since its value cannot be verified by reference to objective evidence, and since it is, moreover, subject to constant change because of economic conditions generally and other uncontrollable factors, it has been the general practice in recent years to eliminate good will from the accounts.

In my opinion there is insufficient evidence to justify any amount for loss of goodwill.

(2) Loss of potential profits.

The next item is a claim for prospective profit which the suppliant was prevented from realizing during the twenty-two months preceding the abandonment of the expropriation. This item, which is an important one, is difficult to resolve. I am unaware of any hard and fast assessment formula which properly could be applied to the unusual circumstances prevailing in the instant case and any improvised one will, I am sure, not result in anything more accurate than an approximation. One approach whereby an assessment might be made of the likely profits that the suppliant would have realized in twenty-two months but for the expropriation is to refer to the financial statements of the company covering the period from January 1, 1945, to December 31, 1957 (Exs. D to N and Ex. 17), in order to establish and use as a yardstick the average amount of the net profits made during that period. To do so would reflect two full years' operations following the restoration of the premises which was completed in September 1955, and would on my calculations establish the amount of the average net profit at approximately $700 per month or $15,400 for twenty-two months. I do not think that the results of the operations carried out in 1951, which begot a loss of $49,000, should be looked upon as those of a normal year because of the destructive fire which occurred in mid-year. The six months of 1951 preceding the fire might well

be taken into account but no breakdown of operations for that year on a monthly basis has been made available. Counsel for the suppliant submitted that the calculations should be based on the difference between the average net profit per month realized during 1945 to 1950 compared with the monthly average net losses incurred during 1952 to 1955, which would amount to $1,840 per month, or approximately $40,500 for twenty-two months.

If the period from 1945 to 1950, both inclusive, were considered as an aceptable norm, the average net monthly earnings would amount to $1,180, and for twenty-two months almost $26,000. The more speculative the business involved, the less reliable are past earnings as a reflection of those which may be expected in the future. There are unquestionably speculative elements in the suppliant's business, but there is at least one facet of its operations which can be reasonably relied upon to produce net revenue at low cost.

An examination of the financial statements (Exs. D to N) show that room rentals were realized with little overhead expenditures. Rodolphe Maheu, a member of the Institute of Chartered Accountants, and auditor of the suppliant company, testified that the most paying proposition in a hotel which is well organized are the rooms, because expenses directly pertaining to the rooms are very, very low, and consequently gross rental receipts though small compared with overall sales can have a very important bearing on the net income of the enterprise.

The suppliant company was in a position, once the proceeds from the fire insurance policies began coming in in 1952, to rebuild *inter alia* the bedrooms which had been destroyed. As appears by exhibits I, J and K, bedroom returns were low during part of 1952, 1953 and 1954, but during the twelve months following their restoration in 1955 the net revenues compared favourably with those of the best previous year (Ex. M). Room rental returns for 1945 and 1946 were not produced but for 1947 to 1957, both inclusive, they averaged nearly $21,000 per annum; and room rental is probably the most reliable and stable source

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of revenue which the suppliant may depend on. In connection with the dining room revenue, Jacques Smits, a manager of hotels under trusteeship, who in 1952 was in charge of the Windsor Hotel which is not far from the Standish Hall, stated in evidence that, in his opinion, the hotel business to be successful must be built around its dining room. The overhead in respect of dining room service is much larger than in the case of room rentals, and to a lesser extent it can be considered as a fairly stable source of revenue.

The overall picture of the situation, as reflected in the financial statements stretching over thirteen years, requires careful study, in the course of which, I think, the following circumstances should be borne in mind. The fire of August 1951 greatly reduced the earning capacity of the suppliant and, notwithstanding that certain temporary repairs were made, the same conditions largely remained at the date of expropriation as well as at the date of revesting. The pre-fire earning capacity of the suppliant could be restored only by a delayed expenditure of approximately $175,000, and the added cost of building due to the delay should be reckoned with; but this same increase in building costs would serve to increase the value of that portion of the building unaffected by the fire because its replacement cost would be increased. I will deal with the last-mentioned factors later when I endeavour to estimate the value of the property to the suppliant at the time of the expropriation compared with such value on revesting. The suppliant, by expending $175,000 during part of the years 1954-55, reaped a net profit of $45,000 in round figures on 1956 operations which dropped to $21,000 in 1957, or an average of $33,000 a year. There is no assurance, however, that if the suppliant had been permitted to make the same expenditure during 1952, similar profits would have been realized. It is possible but not likely that a loss such as took place in 1950 would have re-occurred. In my opinion, however, it is more probable that the net profit would have exceeded the 1945-50 average by about ten per cent. Under the circumstances, including those considered later, I think that the suppliant, owing to the expropriation followed by revesting,

was deprived of a profit of $1,300 a month or $28,600 which it otherwise would have realized during the intervening twenty-two months in question.

