BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

SUPERTEST PETROLEUM CORPORATION LIMITED ..... DEFENDANT.

1951
Apr. 9-13
June 5-7, 29
1954
Mar. 5

Expropriation—The Expropriation Act, R.S.C. 1927, c. 64, s. 9—Award of compensation to be fair to Crown as well as to owner—Need for statutory definition of value—Unwillingness of owner to sell and urgent need of purchaser to buy to be disregarded—Municipal assessment not evidence of value—Accumulation of profits and savings not to be added to market value—Price at which owner willing to sell not a test of value—Disadvantages of property to be considered—Value of property to owner includes right to compensation for disturbance—Expropriation not a tort or delict—Right under certain circumstances to ten per cent additional allowance for compulsory taking.

The plaintiff expropriated property in the City of Hull on which the defendant had a gasoline service station and a terminal bulk storage plant. The action was taken to have the amount of compensation payable to the defendant determined by the Court.

Held: That in measuring the amount of money which the owner of expropriated property should receive as the equivalent in value of the property taken from him it is just as important to ensure that the Crown, which has lawfully taken the property for public purposes, is not required to pay more for it than it was worth as it is to make sure that its owner receives its fair value. The duty of determining the equivalence in money of the value of the expropriated property demands fairness to the expropriating public as well as to the owner of the property and an excessive award is a breach of this duty.

2. That it is essential to the fair administration of expropriation law that there should be a statutory definition of value.

3. That the test put by Lord Moulton in the *Pastoral Finance Association* case [1914] A.C. 1083 that the owners "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" envisages negotiations between the owners and a prudent purchaser, each knowing the advantages of the property and the possibilities of savings and profits from its use, culminating in a sale of it to the prudent purchaser at the price beyond which, in the ordinary course and without the pressure of urgent need, he would not be willing to go.

4. That in determining the amount of the compensation "the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded". *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302 at 311 followed.

5. That the municipal assessment of expropriated property is not evidence of its value.

6. That the capitalization of anticipated savings and profits or their accumulation for a term of years must not be added to the market value of the land. What should be considered is the adaptability of the land and its advantages for the making of profits and savings.

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7. That the amount for which the owner would have been willing to sell the land is not a test of its value.

8. That in estimating the value of the land regard should be had not only to its advantages but also to its disadvantages.

9. That the right of the owner of expropriated property to compensation for disturbance is included in his right to compensation for its value to him.

10. That it is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of trespass to the conditions of the present times when it frequently happens that the property of individuals has to be expropriated for public purposes. There is no element of tort or delict in an expropriation under the Expropriation Act. It is the lawful exercise by the Crown in right of Canada of its right of eminent domain under the authority of an enactment of Parliament. All that the owner is entitled to is such compensation as Parliament has decreed.

11. That since the case falls within the ambit of the rule in *The King* v. *Lavoie* [December 18, 1950, unreported] an additional allowance of ten per cent for compulsory taking must be added, notwithstanding my opinion that any additional allowance would be an unwarranted bonus and that additional allowances for compulsory taking should be prohibited.

INFORMATION by the Crown to have the amount of compensation money payable to the defendant determined by the Court.

The action was tried before the President of the Court at Ottawa.

F. B. Major, Q.C. and *J. Ste. Marie* for plaintiff.

D. K. MacTavish, Q.C. and *J. C. Osborne* for defendant.

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

THE PRESIDENT now (March 5, 1954) delivered the following judgment:

The amended information herein shows that the lands of the defendant described in paragraph 3 thereof together with other lands were taken by His late Majesty under the Expropriation Act, R.S.C. 1927, chapter 64, for the purposes of a public work of Canada and that the expropriation was completed by depositing a plan and description of the said lands in the office of the registrar of deeds of the registration division of Hull in Quebec, in which the lands are situate, on April 2, 1946, pursuant to section 9 of the Act. Thereupon the said lands became vested in His late Majesty and the defendant ceased to have any right, title or interest therein or thereto.

The parties were unable to agree on the amount of compensation money to which the defendant is entitled and these proceedings were brought for an adjudication thereof. By the information the plaintiff offered the sum of $97,400.60. By its statement of defence the defendant claimed the sum of $220,000 but at the trial its claim was increased to $349,716.27. There is thus a very wide spread between the parties.

The expropriated property is in the City of Hull a short distance north of the Interprovincial Bridge. It was in two parcels, the first having a frontage of 89 feet on the east side of Laurier Street and comprising the whole block between it and the Ottawa River to the east and between St. Laurent Street on the south and Guigues Street on the north except for the northeast corner of Laurier Street and St. Laurent Street and the second on the south side of St. Laurent Street near the river. The total area of the property in the two parcels came to 2·819 acres or 122,820 square feet.

At the date of the expropriation the defendant carried on two operations on its property. On the Laurier Street frontage there was a gasoline service station for the retail sale of its products which, in accordance with its regular practice, it leased to a tenant. On the remainder of the property it maintained a terminal bulk storage plant for its Ottawa sales division for the storage and distribution of its various petroleum products and its tires, tubes and repair accessories and also a garage and repair shop for the storage and repair of its tank wagons and trucks. During the navigation season it received supplies of gasoline and furnace fuel oil by water from a tanker operated by its subsidiary, the Pioneer Transportation Company Limited, plying between its refinery in Montreal and the government wharf at the foot of St. Laurent Street. The cargoes were unloaded at the wharf into a pipe-line leading to the marine storage tanks. Prior to the close of the season these tanks were filled to help meet the needs of the division during the winter. The defendant's additional gasoline and fuel oil requirements came by railway tank cars delivered by the Hull Electric Railway Company on its railway siding on Guigues Street. Other products such as stove oil, diesel oil and kerosene came by railway tanks cars and were unloaded

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into the other storage tanks. Still other products such as lubricating oils, greases, antifreeze, soap and various solvents came to the terminal in steel drums by truck or railway and were stored in the warehouse. Necessary stocks of tires, tubes and repair accessories were also stored in the warehouse for distribution throughout the division. A portion of the warehouse building was used as headquarters for a staff of mechanics who looked after the installation, maintenance and repair of equipment throughout the division. The defendant's tanks and other trucks were stored on the premises when not in use either in the garage or outdoors.

After the expropriation the defendant searched for other premises. There was no available suitable property with marine and railway facilities on the Ontario side of the Ottawa River nearer than Rockland. For a time the defendant considered a site on the Quebec side of the river at Gatineau Mills but it would have been necessary to build a dock there, dredge a channel and bring in a railway spur line. The cost of doing this, the increased cost of distribution and other disadvantages were against the choice of this site. The defendant also considered other possible locations but finally decided on what is called the Heron Road site. This is off the Metcalfe Road about 2 miles south of Billings Bridge. This had several advantages. It was the nearest suitable site to the centre of the Ottawa area for which a permit could be obtained. There were satisfactory railway facilities and an advantageous change in railway freight rates. There was plenty of room for expansion and there was also the advantage that other oil storage plants were near by. In October, 1946, the defendant bought 5 acres of land from the Shell Oil Company for $9,000 and commenced construction of a new storage plant immediately. It did not need as much storage capacity for there was no longer any use for the 3 large marine storage tanks which it had at the Hull plant but otherwise the Heron Road plant was substantially larger than its Hull plant had been. The total cost of the new plant came to $163,000.

While the new plant was being constructed the defendant continued to use the Hull plant for gasoline storage until May 22, 1947, and for lubricating oil storage until July 20,

1947. Then on July 28, 1947, it obtained permission to use the fuel oil marine storage tanks until May 1, 1948. On April 30, 1948, it closed the Hull plant and made no further use of it. Then a dispute arose. On May 7, 1948, the defendant offered delivery of the premises to the Department of Public Works but this was rejected, the Department taking the position that it would accept the keys only when the tanks had been decontaminated. The defendant then arranged for the decontamination and on October 26, 1948, the Department advised that it was satisfied with it. Finally, on March 8, 1949, the defendant turned the premises over to the Department.

