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STANDISH HALL HOTEL INCORPORATED (*Suppliant*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Petition of Right—Crown—Compensation—Subsequent partial abandonment and revesting—Loss of profits in intervening period—Method of valuation—Expropriation Act, R.S.C. 1952, c. 106, ss. 9, 24(1), (4).

In 1952, the suppliant's property, which included a hotel, was expropriated by the Crown in right of Canada under the authority of the *Expropriation Act*, R.S.C. 1927, c. 64. Some months before, the hotel had been seriously damaged by fire and temporarily repaired. The Crown held title for some 22 months and then, by appropriate notice under s. 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, abandoned most of the property, including the hotel, which revested in the suppliant. The latter remained in possession after the expropriation and continued to carry on its business without paying rent. Permanent reconstruction of the building, for which plans had been prepared, was not proceeded with until after the notice of abandonment.

In 1956, by its petition of right, the suppliant made a claim for damages incurred as a result of the expropriation and as compensation for the land taken and not revested. The trial judge awarded $28,600 for loss of profits for the 22 months; $3,500 representing the architect's fees for the preparation of plans for additions to the hotel, proposed prior to the expropriation; $6,021 (plus ten per cent for compulsory taking) for the value of the land retained; and $1,500 for injurious affection resulting from the loss of a right-of-way. In addition, he ordered that

PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

certain valuation and legal fees be determined on taxation by the registrar. The suppliant appealed to this Court and the Crown moved to vary the judgment.

Held: The appeal should be dismissed and the motion to vary allowed in part. Kerwin C.J. and Locke J. (dissenting in part) would not have allowed anything for compensation for the expropriation in view of its subsequent withdrawal.

Per Curiam: The amount of $6,021 for the land retained (but, in view of *Drew v. The Queen,* [1961] S.C.R. 614, without the ten per cent allowance for compulsory taking) and the amount of $1,500 for the deprivation of the right-of-way should not be altered. There was no reason to interfere with the disposition of the valuation and legal fees as made by the trial judge.

Per Taschereau, Fauteux and Abbott JJ: The fact that the whole or part of the expropriated land was returned to the owner did not change the nature of the owner's claim for compensation; it remained a claim under s. 23 of the *Expropriation Act* against the compensation which stands in the stead of the land, and under s. 24 of the Act the revesting was to be taken into account in assessing the amount to be paid. Hence, the value of the land as of the date of expropriation must be set against the value of the land revested as of the date of the revestment. In the circumstances of this case, there should be added to the fair market value of the property expropriated an allowance for business disturbance, in this case of $25,000. Had it not been for the revesting this allowance might have been higher. This allowance should be added to the market value of the property at the date of expropriation. Then from the total arrived at should be deducted the fair market value of the land retained. By that process, the suppliant was entitled to received $30,501.

Per Kerwin C.J., *dissenting in part:* Since the suppliant never attempted to move its business there was no basis for giving anything for loss of business. In addition to the $6,021 for the value of the land retained by the Crown and the $1,500 for the deprivation of the right-of-way, the suppliant was entitled as a separate item to the sum of $3,500 for drawing plans, etc.

Per Locke J., *dissenting in part:* The loss of possible profits amounting to $28,600 awarded by the trial judge could not be allowed as a deduction from the value of the property at the date of the abandonment. The suppliant was entitled under s. 24(4) of the Act to be compensated for such loss as was shown to have been sustained by it which was attributable to the fact that it was deprived of title to the property for a period of 22 months. If there was any loss of profits during that period the suppliant had no claim for compensation, since such loss was occasioned by its voluntary act in remaining in possession rent free. If there was any legal basis for such a claim, the evidence did not support any award. Furthermore, the sum of $3,500 allowed by the trial judge as the fees of the architect should not have been awarded. The suppliant could have availed itself of the benefit of these plans after the notice of abandonment had it wished to do so, and suffered no loss attributable to the expropriation.

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APPEAL by the suppliant from and motion to vary a judgment of Kearney J. of the Exchequer Court of Canada[1], awarding compensation in a matter of expropriation. Appeal dismissed and motion to vary allowed in part (Kerwin C.J. and Locke J. dissenting in part).

J. G. Ahern, Q.C., and *H. J. Maloney, Q.C.*, for the suppliant, appellant.

P. M. Ollivier, for the respondent.

THE CHIEF JUSTICE (*dissenting in part*):—This is an appeal by Standish Hall Hotel Incorporated from a judgment of the Exchequer Court[1], dated March 15, 1960, in proceedings commenced therein by the appellant by petition of right. The respondent gave a notice to vary the judgment.