(3) Loss of additional profits.

Additional profits allegedly totalling $220,000 would have been realized if, instead of spending $175,000 (including architects' fees of $7,500) on renovations as was done, the suppliant had expended $590,000 on a greatly enlarged structure as was at one time contemplated. The suppliant, in my opinion, has failed to establish that, but for the expropriation proceedings, it would have proceeded with the larger structure, which makes further consideration of this claim unnecessary.

(4) Recovery of expenditures on temporary repairs.

A sum totalling about $30,000 (Ex. 16), representing repairs, alterations, decorations to the existing building and a temporary entrance is claimed under this heading. As I read the evidence, the repairs in question began in August 1951, shortly after the fire, and continued throughout the remainder of that year. They were undertaken chiefly, if not exclusively, to maintain in good standing the suppliant's liquor licence and turn it to account in order to partially offset the reduced earning capacity of the hotel attributable to the fire. The suppliant had the benefit of the said repairs which as a stop-gap served a useful purpose and, for what they were worth, acquired title to them on revesting. Under the circumstances any claim under this title is too remote to merit recognition.

(5) Architect's bill for preparation of plans for new structure which were never made use of.

Architect W. E. Noffke rendered an account to the suppliant amounting to $11,800 for architects' fees, on which nothing has been paid. Mr. Noffke testified that about a month prior to the notice of expropriation he received a rush order from the president of the suppliant to prepare sketch and blueprint plans (Exs. 2 and 3) for the enlarged hotel project already referred to, upon which he immediately commenced to work. It appears that a couple of days before the expropriation notice was filed he saw a newspaper item announcing the intended expropriation of

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the instant property and he thereupon ceased work on the plans. His fees were based on two per cent of the estimated cost of $590,000 for the new structure. It was proven that two per cent of the estimated cost of the structure is recognized in architectural circles as a proper fee for the preparation of complete plans; but it is admitted that in the instant case no specifications or calls for tenders were prepared, and completion of the plans would have required about another three weeks. A fee for the preparation of plans based on two per cent of the estimated cost of the structure was allowed in the case of *Federal District Commission v. Henri Dagenais*[1] but in that case the plans were further advanced than in the present instance and no revesting occurred. Under the circumstances I think that a fee of $3,500 would be adequate compensation. After some hesitation I am prepared to place this item in the same category as item (2) and look upon it as a factor tending to decrease the value of the property to the owner on revesting. According to the evidence, because of non-payment of his fees, Mr. Noffke had a falling-out with Mr. Maloney, and the former tendered at the hearing an assignment from the suppliant covering any award made by this Court in connection with the above-mentioned architects' fees. I do not think this Court should concern itself with the assignment, particularly as I understand it is the practice for the Crown, in effecting payment in like circumstances, to make the cheque payable jointly to the suppliant and to the architect.

(6) Additional costs of works executed in 1955 over 1952.

I will have occasion to review the above item, allegedly amounting to $26,250, when determining the value of the suppliant's property on revesting.

(7) Expert valuator's and legal fees.

Mr. Noffke was also engaged as an expert valuator by the suppliant to estimate the value of the expropriated property at the date of its expropriation and of its return and to testify in respect thereof as required. He claimed a sum of $22,500 for his services based on three per cent of his estimate of the value of the entire property at the date

[1] [1935] Ex. C.R. 25.

of expropriation amounting to $750,000. I will have reason to comment later on expert valuations made of the property; but, as this item is a matter of fees of an expert which form part of the taxable costs in the case, I consider that it should be referred to the Registrar of this Court for assessment.

The remaining item is a claim for legal services amounting to $7,000 which the president of Standish Hall Hotel Inc. paid on its behalf to the estate of the late Senator Elie Beauregard said to have been rendered in connection with expropriation proceedings. Legal fees, like experts' fees, are subject to taxation; and I likewise refer this item to the Registrar, as I think that the respondent should be required to pay taxable costs for services rendered by the late Senator Beauregard in respect of the information that was laid by the respondent and later withdrawn.

I will now deal with the item amounting to $36,000 which the suppliant added to other claims made under the title of damages, namely, the deprivation of the use of a right of way. It is an admitted fact that the suppliant's property enjoyed a right of passage over a portion of lot 303 which led from the rear of its property to Rue Principale; and that the respondent, by building a post office on that portion of lot 303, deprived the suppliant of this right of way. The evidence shows that the passage way had occasionally been used in connection with car parking at the rear of the hotel but that otherwise it had been rarely used; and that, apart from this right of way, the suppliant property had almost unlimited access to Rue Principale. This item, in my opinion, should be based on injurious affection, as contemplated in s. 23 of the Act which reads as follows:

> 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; and any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty. R.S., c. 64, s. 23.