The principles to be applied in determining the amount of compensation to be paid to the owner of expropriated property have been discussed in many cases but it would not be correct to say that they are wholly settled. It is established, of course, that the owner is to receive its money equivalent, that is to say, its worth to him in money, that, while his property is changed in form, it is not diminished in amount and that its money equivalent is estimated on its value to him and not on its value to the purchaser: *Vide In re Lucas and Chesterfield Gas and Water Board* (1). But there are differences in the statements of the tests of value to be used.

Before I deal with these tests I must refer to the second last paragraph of the reasons for judgment of the Supreme Court of Canada in *Woods Manufacturing Co. Ltd.* v. *The King* (2) which reads as follows:

> There is this to be added. It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

This is a remarkable statement. While there will be general agreement with most of its sentiments it is subject to objection on several counts. It was neither necessary

(1) [1909] 1 K.B. 16 at 29. (2) [1951] S.C.R. 504 at 515.

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nor relevant to the decision in the case. Consequently, its admonitions, being *obiter dicta,* have no binding effect. That being so, the easier course to follow would be to let them pass without comment but, in view of the circumstances, it would not be proper to do so.

The implications in the statement have caused me deeper concern than I care to express. For, while the reason for making it is not apparent on its face, there is no doubt that it was because of the fact that I have disagreed with some of the opinions expressed by individual judges of the Supreme Court of Canada in certain expropriation cases.

If there is implied in the statement, as appears to be the case, an imputation that by disagreeing with the opinions referred to I have not shown proper respect for the authority of the Supreme Court of Canada and that my disagreements have tended to the administration of justice becoming disordered, the law becoming uncertain and the confidence of the public in it being undermined there is the simple answer that there is no foundation or justification for any such imputation.

Here I may perhaps be permitted to interject what I hope will not be considered too personal a note. Prior to my appointment I was made aware of the fact that there was criticism of the Exchequer Court of Canada on the ground that many of its awards in expropriation cases were excessive. In an attempt to remove this ground of criticism I have since my appointment to the presidency of the Court set myself rigidly against excessive awards. It was, and is, my opinion that in measuring the amount of money which the owner of expropriated property should receive as the equivalent in value of the property taken from him it is just as important to ensure that the Crown, which has lawfully taken the property for public purposes, is not required to pay more for it than it was worth as it is to make sure that its owner receives its fair value. The duty of determining the equivalence in money of the value of the expropriated property demands fairness to the expropriating public as well as to the owner of the property and an excessive award is a breach of this duty.

In the course of attempting to make awards that would be as fair to the Crown as to the owner I sought, as carefully as I could, to apply what I considered, in my view of

the decisions, a fair test of the value to the owner of the expropriated property under consideration and it was in the search for such a test that the disagreements to which I have referred occurred. They were intended to be impersonal and objective and were expressed in the belief, as Joseph H. Choate, a great American lawyer, once put it, that it is "only on the anvil of discussion that the spark of truth can be struck out". There was no vestige of disrespect for the Supreme Court of Canada or any of its judges in any of my remarks and any imputation or suggestion to the contrary is quite unjustified.

But there is a more serious objection to the statement than that which I have mentioned. This is to the *dictum* in its last sentence, which reads as follows:

> If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

The meaning of the *dictum* is not clear. But if it purports to prohibit this Court from any further examination of judgments dealing with the difficult question of the value of expropriated property and the tests by which it is to be measured it seeks to impose a restriction on the judicial independence and freedom of the Court to which it has hitherto not been subject.

There are several reasons for objecting to the *dictum*. In the first place, the Court could not, in my opinion, properly perform its duty if it were to cease its inquiry as suggested. I doubt whether there is any concept in the whole field of law that is more elusive than that of value. There has been a long and ceaseless search by judges and others charged with the valuation of property to ascertain the proper tests by which the amount of such value can be ascertained in any given case. And the search must continue for the factors of value that should be taken into account are not static. On the contrary, there is a continuing shift in their respective weights as the circumstances under which they arise alter.

Moreover, the restriction sought to be imposed is not required under even the strictest view of the doctrine of *stare decisis* and it is certainly not in accord with the spirit that has permitted judges, even of courts of first instance, to make a useful contribution to the administration of justice

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by pointing out defects in the law as they become manifest and recommending legislative action for their remedy when reform by judicial decision has become impossible. Under the circumstances, I respectfully suggest that the ends of justice will be better served by the continued freedom of inquiry of this Court than by the prohibition of it.

In my opinion, there are several features in this case that call for careful analysis of the various tests of value that have been laid down in the leading cases but before I attempt such analysis I should set out the breakdown of the defendant's claim and then dispose of those portions of it that are not seriously in dispute. As I have already stated, the defendant put its claim at $349,716.26. Of this amount $215,999.24 was for the land and $39,172 for the buildings. The claim for the storage and operational equipment was put at $59,896.17, against which there was a contra account credit of $21,566.03 for tanks and other equipment removed by the defendant to its Heron Road site, leaving a net claim of $38,330.14. In addition, there were claims of $23,355.62 for disturbance and $1,066.88 for abandonment costs. The total of these claims came to $317,923.88 to which the defendant added ten per cent, or $31,792.38, by way of additional allowance for compulsory taking.

Evidence of value was given for the defendant by Mr. W. G. Perry, who was its comptroller at the date of the expropriation, Mr. A. S. Eadie, its construction superintendent, Mr. E. S. Sherwood, an Ottawa real estate agent, Mr. W. F. Hadley, an Ottawa engineer and real estate agent, Mr. W. H. Bosley, a Toronto real estate agent, and Mr. B. Doran, an Ottawa general contractor; and for the plaintiff by Mr. J. A. Coote, a retired engineer and former assistant professor of mechanical engineering at McGill University, Mr. D. H. Sharp, a Montreal professional engineer, Mr. S. E. Farley, an Ottawa and Hull civil engineer and land surveyor, and Mr. T. Lanctot, a Hull professional and former City engineer.

The only real problem in this case is the value of the land. It will, therefore, be desirable to dispose of the valuations of the buildings and the storage and operational equipment first. It is not difficult to determine the value of the buildings of which there were six altogether, namely, the service

station with its attached garage, a warehouse storage shed, a truck garage and repair shop, a warehouse and foreman's office, a foamite shed and pumphouse. Detailed descriptions of each of these buildings were given in Section B of Exhibit C, which was prepared under the direction and supervision of Mr. Eadie, the defendant's construction superintendent. Page 42 of this exhibit summarizes for each building the year of its construction, its replacement cost at the date of the expropriation, its expectancy of life, the rate and amount of its depreciation and its depreciated value at the date of the expropriation. The total amount for replacement cost of all the buildings came to $50,921.98 and for depreciated value to $39,172. Mr. Sherwood estimated the value of the buildings after taking depreciation into account at $43,317 and Mr. Hadley put it at $42,925.50. Mr. Bosley had the benefit of these two valuations and put his estimate in round figures at $40,000. Mr. Doran estimated the reconstruction cost of the buildings at the date of the expropriation at $50,460, which is remarkably near the amount of Mr. Eadie's estimate, but this should be reduced by $750. For the plaintiff, Mr. Lanctot and Mr. Farley valued the buildings at $33,898.35, according to Exhibits 11 and 12, but this should be reduced by $720, leaving a valuation of $33,178.35. Of these valuations I accept that prepared by Mr. Eadie, supported as it was by Mr. Bosley. I am satisfied that his statements of replacement costs were accurate and that his allowances for depreciation were reasonably fair. I, therefore, find $39,172 as the value of the buildings.

The determination of the value of the storage and operational equipment is somewhat more difficult. The details of each item were given in Section C of Exhibit C, which was also prepared under the direction and supervision of Mr. Eadie. I shall deal first with the tanks with a view to determining the value of those that were not taken away by the defendant. There were 17 storage tanks altogether, 13 of them being vertical and 4 horizontal. In addition, there were 4 underground tanks at the service station. Page 43 of Exhibit C gives for each tank the year of its installation, its replacement cost at the date of expropriation, its life expectancy, the rate and amount of its depreciation and its depreciated value at the date of the expropriation. The total replacement cost of the 21 tanks came to

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$61,388.47 and their depreciated value to $41,823.42. All the storage tanks except the 3 large marine storage tanks were removed by the defendant to its Heron Road site and the figures for these in the contra account came to $33,912.20 for replacement cost and $20,625.89 for depreciated value. This left the replacement cost of the tanks that were not taken away at $27,471.27 and their depreciated value at $21,197.53. To arrive at the figures for the 3 large marine storage tanks there must be deducted the replacement cost of the 4 underground tanks at $405.67 and their depreciated value at $202.84. This left $27,065.60 as the replacement cost of the three large storage tanks and $20,994.69 as their depreciated value. These were the amounts according to Mr. Eadie's evidence. I would be prepared to accept these figures as fair and reasonable except for the fact that Mr. Eadie put the life expectancy of the storage tanks at 40 years.

