IRVING OIL COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) RESPONDENT.

1946
*May 13, 14
*Oct. 1

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Compensation—Value to owner—Gasoline service station—Allowable items—Expropriation Act, R.S.C. 1927, c. 64, sections 2 (d) 3, 23.

The appellant company, a distributor of gasoline and oil products, purchased a corner lot in the city of Saint John N.B., and erected a service station thereon. Some years later, the Crown expropriated the property and the present action is to determine its value. The Crown offered a sum of $4,750, while the Company claimed an amount over $21,000. The Exchequer Court of Canada awarded $6,000 in all to the Company, after having estimated at $4,000 the fair market value of the land and improvements. The Company appealed to this Court.

Held, varying the judgment of the Exchequer Court of Canada ([1945] Ex. C.R. 228), that the amount of compensation money to which the appellant company is entitled should be increased and that a sum of $8,697.88 should be awarded, consisting chiefly of the costs of the purchase of the land, of the making of a necessary fill-in and of the construction of the service station less fifteen per cent. for depreciation on the latter, plus expenses of removal and depreciation of equipment and compensation for compulsory taking.

Section 23 of the *Expropriation Act* provides that "The compensation money * * * adjudged for any land * * * acquired or taken * * * shall stand in the stead of such land * * *," and, by section 2 (*d*), "'land' includes * * * damages, and all other things done in pursuance of this Act * * *"

PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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Per The Chief Justice and Kerwin J.:—The principle in this class of case is that the displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which compensation was claimed was directly attributable to the taking of the lands.

Per Hudson J.:—The value to be fixed is the value to the owner, bearing in mind its acquisition of the property for special purposes and the net earnings which it might receive therefrom until it had established other profitable outlets for its products.

Per Rand J.:—The use of the word "damages" and the further language "and all other things done in pursuance of this Act" in section 2 (*d*) indicate the comprehensive sense in which the word is used and that it is intended to cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause.

Per Estey J.:—It is the market value of the property expropriated, plus allowances equivalent to the present worth of those advantages which the property possessed to the owner, that constitutes the compensation to which he is entitled.

Cedar Rapids Manufacturing and Power Co. v. *Lacoste* ([1914] A.C. 569) and *Pastoral Finance Association Ltd.* v. *The Minister* ([1914] A.C. 1083) ref.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), awarding to the appellant company the sum of $6,000 in full compensation for the property expropriated by the Crown under the *Expropriation Act*, R.S.C. 1927, c. 64. The Crown had offered $4,750 and the appellant company had claimed $21,544.30. The appellant appealed to this Court for an increase of the award granted by the Court below.

C. F. Inches K.C. for the appellant.

R. D. Keirstead and *C. Stein* for the respondent.

The judgment of the Chief Justice and of Kerwin J. was delivered by

KERWIN J.:—On July 8, 1943, under the provisions of the *Expropriation Act*, R.S.C. 1927, chapter 64, the Crown expropriated lands of the Irving Oil Company Limited, situate at the corner of Britain and Prince William Streets, in the city of Saint John, in the province of New Brunswick. It offered the Company for the property $4,750 and the

(1) [1945] Ex. C.R. 228.

proportionate share of the 1943 municipal taxes from July 8 to December 31, 1943, while the Company claimed some $21,000. The Exchequer Court of Canada awarded $6,000 and the Company now appeals.

The Company is a distributor of gasoline and other oil products, with its head-office at Saint John, and operates and maintains bulk stations and service stations throughout the Maritime provinces. It does not carry on business in the United States. In 1935, the Provincial Government announced plans for a system of paved roads, and the Company, expecting an influx of tourists, turned its attention to a consideration of the increased number that might be expected to travel by ship from Boston to Saint John. This ship made two trips each week during the summer, docking at Reed's Point, just across Prince William street from the land here in question. It did not run in the winter. The ship carried automobiles whose gas tanks, however, had to be emptied before being put on board.