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I consider the compensation to which the suppliant is entitled by reason of the injurious affection suffered does not approach the amount claimed, and I would estimate it at $1,500.

I will now revert, for final disposition, to the amounts of $28,600 and $3,500 which I have already allowed, and also to the item of $26,250 claimed for added cost of construction which I have not dealt with. The respondent cannot be held responsible in tort for having deprived the suppliant of its title to certain properties and for having abandoned all claim to them after a lapse of nearly two years. In virtue of ss. 9(1) and 24(1) of the Act, the Crown was only doing what was specifically permitted and which, but for s. 24(4), might be done with impunity. In *Gibb v. The King*[1], which reached the Privy Council, Lord Buckmaster stated:

> 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.

Commenting on the judgment rendered in the same case by the Supreme Court of Canada (*supra*), wherein the Court was equally divided, His Lordship went on to say:

> . . . that the judgment of Fitzpatrick C.J. was accurate in all respects, . . .

And the latter, at p. 409 (*supra*), speaking of the judgment rendered by the trial judge, said:

> The form in which the proceedings were brought before the court, may have induced the error into which I think the assistant judge of the Exchequer Court has fallen. It is not, as he says, an action for damages resulting from the abandonment.

As I mentioned earlier, an important element to be considered in this case is the value of the property to the suppliant at the time of revesting. In the *Gibb* case, the Chief Justice observed at p. 408 (*supra*):

> The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co. v. Lacoste,* to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of

[1] [1918] A.C. 915, 922.

the taking. *If, by the inverse process of expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.* (Emphasis supplied)

In endeavouring to arrive at the value of the property to the suppliant, its fair market value can be used as a guide. Messrs. Sherwood and Noffke admitted that with few, if any, comparative sales on which to base their fair market valuation, their only guide was their own knowledge and experience. In the opinion of Mr. Sherwood, the market value of the property at the date of expropriation was $440,743; and at the date of its abandonment, after taking into consideration the rise in building costs less depreciation, it was $458,050, being a net increase of $17,307. Mr. Noffke's figures, as of the same dates, were $750,000 (Ex. 12) and $764,979 (Ex. 13), showing a net increase of $14,979. Mr. Noffke made a miscalculation which vitiated his valuation on revesting when he misplaced a decimal point and deducted $7,305 in depreciation instead of $73,050. In addition, in my opinion, he overestimated the rate of depreciation and unlike Mr. Sherwood, failed to allow for the increase in land values and in the replacement value of the buildings. William Frazer Hadley, a real estate expert called by the respondent, testified like Mr. Sherwood that between July 1952 and May 1954, owing to a growing scarcity of vacant land the value of the unimproved portions of the suppliant's lot had increased, and so had the value of the improvements owing to increased cost of replacement. Neither is Mr. Sherwood's report (Ex. KK) free from error but, subject to certain corrections, I am prepared to accept his estimates of the fair market value of the property. In support of his calculations the following is found, beginning at p. 4 of Mr. Sherwood's report:

During the twenty-two months in which the property was held by the Crown, additional depreciation accrued to the buildings, so that when it was handed back it was less valuable to the extent of 1.8%, based on slightly more than 1% per annum (Montreal's Table of Structural Depreciation, as set forth in McMichael's Appraisal Manual, 4th Edition.)

On the other hand, the overall cost of construction index had risen throughout Canada by 6.4%, according to a recognized authority, (MacLean Building Report). As a result, the buildings were 4.6% more valuable at the date of return.

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| | *Value as of Date of Expropriation July 1952* | *Value as of Date of Abandonment May 1954* |
|---|---|---|
| LAND | $ 97,405.00 | $ 99,851.00 |
| BUILDINGS | $343,338.00 | $358,199.00 |
| | $440,743.00 | $458,050.00 |