Against Mr. Eadie's evidence there was the valuation made by Professor Coote and Mr. Sharp who worked together. This was set out in Exhibit 5 which covered all the storage and operational equipment but I shall for the moment refer only to those portions of it that relate to the 3 large marine storage tanks. The reconstruction cost of these was placed at $27,445 and their depreciated value at $17,350. In Exhibit 5 the reconstruction cost of tank fittings was first put at $500 and their depreciated value at $300, but on cross-examination Mr. Sharp agreed that this was an error and that the reconstruction cost of the fittings should have been put at $1,000 instead of $500 and their depreciated value at $600 instead of $300 and that these amounts should have been added for each of the 5 larger tanks. But only the 3 large marine storage tanks that were not taken away need be considered. This means that there should be added to the figures mentioned $3,000 for the reconstruction cost of the fittings for the 3 tanks and $1,800 for their depreciated value bringing the revised figures for them up to $30,445 for reconstruction cost and $19,150 for depreciated value to which there should be added some amount for labor. In Exhibit 5 the life expectancy of the tanks was put at 25 years. Then Professor Coote put in Exhibit 10 under circumstances to which I shall refer later. This estimated the life expectancy of the tanks at 30 years

instead of 25 years, which left the reconstruction cost of the 3 tanks at $27,445 but brought their depreciated value up to $19,036 to which there must be added the corrections made by Mr. Sharp in respect of the fittings bringing the figures up to $30,445 for reconstruction cost and $20,836 for depreciated value.

In my judgment, the best figures for the replacement cost of the tanks are those given by Mr. Eadie and the only question in dispute is the amount of their depreciation. Page 43 of Exhibit C shows the expectancy of life of the storage tanks as 40 years and Mr. Eadie stated that he had taken this estimate from page 54 of Bulletin "F", a pamphlet issued by the Bureau of Internal Revenue of the United States Treasury Department and published by the United States Government Printing Office at Washington. Bulletin "F" deals with Income Tax, Depreciation and Obsolescence, Estimated Useful Lives and Depreciation Rates. It is primarily intended for use in connection with income tax deductions but is used for other purposes. It is stated, on page 11, that the probable useful lives shown in it for each kind or class of assets are based on the usual experience of property owners and are predicated on a reasonable expense policy as to the cost of repairs and maintenance. Counsel for the defendant relied on it as a record of actual experience and Mr. Eadie considered it fair. But in Exhibit 5 Professor Coote and Mr. Sharp put the expectancy of life of the tanks at 25 years and Professor Coote stated that he had taken this estimate from Marston and Agg's treatise on Engineering Valuation, published by McGraw Hill Book Company Inc. of New York and London. Professor Coote described this as the best recognized text book in the field but in reply to a question which I put to him expressed the opinion that Bulletin "F" was more authoritative than Marston and Agg's book and I then requested him to prepare another valuation, using the expectancy of life figures given in Bulletin "F", and he stood down for that purpose. Mr. Sharp did not agree with Professor Coote's opinion about Bulletin "F". His preference as a practical man was for Marston and Agg's book, because the data in it came from so many sources. But the importance of Mr. Sharp's evidence was in his opinion that if Bulletin "F" was to be taken as the authority for

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determining the life of the tanks, as put forward for the defendant, then Mr. Eadie was in error in putting it at 40 years and should have put it at 30 years or even less. Mr. Sharp drew attention to page 53 of Bulletin "F". There under the general head of "Oil and Gas" and the sub-head of "Marketing" there is an item "Tanks, storage" and the average useful life of such storage tanks is put at 30 years for cylindrical horizontal tanks and 20 years for underground tanks. Mr. Sharp's opinion was that the life of horizontal tanks which are off the ground would be longer than that of vertical tanks such as the 3 large marine storage tanks which rest on the ground, with which opinion Mr. Eadie later agreed, and for that reason he thought that the estimate of 25 years for the useful life of the storage tanks was fair. It appeared from Mr. Sharp's evidence that Mr. Eadie had taken his 40 year expectancy of life estimate from page 54 of Bulletin "F". There under the general head of Oil and Gas and under the subhead of "Transportation" and a further sub-head of "Oil Pipe Lines" there is an item "Oil Tanks" against which there is a useful life of 30 years for gathering lines and 40 years for trunk lines. After Mr. Sharp had pointed this out Mr. Eadie was recalled to explain how he got the storage tanks into the class of assets referred to on page 54. He was unable to give a reasonable explanation. The defendant's storage tanks were part of its bulk storage plant in its Ottawa marketing division and there was no justification for applying the 40 year life expectancy estimate referred to on page 54 of Bulletin "F" to them, and Mr. Eadie was in error in so doing. The fact is that he picked out the estimate that was most favourable to the defendant in that it put the expectancy of life of the tanks at the highest figure with their resulting high depreciated value. When Professor Coote came back to the stand with his revision of Exhibit 5, which he had prepared at my request, which was filed as Exhibit 10, he explained that the only change he had made had been to put the life expectancy of the tanks at 30 years instead of 25 years with the resulting increase in the figures which I have mentioned. In so doing he somewhat qualified his opinion that Bulletin "F" was more authoritative than Marston and Agg's book by saying that both publications should be considered as guides and that the tables of useful life of the various assets contained in each should be used in the light of the actual

situation. With this statement I am in agreement. Both Bulletin "F" and Marston and Agg's Engineering Valuation are useful and dependable books but the tables of useful life in each are not to be read as absolute. The actual condition of the asset under consideration should be taken into account. Professor Coote then made a statement which, I think, offers a solution of the problem. He said that he did not think that there was any item in Bulletin "F" that applied specifically to vertical tanks such as those in question, but his opinion was that they were of the same type as the oil tanks that are used in connection with oil pipe lines that are gathering lines for which a life expectancy of 30 years was given on page 54 of Bulletin "F". He also stated that if he had had access to Bulletin "F" when he prepared his report he would have put the life expectancy of the tanks at 30 years instead of at 25 years but 30 years was the maximum that was reasonable.

After careful consideration I accept Professor Coote's estimate of 30 years as the reasonable expectancy of life of the storage tanks. I have already stated that the best figures for their replacement cost are those given by Mr. Eadie. But, in view of my finding on the expectancy of life of the tanks Mr. Eadie's estimate of their depreciated value must be revised. For the 3 large marine storage tanks this will come to $18,972.23, instead of $20,994.69, to which there should be added $202.84 as the depreciated value of the 4 underground tanks making the total depreciated value of the tanks that were not taken away come to $19,175.07.

The remainder of the storage and operational equipment consisted of a great many items, including loading racks and platforms, railway siding, pumps, pipe lines, heating plant, light poles and flood lights, sewers and water service, fire-walls, fire protection equipment, driveways, fence and gates. The details of these items were given in Section C of Exhibit C and summarized on pages 44 and 45. For each item particulars were given of the year of construction, the replacement cost at the date of expropriation, the expectancy of life, the rate and amount of depreciation and the depreciated value at the date of the expropriation. Some of the items of equipment were removed by the defendant to its Heron Road site. The replacement cost of these came to $2,116.83 and their depreciated value to $940.14.

