THE METROPOLITAN TORONTO AND REGION CONSERVATION AUTHORITY ..... APPELLANT;

1962

*May 22, 23, 24 Oct. 2

AND

VALLEY IMPROVEMENT COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Land taken by conservation authority—Order of Ontario Municipal Board fixing compensation—Appeal on questions of law and jurisdiction—Court of Appeal without jurisdiction to determine amount of compensation—Matter returned to Board to be dealt with in accordance with opinion of Supreme Court.

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Martland and Judson JJ.

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The respondent company was the owner of a parcel of land on which it had a restaurant and an administration building, together with parking areas, tennis courts and bowling greens. The company proposed to build a motel on a certain part of its holding. In January 1956 a meeting was held with the municipality to discuss the project, and, as the building would require a change in existing zoning regulations, it was suggested that the respondent make a formal application for such rezoning; however an application was not made. On August 20, 1958, the appellant conservation authority expropriated a portion of the respondent's lands, thereby making the erection of the proposed motel impossible. The municipality had passed a by-law on November 5, 1956, which prohibited the erection of buildings or structures for residential or commercial purposes in an area including the lands in question. This by-law was approved for a period ending June 15, 1957; there was no application for extension of the approval, nor was the by-law repealed. Another zoning by-law similar to the one of November 5, 1956, was passed on May 4, 1959.

The respondent claimed $85,500 as compensation; the appellant's expropriation advisory board recommended an amount of $2,700. The Ontario Municipal Board fixed the compensation at $3,370.40, but added nothing on the ground of possible rezoning. The respondent obtained leave to appeal upon certain questions of law and jurisdiction and the Court of Appeal allowed the appeal, ordering that the compensation be increased to $77,313. The appellant in appealing to this Court questioned the correctness of the answers made by the Court of Appeal and submitted that, in any event, that Court had no jurisdiction to determine the amount of compensation to be awarded.

Held (Judson J. dissenting in part): The appeal should be allowed and the matter returned to the Municipal Board to be dealt with in accordance with the answers, as set out in the judgment of the majority of this Court, to the questions upon which leave to appeal was granted.

Per Kerwin C.J. and Cartwright, Fauteux and Martland JJ.: *The Judicature Act* by s. 26(2) provided that "the Court of Appeal also has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature", but did not enlarge the jurisdiction conferred upon that Court by s. 22(10) of *The Conservation Authorities Act,* R.S.O. 1950, c. 62, as amended, and by s. 98(1), (3) and (7) of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, as amended. No authority was found in *The Conservation Authorities Act* or *The Ontario Municipal Board Act* to give a judgment but only an opinion on a question of jurisdiction or law, which opinion was directed to be acted upon by the Board, who "shall make an order in accordance with such opinion". This required the opinion of the Court of Appeal to be applied and made effective by an order of the Board.

Accordingly, the Court of Appeal did not have jurisdiction to determine the amount of compensation payable to the respondent. It also appeared that in arriving at the figure which it fixed the Court of Appeal drew an inference or made a finding of fact inconsistent, and indeed, directly at variance, with the finding of fact expressly made by the Board, "that there was not a reasonable probability of the desired zoning being realized". *Re Hollinger Consolidated Gold Mines*

Ltd. and Township of Tisdale, [1931] O.R. 640, distinguished; *Re Bloor Street Widening* (1925-26), 58 O.L.R. 230 and 511, discussed; *Re Casa Loma* (1927-28), 61 O.L.R. 187, referred to.

The most important factor in deciding the amount of compensation in this case was the probability or improbability of the respondent being able to have its lands rezoned to permit the erection of apartment houses. Whether such a probability existed at the date of the expropriation and, if it did exist, its degree were both questions of fact on which the decision of the Board was final unless in arriving at its decision it erred in some matter of law. The inquiry as to whether it had so erred was not at large but was limited to a consideration of the questions on which leave to appeal was granted.

(1) The Board erred in law in directing itself that the effect of the by-law passed on November 5, 1956, was to require the compensation for the lands expropriated to be fixed on the assumption that they were an entity separate from the remainder of the lands of the owner and that the owner could never acquire or use them.

(2) The Board did not err in considering the effect of the similar by-law passed on May 4, 1959. It referred to it only as showing that its conclusion reached on the circumstances at the date of the expropriation had received subsequent confirmation.

(3) Nor did the Board err in considering and making findings with respect to the state of mind of the municipality and the conservation authority.

(4) There was evidence upon which the Board could presume that the planning board of the municipality would consult with the conservation authority prior to dealing with applications before it for rezoning.

(5) The Board did not err in law in giving effect to that presumption.

(6) Assuming this to be a matter of law, there was evidence to support the Board's finding that in the opinion of the planning director of the municipality the highest and best use of the respondent's top lands would be a public use.