It is important to set forth the substance of the formal judgment:

(*a*) It ordered that $6,623 with interest from July 19, 1952, to the date of judgment was sufficient and just compensation for the taking by the respondent of part of Lot 304 in Ward II, District of Hull, Quebec, containing 2,007 sq. ft., and for any loss occasioned to the owner or any other person having interest in the land on July 19, 1952, "the said sum of Six Thousand Six Hundred and Twenty-Three Dollars ($6,623) to include the allowance for forceable taking";

(*b*) That the appellant recover from the respondent $31,600 with interest from May 18, 1954, to the date of judgment "as compensation for the expropriation and subsequent revesting of the lands described as parts of Lot 304, 306 and 307 in Ward II, District of Hull, Quebec, having a total area of Eighty-six Thousand Five Hundred and Thirty-six Square Feet (86,536 sq. ft.) less the Two Thousand and Seven Square Feet (2,007 sq ft.) aforesaid";

(*c*) It ordered "that the sum of One Thousand Five Hundred Dollars ($1,500) with interest from the 19th day of July, A.D. 1952 to the date hereof is a sufficient and just allowance for injurious affection for the deprivation of a registered servitude consisting of a right of passage over lands adjoining the said lands hereinbefore referred to";

(*d*) It ordered that the appellant recover such further amounts "in respect of assessors and legal fees as may be determined on taxation by the Registrar";

(*e*) It ordered that the respondent pay the appellant the costs of the action.

On July 19, 1952, the appellant was the owner of lands in Hull, in the Province of Quebec, upon which was erected the Standish Hall Hotel. On that date this property was

[1] [1960] Ex. C.R. 373, 23 D.L.R. (2d) 38.

expropriated by the respondent under the provisions of the *Expropriation Act*, R.S.C. 1927, c. 64. On May 18, 1954, the respondent abandoned the expropriation of this land except a small part at the south-eastern extremity, which is the part described in (*a*) of the summary of judgment set forth above. In the meantime, on July 14, 1953, the respondent had filed an information to have the amount of compensation determined under the expropriation of July 19, 1952, but no further proceedings have been taken. At the hearing of the present action it was agreed by counsel that the information by the respondent should be dismissed without costs but it was also agreed that the account of the late Senator Beauregard for legal services against the appellant and also the amount paid to the expert (W. E. Noffke) in connection with the first expropriation "should not be prejudiced". The Court thereupon directed that "this expense will be attached to the petition of right". Subject to this the information by the respondent need not be further considered.

The account of Senator Beauregard was referred to the registrar for taxation and the trial judge considered the claim of W. E. Noffke of $11,800, allowed it at $3,500, but, after some hesitation, placed it in the same category as, (and therefore included it in), the allowance of $31,600 he granted as "Loss of business caused by the expropriation". Counsel for the appellant argued that Noffke's account should have been fixed at $4,400 but subject to that is satisfied with the amount fixed by the trial judge under heading (*b*), although claiming other amounts in connection with other items which were disallowed. On the other hand, the respondent takes the position that if the petition of right is maintained and the appellant awarded compensation, the appellant is entitled to assessor's fees as part of the costs of the cause and to the amount allowed for Noffke's account.

As to the small bit of land referred to in (*a*) above, we are all of opinion that no reason has been shown to alter the value placed upon it by the trial judge, $6,021. However, in view of the decision of this Court in *Drew v. Her Majesty the Queen*[1], ten per cent of that sum which the trial judge allowed for forceable taking cannot stand. This item is

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

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therefore reduced to $6,021. Similarly we are all of opinion that the value of the servitude referred to in (*c*) should not be increased from the $1,500 allowed by the trial judge. The "assessors and legal fees" in (*d*) refer to the account of Senator Beauregard and to whatever may be properly allowable to Noffke as a witness at the trial. It does not include anything for Noffke's account of $11,800 for preparing plans after the expropriation because while the trial judge in his reasons shows that he considered that it should be fixed at $3,500, he did not allow it specifically, as he had included the $3,500 in the sum of $31,600 mentioned in (*b*). I would not interfere with the trial judge's disposition of the fees of assessors (which include Noffke's) and of Senator Beauregard's account, but, as I consider no allowance should be made for what I understand the trial judge has fixed as damages, I would allow the $3,500 as a separate item.