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The replacement cost of the remaining items that were left on the property came to $25,991.66 and their depreciated value to $17,132.61. The evidence for the plaintiff on these items was not prepared in the same way. To obtain figures that would be comparable to those appearing on pages 44 and 45 of Exhibit C it is necessary not only to look at Exhibit 10 for the valuations made by Professor Coote and Mr. Sharp and Exhibit 11 for those made by Mr. Farley and Mr. Lanctot but also to review the evidence of these witnesses and the corrections made by them on their cross-examinations. I have found Mr. Osborne's analysis of the evidence on the various items very helpful in arriving at the total figures. As I have calculated them the total reconstruction cost of the items, other than the tanks and excluding those mentioned in the contra account, came to $24,509 and their depreciated value to $14,981.30. This latter figure is subject to some increase by reason of Mr. Sharp's acceptance of Mr. Eadie's figures regarding the catwalks on the tanks. There will then be a difference of somewhat less than $2,000 between the opposing estimates. This difference is not large. While I feel that Mr. Eadie's estimates on some items were somewhat high I accept them. Consequently, I find that the depreciated value of the operational equipment, other than the tanks, that was not taken away was $17,132.61. This puts the value of all the storage and operational equipment that remained on the property at slightly over $36,000.

I now come to the value of the land. This presents a serious problem. It is, of course, well established that the Court should estimate the value of the expropriated property on the basis of its most advantageous use, whether present or prospective, but it is only the present value, as at the date of the expropriation, of its prospective advantages that is to be determined: *The King* v. *Elgin Realty Company Limited* (1).

There is no doubt that the land was conveniently located and that its location gave it many advantages. It was near the centre of the two cities of Hull and Ottawa. It was also adjacent to the Government wharf on the Ottawa River which made it possible for the defendant to bring its supplies of gasoline and fuel oil from its refinery in Montreal

(1) [1943] S.C.R. 49.

by tanker and unload them there into a pipe line connected with its storage tanks with a considerable saving in transportation costs over those of transport by rail or truck. Moreover, the property was served by a railway siding running down Guigues Street by which railway cars operated by the Hull Electric Railway Company could deliver supplies to it. In addition the location of the property on the river bank and near the Interprovincial Bridge made for effective advertising display. And the nearness of the property to the Hull labor market reduced the defendant's labor problem to a minimum. Moreover, the service station portion of the property enjoyed several special advantages. It had a frontage on Laurier Street which is a main traffic artery of the City of Hull and part of Provincial Highway No. 8 and carries heavy local and tourist traffic. There was commercial development in the immediate vicinity and the proximity of the station to the storage plant made the delivery costs of supplies to it negligible.

In this case Mr. Sherwood expressed the opinion that the land would have been desirable for apartment site purposes but Mr. Hadley disagreed with this. He considered it as commercial property and Mr. Bosley thought its best possible use was for industrial purposes. Indeed, his opinion was that the best and most advantageous use that could have been made of the land was that to which it was actually put. This was also the view of Mr. Farley and Mr. Lanctot. There can be no doubt of this and it is on that basis that the value should be estimated.

The evidence is that the land was acquired by the defendant in 1930 at a cost to it of $14,000. It was purchased by the defendant's subsidiary, Pioneer Transportation Company Limited, on April 2, 1929, from J. E. Laflamme for $13,000 and then sold by it to the defendant on September 17, 1930, for the expressed consideration of $1.00 but Mr. Perry stated that it was carried on the defendant's books at a cost of $14,000.

It is manifest that the land had substantially the same advantages, potentially at any rate, in 1930 as at the date of the expropriation and Mr. Perry admitted that the defendant had taken them into account when it acquired the property.

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It also appeared that the defendant did not consider that the price was cheap for as late as October 31, 1940, when its general manager wrote to the Mayor of the City of Hull protesting against the proposal to have the Hull Electric Railway Company remove the rails from the streets serving its plant he stressed the fact that the defendant had acquired the property "à prix très substantiel". This had worked out at slightly less than $5,000 per acre.

But now the defendant claims that on April 2, 1946, the date of the expropriation, the value of the land was $215,999.24, which works out at over $76,000 per acre.

This claim was built up by the defendant by the addition of three items. These were stated on page 32 of Exhibit 32 as follows, namely, assessed value, $45,825, marine facilities, Pioneer Transportation Company Limited, $125,557.20, and central location, $44,617.04, making the total of $215,994.24. These three items may be summarized briefly. The first is the assessed value of the land at $45,825. The details are set out in a sheet headed "Supertest Assessment 1948-1949", attached to Mr. Hadley's report, Exhibit J. Mr. Hadley explained that he had gone to the City Hall in Hull to find out what lands the defendant had and what the areas were, that the sheet was copied from the assessment roll and was given to him by the City Assessor himself. This will be commented on later.

The next item in the claim, namely, $125,577.20, equals the amount of the net profits after tax made by Pioneer Transportation Company Limited in the ten year period between 1936 and 1945 inclusive. This company was a subsidiary of the defendant and was incorporated in 1928 for the purpose of acquiring and operating a tanker and the profits made by it during the period mentioned came from the transport by its tanker of gasoline and furnace fuel oil from the defendant's refinery at Montreal to the Government wharf adjoining its terminal storage plant in Hull where the cargoes were unloaded into a pipe line leading to the defendant's marine storage tanks. The tanker had been built for river service and after the defendant ceased its use of the marine storage tanks the tanker was no longer required for the use to which it had been put and the Pioneer Transportation Company Limited finally sold it in 1948. The defendant owned all the shares in Pioneer

Transportation Company Limited except the qualifying shares of the directors and in that capacity received all its profits in the form of dividends as they were declared. The details of the profits and the dividends appear in Exhibits D and E. Some of the profits came from services other than the transport of supplies to the defendant and it was also admitted that, to some extent at any rate, the profits were the result of good management. But the whole amount was claimed as part of the value of the land to the defendant.

The third item in the defendant's claim is its measure of the value of its central location. This was put at $44,617.04. This amount is described on page 37 of Exhibit C as being the saving in tank truck operating costs of the Hull plant as against the Heron Road plant in the ten year period from 1947 to 1956 both inclusive. The figures are based on the calculation that a round trip for each tank truck from the Hull plant is 3·432 miles shorter than from the Heron Road plant. The page shows the number of loads, the total lower mileage, the operating costs per mile and finally the total saving in operation costs for each of the years 1947 to 1956. The figures for the years 1947 to 1949 are actual cost figures, the details appearing on pages 38 to 40, whereas the figures for the years 1950 to 1956 are estimates.

I have never before had to consider a claim built up in this manner. It is a novel one in my experience of expropriation cases. It also raises several questions of great importance. This makes it essential to consider the leading decisions on the principles to be applied in determining the value of the land in question. It will, I think, be useful to set out side by side with one another the several tests of value that have been laid down in these decisions.

My first reference is to the outstanding statement of Fletcher Moulton L.J., as he then was, in *In re Lucas and Chesterfield Gas and Water Board* (1) where he said:

> 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*

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

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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.

This statement was expressly approved by the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1). There the appellant company had power to expropriate lands required for a water power development scheme. The respondents owned three properties that were necessary to it. The majority of the arbitrators had valued their lands purely as agricultural land, but their award had been set aside by the Superior Court of Quebec which held that the owners were entitled to share in the value of the scheme. The Judicial Committee disagreed with this view, allowed the appeal from the decision of the Court below and ordered it to remit the matter to the arbitrators so that they might consider the value in the light of the possibiliy of a company coming into existence and obtaining powers. In delivering the judgment of the Committee Lord Dunedin made the following statement, at page 576:

> 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* [1909] 1 K.B. 16, where Vaughan Williams and Fletcher Moulton L. JJ. deal with the whole subject exhaustively and accurately.
>
> For the present purpose it may be sufficient to state two brief propositions:— (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. (2) The value to the 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.
>
> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adapatibility, as pointed out by Fletcher Moulton L.J. in the case cited, is really rather an unfortunate expression) *the value* is not a proportional part of the assumed value of the whole undertaking, but *is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale but before any undertakers had secured the powers, or required the other subjects which made the undertaking as a whole a realized possibility.*

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

And, at page 579, he put the test of value as follows:

The real question to be investigated was, for what would these three subjects have been sold, had they been put up for auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

In the same year the Judicial Committee decided *Pastoral Finance Association, Limited* v. *The Minister* (1). There the land taken by the Minister had been bought by the appellants for the expansion of their business. Evidence was given at the trial as to the savings and additional profits which they would have made in their business if it had been transferred to the expropriated land and the trial judge directed the jury as follows:

Then you will consider what capital amount fairly represents those savings and those profits and you will add that to the amount that you consider fairly represents the market value of the land independently of these special questions.