Per Judson J., *dissenting:* The Board did not err in considering the effect of the by-law passed on November 5, 1956. It found "that there was no reasonable probability of the desired zoning being realized". If the reasons of the Board were taken as a whole, the mention of severance did not mean anything more than the lack of this reasonable probability of rezoning the whole area including the expropriated land. This was not error in law. The expropriated lands could only have value to the owner of the amount assigned to them by the respondent if they remained part of the whole and were rezoned.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an expropriation award by the Ontario Municipal Board. Appeal allowed, Judson J. dissenting in part.

Hon. R. L. Kellock, Q.C., and *D. R. Walkinshaw, Q.C.*, for the appellant.

J. T. Weir, Q.C., and *B. H. Kellock*, for the respondent.

[1] [1961] O.R. 783, 29 D.L.R. (2d) 593.

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The judgment of Kerwin C.J. and of Cartwright, Fauteux and Martland JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario[1], made on July 22, 1961, answering certain questions and ordering that the compensation allowed to the respondent for a portion of its lands expropriated by the appellant be increased from the sum of $3,370.40 fixed by the Ontario Municipal Board to the sum of $77,313. The appellant questions the correctness of the answers made by the Court of Appeal and submits that, in any event, that Court had no jurisdiction to determine the amount of compensation to be awarded.

The appellant is a corporate body created by chapter 9 of the Statutes of Ontario, 4-5 Elizabeth II, 1956, which amended *The Conservation Authorities Act,* R.S.O. 1950, c. 62. Under clause (*c*) of s. 15 of the last mentioned Act the appellant had power to expropriate any land it might require for the purposes of carrying out a scheme under the Act. Pursuant to this power, on August 20, 1958, it expropriated 3.47 acres of land owned by the respondent.

The respondent claimed $85,500 as compensation. The Expropriation Advisory Board of the appellant, on December 12, 1958, recommended that the compensation be fixed at $2,700. The respondent served a notice of dissatisfaction and on August 26, 1960, the Ontario Municipal Board made an order fixing the compensation at $3,370.40 with interest at 5 per cent from the date of taking. On November 18, 1960, the Court of Appeal made an order giving the respondent leave to appeal to that Court "upon the following questions of law and jurisdiction:—"

1. Did the Ontario Municipal Board err in considering the effect of by-law 10370 of the Township of Etobicoke;

2. Did the Ontario Municipal Board err in considering the effect of a by-law passed by the Township of Etobicoke on the 4th day of May, 1959;

3. Did the Ontario Municipal Board err in considering and making findings with respect to the state of mind of the Municipal Corporation and the Conservation Authority;

[1] [1961] O.R. 783, 29 D.L.R. (2d) 593.

4. Was there any evidence upon which the Ontario Municipal Board could presume that the Planning Board of the Township of Etobicoke would consult the Conservation Authority prior to dealing with any applications before it for re-zoning;

5. If there was any such evidence, did the Ontario Municipal Board err in law in giving effect to that presumption;

6. Did the Ontario Municipal Board err in failing to allow to the appellant damages claimed by reason of the proposed use of land of alleged higher value in place of the land expropriated for the purpose of carrying out the proposed undertaking of the appellant;

7. Was there any evidence to support the finding of the Ontario Municipal Board that in the opinion of the Planning Director of the Township of Etobicoke the highest and best use of the appellant's top lands would be a public use.

The Court of Appeal on July 22, 1961, gave judgment directing that questions 1, 2, 3 and 5 be answered in the affirmative and that questions 4, 6 and 7 be answered in the negative and ordering that the compensation allowed the appellant pursuant to the order of the Ontario Municipal Board be increased to the sum of $77,313.

Prior to the expropriation the respondent was the owner of 10.8 acres of land in the Township of Etobicoke bounded on the north by Old Mill Road, on the east by the Humber River, on the west by Humber Boulevard, and on the south by Bloor Street. The elevation of the respondent's land varies from approximatley 252.5 feet above sea level at the bank of the Humber River to approximately 295 feet above sea level on the table-lands to the west of the valley.

Of the total holding of 10.8 acres, 3.28 acres was occupied or used in conjunction with the existing buildings on the south side of Old Mill Road, described as the Old Mill Restaurant and the Administration Building used by the respondent and other tenants; of the remaining 7.52 acres, 2.6 acres was used for tennis courts and bowling greens; 1.45 acres was table-land referred to as park land; .85 acres was embankment; .9 acres was valley land being prepared for use as parking space and 1.72 acres was unused valley land.

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The 3.47 acres expropriated was made up of the .9 acres of valley land being prepared for parking space, .85 acres embankment land and 1.72 acres of unused valley land.