The appellant did not move its hotel business to another site and therefore I am unable to concur with the trial judge that anything is allowable "in equity". The appellant remained in possession of the hotel property and carried on business, paying no rent, and according to the exhibits filed at the trial as to which there was no cross-examination, paying taxes and insurance premiums. The trial judge fixed the value of the lands as of the date of expropriation and the value as of the date of abandonment, finding the latter to be slightly in excess of the former. There is no basis for giving the appellant anything for loss of business as it never attempted to move its business.

I would therefore dismiss the appeal with costs, allow the motion to vary with costs and in lieu of the judgment below direct that it read as follows:

1. That it be ordered and adjudged that $6,021 with interest from July 19, 1952, to the date of judgment, March 15, 1960, was sufficient and just compensation for the taking by the respondent of part of lot 304 in ward II, District of Hull, Quebec, containing 2,007 sq. ft., and for any loss occasioned to the owner or any other person having interest in the land on July 19, 1952.

2. That the sum of One Thousand Five Hundred Dollars ($1,500) with interest from the 19th day of July, A.D. 1952 to March 15, 1960, is a sufficient and just allowance for

injurious affection for the deprivation of a registered servitude consisting of a right of passage over lands adjoining the lands expropriated.

3. That the appellant recover such further amounts in respect of assessors and legal fees as may be determined on taxation by the registrar.

4. That the appellant recover the sum of $3,500 for the services of W. E. Noffke for drawing plans, etc.

5. That the respondent pay the appellant the costs of the action.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—The appellant has appealed, and the Crown has moved to vary, a judgment of the Exchequer Court[1], rendered on March 15, 1960, awarding to appellant the sum of $39,723 as compensation for its property and in addition certain valuation and legal fees to be determined on taxation by the registrar.

The facts are fully set forth in the judgment of the learned trial judge and for the purposes of this appeal can be shortly stated.

The appellant is the owner and operator of the Standish Hall Hotel which is situated close to the centre of the main business section of Hull. It has frontage on three important streets, namely 293.8′ on rue Principale to the south, 190.5′ on rue Montcalm to the west and 184.4′ on Wellington St. to the north. The eastern boundary, being part of lot 304, measures 351′. The total area of the land is approximately 84,700 sq. ft.

On July 19, 1952, the above property along with other property to the east of it was expropriated by Her Majesty the Queen under the authority of the former *Expropriation Act*, R.S.C. 1927, c. 64.

On May 18, 1954, twenty-two months later, the Crown abandoned the expropriation of the appellant's property with the exception of a small area of vacant land measuring approximately 2007 sq. ft. and situated at the southeastern extremity of the land.

[1] [1960] Ex. C.R. 373, 23 D.L.R. (2d) 38.

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Appellant remained in possession of the property during the full period of expropriation, continued to carry on its business there and paid no rent. Some months before the notice of expropriation was given on July 19, 1952, the buildings on the property had been seriously damaged by fire and temporary repairs were made prior to that date. Permanent reconstruction of the buildings, for which plans had been prepared, was not proceeded with however, until after the notice of abandonment was given by the Crown on May 18, 1954.

On January 7, 1956, appellant took a petition of right against the Crown claiming $584,330.61 as damages incurred as a result of the expropriation and as compensation for the land taken and not revested.

Both the appeal and the motion to vary turn upon the interpretation and effect to be given to ss. 23 and 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, which read:

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

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.

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

(3) In the event of a limited estate or interest therein being retained by the Crown, the land shall so revest subject to the estate or interest so retained.

(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.

The meaning and effect of these two sections was considered by this Court and by the Judicial Committee in *Gibb v. The King*[1], and Fitzpatrick C.J. (whose judgment was declared to be correct in all respects by the Judicial Committee) at p. 407 said:

> The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.
>
> The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sc. 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* (1914) A.C. 569, 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 the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

The fact that the whole or some portion of the land expropriated has been returned to the person from whom it was taken, does not change the nature of the owner's claim for compensation. It remains a claim under s. 23 of the *Expropriation Act* against the compensation money which stands in the stead of the land. As Lord Buckmaster said in *Gibb v. The King, supra,* at p. 922:

> Even after revesting, the claim for compensation still remains open for adjustment, for it has nowhere been taken away or satisfied, and in its settlement the effect of the revesting is an element to be considered.
>
> Their Lordships are therefore unable to accept the view that the true measure of the appellant's right is something in the nature of a claim for damages for disturbing or injuriously affecting. In fact, so far as the particular piece of land is concerned, the Crown does not appear to have done any act upon the land itself that would either damage or injuriously affect its value. Its advisers have been enabled by virtue of the section to change their mind and give back the property which they originally took, and it is this fact which must be considered with other circumstances in determining the original amount of compensation which they became liable to pay.