A business competitor, Provincial Oil Company, purchased a lot on the north side of Britain street for $1,600 and erected a service station thereon. In December of that year the appellant company purchased its corner lot for $3,000 and erected a service station thereon with a large sign in front. It cost $666 to fill-in the land, and the cost of the service station appears to be $3,938. In accordance with its usual practice, it leased the property to various lessees to run the service station at a rental of one cent for every gallon of gasoline sold by the lessee. After allowing for taxes and maintenance, and taking into consideration losses from the renting of the property in certain years, the Company estimated that it had a net annual revenue from it and from the profit of five cents per gallon for every gallon furnished by it to its lessees during the years 1937 to 1941.

The Company's object in buying the property and erecting the service station was, as one of its officers stated, to have it as an advertising medium. Not relying solely upon the building and sign, it had its men approach the passengers from the Boston ship with literature and maps and, of course, endeavour to sell its own products. The Provincial Oil Company was doing the same thing and the

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competition became so keen that the ship's officials finally took steps to keep the contending parties off the dock. The appellant company's premises are nearer to the dock than those of Provincial Oil Company. The Boston ship ceased running in the fall of 1939 or 1940 but it is a reasonable probability that it will start again.

The appellant's service station is not located in a desirable district from the point of view of residence, and in fact most of the buildings in the neighbourhood are stated to be in a condition of non-repair; railway tracks run along Prince William street and part, at least, of the section is more suited for manufacturing than anything else. The Company made up its claim on the basis of the original cost, or upon the replacement value in 1943 of the building, and claimed for loss of goodwill and loss of profits besides several small items to be mentioned hereafter. The Crown's evidence was directed towards showing the assessed value of this property and adjoining property which had also been expropriated by the Crown but as to which it had been able to arrive at a settlement with the owners. Assessment, of course, is not a deciding factor but merely one of the things that may be looked at in arriving at a final conclusion. In this case I think it has no bearing whatever. The evidence as to what other owners in the immediate vicinity accepted in payment of their holdings is not of assistance because, as it has been pointed out more than once, these owners may for various reasons prefer to take lower sums rather than enter into a dispute; and, furthermore, none of the properties is really comparable when one considers what the Crown is taking from the appellant.

The trial judge stated:—

> While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000. the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant. The price that another oil company would pay would certainly be based on the yearly gallonage of gasoline passing through the station and the evidence showed that over a five-year period this was small.

While making no allowance for loss of profits, he found that the compensation money to which the appellant was

entitled was $6,000. This is about the sum mentioned by the witness Lawton, called on behalf of the Crown. While the reading of his evidence does not impress me, if the trial judge had chosen to take his estimate in preference to others and had proceeded upon proper principles, I would, of course, not suggest any change. However, while expressions may be found in some of the cases that, where property expropriated is not ordinary agricultural or residential land, there should be added to the fair market value of land of that type an additional amount for the particular value to the owner, it is not meant by that, that two sets of figures should be set down and added together,—at least not in all cases. In another respect the trial judge erred where he said that while damages are included in the definition of "land" in section 2 (*d*) of the *Expropriation Act*, that was clearly damage for land injuriously affected. That statement would cover but a few items of the amounts claimed and I shall revert to the question later.

In this type of case, two decisions of the Privy Council are always referred to. The principles set forth in *Cedar Rapids Manufacturing and Power Company* v. *Lacoste* (1) are well-known and need not be repeated but it is important to refer particularly to a passage in the judgment of Lord Moulton in *Pastoral Finance Association Limited* v. *The Minister* (2). He pointed out that the owners in that case were not entitled to have the capitalized value of certain prospective savings and additional profits added to the market value of the land taken in estimating their compensation, and then continues:—

> They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

As pointed out by Mr. Justice Duff, as he then was, in *Manuel* v. *The King* (unreported), where this Court affirmed the judgment of the Exchequer Court of Canada (3), this statement is not a preferable way of putting it for the purpose of a case where a residence long occupied by the owner had been expropriated. In the present case, however, the appellant company was not imprudent, in

(1) [1914] A.C. 569.
(2) [1914] A.C. 1083.
(1) (1915) 15 Ex. C.R. 381.