Speaking generally the valley land is that land reasonably flat in contour adjacent to the river, the embankment land is the portion between the top and the toe of the embankment rising steeply from the valley to the table-land and the table-land is that above and beyond the top of the embankment.

Parking accommodation for the occupants of the respondent's building and the guests of its restaurant was provided in three locations; a small area adjacent to the administration building accommodated 30 cars; a second area on the north side of the Old Mill Road accommodated 50 cars; an area on the south side of Old Mill Road to the east of the restaurant accommodated 140 cars. At the time of the expropriation a further area of .9 of an acre on the south side of Old Mill Road at the north-east corner of the respondent's lands was being prepared to accommodate 96 cars, the necessary filling having been completed to the extent of about 70 per cent.

On the west side of Humber Boulevard opposite to the respondent's land are "sixplexes" and "eightplexes". On the south side of Bloor Street opposite to the respondent's land apartment buildings have been erected. On the northwest corner of Humber Boulevard and Bloor Street there is a gasoline service station. On the north side of Old Mill Road opposite to the lands of the respondent are "double-duplexes". There are no single family homes on Humber Boulevard between Bloor Street and Old Mill Road.

On April 4, 1955, the Township of Etobicoke passed by-law 9454, entitled "Restricted Area (Zoning) By-Law of the Township of Etobicoke", under which the whole 10.8 acres of the respondent's lands formed part of Greenbelt Zone "G". The use of lands in this zone for any business purpose is prohibited and the only residences permitted are one-family detached dwellings each with a minimum lot area of 1 acre. As the use made of the land by the respondent was in existence at the date of the by-law, it was a legal non-conforming use after the by-law was passed. In October 1955 the Committee of Adjustment of the Township of Etobicoke authorized an extension to the respondent's buildings by the addition of dining-room space.

In November 1955 the respondent had consulted architects with reference to a proposed motel along the crest of the bank. In the following month the architects submitted sketch plans for such a building extending over the edge of the embankment. In January 1956 representatives of the respondent met with members of the township planning board to discuss the proposed plan. As the proposed building would require a change in the existing green belt zoning, the board suggested that the respondent make a formal application for such rezoning accompanied by the data normally required in such applications.

Subsequently the respondent did some soil sampling work; it received more detailed plans from its architects in May 1956 and some preliminary cost estimates from contractors in June or July of 1956. Nothing further was done by the respondent with regard to the project up to the date of the expropriation, and in particular no complete working drawings were produced, no application was made for a building permit and no application for rezoning was made.

On November 5, 1956, by-law 10370 was passed by the Township of Etobicoke prohibiting the erection of buildings or structures for residential or commercial purposes between the lines shown on maps attached to the by-law which ran approximately along the contour of 267.5 feet above sea level on either side of the Humber River. This by-law was approved by the order of the Ontario Municipal Board dated March 15, 1957, for a period ending June 15, 1957. The township did not apply for extension of this approval, nor was the by-law repealed.

In 1957 the appellant had prepared a scheme to acquire all the lands in the Lower Humber Valley from Dundas Street to the mouth of the Humber River, which include the lands here in question, in order to straighten the river bed and build works to prevent damaging floods such as were caused by Hurricane Hazel in October 1954. This scheme was approved by the Provincial Government and the member municipalities of the appellant, and the appellant began acquiring the lands in the valley for this purpose. It was in pursuance of this scheme that the lands of the respondent were expropriated on August 20, 1958.

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On May 4, 1959, the Township of Etobicoke passed by-law 11757, which was similar in terms to by-law 10370. The by-law was approved by the Municipal Board on October 13, 1959.

The Ontario Municipal Board based its award on a valuation of $739 per acre for the 3.47 acres taken (plus an allowance of $500 to cover the expenditure in preparing the .9 acres for parking and an additional 10 per cent for forcible taking). There was evidence to support the figure of $739 per acre, unless it should be held either (i) that the lands taken might have been rezoned to permit the erection of the proposed hotel building or (ii) that the "table-lands" might have been rezoned to permit the erection of apartment houses. In the latter alternative the ownership of the lands taken would have added to the value of the "table-lands" as, under the existing by-laws, the number of apartment suites which were permitted to be constructed on a parcel of land was proportional to the area of that parcel. It was stated in argument that had the table-lands been rezoned to permit the erection of apartments, the ownership of the expropriated lands would have permitted the building of seventy-six more suites than would be permitted lacking that ownership. I did not understand this statement to be challenged.

The Ontario Municipal Board came to the conclusion "that there was not a reasonable probability of the desired zoning being realized" and added nothing to the compensation on the ground of possible rezoning.