It follows that in a case such as this the tribunal of fact must first determine in accordance with well-established principles, the value of the land to the owner as of the date of the expropriation and the value of the land revested must also be determined as at the date of revestment. If the latter value is equal to or exceeds the value of what was taken, the owner is then in the position of having received in property

[1] (1915), 52 S.C.R. 402, 27 D.L.R. 262; [1918] A.C. 915, 42 D.L.R. 336.

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"the equivalent in value to him of the property taken as of the date when sec. 23 became operative" to adopt the words used by Duff J. in *Gibb v. The King, supra,* at p. 429.

The learned trial judge found the fair market value of the property at the date of expropriation to have been $440,743, and some twenty-two months later at the date of revesting to have been $441,263. There is ample evidence to support those findings and they should be accepted.

To each of these amounts however, he added $100,000 as "a value in equity" to appellant of the business conducted on the property. He therefore fixed the value of the property to appellant as owner, at the date of expropriation, at $540,743.

As I have stated, at the date of revesting he found the market value of the property to be $441,263 (an increase of $520) to which he added the sum $100,000 just referred to. From that total of $541,263 he deducted $28,600 for loss of profits during the twenty-two month period and $3,500 for the cost of certain plans prepared for appellant but not used, and fixed the value to the owner at the date of revesting at $509,163.

The effect of these calculations was of course to award to appellant a sum of $28,600 as damages for loss of profits and a sum of $3,500 representing the cost of certain plans.

In the result the learned trial judge held that appellant was "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". To this sum he added (1) $6,623 (which included 10 per cent for forcible taking) as the value of the small portion of land retained by the Crown, (2) $1,500 for injurious affection due to loss of a right of way, and fixed the total compensation due by respondent at $39,723.

With deference, I am unable to agree that the compensation to which appellant may be entitled can properly be ascertained in this way.

The principles applicable in determining compensation are well established, and were re-stated by this Court in *Woods Manufacturing Co. v. The King*[1]. The rule is that the owner at the moment of expropriation is deemed as

[1] [1951] S.C.R. 504, 67 C.R.T.C. 87, 2 D.L.R. 465.

without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

In the *Woods* case, in *Diggon-Hibben Ltd. v. The King*[1], and in other cases decided by this Court, it has been held that in appropriate circumstances value to the owner includes an allowance for business disturbance. Appellant was without title to the property for some twenty-two months although it continued in possession, apparently with the consent of the Crown. In these circumstances, I think that an allowance for business disturbance should be made in fixing the compensation to which appellant was entitled but, under the terms of s. 24(4) of the *Expropriation Act,* the tribunal of fact in fixing the amount of such allowance must take into account the re-vesting and the fact that appellant continued to carry on business on the property.

As my brother Locke pointed out in *Drew v. The Queen*[2], such an allowance is in the nature of unliquidated damages and, except in very rare circumstances, cannot be determined with complete accuracy. In all the circumstances here, in my opinion an allowance of $25,000 for business dislocation is fully adequate and the value of the property to appellant as owner at the date of expropriation could not exceed its fair market value plus the amount of such an allowance. In my view, had it not been for the revesting such an allowance for business disturbance might well have been substantially higher than $25,000. The learned trial judge found the market value of the property at the date of expropriation to be $440,743. I would therefore fix the value to appellant as owner at that date at $465,743.

To arrive at the compensation to which appellant is entitled, from the said amount of $465,743 must be deducted the value of the land revested in appellant and for that purpose, in my opinion, the value of such land should be its fair market value at the date of revesting.

As I have stated, the learned trial judge found the market value of the whole property at the date of revesting to have been $441,263. He fixed the market value of the small portion retained by the Crown at $6,021, and in view of the

[1] [1949] S.C.R. 712, 4 D.L.R. 785.

[2] [1961] S.C.R. 614 at 626, 29 D.L.R. (2d) 114.

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decision in *Drew v. The Queen, supra,* there should be no allowance for compulsory taking. Deducting the said amount of $6,021 from the fair market value of the whole property at the date of revesting leaves a sum of $435,242 which represented the value of the property revested in the appellant. On May 18, 1954, the date of revesting, the appellant was entitled therefore to receive from respondent the sum of $30,501. Appellant should also receive the sum of $1,500 for injurious affection resulting from loss of a right-of-way as found by the trial judge. In the result, appellant is entitled to receive as compensation the sum of $32,001, with interest as from July 19, 1952, on the above amounts of $6,021 and $1,500, and as from May 18, 1954, on the balance.