On this direction the jury gave a verdict for the appellants for £23,550, adding by way of rider that they valued the land at £9,950. The trial judge entered judgment for the appellants for the amount of the verdict. The Full Court reduced the verdict to £9,950 on the ground that the appellants were not entitled to anything beyond the market value of the land by reason of the fact that they had not as yet erected any building thereon. The Judicial Committee decided that the principle underlying this decision was erroneous. They had difficulty in arriving at the meaning of the rider but decided that it was not in law the verdict of the jury and that no legal effect could be given to it. While their Lordships allowed the appeal from the decision of the Full Court they disagreed with the trial judge's direction to the jury. Lord Moulton said, at page 1088:

Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their

(1) [1914] A.C. 1083.

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compensation. 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.* Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

The next decision to which I refer is that of the Judicial Committee in *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* (1). There a harbour was being constructed at Vizagapatam and land acquired by the harbour authorities on the south of the harbour had been allocated to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was south of this land, contained a spring which yielded good drinking water which could easily be made available for the oil companies and people engaged in the harbour and was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the footing of its potentialities as a building site but the Land Acquisition Officer disallowed such claim and awarded compensation on a valuation of it as partly waste and partly cultivated with an allowance for buildings and trees. On appeal to the Subordinate Judge the appellant made a further claim on the footing of its potentialities as a source of water supply. The Subordinate Judge found against its potentialities as a building site but held that the water could be sold to the oil companies and others at a profit, that the only possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded even where the only possible buyer was the acquiring authority and assessed the value of such potentialities at a very substantial sum. On appeal the High Court of Madras set aside his award and restored that of the Land Acquisition Officer, but on appeal to the Judicial Committee of the Privy Council the judgment of the High Court was reversed and the amount found by the Subordinate Judge was reduced. Lord Romer, who

(1) [1939] A.C. 302.

delivered the judgment of the Committee, dealt with a number of important matters. After setting forth the facts and referring to certain provisions of the Indian Land Acquisition Act, 1894, he said, at page 311:

> The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act." *The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded.* Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded, is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its "market value". But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price", to use the words of s. 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression "the market price". There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market value" in s. 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4, sub-s. 1), but also by reference to the uses to which it is reasonably capable of being put in the future.

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There are also two decisions of the Supreme Court of Canada to which reference should be made. The first of these is *Diggon-Hibben Limited* v. *The King* (1). In that case Rand J., at page 715, paraphrased the statement in the *Pastoral Finance Association* case (*supra*), which is set out in italics above, as follows:

> The statement means . . . that *the owner* at the moment of expropriation *is to be deemed as 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.* It is assumed, in the situation here, that he is to continue in business. In this we have no need of an imaginary market, purchase, or interest; we have the real interest of the owner, and its measurement in value is the task for the Court.

Finally, this statement was expressly approved by Rinfret C.J., in delivering the judgment of the Supreme Court of Canada in *Woods Manufacturing Co. Ltd.* v. *The King* (2).

The italics in the above statements are mine. I have used them so that the variations in the tests of value laid down in them may more readily be seen. It is obvious that it is impossible to reconcile all the statements. For example, there is a sharp divergence between the statement of Fletcher Moulton L.J. in the *Lucas and Chesterfield Gas and Water Board* case (*supra*) that the owner is *only* to receive compensation based upon the market value of his lands as they stood before the scheme was authorized and that *subject to that* he is to be paid the full price of 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 and the statement in the *Diggon-Hibben* case (*supra*). The two tests cannot possibly stand together. In the *King* v. *Thomas Lawson & Sons Limited* (3) I expressed the opinion that the definition of value to the owner as realizable money value which I had deduced from the cases was essentially the same as that of fair market value, as given in Nichols on Eminent Domain, 2nd edition, at page 658, but in the *Woods Manufacturing Company* case (*supra*), at page 509, Rinfret C.J. expressly rejected this definition as not a true expression of the law. It must follow, I respectfully suggest, that in rejecting this

(1) [1949] S.C.R. 712. (2) [1951] S.C.R. 504 at 508.
(3) [1947] Ex. C.R. 44 at 80.

definition the Supreme Court of Canada has also disapproved the limitation of market value which *Fletcher Moulton* L.J. expressly put on value to the owner in the *Lucas and Chesterfield Gas and Water Board* case (*supra*).

It follows, as a matter of course, that the statement in the *Diggon-Hibben* case (*supra*) is at variance with the decision of the Judicial Committee in the *Cedars Rapids Manufacturing Company* case (*supra*) for in that case Lord Dunedin expressly adopted the test of value laid down by Fletcher Moulton L.J. Moreover, I cannot see how the statement can be reconciled with the test put by Lord Dunedin that the value was a *price* that must be tested by the imaginary *market* which would have ruled had the land been exposed for sale under the conditions specified or his statement that the real question was for what would the properties have been sold had they been put up for auction under the conditions specified.

And I must confess that I cannot see how the test in the *Diggon-Hibben* case (*supra*) can be considered the same as that put by Lord Moulton in the *Pastoral Finance Association* case (*supra*). As I read his statement the value of the property is the amount which a prudent purchaser, in a position similar to that of the owner, would have been willing to pay for it after he had considered the elements of value indicated by the possibility of the savings and additional profits referred to and been guided by them in arriving at the price he would be willing to pay. But the statement in the *Diggon-Hibben* case (*supra*) rejects any such limitation.

And, of course, the test stated in the *Diggon-Hibben* case (*supra*) is quite different from that laid down by Lord Romer in *Vyricherla* case (*supra*) that the compensation must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser.

It is thus plainly evident that the law on this vexatious question is, to say the least, in a very unsatisfactory state and it is very doubtful that any clarification by judicial decision is possible. Under the circumstances, I have come to the conclusion that it is essential to the fair administration of this branch of the law that there should be a statutory definition of value. It was found necessary in the

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United Kingdom, as long ago as 1919, to lay down such a definition for use in the case of all lands compulsorily acquired by a government department or a local or public authority. This was accomplished by the Acquisition of Land (Assessment of Compensation) Act, 1919. In my opinion, similar action should be taken in Canada.

In view of this recommendation it would not be out of order to express my opinion on what would be the most desirable definition even although this will involve critical comment on some of the tests of value that have been laid down. My first comment must, with respect, be on the test stated in the *Diggon-Hibben* case (*supra*) and adopted in *Woods Manufacturing Company* case (*supra*). This is a novel one for which there is no precedent in England. But the criticism of the test is not on the ground of its novelty. I think it will be conceded that it is the most expensive test that has been laid down. My experience in expropriation cases makes me fearful that attempts to apply it will result in excessive awards through the difficulty of avoiding duplication in the weighting of the various factors of value that should be taken into account just as there has been duplication in the defendant's claim for the value of the land in the present case. But whether there is such danger or not there is a more serious objection to the test, namely, the difficulty of applying it. For my part, I must frankly confess that I do not understand it and I am at a loss to know how to operate it. Is the market value of the land to be wholly disregarded? How is the amount which the assumed owner would be willing to pay to be determined? Whose opinion on this subject, if it is not left to the owner to decide, will be available to the Court? Real estate experts will not be able to give it any help. During the trial I put the test to Mr. Bosley, one of the most experienced and reliable real estate experts in the country, but he could not assist the Court in arriving at an answer to it. He explained that he could not apply the test because he could not know what was in the owner's mind. In his opinion, it was only the owner who could decide how much he would be willing to pay. While the wording of the test lends itself to such an opinion it could not have been intended that the owner should be the arbiter of his own entitlement. Under these

circumstances it seems to me that in view of the difficulty of applying this test a search should be made for a more easily applicable one.