The Court of Appeal was of opinion that if the respondent's lands were rezoned to permit the erection of apartment houses all of its lands except the .85 acres of the embankment would have a value of $40,000 per acre, but that this value should be discounted by $33\frac{1}{3}$ per cent because of the "uncertainties and delays implicit in the necessity of obtaining appropriate re-zoning".

Before turning to a consideration of the seven questions it will be convenient to consider the extent of the jurisdiction of the Court of Appeal as our duty, if this appeal succeeds, is to give the judgment which that Court should have given.

The limited right of appeal from the decision of the Ontario Municipal Board is set out in s. 22(10) of *The Conservation Authorities Act,* R.S.O. 1950, c. 62, as amended by 1952, Statutes of Ontario, c. 11, s. 7. Subsection (10) reads as follows:

(10) The Ontario Municipal Board shall have authority to determine the amount of compensation payable and its decision shall be final and shall not be open to appeal except that an appeal shall lie to the Court of Appeal upon a question of jurisdiction or upon a question of law in the manner and under the conditions set out in section 98 of The Ontario Municipal Board Act, and that section shall apply mutatis mutandis.

The relevant provisions of s. 98 of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, as amended by 1956, Statutes of Ontario, c. 60, s. 10, are subsections (1), (3) and (7) which read as follows:

(1) Subject to the provisions of Part IV, an appeal shall lie from the Board to the Court of Appeal upon a question of jurisdiction or upon any question of law, but such appeal shall not lie unless leave to appeal is obtained from the Court within one month after the making of the order or decision sought to be appealed from or within such further time as the Court, under the special circumstances of the case, shall allow after notice to the opposite party stating the grounds of appeal.

(3) On the hearing of any appeal the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question of jurisdiction or law, as the case may be, and shall certify its opinion to the Board and the Board shall make an order in accordance with such opinion.

(7) Save as provided in this section and in sections 46 and 97,

(*a*) every decision or order of the Board shall be final; and

(*b*) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court.

With respect, I have reached the conclusion that, in the case at bar, the Court of Appeal had no jurisdiction to fix the amount of the compensation. *The Judicature Act* by s. 26(2) provides that "the Court of Appeal also has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature", but does not enlarge the jurisdiction conferred upon that Court by the provisions of *The Conservation Authorities Act* and *The Ontario Municipal Board Act* quoted above.

In supporting the jurisdiction of the Court of Appeal Mr. Weir referred to the following two cases.

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Re Hollinger Consolidated Gold Mines Ltd. and Township of Tisdale[1] was a case in which the appeal from the Ontario Railway and Municipal Board was brought under s. 83 of *The Assessment Act*, R.S.O. 1927, c. 238. Subsections (6) and (7) of that section read as follows:

> (6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Municipal Board.
>
> (7) The practice and procedure on the appeal to a Divisional Court shall be the same *mutatis mutandis* subject to any rule of court or regulation of the Board as upon an appeal from a county court.

Owing to the difference in wording between those subsections and the ones with which we are concerned this decision is not of assistance.

In *Re Bloor Street Widening*[2], an appeal was brought from an order of the Ontario Railway and Municipal Board permitting the City of Toronto to pass a by-law repealing an earlier expropriation by-law. The right of appeal was given by subsections (1) and (3) of section 48 of *The Ontario Railway and Municipal Board Act*, R.S.O. 1914, c. 186, the wording of which is as regards subs. (1) substantially and as regards subs. (3) exactly the same as that of subs. (1) and subs. (3) of s. 98 of *The Ontario Municipal Board Act* which I have quoted above. In the judgment of the Court of Appeal reported at p. 230 it was held by the majority of the Court that the sole question to be determined was one of law—the true construction of a statutory provision—that the Board had erred in its construction and that on the true construction the Board was without jurisdiction to make the order permitting the repeal. The reasons of the majority directed that the appeal be allowed with costs "here and below". The report at p. 511 is that of the judgment of the Court of Appeal, similarly constituted, on a motion to vary the decision, reported at p. 230, by eliminating the part dealing with the costs before the Board upon the ground that these costs were in the discretion of the Board and the Court of Appeal had no jurisdiction over them. The motion was dismissed, Hodgins and Ferguson JJ.A. dissenting.

[1] [1931] O.R. 640.

[2] (1925-26), 58 O.L.R. 230 and 511.

If it be assumed that the judgment of the majority was right, it decides that in a case where the decision of the question of jurisdiction or law submitted to the Court of Appeal, pursuant to subs. (1) and subs. (3) referred to above, of necessity disposes of the whole matter which was before the Board, the Court of Appeal can deal with the costs of the proceedings before the Board, and it does not appear to me to be of any great assistance to the respondent in the case before us. However, in my respectful opinion, the reasoning of Hodgins J.A. in his dissenting judgment, concurred in by Ferguson J.A., is to be preferred to that of the majority.