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1935, in purchasing this corner lot and expending the money they did upon it, and, therefore, they should receive the cost of the land, the cost of the fill, and the cost of the service station, less an allowance for depreciation of fifteen per cent. on the latter. This would mean $3,000 plus $666 plus 85 per cent. of $3,938. I agree with the trial judge that notwithstanding the fact that by a by-law of the city of Saint John, the erection of any service station from a point 100 feet north of Britain street is prohibited, and that by a provincial enactment of 1935 no retailer's licence for a new service station shall be issued unless in the judgment of the appropriate Minister, public convenience and necessity so require, the appellant will not lose the sale of all its products that had previously gone through this particular service station. Under the circumstances of this case, the appellant is entitled to ten per cent. for compulsory taking on the total of the above items, $7,013.50 or $701.33.

Under section 23 of the *Expropriation Act*,

> The compensation money * * * adjudged for any land * * * acquired or taken * * * shall stand in the stead of such land,

and by section 2 (*d*) "land" includes "damages." It was argued in the Exchequer Court of Canada, before the late President Maclean, in *Federal District Commission* v. *Dagenais* (1), that no compensation could be allowed for certain items there claimed because they did not represent an estate or interest in the lands taken. While saying nothing as to the correctness of the list of things for which compensation has been allowed and enumerated by the late President, I agree with him that the principle in this class of case is that the displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which compensation was claimed was directly attributable to the taking of the lands. Examples may certainly be found of cases where allowances have been made for such things as would correspond to the cost of moving the present appellant's equipment, and depreciation thereon. There is no dispute as to the amounts of these items, $120 and $275. There is also no good reason why, in these cases, the Crown should not pay the proportion of municipal taxes from the date of expropriation to the

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

end of the current year, $88.25, and as a matter of fact, that was offered by the Crown in addition to the sum of $4,750.

The total of the above items is $8,197.88, which I considered sufficiently large to include any loss of profits. However, as some members of the Court consider $500 more should be allowed under that heading, I do not disagree. The appeal should, therefore, be allowed and in lieu of the sum of $6,000 mentioned in the judgment, there should be inserted the sum of $8,697.88. The appellant is entitled to interest thereon at the rate of five per centum per annum from July 8, 1943, the date of the expropriation, to the date of this judgment, and is also entitled to its costs of the appeal.

HUDSON J.:—The matter for decision in this appeal is the amount of compensation payable to the respondent for rights owned by it and taken by the Crown in the right of the Dominion for public purposes.

The land in question is near the harbour of Saint John, N.B. It was purchased by the respondent in December, 1935, for $3,000 and the defendant erected thereon a building for a service station at a cost of $3,947.58.

Thereafter the respondent leased the premises to various tenants who operated same on the basis that the tenant should there sell exclusively gasoline and oil products of the respondent and should pay as a rental one cent per gallon for all gasoline sold.

The evidence of value at the date of expropriation is not satisfactory.

The learned trial judge puts the matter thus:

> While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000, the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant. The price that another oil company would pay would certainly be based on the yearly gallonage of gasoline passing through the station and the evidence showed that over a five-year period this was small.

I see no reason to question the finding of the learned trial judge as to the market value of the property, apart from its special usage. The purchase price is some

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evidence of the value but this depends on many circumstances. A purchaser may make a bad bargain or a good one. If he makes a bad bargain, he surely is not entitled to compensation, and if he makes a good one he should not be deprived of any advantage thereby gained. Moreover, conditions affecting value may change.

In the present case, the evidence makes it fairly clear that the value of the property to the respondents must be greatly affected by the revenue which they derived and might expect to receive from the sale of their products. It appears that on the basis of the rental the property did not carry itself but, on the other hand, the respondents did make profits from the sale to the tenant of its products. This should be taken into account.

The learned trial judge in the portion of his judgment above quoted refers to the amount another oil company might be expected to pay for the property. With respect, I do not think that this is the sole criterion of the value. It seems to me that here, where the owner had acquired the property for a specific purpose and had established a business thereon, there might well be a special value to him greater than to any other competitor. The statement put in evidence as to the net profits on the sale of products showed something in excess of $1,000 a year for a number of years preceding the expropriation.

