D'auteuil Lumber Co. Ltd (*Appellant*) *v.* **Minister of National Revenue** (*Respondent*)

Jackett P.—Ottawa, January 28, March 5, 1970.

Income tax—Capital cost—Property partly expropriated and partly transferred in exchange for other property—Ascertainment of capital cost of property acquired—Whether value of acquired property value of property given up—Income Tax Act s. 11(1)(a), Regulation 1100(1)(e).

Appellant owned a timber limit in Quebec. In 1953 the Province expropriated part of the timber limit. In 1956 appellant accepted a grant of cutting rights elsewhere in Quebec in consideration of a release of its rights against the Province in respect of the expropriated portion of the timber limit and the transfer to the Province of the remainder of the limit. Appellant contended that the capital cost of the cutting rights for purposes of capital cost allowances under s. 11(1)(*a*) and Regulation 1100(1)(*e*) of the *Income Tax Act* was their value at the time of acquisition, which appellant estimated at $2,887,000. The Minister contended that the capital cost was the value of the timber limit at the dates, respectively, of the expropriation and the transfer, plus damages and interest, which he calculated at approximately $445,000.

Held, the capital cost to appellant of the cutting rights which it acquired in 1956 was the value of what appellant gave up to get them, *viz* (a) the compensation to which it was then entitled (including interest, if any) by virtue of the 1953 expropriation, plus (b) the value of the remainder of the timber limit which appellant transferred to the Province in 1956.

Ottawa Valley Power Co. v. M.N.R. [1969] 2 Ex.C.R. 64, explained.

INCOME tax appeal.

M. Regnier and *C. Tremblay* for appellant.

A. Garon, Q.C., and *J. C. Sarrazin* for respondent.

JACKETT P.—This is an appeal from the appellant's re-assessment under Part I of the *Income Tax Act* for the 1957 taxation year in which the only issue between the parties is the correct determination of the "capital cost" of certain rights "to cut timber from a limit" as a base for determining, under Schedule C to the *Income Tax Regulations,* the amount that the taxpayer may claim as a deduction in computing income for the year in respect of those rights under section 11(1)(*a*) of the *Income Tax Act* and Regulation 1100(1)(*e*).

For the purpose of determining the question in issue in this appeal, it will be sufficient to state the facts very briefly and in very general terms.

Prior to 1953, the appellant owned a timber limit that was partly in Rimouski County and partly in Temiscouata County. In 1953, the Province of Quebec expropriated the part of that timber limit that was in Rimouski being about ninety-five per centum of the whole limit. In 1956, there was carried into effect an arrangement between the Province of Quebec and the appellant

under which the appellant accepted a grant of cutting rights in respect of three different sites—known as Chemin-des-Marais, Rivières-aux-Vases and Picauba—in consideration of a release of its rights against the province in respect of the expropriation of the Rimouski portion of the timber limit and a transfer by it to the province of the Temiscouata portion.

In these circumstances, the appellant took the position that the "capital cost" of its newly acquired cutting rights for the purpose of section 11(1)(*a*) was their value at the time of acquisition (for purpose of simplicity, I omit reference to certain other expenses of acquisition) which it fixed for purposes of its books at a total amount of $2,887,500, and it treated the difference between this amount and the written down cost (undepreciated capital cost) of the aforesaid timber limit in Rimouski and Temiscouata (being $349,586.55) as a "capital gain", which it credited to surplus account. The "capital gain" so computed was $2,537,913.45. The respondent, on the other hand, according to the allegations in the Reply to the Notice of Appeal, assessed the appellant on the assumption that the "cost" of the cutting rights in question was to be determined by reference to

(*a*) the value of the Rimouski portion of the timber limit (i.e., the portion of the timber limit that was expropriated) at the time of the expropriation,

(*b*) damages resulting from the expropriation,

(*c*) interest from the time of the expropriation to the time of settlement, and

(*d*) the value of the Temiscouata portion of the timber limit (i.e., the portion of the timber limit that was not expropriated) at the time it was conveyed to the province in 1956,

and that these amounts came, in all, to $445,169.30.