Some help towards the solution of the problem is to be found in the remarks of Rand J. in the *Diggon-Hibben* case (*supra*). He drew a distinction between those factors of value that might influence the judgment of a purchaser and those with which a purchaser would not be concerned. After pointing out that the meaning of Lord Moulton's language in the *Pastoral Finance Association* case (*supra*) had been somewhat misconceived by me in the course of the trial and in my reasons for judgment, he said at page 715:

> It is obvious that the purchaser will pay according to the strength or value of his interest or his "anxiety" to obtain the property and to nothing else. He is not concerned with the consequences of disturbance to the owner.

But he made it very clear that in his view value to the owner includes factors of value other than those with which a purchaser would be concerned. He refers to factors of this sort at page 714:

> The question arises here in connection with the claim for disturbance of possession, including expenses of moving, damages to or loss of fixtures, and for interruption of business generally. The debate is whether these are to be taken as elements of the value of the land to the owner or items of an independent claim for damages. There is no serious dispute that they should be allowed; that they must be such as can be brought within the scope of the "value of the land to the owner" has not been questioned; and what is at issue in the particular items is in reality a conceptual refinement which is devoid of practical significance.

With deference I suggest that the last part of the statement is open to question. In my opinion, it is essential, in the interests of precision, to recognize the distinction between the factors of value that would be likely to affect the judgment of a purchaser and those that would not. The statutory definition of value should be such as to exclude from consideration all factors that would not be likely to affect the judgment of a prudent purchaser. I do not see how there could be any objection to such a definition if statutory provision was also made for due consideration of those factors of value to the owner with which a purchaser would not be concerned. I shall defer the discussion of such a provision until I deal with the defendant's claim for disturbance. In the meantime, I shall confine myself to consideration of what definition of value would best meet the suggested condition.

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The tests of value stated in the first four decisions above referred to are basically the same. In each one the value of the land is limited to the amount which it is assumed some purchaser would be willing to pay. But while the tests all have this advantage in common it does not follow that they are all equally desirable. Some are less valuable than others. For example, the test in the *Pastoral Finance Association* case (*supra*), notwithstanding its high authority, is not as clear in meaning as it might be and it could lead to unsatisfactory results if stretched to the limits of its language. I have already expressed the opinion that I do not see how it can be considered the same as that put in the *Diggon-Hibben* case (*supra*), but if its language is open to the paraphrasing of it made by Rand J. in the *Diggon-Hibben* case (*supra*) then its meaning is ambiguous for it has not been interpreted in that way in other cases in which it has been followed and applied: *vide*, for example, the decision of the High Court of Australia in *The Minister* v. *New South Wales Aerated Water and Confectionery Co. Ltd.* (1) where Isaacs J., as he then was, after referring to Lord Moulton's statement, said:

> That assumes a sale, an imaginary sale, in the "imaginary market" and the question was what an imaginary prudent buyer in the claimant's position—because such a person was assumed to make the best use of the land—would give for it.

Thus value was limited to the amount that a prudent purchaser would pay. Moreover, if the words in the test, particularly the words "sooner than fail to obtain it", were stretched to the full limit of their meaning the test could lead to unsatisfactory results. When I put it to Mr. Bosley he said that he could not apply it for the reason that he could not tell how much a purchaser would be willing to pay for a property "sooner than fail to obtain it" without knowing how urgently the purchaser needed it. There is room for this criticism. Moreover, he gave two interesting illustrations. He related an experience in Toronto where the firm he was with had been retained to buy a block of land. One owner of a lot in the block, suspecting that someone was interested in the whole block, pushed his price up to four or five times what his lot was considered to be worth but the purchaser paid it "sooner than fail to obtain it".

(1) (1916-17) 22 C.L.R. 56 at 83.

Mr. Bosley's second illustration was a more recent one. He had been instructed to acquire a parcel of land at Oakville. The owner of part of it, sensing the purchaser's need, ran the price of his property, consisting of 2 acres, up to $20,000 per acre. Its ordinary value was not more than $3,000 per acre but its acquisition was essential to the success of the project and Mr. Bosley's principal was put in the position of having to pay the exhorbitant price asked for it "sooner than fail to obtain it". In each case the amount paid by the purchaser answered the test of value as put in the *Pastoral Finance Association* case (*supra*) but it would be absurd to say that it represented the value of the property. Thus the test, when the words in which it was expressed are stretched, appears to be capable of leading to a result based not on the value of the land to its owner, as ought to be the case, but on its value to the purchaser because of the urgency of his need, which is contrary to all precepts. But while there is this possibility I am confident that it was never intended that the test should be capable of such results. As I read Lord Moulton's judgment it envisages negotations between the owner of the property and the prudent man referred to, who is a purchaser, each knowing the advantages of the property and the possibilities of savings and profits from its use, culminating in a sale of it to the prudent purchaser at the price beyond which, in the ordinary course and without the pressure of urgent need, he would not be willing to go. In that sense, Lord Moulton's test in the *Pastoral Finance Association* case (*supra*) is the same as that which he had laid down earlier in the *Lucas and Chesterfield Gas and Water Board* case (*supra*). I am unable to believe that he intended it to be different. But since the Supreme Courts of two countries have taken conflicting views of the meaning of the formula in which the test was expressed and since it might be capable of the results indicated by Mr. Bosley's illustrations it would surely not be wise to adopt it as a statutory definition of value.

Moreover, I draw attention to the statement of Lord Romer in the *Vyricherla* case (*supra*) that in determining the compensation "the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to

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buy must alike be disregarded." The exclusion of these two considerations seems to me to be essential for neither can have any true bearing on the value of the land.

This leaves the other three tests, namely, those laid down by Fletcher Moulton L.J., Lord Dunedin and Lord Romer. While these are all similar to one another and clear, it seems to me that the best definition of value would be that which was actually adopted by the Parliament of the United Kingdom in the Acquisition of Land (Assessment of Compensation) Act, 1919, in which one of the rules governing the assessment of compensation by an official arbitrator was put in part by section 2(2) of the Act as follows:

> The value of land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize:

This definition would have several advantages. It would be of general application and readily applicable by real estate experts who could thereupon give realistic and reasonably certain opinions of value and it would be conducive to precise and fair awards. In my judgment, the adoption of this definition would go a long way towards the solution of the problem under discussion. Certainly, it would be of great assistance to this Court in carrying out its duty.

After this discussion, some of which is a digression, but perhaps permissible in view of the importance of the subject, I return to the defendant's claim. But before I summarize the valuations of the experts I should refer to other evidence bearing on the value of the land.

Fortunately, there was evidence of three sales of fairly large parcels of land all facing on Laurier Street and extending easterly to the Ottawa River. There was, first of all, the acquisition of the land in question by the defendant in 1930 at a cost of $14,000 for 2.819 acres. Then on September 26, 1930, the Shell Oil Company bought land immediately north of and adjoining the defendant's land for $21,000 for 2.6 acres. And on September 31, 1931, the Sisters of Charity bought land a little north of the two oil company properties at $12,000 for 2.4 acres. The average for these three large parcels works out at a little over $6,000 per acre.

There was some conflict in the evidence on the rise in land values between the time of these sales and the date of the expropriation. Mr. Sherwood expressed the opinion that land values had reached their high points in 1929 and 1930. Of this, I think, there can be little doubt. Then came the depression years and values slumped. Mr. Sherwood thought that they had recovered prior to 1939 or 1940 but was not definite. He would not express an opinion on the rise in values between 1930 and 1946. Mr. Hadley put the increase at 100 per cent. Mr. Bosley considered that it had been not less than 25 per cent. Mr. Lanctot put it at 35 per cent. I consider his opinion on this point to be the best one. If this rate of increase were to be applied to the average value of a little over $6,000 per acre for the land the average would be increased to somewhat less than $8,500 per acre. This is, I think, a reasonably fair starting point in the estimation of the land value. I should point out, of course, that the average value of a little over $6,000 per acre which I mentioned was for each whole parcel including the frontage on Laurier Street.