The learned trial judge held that certain claims made by appellant for valuation and legal fees incurred in connection with the expropriation, should be referred to the registrar for assessment and taxation, and I see no reason for interfering with that disposition of these two claims.

I would dismiss the appeal with costs and allow in part the motion to vary with costs. The judgment is amended by striking out the words and figures "Six Thousand, Six Hundred and Twenty-three Dollars ($6,623)" wherever they appear in the first operative clause of the judgment and inserting in lieu thereof the words and figures "Six Thousand and Twenty-one Dollars ($6,021)". The judgment is also amended by striking out the words and figures in the second operative clause "Thirty-one Thousand, Six Hundred Dollars ($31,600)" and inserting in lieu thereof "Twenty-four Thousand, Four Hundred and Eighty Dollars ($24,480)".

LOCKE J. (*dissenting in part*):—This is an appeal by the suppliant, and a cross-appeal on behalf of the Crown, from a judgment[1] of Kearney J. awarding compensation to the appellant by reason of the expropriation by the Crown of a hotel property in the city of Hull. The expropriation was subsequently abandoned under the provisions of s. 24(1) of the *Expropriation Act,* R.S.C. 1952, c. 106. By the judgment appealed from, the appellant was awarded sums aggregating $39,723 and such further amounts as might be determined

[1] [1960] Ex. C.R. 373, 23 D.L.R. (2d) 38.

on taxation by the registrar for the services of an expert witness and for legal fees incurred in the circumstances to be hereafter mentioned.

The appellant is the owner of lands in the city of Hull upon which the Standish Hall hotel is built, which is and was at the relevant times operated as such. These operations were shown to have been profitable in five of the six years prior to August 1951 when a large area of the southern part of the hotel was damaged by fire. Repairs were made in that year which permitted the continuation of the business and the retention of the liquor licence, shown to be a valuable asset.

The notice of expropriation was given on July 19, 1952, and the notice of abandonment on May 18, 1954. The abandonment was not of the entire property, there being excepted a small area of vacant land containing 2,007 square feet situated along the south eastern limit of the land, and the value of this property is one of the matters in issue. The Crown permitted the appellant to remain in possession and to operate its business throughout this period without payment of any rent.

An information for the purpose of determining the compensation to be paid was exhibited by the Attorney General in the Exchequer Court on July 14, 1953, but it does not appear that this was served and, for reasons unexplained, the matter was not proceeded with by the Crown.

On July 5, 1956, the appellant filed a petition of right claiming a sum of $584,330.61 as compensation for damages claimed to have been suffered. The particulars of this claim were as follows:

1. For loss of good will and patronage due to inability to rebuild: ..... $160,000.
2. For loss of revenue for 22 months at $1,841.55 a month: 40,514.61
3. For loss of additional revenue from additions to the hotel, said to have been proposed prior to the expropriation during the 22 months' interval: ..... 220,140.
4. For the cost of temporary repairs to the premises: ..... 24,000.
5. For architect's fees for the plans of the proposed addition mentioned in No. 3 above: ..... 11,800.
6. For additional cost of the construction of an addition built in 1955 over 1952 prices: ..... 26,250.
7. For costs involved in expropriation proceedings: ..... 29,500. being $7,000. legal fees and "owner's expropriation expert's fee" W. E. Noffke $22,500.

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8. For value of 2,007 square feet retained: ..... 36,126.
9. For loss of a right-of-way over the western part of a lot adjoining the property to the east: ..... 36,000.

The claims were dealt with separately by the learned trial judge in a carefully considered judgment.

Kearney J. found that there was no sufficient evidence of loss to justify any allowance in respect of the claim under head 1 above.

In respect of the claim for loss of profits under head 2, the learned judge held that there had been a loss of $28,600 during the period of 22 months.

Dealing with the loss of additional profits under head 3, he found that the suppliant had failed to establish that but for the expropriation proceedings he would have proceeded with the larger structure, which made further consideration of the claim unnecessary.

The claim for expenditures for repairs made following the fire under head 4 was dismissed.

The sum of $11,800 claimed as architect's fees for the preparation of the plans for the large addition said to have been contemplated under head 5 was allowed at $3,500.

The claim for the additional cost of building the addition to the hotel, constructed after the abandonment of the expropriation, over the cost of such work in 1952 under head 6 was considered in connection with the valuation of the property on revesting.

The claim for the services of Mr. Noffke as a valuator and the claim of $7,000 for legal fees, said to have been incurred in connection with the information that was not proceeded with, under head 7 were referred to the registrar for taxation.