In these circumstances, counsel for the parties agreed that the hearing of the appeal should proceed on the understanding that neither party would lead any evidence on any question of fair market value or any other value relating to the matter[1] and that the Court would be asked to dispose of the appeal, under section 100(5)(*c*)(iv) of the *Income Tax Act*, by referring it back to the respondent for re-consideration and re-assessment on the basis of the court's conclusions. Having regard to the problems and expense of a hearing in which evidence would be led on the various possible theories, this understanding appeals to me as a sensible one.

It is common ground that the question to be determined is what was the "capital cost" to the appellant of the cutting rights acquired by the appellant in 1956 within the meaning of those words in section 11(1)(*a*). (It is to be noted that the French version of section 11(1)(*a*) speaks of *ce que coûtent en capital les biens au contribuable.*)

My view is that, in this context, "capital cost" must mean simply "cost". The question is, therefore, what was the "cost" to the appellant of the cutting

[1] It was clear, according to the way that the hearing was conducted, that, not only did each party challenge the principle applied by the other, but each side challenged the amount obtained by the other even assuming that the other was applying the right principle. In the event that it appears that there is any doubt that the notice of appeal and reply are framed so as to raise these secondary issues, leave should be granted for appropriate amendments.

rights and my first impression is that the cost to the appellant of those cutting rights is what the appellant "gave up" to get them,[2] which was

(*a*) the compensation to which it was entitled (including interest, if any) on the appropriate day in 1956 by virtue of the 1953 expropriation, plus

(*b*) the value of the portion of the timber limit in Temiscouata County that it transferred to the Province of Quebec at the same time.

I do not understand that there is any difference between that tentative view and the view urged on me on behalf of the respondent.[3]

My impression of the view that was urged on me, very ably indeed, on behalf of the appellant, was that the single transaction in 1956 between the appellant and the province was, in effect, two transactions, *viz,*

(*a*) a transaction whereby the appellant, for a "consideration" gave a release of all its rights against the province arising out of the expropriation and gave a transfer of the Temiscouata portion of the timber limit to the province, and

(*b*) a transaction whereby the appellant acquired the cutting rights for the same "consideration",

and, that as the amount of the "consideration" in question was the value of the cutting rights,[4] it must be taken that the value of the cutting rights was not only what the appellant received from the province but what it gave to the province for the cutting rights. By this reasoning, if I properly understood counsel, one arrives at the conclusion that the capital cost of the cutting rights to the appellant is the value of the cutting rights when acquired.

At this point, I should say that I accept it that the 1956 transaction between Quebec and the appellant was negotiated at arm's length between parties who were each fully capable of looking after their own interests and it is therefore a fair assumption that what was given by one side was equal in value to what was given by the other.[5] Any apparent difference between

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[2] Compare *Tuxedo Holding Co. Ltd. v. Minister of National Revenue,* [1959] Ex.C.R. 390, per Cameron J., particularly at pages 403-4.

[3] As I understood counsel for the respondent, he put it, as far as the expropriated property is concerned, as being "The indemnity to which the appellant would have been entitled as a result of the expropriation by virtue of the laws of the Province of Quebec including any interest... to that date".

[4] *Cf.* section 139(1)(*a*) which reads:

139. (1) In this Act,

(*a*) "amount" means money, rights or things expressed in terms of the amount of money or the value in terms of money of the right or thing;

[5] For this reason, I do not find any help in determining the right principle to be applied from the argument mounted by the appellant on the statutory requirement that the compensation be paid from consolidated revenue. All I get from this is that we must assume that an amount was agreed on as being both the compensation payable (plus the value of the Temiscouata portion of the timber limit) and the value of the cutting rights and that it can be regarded as having been paid into consolidated revenue as payment for the cutting rights and paid out as compensation for the expropriation (and consideration for the transfer of the remainder of the timber limit). The result is the same whether we start by valuing the cutting rights or by determining the compensation payable. With regard to the probability that two things exchanged will have the same value, compare *Westminster Bank v. Osler,* (1932) 17 T.C. 381, per Viscount Buckmaster at page 402.

the 1953 market value of the Rimouski and Temiscouata timber limits and the 1956 value of the cutting rights acquired in that year is, presumably, explained by the fact that the compensation to which the appellant was entitled for the expropriation of its freehold timber limit, on which it was probably operating its business, was a very different thing from the market value of the timber limit when it acquired it. I have, of course, no information before me on which I can formulate any idea as to what the compensation claim might be, but I can appreciate that its determination might be a very complicated matter and that it can only be determined by proceedings that would be equivalent to those that would have been necessary between the appellant and the province if they had not reached a settlement agreement.