I shall now summarize the valuations of the land made by the various experts. Mr. Sherwood estimated the area of the land at 123,651 square feet. He valued the Laurier Street frontage of 89 feet to a depth of 100 feet at 84 cents per square foot, or $7,476, and the remaining 114,751 feet at 25 cents per square foot, or $28,687.75, making a valuation of $36,163.75. He said that in this valuation he had not taken into account the benefit to the defendant of being able to bring in its supplies by water transportation with its substantial saving of cost. His attention was called to Mr. Perry's evidence on the profits made by the Pioneer Transportation Company Limited and he expressed the opinion that the defendant was entitled to ten years of reasonably anticipated profits and that these should be added to his valuation. This, in Mr. Sherwood's opinion, would be a greater amount than that which was claimed by reason of the fact that in some of the years 1936 to 1945 gasoline had been rationed and the defendant's sales had been restricted.

Mr. Hadley, using the same area as Mr. Sherwood, valued the Laurier Street frontage at 88 cents per square foot, or $7,832, and the remainder at 27½ cents per square foot, or

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$31,500.56, making a total of $39,332.56. He said that he did not take the presence of the siding into account when making his valuation nor the attribute of the property resulting from its being on the river and adjacent to the wharf, except as a means of access. Then after having stated that he would have advised the defendant to sell for the amount of his valuation plus the value of the equipment, considering it as a piece of real estate, he expressed the opinion, in reply to suggestive questions, that the defendant should get something in excess of his valuation by reason of the special facilities for water transport which the land enjoyed.

The other three experts, Mr. Bosley for the defendant and Mr. Farley and Mr. Lanctot for the plaintiff, approached their valuations differently. They considered the sales that I have mentioned and the general increase in land values that had taken place. They also stated that they had taken into account the advantages which the land possessed. Mr. Bosley referred to all the advantages which I mentioned earlier in these reasons for judgment. He valued the land fronting on Laurier Street for a depth of 66 feet, which was the actual depth of the service station property, at $1.00 per square foot, or $5,874. The area of this came to ·135 of an acre. This left 2·684 acres for the storage plant property, which he divided into two parts, one consisting of the land fronting on the river and extending 250 feet back from it, amounting to 1·818 acres, and the other of the land between this portion and the service station land, amounting to ·866 acres. Mr. Bosley took the sales that I have mentioned into account and then referred to his valuation of the land in the *Woods Manufacturing Company* case, in which he had been a witness, at $7,700 per acre. He thought that this should be increased for the defendant's land because of the advantages specified and put it at $10,000. His view was that land fronting on water which provides transportation by water as well as by rail commands a premium price which should be double the ordinary price. For that reason he put a valuation of $20,000 per acre on the part fronting on the river, which for 1·818 acres came to $36,350. The remaining intermediate part he valued at $10,000 per acre, which for ·866

acres came to $8,660. This made Mr. Bosley's total valuation come to $50,894, which he put in round figures at $50,000.

Mr. Farley valued the Laurier Street frontage of 89 feet for a depth of 66 feet at 69 cents per square foot, or $4,053.06, and the rest of the property amounting to 2·68 acres, at $12,500 per acre, or $33,500, making a total valuation of $37,553.06.

Mr. Lanctot's valuation was a little higher. He valued the service station land at 69 cents per square foot, or $4,053.06, and the balance, consisting of 116,965 square feet, at 30 cents per square foot, or $35,089.50, making a valuation of $39,142.56.

Having thus summarized the various valuations put forward I must now come to my estimate of the value of the land. It is obvious from my confession that I do not understand the test laid down in the *Diggon-Hibben* case (*supra*) and adopted in the *Woods Manufacturing Company* case (*supra*) and do not know how it operates that I cannot apply it. That being so, I apply to the determination of the value of the land the principles laid down by the Judicial Committee of the Privy Council in the three decisions which I have cited and by Fletcher Moulton L.J. in the *Lucas and Chesterfield Gas and Water Board* case (*supra*). I take the term "prudent man in their position" in Lord Moulton's formula in the *Pastoral Finance Association* case (*supra*) not as referring to a prudent owner but as meaning a "prudent purchaser in a position similar to that of the owners". Such a purchaser could, for example, be another oil company which might be assumed to have full knowledge of all the advantages of the land and the use that could be made of it with its facilities. The value should be the price that a purchaser of this sort might be expected to be willing to pay. In making this statement I am not overlooking the fact that what the Court must estimate is not the value of the land, buildings and equipment, separately found and then added together, which would make for a high estimate, but the value of the land as it stood at the date of the expropriation with the buildings and equipment on it, less the equipment that was removed. In addition, the Court must take into account

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the factors of value to the owner involved in the defendant's claim for disturbance with which, as Rand J. put it, a purchaser is not concerned. On this basis, I proceed to my estimate.

The defendant's claim of $215,999.24 for the value of the land is plainly excessive. In this connection it is interesting to note the striking difference between the amount of its claim and that made by the Shell Oil Company for its land which was immediately adjacent to the defendant's land and almost as large in area, 2·6 acres as against 2·819 acres. The Shell Oil Company operated a bulk storage plant with large marine storage tanks in much the same way as the defendant did, except that its plant was a little smaller. During the navigation season it brought its supplies of fuel oil and gasoline by its tanker from Montreal to the government wharf and the tanker unloaded its cargoes into a pipe line leading to its marine storage tanks. It was also served by the same railway siding as that which served the defendant. After the expropriation the Shell Oil Company moved to Heron Road and the defendant followed it there. It would be hard to find two situations that were more alike. There was one difference. The Shell Oil Company continued to use its tanker, whereas the defendant's subsidiary ceased its tanker operation. It is obvious that the Shell Oil Company's land enjoyed the same advantages as the defendant's land and was of approximately the same value. Yet, as appears from the judgment of this Court in *The King* v. *Shell Oil Company of Canada Limited* (1), the Shell Oil Company claimed $40,000 for its land as against the defendant's claim of $215,999.24 for its land.

While my opinion is that the defendant's claim is excessive it would not be fair, in view of the state of the law, to find fault with the defendant for making it. And I should add that both counsel for the defendant prepared and presented its case with great care and ability.

But, in my judgment, the components of the claim must be rejected. It is established in this Court that the municipal assessment of expropriated property is not evidence of its value. It is made for municipal taxation purposes and not for the purpose of determining value for compensation.

(1) (June 16, 1948) unreported.

But it has been the practice to allow evidence of the municipal assessment to be given as a check on excessive valuation. Moreover, it should also be pointed out that the municipal assessment of the defendant's land in 1946 was not $45,825, as claimed, but only $17,800, as appears from the evidence of Mr. L. Leblanc, the Clerk of the City of Hull. Mr. Grandguillot's re-assessment of the City had not been completed at the date of the expropriation.

Nor can the claim of $125,577.20 for the marine facilities be admitted. This was the amount of the profits made by the Pioneer Transportation Company Limited for a ten year period prior to the expropriation. Counsel for the defendant argued that this amount was not being claimed for loss of profits as such but described it as the yardstick for the measurement of the value of the land to the defendant. It will be recalled that in the *Pastoral Finance Association* case (*supra*) it was held that the capitalization of anticipated savings and profits should not be added to the market value of the land. In my opinion, the addition of an accumulation of profits for a ten year period is subject to a similar objection. The difference is one of degree rather than of kind. An attempt was made to show that the addition of profits for ten years was fair and reasonable but counsel could not suggest any principle in support of his attempt. Why not take five years instead of ten? And, on the other hand, why stop at ten years? Why not take fifteen or twenty years? Who can with any degree of accuracy answer these questions? Moreover, the loss ought not to be attributed to the expropriation. Mr. Perry explained that the Pioneer Transportation Company Limited had decided on a tanker exclusively for river use. The result was that when it lost its chief customer on the Ottawa River the tanker was of no further use to it. If it had built a tanker like that which the Shell Oil Company used it could have continued to operate its tanker just as the Shell Oil Company did and there would then, in all likelihood, have been no loss of profits at all. Under the circumstances, the claim is tantamount to saying that because the defendant's subsidiary had acquired a tanker that was suitable only for river use the defendant's land was worth $125,577.20 more than if the subsidiary had used a tanker that had a wider scope of use. Moreover, the loss of profits

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from an operation such as that conducted by the defendant's subsidiary cannot be said to be a factor of value in the land for the making of profits may, to a substantial extent, be the result of good management. And finally, there is never an allowance for loss of profits as such in cases such as this. What should really be considered is not the profits but the adaptability and the advantages of the land for the making of profits. That is what the prudent purchaser referred to in the *Pastoral Finance Association* case (*supra*) would consider. He would take into account the profits that were likely to be made and they would guide him in arriving at the price he would be willing to pay. That is quite a different approach to the value of the land from that made by the defendant.