For the area retained by the Crown the learned judge allowed $6,021 and, in addition, ten per cent for forcible dispossession (head 8).

For the loss of the right-of-way under head 9 $1,500 was allowed.

While Mr. E. S. Sherwood, called as an expert witness as to values on behalf of the Crown, and Mr. Noffke, who in addition to being an architect was shown to be experienced in valuing land, differed widely as to the value of the lands taken, they were agreed that the property was greater in

value at the date the expropriation was abandoned than when expropriated. Sherwood's valuation of the land and buildings as of the date of the expropriation was $440,743 and as of the date of abandonment $458,050. The learned trial judge accepted the first of these valuations but said that he considered the value at the time of abandonment to be $441,263, the difference being caused by an error made by the witness in the percentage of increase in building costs as between the two dates. I have examined with care the evidence of these two witnesses and I respectfully agree with the conclusion of the learned trial judge that these figures represent the value of the property at the respective dates. While the witness did not state that this was market value, I think it clear that this is what was intended and it was so found by Kearney J.

The reasons for judgment, after saying that market value did not represent the value to the suppliant at these dates, read in part:

> 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.

No further details than those above stated were given as to the manner in which the learned judge arrived at the figure of $100,000. While the reference is to "the value in equity to the suppliant", I construe this portion of the judgment as a finding that this amount, added to the market value, was the value to the owner at the respective dates. I do not think the use of the expression "a going concern" was intended to mean that the value of the business itself which was not, of course, expropriated, as distinct from the property on which it was carried on, was $100,000. The learned judge had in the course of his judgment referred to *Cedars Rapids v. Lacoste*[1], dealing with another

[1] [1914] A.C. 569, 6 W.W.R. 62, 16 D.L.R. 168.

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aspect of the matter and, in my opinion, it should be taken that the sum of these two amounts was, in his opinion, the value to the owner with all the advantages which the land possessed, present or future, the compensation to which an owner is entitled as stated at p. 576 of the report of that case.

In cases such as *Diggon-Hibben Ltd. v. The King*[1], and *Woods Manufacturing Co. v. The King*[2], substantial allowances were made for the dislocation of the business carried on due to the dispossession and the cost of establishing it in new premises, but there was nothing of this kind in the present case as there was no evidence that the appellant proposed to establish a hotel business elsewhere and it elected to remain on the premises carrying on its business and the expropriation did not either interrupt it or cause any added expense. Rather was the expense diminished by reason of the exemption from municipal taxation on the land. Since nothing of that nature could accordingly be included in the allowance made, it would appear that the learned judge added the amount of $100,000 as the added value to the owner, owing to the suitability of the premises and their location for the carrying on of a hotel business by it. Since the value of the land was greater when returned than when taken, the only importance of the allowance is its bearing upon the consideration of the amounts allowed for loss of profit.

Thus, in the result, the suppliant has been awarded not merely the full value to it of the lands taken less the value of the property when returned to it but, in addition, $28,600 for loss of profits it might have made had additions to the hotel costing $175,000 been made, similar to those that were proceeded with after the abandonment in the year 1954 and which were only available for use in 1955.

Section 23 of the *Expropriation Act* provides that upon the filing of the plan and description of the land which is required by s. 9 such lands become absolutely vested in the Crown and it is common ground that this was done on July 19, 1952.

[1] [1949] S.C.R. 712, 4 D.L.R. 785.
[2] [1951] S.C.R. 504, 67 C.R.T.C. 87, D.L.R. 465.

Section 24 of the Act, so far as it needs to be considered, reads:

> 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.

The appellant's claim is for compensation and must be based entirely upon the provisions of the statute. It is not a claim for damages: *Jones v. Stanstead Railway Company*[1]; *Gibb v. The King*[2]. The Act in terms says no more than that the fact of the revesting shall be taken into account "in connection with all the other circumstances of the case" in determining what compensation is to be paid.

With great respect for the contrary opinion of the learned trial judge, I do not agree that the loss of possible profits amounting to $28,600, considered to have been suffered, may be allowed as a deduction from the value of the property at the date of the abandonment. If any such allowance may be made, it must be dealt with independently as a loss resulting from the expropriation. The value of the property when revested in the suppliant was not diminished by the fact that during the twenty-two month period profits which might have been made had not been realized. If the property had diminished in value during the period, the claim made under this head would be quite distinct from the claim for loss of profit.