Because of differences in the names of the applicable statutes and in the numbering of sections, I shall, in the following paragraph, paraphrase, instead of quoting verbatim, the reasons of Hodgins J.A. at p. 515.

By s. 26(2) of *The Judicature Act* the Court of Appeal is given jurisdiction as provided by any act of the Legislature. It is under this section that an appeal from the Board is possible. To find what that jurisdiction is in this case one must go to *The Conservation Authorities Act* and *The Ontario Municipal Board Act* which determine the powers of the Court of Appeal in the matter. In these there is found no authority to give a judgment (to which s. 27 of *The Judicature Act* might well apply) but only an opinion on a question of jurisdiction or law, which opinion is directed to be acted upon by the Board, who "shall make an order in accordance with such opinion". This requires the opinion of the Court of Appeal to be applied and made effective by an order of the Board.

This reasoning of Hodgins J.A. strengthens the opinion I have formed from a consideration of the wording of the applicable statutory provisions, all of which I have quoted, that the Court of Appeal did not have jurisdiction to determine the amount of compensation payable to the respondent. It would also appear that in arriving at the figure which it fixed the Court of Appeal drew an inference or made a finding of fact inconsistent, and indeed, directly at variance, with the finding of fact expressly made by the Board, "that there was not a reasonable probability of the desired zoning being realized".

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In the course of the argument reference was made to the following statement in the reasons of Middleton J.A. in *Re Casa Loma*[1]:

> The motion before us is under sec. 48 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, which gives the right of appeal from the decision of the Board "upon a question of jurisdiction or upon any question of law" if leave is obtained from this Court.
>
> Before we can grant leave we must determine whether the question which it is sought to argue upon the appeal falls within the statutory category and is a "question of jurisdiction" or "a question of law", and our decision upon the question is final and cannot be reconsidered upon the argument of the appeal: *Re Bloor Street Widening.*

This statement was not necessary to the decision of the application and, with respect, I am of opinion that it is inaccurate. It is contrary to what was decided on this point in *Re Bloor Street Widening* on which it purports to be based. At p. 236 of the report of that case the same learned Justice of Appeal said:

> An appeal can be had only upon a question of jurisdiction, or on any question of law (sec. 48(1) of the Ontario Railway and Municipal Board Act), and in granting leave it was intended to reserve to the Court hearing the appeal power to determine whether the question raised by the appeal came within these words, and it is now argued that the appeal does not raise either a question of jurisdiction or of law.

Middleton J.A. proceeded to consider at length whether the question on which leave to appeal had been granted was one of jurisdiction or law and decided, with the concurrence of the majority, that it was "both a question of jurisdiction and of law".

The circumstance that the Court of Appeal in granting leave to appeal pursuant to s. 98(1) of *The Ontario Municipal Board Act* has described certain questions as being questions of jurisdiction or of law does not deprive the Court which hears the appeal of power to decide whether the questions submitted are in truth such questions.

In approaching the individual questions on which leave to appeal was granted, it is necessary to bear in mind two well-settled principles. First, that the duty of the tribunal empowered to determine the amount of compensation is to arrive at the sum of money which the owner, as a prudent man, at the moment of expropriation would have paid for the land taken rather than be deprived of it. On this point

[1] (1927-28), 61 O.L.R. 187 at 194.

it is sufficient to refer to *Woods Manufacturing Co. Ltd. v. The King*[1]. Second, that in arriving at that sum it is the duty of the tribunal to take into consideration the probability or even the possibility of the rescission of any by-law restricting the use to which the property may be put. On this point reference may be made to two judgments of the Court of Appeal for Ontario; *Re Gibson and City of Toronto*[2], particularly at p. 23, and *Re Forbes and City of Toronto*[3], particularly at p. 39.

The most important factor in deciding the amount of compensation in the present case was the probability or improbability of the respondent being able to have its lands rezoned to permit the uses referred to earlier in these reasons. Whether such a probability existed at the date of the expropriation and, if it did exist, its degree were both questions of fact on which the decision of the Board is final unless in arriving at its decision it has erred in some matter of law. The inquiry as to whether it has so erred is not at large but is limited to a consideration of the questions on which leave to appeal was granted.

Question 1 is as follows:

> Did the Ontario Municipal Board err in considering the effect of by-law 10370 of the Township of Etobicoke?