Because I was not sure that I understood the precise thrust of the submission for the appellant, I made a request to him that he reduce it to writing and he has done so in a document that reads, in part, as follows:

> Since our submission on the capital cost of the cutting rights is substantially the same for the expropriated and exchanged portions, we shall deal first with the capital cost of the cutting right granted as indemnity for the expropriated portion and comment briefly at the end on the other portion.
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> The expropriation of the timber limit entitled the Appellant to an indemnity under the enabling legislation, being Chapter 38 of the Statutes of Quebec, 1951. As a result of negotiations between the Appellant and the Government of the Province of Quebec, an arrangement was arrived at whereby the Government would transfer to the Appellant certain cutting rights in payment of whatever claims the Appellant had pursuant to the expropriation (see in particular page 7 of the Deed of May 9, 1956, being page 51 of the Documentary Evidence).
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> Although the controversy was settled in one transaction, nevertheless the bargain arrived at between the Parties was made up of the following two basic elements:
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> (*a*) the payment of the indemnity; and
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> (*b*) the transfer to the Appellant of the cutting rights,
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> which could have been the subject-matter of two separate transactions. The Minister of Finance of Quebe could have paid the indemnity in cash in an amount equal to the value of the cutting rights and in turn the Appellant could have transferred the funds back in payment of the cutting rights. Had these two steps been implemented, we would imagine that the present controversy would not have arisen and that the Respondent would have regarded the amount in cash as being the capital cost of the cutting rights. In our submission, the fact that in form a shorter route was taken should not justify a different conclusion.
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> In reply to the question, what is the cost to the Appellant of the cutting rights, we submit that the correct answer is: the right to be paid an indemnity in cash that was forsaken for the cutting rights. However, since these cutting rights were the indemnity for the expropriation fixed by mutual consent of the parties, the right to the cash indemnity that was abandoned to acquire them must have been of an amount equal to the value of those same cutting rights. In other words, what the Appellant gave up for its capital right to be paid a compensation in cash was worth what the Appellant obtained in return, i.e. the cutting rights themselves.
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> Support for this reasoning is found:
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> (*a*) in the views of Your Lordship as to the correct analysis of the agreement in *Ottawa Valley Power Company v. Minister of National Revenue*, [1969] 2 Ex. C.R. 64 at pp. 75 et seq.; and

(*b*) in an analysis of the transcation from a strict civil law point of view:

The transfer of the cutting rights was a *dation en paiement* (a giving in payment) as provided in Article 1592 of the Civil Code. A number of commentators on the French and Quebec Civil Codes interpret this transaction as giving rise to an objective novation, i.e. a novation by way of a change in the debt (see paragraph 1 of Article 1169, of the Civil Code), from which they conclude that the creditor is a purchaser while the debtor, whose debt is satisfied by the *datio,* is in the position of a vendor. We conclude from this analysis that since a sale calls essentially for "a price in money" (1472 C.C.) this price must be in an amount equal to the value of the thing given in payment. By invoking the strict legal nature of this transaction, it is not the Appellant's intention to make it the essential basis of its submission to the Court. In our view, the matter can be resolved solely by looking at the business realities of the bargain. If reference was made to the Civil Code, it was merely to refute any suggestion based on the language of the Deed of May 9, 1956 that the settlement regarding the expropriated portion of the limit consisted contractually in an exchange. The Appellant having lost all rights in the limit as such on October 21, 1953 (see paragraph 10 of the Agreement as to Facts and Section 14 of Chapter 38 of the Statutes of Quebec, 1951), it merely possessed from that date on a claim against the Crown to be paid an indemnity for the expropriation. Thus, on May 9, 1956, no exchange could have been effected since the Appellant no longer owned the expropriated portion of the limit. However, having said what the Deed did not purport to do contractually, we adverted to the correct nature of the contractual arrangement merely to observe that our reasoning, far from being repugnant to the general law, was fully in accord with it.

With regard to the part that was situated outside the electoral district of Rimouski, we agree that the Deed of May 9, 1956 gave rise legally to an exchange. However, we submit that the reasons set forth above regarding the capital cost of the cutting rights for the expropriated portion are equally applicable here. Actually, what the Appellant gave up for this smaller portion was a price in money and in return it obtained cutting rights. Thus, the capital cost of these rights must be equal to their value.