I am not satisfied that a thorough examination of circumstances might not reduce this sum substantially but, on such evidence as there is, it would appear to be sufficient to provide a return which would justify a valuation of somewhat over $8,000, if there be included therewith the miscellaneous items such as costs of moving equipment, etc., and special allowance for compulsory taking included by the trial judge in his computation.

The principles upon which compensation for compulsory taking should be based are very well settled by decisions of Canadian courts and the Judicial Committee. I would just quote again the statement of Lord Dunedin in *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste* (1).

> The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. The value to the

(1) [1914] A.C. 569 at 576.

owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

In the present case I think that the value to be fixed is the value to the owner, bearing in mind its acquisition of the property for special purposes and the net earnings which it might receive therefrom until it had established other profitable outlets for its products.

For these reasons, although I think the amount rather generous, I will not dissent from the amount proposed by the other members of the Court, namely, $8,697.88 and concur in the order that the appeal should be allowed with costs, and the amount awarded to the appellant increased to that figure, with interest from 8th July, 1943.

RAND J.:—This is an appeal against the award of the Exchequer Court of Canada for land taken by the respondent under the *Expropriation Act*. The property consisted of a gasoline filling station with the ordinary facilities for persons and for washing and greasing cars. The land lay at the corner of Britain and Prince William streets in the city of Saint John, almost immediately opposite the wharf at which the steamships of the Eastern Steamship Company tied up. This service between Boston and Saint John has been in existence for many years.

The appellant in the course of establishing a system of gasoline distribution throughout the Maritime provinces came to the conclusion that the land in question would afford a desirable site from which to advertise its business to incoming tourists by boat to New Brunswick. In 1936 it purchased the land for $3,077, spent approximately $600 to make a necessary fill, and set up the building and gasoline service facilities at an expense of $3,938. From that time until the summer of 1942 the station was operated by several lessees. The arrangement tied the station to the purchase from the appellant of all gasoline, oil and other automobile supplies, and the rent was based upon 1c for each gallon so supplied. Some time in the late summer of 1942, the naval authorities at Saint John intimated to the lessee that the property was to be taken over for war purposes, and the lessee promptly gave up the station. The plan of expropriation was actually filed only in June, 1943.

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At that time there were three sets of restrictions upon opening gasoline stations. First, there was a zoning limitation in the city of Saint John which did not permit a filling station in this particular section of the city below a point 100 feet north of Britain street. There was, next, a provincial regulation which required that good ground be shown for a new facility before it would be authorized; and finally, the war regulations prohibiting absolutely new stations. From this it resulted that from the time of expropriation until the trial of the information, it was legally impossible for the appellant to have opened a substitute station for that taken over.

The appellant claimed:—

(*a*) For the value of the land and building;

(*b*) The expense of taking up and removing certain parts of the facilities, such as gasoline tanks and pumps; and

(*c*) Loss of profits.

The Court allowed the sum of $4,000 as the market price of the land and improvements, and estimated that for the special purposes of the business of the appellant, an additional value of $2,000 should be allowed; and from that award, the appeal is brought to this Court.

The provisions of the *Expropriation Act* dealing with compensation are in general language. Section 2 (*d*) defines "land" as follows:

(*d*) "Land" includes all granted or ungranted, wild or cleared, public or private lands, and all real property, missuages, lands, tenements and hereditants of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act.

The use of the word "damages" and the further language "and all other things done in pursuance of this Act", indicate the comprehensive sense in which the word is used and that it is intended to cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause.

Then section 3 provides:

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;

* * *

This language must be construed, within the limits mentioned, in the sense of compensation "by reason of" the acquisition or taking of land or property. The clause "shall stand in the stead of such land or property" can only mean that, with the compensation money in the hands of the owner, he is in the equivalent position of holding his land or property instead of the money. He is, therefore, under that section, in the sense indicated, to be made economically whole.

There is nothing in the *Exchequer Court Act* which is in conflict with that view. Section 47 provides that

> the Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work * * * shall estimate or assess the value or amount thereof at the time when the land or property was taken, * * *

The word "for" taken with the language of section 50:—

> The Court shall, in determining the compensation to be paid to any person for land taken * * *

supports it.