If the point of law intended to be raised by this question is whether evidence of the fact of the by-law having been passed and of its contents was inadmissible, it is my opinion that it was admissible as showing that on the date of its passing the Council had reached the conclusion that the lands described in it were subject to the risk of being flooded and that no structures for residential or commercial purposes should be erected thereon. This evidence was relevant to the question whether the Council was likely in the future to rezone the lands described in the by-law to permit their use for commercial purposes. The circumstance that the Board had approved the by-law for a limited period only and that the period had expired on June 15, 1957, prior to the date of expropriation might affect the weight of this item of evidence but did not, in my opinion, render it inadmissible. The Board gave consideration to the fact that the Council had not applied for an extension of the Board's

[1] [1951] S.C.R. 504 at 508.
[2] (1913), 28 O.L.R. 20.
[3] (1930), 65 O.L.R. 34.

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approval. The Court of Appeal were of the view that the failure of Council to apply for an extension of the approval established conclusively that by June 15, 1957, the township "had as fully abandoned its former intention to control the land affected as if it had rescinded the by-law in question". With respect, this seems to me to be an inference of fact rather than a conclusion of law. If it were regarded as a statement of law it would appear to be at variance with the opinion expressed in the reasons of the Court of Appeal, delivered by Schroeder J.A., in *Re Wright and Burlington*[1].

If this were the only point raised by this question, I would answer it in the negative.

However, Mr. Weir presented argument on another point which appears to me to be raised by the wording of Question 1; his submission is that the Board erred in law in directing itself that the fact of by-law 10370 having been passed had the effect of making the expropriated lands an entity entirely separate from the remainder of the respondent's 10.8 acre parcel so that in fixing the compensation for the lands taken it must not consider any added value to the respondent which those lands had by reason of their forming part of the larger parcel. The Board did not so direct itself in so many words but I am satisfied that it did so in effect.

The reasons of the Board read in part as follows:

> The respondent accepts the value of $739 per acre for the lower lands and called no evidence of value in this regard. He takes the position that the flood zone by-law of the township passed November 5, 1956, had the effect of making the subject lands a separate entity and they cannot thus be considered as adjunct or part of the appellant's remaining lands at the top on the date of expropriation, in spite of the fact that the Corporation did not apply for a further time extension. This course was followed he contends, because the Conservation Authority had not decided what lands they wanted covered, and were negotiating with certain parties for acquisition of land. Meanwhile expropriations by the Authority were taking place up and down the river. Since the expropriation of the subject lands, however, a new flood zone by-law was passed on the 4th day of May, 1959.

The witness Davis, who gave the value of $739 per acre, made it clear that in his opinion the lands taken were worth very many times that amount to the respondent and that the answer in which he gave the figure of $739 was based on the premise, which counsel's question required him to

[1] [1959] O. R. 183, 17 D.L.R. (2d) 537.

accept, that the respondent could never acquire or use them. It is sufficient to quote the following passage from the evidence of Mr. Davis:

Mr. HONSBERGER: Q. I think I will phrase my question this way to see if it will simplify it. The value of that land if it is separated entirely from the top land and cannot be used in conjunction with the top land—is that simpler?

Mr. WEIR: That includes the Old Mill as a purchaser?

Mr. HONSBERGER: I said it can't be used in conjunction with the top land.

Mr. WEIR: I think that is reasonable.

The CHAIRMAN: I think so.

Mr. HONSBERGER: Q. Will you give me that answer? A. If I may qualify my reply, that was the confusion in my mind earlier. To me it was a very hypothetical question. It wouldn't matter much who owned the bottom land as long as the Old Mill had use of them or would be able to buy them. If you exclude that, ask me to exclude that possibility of the Old Mill being able to acquire or use them in any way, shape or form, and they must remain a single entity for time immemorial (sic) . . .

Q. What I said, they can't at any time be attached to the upper lands. A. Yes, then I think the value would be in this neighbourhood of $739.00.

The fact that the Board fixed the value of the lands taken at $739 per acre shows that it did give to itself the direction of which Mr. Weir complains.

In my opinion, it erred in law in so doing. The giving of this direction would inevitably have the effect of rendering it unnecessary for the Board to give the consideration it would otherwise have given to the question of what estimate a prudent man in the position of the respondent would have made, on the date of expropriation, of the probability or possibility of the "table-lands" being rezoned to permit the erection of apartment houses. If the value of the lands taken was to be determined on the assumption that the respondent could never use or acquire them it would be a matter of indifference whether there was any possibility of the "table-lands", as distinguished from the lands taken, being rezoned. If, on the other hand, it was kept in mind that the mere fact of ownership of the lands taken would, in the event of the "table-lands" being rezoned, permit the erection of an additional seventy-six suites, the duty, already alluded to, of taking into consideration and estimating the probability or possibility of amendment of the zoning by-law in regard to the "table-lands" would assume great importance.

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I would answer Question 1 as follows:—"The Board erred in law in directing itself that the effect of this by-law was to require the compensation for the lands expropriated to be fixed on the assumption that they were an entity separate from the remainder of the lands of the owner and that the owner could never acquire or use them."