Increase in value during the twenty-two month period = $ 17,307.00

An extract from MacLean's *Building Reports,* which is annexed to Mr. Sherwood's appraisal, indicates that between July 1952 and May 1954, based on 1939 prices, the price index of materials fell while the wage rate index rose with the result that the index for the overall cost of construction was 252.7 for July 1952 and 259.1 for May 1954. The difference between these figures is 6.4 but it is expressed in points and not in percentage as assumed by Mr. Sherwood. In terms of percentage it amounts to 2.5 which, if substituted in the report for 6.4 per cent, would reduce Mr. Sherwood's increased value from $17,307 to $4,707. Mr. Noffke, relying on the MacLean *Building Reports,* stated (Ex. 7) that the same reconstruction carried out by the suppliant in 1954-55 at a cost of $175,000 could have been made in 1952-53 for $26,250 less. In coming to this conclusion Mr. Noffke misapplied the MacLean *Building Reports* in the same way as Mr. Sherwood. He also failed to confine his calculations to a comparison of costs as of July 1952 with corresponding costs as of May 1954 and, in addition, erroneously included architects' fees in his calculations. Had he properly applied the *Building Reports,* he would have arrived at $4,187 instead of $26,250. As already mentioned in my criticism of Mr. Sherwood's report, the proper figure to be employed is 2.5 per cent which, when applied to $167,500 ($175,000 less architects' fees of $7,500) results in an increase in overall building costs on May 18, 1954, as compared with July 19, 1952, of $4,187 instead of $26,250, which is based on 15 per cent of $175,000, as stated by Mr. Noffke. By deducting $4,187 from $4,707, the resulting figure of $520 represents, in my opinion, the net increase in the market value of the suppliant's property at the time of revesting compared with the market value at the date of expropriation.

Considering that, as of July 1952, the value of the suppliant's property had been reduced previously by the fire, I think Mr. Sherwood's estimate as of the date of taking, amounting to $440,743, represents its fair market value at the time; and that its corresponding value at the date of revesting was $441,263, but in my opinion this does not represent its value to the suppliant at these respective dates.

The promise of sale of all the issued stock of the company in 1949 for $775,000 may be regarded as some criterion of its worth to the suppliant in July 1952 but because of its unusual terms it is not convincing. The promising purchaser made no immediate cash payment, had control of the suppliant company for a year before the first instalment became due and was not personally liable in the event of default. I consider that as of July 19, 1952, the business as a going concern had, exclusive of fixed assets, a value in equity to the suppliant of approximately $100,000. This amount added to $440,743 would raise its value at the time of expropriation to $540,743. In my view, the value to the suppliant of the property on revesting had depreciated because of deprivation of profits amounting to $28,600 plus the sum of $3,500 which I would allow for the cost of plans less the sum of $520, previously referred to, and I would accordingly fix the value of the property to its owner as of May 18, 1954, at $509,163. Because of the foregoing factors included in items (2), (5) and (6) of its claim, I think the suppliant is entitled to succeed to the extent of $31,600, being the depreciation in value to the owner which the instant property suffered in the twenty-two month period during which the respondent retained title to it.

The last item to be dealt with is the parcel of land on the southeast corner of lot 304, comprising a total of 2,007 square feet. Mr. Noffke identified it on exhibit 10 by outlining it in pencil and marking it with an "X". It is more clearly shown on exhibit Q. Examples of comparable sales in the neighbourhood are practically non-existent. Mr. Sherwood in his written report (Ex. JJ) stated that in his opinion this property was worth to the owner at the date of expropriation $2.50 a square foot, or $5,017. During cross-examination Mr. Sherwood sought to shy away from that

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Kearney J.

valuation, but I disregard this portion of his evidence. Mr. Noffke placed a valuation of $36,000, or $18 a square foot, on this small piece of property, although the highest sale on record in the neighbourhood was at $5.50 a square foot, and this sale occurred as late as 1958.

Mr. Hadley testified that he was interested in the Scott property which is on the east side of St. Redempteur Street and bears lot No. 715-1 and also in parts of lots 304-3 and 303-3 (see Ex. Q), which are contiguous to the instant property and belong to the E. B. Eddy Co. Mr. Hadley also stated that he had placed a valuation of $3.50 a square foot on the Eddy property to a depth of 100′ from Rue Principale and that, in his opinion, because of the smallness and irregular shape of the 2,007 square foot lot, he would value it at less than $3.50 a square foot. Although it is true that the lot in question is small, it is well located, fronting on Rue Principale, and I would place a valuation on it of $3.00 a square foot, or $6,021; and in addition I would allow ten per cent because of forcible dispossession, making a total of $6,623 for this piece of land, with interest from the date of expropriation.

Apart from this amount of $6,623, I consider that the suppliant is entitled to the difference in the valuation which I have placed on the revested portion of the property at the date of abandonment compared with the valuation as of the date of expropriation, which amounts in round figures to $31,600, with interest from May 18, 1954; and $1,500 for injurious affection due to loss of the right of way hereinbefore described, with interest from July 19, 1952. In addition to the three above-mentioned amounts totalling $39,723, the respondent will be required to pay such further amounts in respect of the two items of assessor's and legal fees as may be determined on taxation by the Registrar of this honourable Court. The whole with costs to be taxed in the usual way.

*Judgment accordingly.*