This interpretation of the statute, in agreement with that given similar but not precisely the same statutory language in England, is assumed by this Court in the case of *The King* v. *MacArthur* (1), and the reference to that decision by Duff J. (as he then was) in *City of Toronto* v. *Brown* (2), does not challenge that interpretation in relation to the *Expropriation Act* or the *Railway Act*; and the long series of cases decided in the Exchequer Court of Canada since 1887 on the same assumption puts it beyond doubt that the effect of the Canadian Acts has been judicially determined to be the same as that of the *Railway Clauses Act* and the *Land Clauses Act* of England.

The statement of Lord Justice Moulton in *Pastoral Finance Association Ltd.* v. *The Minister* (3):

> Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

emphasizes the essential consideration to be regarded in determining compensation in a case of this kind. If the land is such as to have no special value to the owner, then

(1) (1904 34 Can. S.C.R. 570.
(2) (1917) 55 Can. S.C.R. 153.
(3) [1914] A.C. 1083, at 1088.

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the general market value, including the present worth of all possibilities, is the measurement of compensation. If a special value is actually realized by him, then the compensation must represent the sum which as a prudent man he would be prepared to pay rather than to fail to obtain or retain his property.

Admittedly here the property had a special value and a special adaptability to the appellant. It was purchased and developed in an unusual site for advertising the products of the appellant. For any other purpose suggested, the value of the land would be less than that which the appellant paid. There was a competing service station about 75 yards or so farther east on the north side of Britain street as well as the larger generalized competition prevailing in the whole of the gasoline supply field.

But the only evidence before the Court bearing upon the value to the owner is the amount which it cost the appellant to set the station up. As to this, there is no dispute, but it was not on that basis that the award was made. The Court considered rather the general market value of the property from evidence given of amounts paid for adjoining lots taken in conjunction with the improvement added. But for the $2,000 additional sum representing in effect the special value to the owner, there is nothing beyond what the appellant itself has presented. There is no suggestion in the case that the purchase was unprofitable or that the judgment of the company was poor or that the experience of six years showed that it was not when purchased or at that time worth what the appellant had laid out in it.

In this branch of the claim then I am forced to the view that the court below erred in the basis in fact of its computation; in the absence of any other evidence the actual outlay, with the prudence of judgment behind it unquestioned, should, in such a field, have been the support for the finding of the special value to the appellant. Under this heading I think the appellant is entitled to the amount which was actually expended, up to the time of expropriation, in the development of the property, less a depreciation of 15 per cent. on the building. To this should be

added the expense of taking up and removing to its stock yard the tanks and pumps and other apparatus of the station, the possibility of their re-installation in a substitute station, and some allowance for their depreciation.

The final item is expressed in terms of loss of profits. It is said that profits are never recoverable under the principles of compensation so laid down, and in the true sense, that is so: they are not recoverable as such: and they cannot be used for the purposes of capitalization to reach the sale value of the land. They represent in this aspect the productive capacity of the owner as contrasted with rents which may represent the productive capacity of the land. But where a business is temporarily disrupted, then loss of profits may furnish the proper basis to estimate the damage suffered by reason of the loss of possession. The causal connection must of course be shown: but if it is, then the settled rule takes them into account generally as disturbance to or interference with the business. This is well issustrated in *Jubb* v. *Dock Company* (1). In that case the language of the statute contained this clause:

and also the sum to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works.

The jury found a sum of £300 as compensation for the damage, loss and injury which the owner sustained by reason of having to give up his business as a brewer until he could obtain other suitable premises, and that allowance for damages was held by the Court to be within the language quoted.

There was a substantial gallonage of gasoline being sold at the station, the loss of which would be reflected both in the rent and in the company's general profits; but it is quite impossible to say how much if any went to other stations of the company. Obviously the cessation of sailings of the steamship company to Saint John during the war and the uncertainties of business after the war render estimates difficult. There can be little doubt, however, that between June, 1943, and the date of the trial or the end of the war, a measurable loss was suffered. For this damage, taking into account off-setting items, I think the appellant should be allowed the sum of $500.