In my opinion, in circumstances such as are disclosed by the evidence in this matter, the suppliant is entitled under s. 24(4) to be compensated for such loss as is shown to have been sustained by it which is attributable to the fact that it was deprived of title to the property for a period of 22 months.

[1] (1872), L.R. 4 P.C. 78.
[2] [1918] A.C. 915 at 922, 42 D.L.R. 336.

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The appellant might have ceased its business and removed its furniture and other personal property from the premises in July 1952, in which event it would have been entitled to be paid, in the opinion of the learned trial judge, $540,743. However, of its own motion and with the apparent consent of the Crown, the suppliant remained in possession rent free and operated its business.

I am unable to appreciate how it can be said that by following this course an added liability was imposed upon the Crown.

The allowance was made under head 2 of the suppliant's claim and the reasons for judgment described it "a claim for prospective profit which the suppliant was prevented from realizing during the twenty-two months preceding the abandonment of the expropriation."

The appellant had filed a series of financial statements referring to its operations during the years 1947 to 1957, both inclusive, and it was upon the facts disclosed by these statements that the learned trial judge was invited to assess the loss of profit during the twenty-two month period in question. The judgment dealing with this aspect of the matter reads in part as follows:

> 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.

There are, in my opinion, upon the evidence in this case, insuperable objections to determining the amount of the alleged loss in this manner.

The fire which took place in August 1951, according to the witness J. P. Maloney, destroyed practically half of the hotel buildings and in respect of this loss the appellant was paid $237,390.47 by various insurance companies. In spite of the receipt of this large sum, the only expenditures made on the buildings up to the date of expropriation were some $30,000 for additions and repairs, which enabled the continuation of the business and the retention of the licence.

According to the witness Noffke, he had received instructions shortly before the expropriation to prepare plans for a large addition to the buildings and these had been partially prepared on July 19, 1952, though the specifications were not prepared. The learned judge found as a fact in disposing of the claim for loss of revenue made under head 3 that the appellant had failed to establish that but for the expropriation proceedings he would have proceeded with this large addition to the buildings.

There is no evidence in this record which indicates that the building of the addition, plans for which were prepared in August 1954 and as to which the architect was only instructed after the notice of abandonment, would have been proceeded with but for the expropriation. Noffke, when asked on cross-examination whether this addition could not have been built during the period between May 1952 and May 1953, answered:

> On account of conditions it was not possible because the money was not available.

The compensation awarded, however, proceeds on the basis that but for the expropriation the appellant would have had in operation the enlarged hotel which, as the evidence shows, was not ready for occupation until September 1955, throughout the period from July 19, 1952, to May 18, 1954. Noffke, whose plan for the addition undertaken in 1954 is dated August 3, 1954, said that it had taken him two or three months to complete the plans from the time they were ordered and that the shortest time required to complete the work would be one and a half years. Assuming that funds had been available in May 1953, the addition would not have been ready for operation until several months after the notice of abandonment was given. He confirmed the fact that there was no talk of constructing the lesser addition to the premises in 1952. In these circumstances, there appears to me to be no foundation for the allowance made, computed in this manner.

Apart from these considerations and with great respect, I do not think that the evidence supports the finding that, assuming the expenditure of $175,000 for the building had been completed on the date of the expropriation, the profits would have exceeded the amount actually realized by $1,300 a month, the figure used at arriving at the compensation of $28,600.

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The financial statements prepared by the company's auditors for the years 1947 to 1957 were put in evidence. These show that in the year 1950, before the fire, the profit from the operation was $4,660.06. In the following year the operations showed a loss of $44,914.73, this result, no doubt, being contributed to by the interruption of the operations caused by the fire. In 1952 the detailed auditors' statement shows a net loss of $8.44, an amount which was amended, however, to show a profit of $4,062, apparently after the accounts had been reviewed by the Income Tax Department. The statement does not appear to be an accurate statement of the result of the operations for that year for the following reasons:— from July 19, 1952, this property was owned by the Crown and as such was exempt from municipal taxation, other than as regards water supply and light and the making and repairing of sidewalks, water courses and drains under the provisions of s. 409 of the charter of the City of Hull (Statutes of Quebec 1893, c. 52, as amended by s. 17 of c. 96 of the Statutes of 1925). No allowance is made in the statement for this fact, taxes being charged in the amount of $7,817.37 as an expense. In addition, an amount of $7,018.43 was charged for maintenance and repairs and $410 for insurance. Since the buildings were the property of the Crown, to the extent that the maintenance and repairs were made after July 19, 1952, the appellant was under no obligation and, to the extent that the charge for insurance referred to insurance on the buildings, the appellant had no insurable interest from that date. The proportion of these expenses attributable to the period after the date of expropriation was not a proper deduction from income and would increase the profit of $4,062 substantially.