In conclusion, putting our reasoning in a syllogistic form, we submit that as the cost of the cutting rights is computed by reference to the indemnity (this premise also served as the basis of the Respondent's submission) and as the cutting rights constitute the indemnity by mutual agreement of the parties, it follows that the cost of the cutting rights must be computed by reference to their value.

I have struggled to find, in this reasoning, anything more than I have already indicated but I am afraid that I come back, in the end, to my original reaction to the problem.

As it seems to me, if A conveys Blackacre to B in exchange for a conveyance by B to A Whiteacre, the cost of Whiteacre to A is the value of Blackacre (being what he gave up to get Whiteacre) and the cost of Blackacre to B is the value of Whiteacre (being what he gave up in order to get Blackacre). Assuming both parties were equally skilful in their bargaining, there is a probability that the values of the two properties are about the same but this does not mean that A's "cost" is the "value" of what he acquired or that B's "cost" is the "value" of what he acquired. This is established if we assume that some element of generosity or sentiment entered into A's motivation and that, knowing that Blackacre was worth

twice the value of Whiteacre, he nevertheless made the exchange. In that event, the cost to him of acquiring Whiteacre would be the value of Blackacre (what he gave up) and twice the value of Whiteacre (what he acquired).

So here, as a matter of principle, while the cost to the province of getting a release of claims arising out of the expropriation and a transfer of the Temiscouata portion of the timber limit was the value of what it gave up, namely, the value of cutting rights granted to the appellant, the cost to the appellant of the cutting rights acquired by it from the province was the value of what it gave up, namely, its rights arising out of the expropriation and the value of Temiscouata timber limit transferred by it to the province.

For the above reason, I am of opinion that the cost to the appellant of the timber rights that it acquired in 1956 is the value of what it gave up to get them, namely, the value of its rights against the province in respect of the 1953 expropriation and the value of the Temiscouata portion of the timber limit transferred by it to the province, and my judgment will be to the effect that the assessment appealed from be referred back to the respondent to re-assess on that basis.

In view of the reference by the appellant to my judgment in *Ottawa Valley Power Company v. Minister of National Revenue,*[6] I must make some reference to that judgment. There, in a part of my reasons which did not express any concluded view, I said that, in the hypothetical case that I was discussing, a supplier was paying for his plant "by entering into the low-priced supply contract" and that "*prima facie,* what he pays for the plant is the value of the plant". This comes very close to the contention of the appellant in this case, and, in retrospect, I must admit that I did not express myself as carefully as I should have done. There, I was considering a case where the consideration given for the "plant" was "entering into the low-priced supply contract"—a consideration very difficult to put a value on—and what I am sure that I had in mind is that, "*prima facie*", the value of the consideration is equal to the value of what is received for it, so that where, as in my hypothetical case, what was received can easily be valued and what was given is almost impossible to value, it is a fair statement that "*prima facie,* what he pays for the plant is the value of the plant". Thus, in any particular case, there may arise a question as to what evidence is admissible. Where the value of the thing given for the capital asset in question can be determined with the same kind of effort as is required to value the capital asset itself, I should have thought that the Court would not look kindly on attempts to lead evidence as to the value of the capital asset in lieu of, or in addition to, evidence as to the value of what was given for it. On the other hand, when the value of what was given is almost impossible to determine and the value of the capital asset is almost beyond the realm of controversy, it may well be that the only practicable basis for determining

[6] [1969] 2 Ex.C.R. 64, at pages 75 *et seq.*

the value of what was given is to look at the value of the capital asset. This, however, is a question as to the admissibility of evidence on which I should not, and do not, express any opinion concerning any particular fact situation. That question may be argued, in this case, before the Court when the occasion arises if there is an appeal to the Court from the re-assessment by which the respondent determines the amount of the capital cost in accordance with the judgment disposing of this appeal.

As contemplated by Rule 172(1)(*b*) of the Rules of this Court, as amended by Amending Order No. 16 dated September 5, 1969, I will not deliver my judgment in the matter until there is a motion for judgment at which time I will hear the parties on the question of costs and on the way in which the judgment may be most appropriately worded to carry out the conclusion that I have reached.