(1) (1846) 9 Q.B. 443.

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A recapitulation of the allowable items would then be as follows:

Purchase of the lands and making of the fill	$3,666 00
Construction of the building	3,938 00
Expenses of removal and depreciation of equipment, etc.	395 00
	$7,999 00
Less estimated depreciation of building at 15%	590 70
	$7,408 30
Damages through disturbance of business, etc.	500 00
Forcible taking	701 33
Unearned taxes	88 25
Total	$8,697 88

I would, therefore, allow the appeal with costs and increase the amount of the award to the sum mentioned with interest to the date of this judgment.

ESTEY J.:—The Government of Canada on July 8, 1943, expropriated, under the provisions of the *Expropriation Act,* 1927 R.S.C., c. 64, a parcel of land in the city of Saint John. The only part of that land we are here concerned with was owned by the appellant and situated at the corner of Britain and Prince William streets. The government tendered the sum of $4,750, together with interest thereon of 5 per cent. from the date of expropriation, and $88.25 being the taxes paid by the appellant to the city of Saint John for the year 1943 from the date of expropriation to the 31st of December, 1943. The tender was refused by the appellant and consequent proceedings commenced in the Exchequer Court of Canada to determine the compensation the government should pay for the said lot. The appellant before the Exchequer Court of Canada asked $21,544.30.

The learned trial judge in the course of his judgment stated:

> While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000, the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant.

He then fixed $6,000 as the amount of compensation to which the appellant was entitled.

The appellant is a distributor of gasoline and oil products and throughout the Maritime provinces maintains many service stations and bulk distributing centres. In 1935 the Provincial Government entered upon a policy of paved roads which it was anticipated would result in increased tourist traffic, particularly with automobiles. A regular boat service was maintained between Boston and Saint John in the summer months, and at Saint John this boat docked approximately opposite the lot in question. The automobiles of passengers were accommodated upon this boat and under the regulations the gas tank had to be emptied before the automobile could be placed on board. As anticipated, many tourists did come by boat and brought their automobiles. In fact the competition for this tourist business was so keen between the appellant and the Provincial Oil Company that those in charge of the unloading at the docks had to somewhat restrain their activities. There was, therefore, at this point an opportunity for doing business with the tourists, and particularly possibilities for advertising by distributing maps and information that would assist the tourists in their travel throughout the provinces. With these possibilities, particularly that of advertising, the appellant purchased the lot in question in December 1935 for $3,000 and after spending about $666 in levelling the lot and making it suitable for its purpose, erected a service station thereon at a cost of $3,938. It then installed its usual service station equipment. Apart from this latter equipment, which was removed by the appellant at the time of the expropriation, it had an investment of over $7,600.

In the same year, and with apparently much the same objects in view, the Provincial Oil Company purchased a lot nearby for $1,600 and erected thereon a filling station.

Section 23 of the *Expropriation Act* reads in part as follows:

> 23. The compensation * * * adjudged for any land or property acquired or taken for * * * any public work shall stand in the stead of such land or property; * * *

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Lord Dunedin in delivering the judgment of the Judicial Committee in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1), stated as follows:

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board,* (2), where Vaughan Williams and Fletcher Moulton L.J.J. deal with the whole subject exhaustively and accurately.

Lord Justice Fletcher Moulton in that case of *In re Lucas and Chesterfield Gas and Water Board* (2), at p. 29, stated:

The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

Mr. Justice Taschereau, writing the judgment of the Court in *The King* v. *Elgin Realty Co. Ltd.* (3), stated:

* * * the value to the owner consists in all advantages which the land possesses, present and future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value.

Mr. Justice Idington, with whom Davies J. and Maclennan J. concurred, in *Dodge* v. *The King* (4), stated:

The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

* * *

The compensation must rest, not on what such a block may be worth to the Crown for the peculiar purpose involved in its acquisition, but upon the loss the owner suffers by the Crown taking it.