Question 2 is as follows:

Did the Ontario Municipal Board err in considering the effect of a by-law passed by the Township of Etobicoke on the 4th day of May, 1959?

The by-law referred to in this question is number 11757; its enacting clauses are the same as those of number 10370.

To show how the Board dealt with this by-law in its reasons it is necessary to quote the following passage:

> The evidence as to the flood land character of the subject land is very clearly established. Just as clear was the municipality's intent as to the future use of this property when it passed the original flood land by-law on November 5, 1956. The fact that application was not made to the Board for a time extension of its provisions does not in itself denote any change in the thinking of the Conservation Authority or the Corporation as to the ultimate use of this land.
>
> The top land of the appellant has been zoned green belt for many years, as has the subject lands. No assurances were, or could be given by the Planning Board that the subject lands overlooking the Humber would be rezoned for a hotel use. The necessary rezoning may well have been considered as a primary and vital step even if the work was delayed for the reasons given, but in spite of this the evidence does not indicate any further overtures being made to the Planning Board by the appellant in a period extending over two years. The Board, as it must, has considered carefully the reasonable probability of the lands taken being rezoned. At the time of the first meeting with the Planning Board the appellant's lands were zoned green belt, and it would appear that when it was told to make a formal application for rezoning, this was the only hurdle to be surmounted. Under this prevailing circumstance then, formidable in itself, the appellant was told to make its application. On the 5th day of November, 1956, or 10 months later, By-law 10370 was passed designating the land for which rezoning was sought as flood lands Ex. No. 7 is the Board's order setting forth the temporary approval and its date of expiry June 15, 1957. In the light of these changed conditions, and in spite of the expiration of the temporary approval, it is not unreasonable to assume that the Planning Board in the normal course of its operations would have consulted the Conservation Authority and the council, before recommending any change in zoning, especially since the land had recently been covered by a flood land by-law. Evidence has indicated that the Conservation Authority was expropriating land up and down the river, and even if rezoning of the subject lands had passed the Planning Board level, it would still have to come under the careful scrutiny of council who in the last analysis are the final arbiters.
>
> In all the circumstances and in the light of the evidence, the Board is of the opinion that there was not a reasonable probability of the desired zoning being realized, and this has been borne out by the fact that a new flood land by-law was put on these lands on the 4th day of May, 1959.

By-law 11757 does not appear to have been entered as an exhibit on the hearing before the Board. In the agreement as to the contents of the case on appeal signed by the solicitors for the parties there is the following item:

> By-laws of the Township of Etobicoke, Nos. 10370 and 11757, which were referred to before the Ontario Municipal Board.

The argument of counsel before the Board was not transcribed and we do not know how the by-law was introduced or whether objection was taken to the Board giving consideration to its existence, but this does not seem to me to be of importance. Its relevance, if any, was to the questions whether (i) the lands described in it and in by-law 10370 were, at the date of the expropriation, lands liable to flooding and, (ii) whether they were at that date so regarded by the responsible officers of the township; quite apart from by-law 11757 there was ample evidence to support the view of the Board that both these questions should be answered in the affirmative. As I read the reasons of the Board they do not rest their decision on these points on the passing of by-law 11757, which would be wisdom after the event, but rather refer to it as showing that their conclusion reached on a consideration of the circumstances existing at the date of the expropriation has received subsequent confirmation.

I would answer Question 2 in the negative.

Question 3 is as follows:

> Did the Ontario Municipal Board err in considering and making findings with respect to the state of mind of the Municipal Corporation and the Conservation Authority?

In the passage from the reasons of the Board quoted above they use the expressions, "the municipality's intent as to the future use of this property", and "the thinking of the Conservation Authority or the Corporation as to the ultimate use of this land".

In a frequently quoted passage, applicable to all corporate bodies, Lord Sumner said, in *Inland Revenue Commissioners v. Fisher's Executors*[1]:

> In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention that the company has is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance.

[1] [1926] A.C 395 at 411.

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On the same page Lord Sumner refers to cases in which Atkin L.J., as he then was, used the expression "the intention of the company" and Viscount Cave spoke of "the last thing which the company desired".

When the reasons of the Board are read as a whole it seems clear that these forms of expression were used to state the view of the Board, arrived at on a consideration of the relevant evidence, that in any future action relating to these lands the Council of the Township and the Conservation Authority would proceed on the basis that the lands described in by-law 10370 were liable to be flooded. The Board was engaged at this point in forecasting the probable future actions of the corporate bodies referred to. They did not, in my opinion, err in law. If they erred in their choice of words they appear to have done so in good company.

I would answer Question 3 in the negative.