For the year 1953 the inaccuracies are more substantial. Throughout the calendar year the lands and buildings were the property of the Crown: yet, as part of the expenses there were charged:

Insurance	$ 531.
Maintenance and repairs	3,046.
Taxes	7,912.
Depreciation of real estate	5,178.

making a total of $16,667. The statement filed on behalf of the appellant showed an operating profit of $2,408 for this year but, adding the deductions mentioned, the operation showed a profit in the neighbourhood of $19,000.

For the year 1954 a loss of $4,581 was shown. Until May 18, 1954, the title remained in the Crown: yet, charges for maintenance and repairs, taxes and depreciation of real estate totalling $14,235 were shown in the statement, a substantial part of which was not properly chargeable.

The learned trial judge was apparently invited to estimate the loss of profit on the footing that the figures submitted were accurate but, as I have indicated, there were grave inaccuracies.

In my opinion, if there was any loss of profits during the period of 22 months the appellant had no claim for compensation, since such loss was occasioned by its voluntary act in remaining in possession rent free during the period. If there was any legal basis for such a claim, I consider that the evidence does not support any award.

I am further of the opinion that the sum of $3,500 allowed as the fees of the architect in preparing the plans for the large addition to the premises under head 5 should not have been awarded. The plans were in fact partially prepared but the learned trial judge has held that it was not shown that the building would have been proceeded with had the property not been expropriated. The appellant could have availed itself of the benefit of these plans after the notice of abandonment had it wished to do so, and suffered no loss attributable to the expropriation.

Under head 7 the appellant claimed to recover a sum of $7,000 which the witness Maloney said he had paid to the late Senator Beauregard for legal fees. No account was put in evidence and no further particulars given in regard to this expenditure. Senator Beauregard was not the solicitor on the record in the present action but appears to have been retained when the information was exhibited by the Attorney General on July 14, 1953. The matter was mentioned by counsel for the Crown at the commencement of the trial, saying that the information had been laid but that, before it had been proceeded with, the appellant had proceeded by way of petition of right and asked permission to withdraw the information without costs. Counsel for the present appellant objected to this, saying that the appellant claimed the amount paid to Senator Beauregard, and the learned judge directed that "this expense will be attached to the

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petition of right." It was this claim that was referred to the registrar for taxation in the judgment appealed from, the learned judge saying:

> 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.

The appellant questions the right of the learned judge to direct the taxation of this account, saying that solicitor and client's costs are not subject to taxation in the courts of Quebec. This objection cannot be given effect to as the costs are payable in respect of the proceedings taken in the Exchequer Court, and those allowable against a party are such as are permitted under the Rules of that Court. While, in strictness, these costs should have been taxed in the action commenced by the Crown, it is clear that the parties agreed that they should form part of the cost of the present action and, accordingly, they may properly be taxed by the registrar. The judgment does not direct whether they are to be taxed upon a party and party or solicitor and client basis. As to this, following the decision in *The Quebec, Jacques-Cartier Electric Company v. The King*[1], I would direct that these be taxed as between solicitor and client.

The judgment referred to the registrar the question as to the allowance to be made to the witness Noffke, provision for which is made in item 42 of the tariff of the Exchequer Court, which is a proper disposition of the matter, in my opinion.

Upon conflicting evidence Kearney J. found the value of the area of 2,007 square feet taken to be $6,021, a finding with which I respectfully agree. The learned judge, however, added to this amount ten per cent for forcible dispossession, for which, in my opinion, there is no warrant in these circumstances.

The claim in respect of the right-of-way over the adjoining lot for which under head 9 $36,000 was claimed was allowed at the trial at the sum of $1,500 and, in my opinion, no ground has been shown upon which this finding should be interfered with.

[1] (1915), 51 S.C.R. 594.

I would, accordingly, allow this appeal in part and reduce the amount of the award to the sum of $7,521 and, in addition, such amounts as are found properly payable by the registrar in respect of the claim for costs for the services of the late Senator Beauregard and for the witness fee payable to the witness Noffke.

I would dismiss the appeal and allow the cross-appeal to the extent indicated and award to the Crown its costs of the proceedings in this court.

Appeal dismissed with costs; motion to vary allowed in part with costs.

Solicitors for the suppliant, appellant: Hyde & Ahern, Montreal.

Solicitor for the respondent: P. Ollivier, Ottawa.