(1) [1914] A.C. 569, at 576.
(2) [1909] 1 K.B. 16.
(3) [1943] S.C.R. 49, at 52.
(4) (1906) 38 Can. S.C.R. 149, at 155 and 158.

These quotations emphasize that it is the market value of the property expropriated, plus allowances equivalent to the present worth of those advantages which the property possessed to the owner, that constitutes the compensation to which he is entitled. An application of the principles embodied in the foregoing quotations to the facts of this case results, with deference to the learned trial judge, in compensation to an amount quite in excess of $6,000. One witness valued the lot at $1,000 and another even a little less. The first condemned it as a suitable location for a service station and the latter based his conclusion upon figures supplied to him and admitted that, had he known that $3,000 had actually been paid for it, he might have so valued it.

The established facts are that in 1935 the appellant paid $3,000 for the lot in question, and the Provincial Oil Company in the same year paid $1,600 for a nearby lot which, for the purposes we are considering, was not so favourably located. Each company established a service station upon their respective lots and continued to carry on business there, until the appellant by these expropriation proceedings was compelled to discontinue. That though the officer of the appellant company who selected the lot deposed that in doing so its possibilities for advertising was "the chief motive in mind at that time", it has in fact been operated at a profit, even in the years after the Boston boats, because of the war, were discontinued. These lots were purchased in the open market and no evidence was adduced that indicated these lots had depreciated in value. The fact that they were operating at a profit and the value of the location for advertising purposes, particularly when the Boston boats resume their sailings, leads to the conclusion that the purchase price would be substantially the market value of these lots, particularly to oil companies, at the time of this expropriation.

In order to make the lot suitable for its purpose, the appellant expended $666 in filling and levelling the ground. This amount is accepted by both of the contractors who examined the plans and specifications. It then constructed a service station at a cost of $3,938, and there was evidence of replacement values by the two experienced

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contractors. After allowing depreciation of 15 per cent. they respectively estimated the replacement cost of the building in 1943 at $5,182 and $5,474.20. The only figure less than the cost deposed to was that of $3,000 by one who had neither inspected the building nor examined the plans and specifications. It would appear, particularly as the appellant was maintaining the business thereon at a profit, that under all the circumstances it is at least entitled as compensation to its original cost less the depreciation adopted by the contractors in the sum of 15 per cent.

The appellant had paid the taxes for the year 1943. The respondent has tendered the proportion thereof from July 8 to December 31, 1943, in the sum of $88.25.

The appellant, because of this expropriation, was required to remove its equipment, including two meter pumps and three 500 gallon storage tanks from this service station. The evidence indicated that this cost $120 and that in the moving this equipment depreciated in the sum of $275.

This expropriation not only involved the closing of this service station which was operating at a profit, but because of the Dominion Oil Control Regulations it could not open another service station. As Sir Louis Davies pointed out in *Lake Erie and Northern Rwy. Co.* v. *Schooley* (1):

> The true principle on which they should have proceeded is that laid down by the Judicial Committee in the *Pastoral Finance Association* v. *The Minister,* (2), namely, that this special suitability of the lands expropriated for the carrying on of an ice business and the additional profits which the owners will derive from so carrying it on, are proper elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the lands.

This item, as well as an allowance for compulsory taking, ought to be taken into account in arriving at the compensation which is equal to, in the above quoted language of Lord Moulton (3):

> * * * the full price for his lands, and any and every element of value which they possess * * * in so far as they increase the value to him.

In my opinion, therefore, the compensation should include the purchase price of the land, cost of the fill, cost of construction less depreciation, expense of removal and

(1) (1916) 53 Can. S.C.R. 416, at 421.

(2) [1914] A.C. 1083.

(3) [1909] 1 K.B. 16 at 29.

depreciation of equipment, proportionate share of 1943 taxes, and an amount for compulsory taking and damage to its business.

I have had the advantage of reading the computation of the foregoing items in the judgment of my brother Kerwin and agree therewith, and that the judgment appealed from should be varied as he directs.

This appeal should be allowed with costs.

Appeal allowed with costs and judgment varied.

Solicitors for the appellant: *Porter & Ritchie.*

Solicitor for the respondent: *R. D. Keirstead.*