Questions 4 and 5 were dealt with together by the Court of Appeal. They are as follows:

4. Was there any evidence upon which the Ontario Municipal Board could presume that the Planning Board of the Township of Etobicoke would consult the Conservation Authority prior to dealing with any applications before it for re-zoning?

5. If there was any such evidence, did the Ontario Municipal Board err in law in giving effect to that presumption?

I do not find it necessary to deal with Mr. Kellock's submission that it was the statutory duty of the Planning Board to consult with the Conservation Authority; in my opinion, the circumstances disclosed in the evidence indicated that it would be proper for it to do so and it was reasonable for the Board to make the assumption which it made. With respect, I find myself unable to agree with the view of the Court of Appeal that the reasons of the Board show that it assumed that the Planning Board would fail to retain its autonomy and independence.

I would answer Question 4 in the affirmative and Question 5 in the negative.

The Court of Appeal answered Question 6 in the negative and, before us, neither party sought to vary this answer. Question 7 is as follows:

Was there any evidence to support the finding of the Ontario Municipal Board that in the opinion of the Planning Director of the Township of Etobicoke the highest and best use of the appellant's top lands would be a public use?

In dealing with this question the Court of Appeal quoted the following passage from the reasons of the Board.

> The Planning Director of the Township of Etobicoke in his evidence said the top lands from the owner's point of view would be suitable for apartments, but gave it his opinion under cross-examination, that the highest and best use of the top lands of the appellant would be for a public use and the land should be precluded from all building.

Read in its context this appears to me simply to form part of the Board's summary of some of the evidence given before it. I find nothing in it to suggest that the Board thought the witness was saying that the best use of the lands from the owner's point of view would be that they should be dedicated to the public. That would have been a self-evident absurdity. The effect of the evidence of this witness appears to be that, in his opinion, although from the owner's point of view the erection of apartment houses on its land would be desirable, from the point of view of the general public it would be best that all building be prohibited. I do not find anything in the reasons of the Board to indicate that it misunderstood or misdirected itself as to the effect of what this witness said. I find it difficult to say that Question 7 is one of law but, on the assumption that it is, I would answer it in the affirmative.

For these reasons I would allow the appeal to the extent indicated and direct that the paragraphs of the order of the Court of Appeal reading as follows:

> THIS COURT DID ORDER that Questions Nos. 1, 2, 3 and 5 be answered in the affirmative and Questions Nos. 4, 6 and 7 be answered in the negative.
>
> AND THIS COURT DID FURTHER ORDER that the compensation allowed the Appellant pursuant to the Order of the Ontario Municipal Board dated August 20th, 1960, be increased to the sum of $77,313.00.

be deleted and that the following be substituted therefor:

> "THIS COURT DID ORDER that Question 1 be answered as follows: 'The Board erred in law in directing itself that the effect of this by-law was to require the compensation for the lands expropriated to be fixed on the assumption that they were an entity separate from the remainder of the lands of the owner and that the owner could never acquire or use them.', that Questions 2, 3, 5 and 6 be answered in the negative and that Questions 4 and 7 be answered in the affirmative.

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AND THIS COURT DID FURTHER ORDER that the matter be returned to the Board to be dealt with in accordance with the answers above set out."

It was necessary for the respondent to appeal to the Court of Appeal and, in turn, it was necessary for the appellant to appeal to this Court. The order of the Court of Appeal as to costs should stand but the appellant is entitled to its costs in this Court and I would so order.

JUDSON J. (*dissenting in part*):—I agree with the judgment of Cartwright J. except on question 1. As stated in his reasons, the Board found "that there was no reasonable probability of the desired zoning being realized." If the reasons of the Board are taken as a whole, I do not think that the mention of severance means anything more than the lack of this reasonable probability of rezoning the whole area including the expropriated land. This is not error in law. The respondent's artificial structure of hypothesis collapses when it is realized that it depends upon getting such a decision. These expropriated lands could only have value to the owner of the amount assigned to them by the respondent if they remained part of the whole and were rezoned.

The respondent seeks to build up value in this way. First, there are plans for a motel to be operated in conjunction with its established restaurant. This would involve putting supporting pillars on the lands in question. When expropriation makes this impossible, the motel must be placed on the table-lands, which otherwise would be used for an apartment building. Then the loss of the bottom lands destroys much of the value of the table-lands for an apartment site because the area of the bottom lands could be used as part of the computation of the land required for such a purpose and thus make possible the building of more suites.

The foundation for all this disappears with the finding of fact made by the Board. I would answer question 1 in the negative.

Appeal allowed, JUDSON J. *dissenting in part.*

Solicitors for the appellant: Roebuck & Walkinshaw, Toronto.

Solicitors for the respondent: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.