The defendant's claim of $44,617.04 for the central location of its land is subject to similar objections. This represents the savings over a ten year period in distribution costs which it might have made if it had remained on its land over those which it has incurred or may incur from its Heron Road site. There is no more justification for adding an accumulation of anticipated savings to the value of the land than for adding an accumulation of profits. As in the case of likely profits so in the case of likely savings the prudent purchaser will consider them only as a guide in arriving at the price he will be willing to pay.

I should refer to another matter. Counsel for the defendant sought to establish from several witnesses the amount for which they would have advised the defendant to sell. Their answer was, in effect, the amount of the defendant's claim. I should really not have allowed these questions. In my opinion, the amount for which the owner of expropriated property would have been willing to sell it is not a test of its value. It would be anomalous if its value were dependent on whether the owner was willing to sell it or the price at which he would be willing to sell. I have already referred to Lord Romer's judgment in the *Vyricherla* case (*supra*) that the unwillingness of the owner to part with his property should be disregarded. The price at which he would be willing to sell it is also irrelevant. If that were the test the task of the Court in determining the value of the property would simply resolve itself into

awarding the owner the amount for which he would be willing to sell which would be just another way of saying that he should be the arbiter of his own entitlement. That would be absurd.

In estimating the value of the land regard should be had not only to its advantages but also to its disadvantages. One of these was the possibility that the railway services to it would be withdrawn. It is true that the Hull Electric Company was still serving the defendant's land on the date of the expropriation. But it applied for leave to abandon its line on September 17, 1946, and the Board of Transport Commissioners on November 26, 1946, gave it permission to do so as from November 30, 1946. But prior to the date of the expropriation there were many complaints against the service and on the evidence I have no hesitation in finding that the cessation of the railway service was likely. I am also of the view that the consequences of such a cessation would have been much more serious than several of the defendant's witnesses made it out to be.

I now return to the opinions of the experts. While I have great respect for Mr. Sherwood's experience and knowledge of land values in the Ottawa area I cannot accept his valuation in the present case. For reasons that I have already indicated I disagree with his opinion that there ought to be added to his valuation of $36,163.75 a sum equal to ten years of anticipated profits from the operations of the defendant's subsidiary's tanker. I cannot escape the feeling that in putting forward this opinion he has really taken the river frontage advantages of the land into account twice. And I am also of the view that the weight of his opinion is lessened by the fact that when he was a witness in the *Shell Oil Company* case (*supra*) he valued the Shell Oil Company land at $42,000 without any addition to its value such as he made in the present case.

Nor was I favourably impressed with Mr. Hadley's valuation. There was no indication of how it was arrived at. But it is interesting to note that without the advantage of the marine facilities which the land afforded he put its value at $39,332.56, which was almost three times as much as it had cost the defendant in 1930, although Mr. Hadley had put the increase in land value from 1930 to 1946 at

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100 per cent. If he excluded from his valuation the advantage of the land from its location on the river and its adaptability for the water transport of supplies to it his valuation was considerably too high.

In my view, Mr. Bosley's opinion of the value of the land is much to be preferred over that given by the other witnesses called by the defendant. He was, I think, the best qualified of all the witnesses to express an opinion on the value of the particular land. He had experience of land values in every part of Canada from British Columbia to Newfoundland. While he never bought or sold a bulk storage plant he acted for the defendant in the purchase of all its sites in Toronto and had a good knowledge of its requirements. He also acted for and advised all the major oil companies on their sites. Moreover, he took all the advantages of the property into account, including its central location and the marine facilities it afforded. He also considered the sales and the rise in land values. It was on this basis that he valued the land at the round figure of $50,000. He was also of the view, on the assumption that the storage and operational equipment was worth $60,000, that the defendant's property could have been sold for $150,000, that this was the amount that the defendant might reasonably have expected to receive from a willing purchaser, who might well have been some other oil company, and that this represented the value of the property. Of course, if the value of the equipment was less than $60,000, then the amount of $150,000 for the property as a whole would be correspondingly reduced.

Mr. Farley and Mr. Lanctot considered Mr. Bosley's valuation of $50,000 too high. There was nothing in the Hull area to warrant it and they pointed out that the river frontage values at Hull were really not to be compared with those at Toronto and Windsor.

While there is a good deal of merit in the opinions of Mr. Farley and Mr. Lanctot and while I consider Mr. Bosley's valuation of $50,000 for the land somewhat high I have decided to accept it.

I next come to the defendant's claim of $23,355.62 for disturbance. It is interesting to note that there is no express provision in the Lands Clauses Consolidation Act, 1845 giving compensation for disturbance. That Act recognized only two kinds of compensation to the owner of land compulsorily acquired under it, namely, for the value to him of the land that was taken and for injurious affection to his remaining land. Similarly, there is no express statutory provision in Canada for compensation for disturbance. But, as Scott L.J. put it in *Horn* v. *Sunderland Corporation* (1), the "judicial eye" has discerned the right to compensation for disturbance in the owner's right to "the fair purchase price of the land taken". Similarly in Canada it is now settled that the right of the owner of expropriated property to compensation for disturbance is included in his right to compensation for the value to him of the expropriated property. It is also interesting to note that when the Bill leading to the Acquisition of Land (Assessment of Compensation) Act, 1919, was introduced into the British House of Commons there was no provision in it for any claim for disturbance. So that if it had passed in the form in which it was introduced the owner of the land would not have been entitled to any compensation for disturbance. But rule 6 was added to section 2 of the Bill when it was before the House of Lords in the following terms:

(6) The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land.

The effect of this provision was considered in the interesting case of *Horn* v. *Sunderland Corporation* (*supra*). It does not give a separate right of compensation in addition to the value of the land. If a statutory test of value of expropriated property is laid down by the Parliament of Canada, it is important that provision should also be made for compensation for disturbance but care should be taken that such provision does not result in profit to the owner

(1) [1942] 2 K.B. 26 at 43.

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such as would be the case if the right to compensation to the owner were made a separate and independent cause of action. In this connection I withdraw the suggestion that I made in *The King* v. *Woods Manufacturing Co. Ltd.* (1) that the owner should have a "right to compensation for loss by disturbance of his business as an independent cause of action quite apart from the value of the property". Such an independent right would be fraught with danger of double compensation as was pointed out in the *Horn* v. *Sunderland Corporation* case (*supra*). And care should likewise be taken to guard against such an award of compensation for disturbance as was made in the *Woods Manufacturing Company* case (*supra*) where a claim for $78,000 for disturbance was allowed for a disturbance that has thus far not happened, the owner still being in undisturbed occupation of the property almost eight years after the date of its expropriation. There is something wrong with a principle that allows such a claim for a loss that has not happened and may possibly never happen.

The actual amount of the defendant's claim for disturbance in the present case was not disputed. The details are set out on page 47 of Exhibit C. There was the cost of moving the tanks amounting to $19,595.86, the particulars of which are set out on pages 48 to 50 of Exhibit C, the cost of moving stock and equipment amounting to $273.10, the details of which appear on page 51 of Exhibit C, and the expense of duplicated warehouse facilities at Hull and at the Heron Road site up to July 20, 1947, amounting to $3,486.66, the details of which are given on page 52 of Exhibit C. The total of these three items comes to $23,355.62. While I am satisfied that these items are correct in their amounts I should add that it is not possible to determine absolutely whether the defendant has suffered a loss by disturbance. It is true that it has lost the advantage of its marine facilities and its present site on the Heron Road is not as close to the centre of Hull and

(1) [1948] Ex. C.R. 9 at 59.

Ottawa as its former site was. But, on the other hand, it now has the advantage of continuous railway service, which it was in danger of losing, and favourable freight rates. Moreover, it has now a better and bigger plant and there is plenty of room for expansion. Actually, only the future can tell whether the move was disadvantageous. Moreover, by the move the defendant has realized a substantial increase over the amount which it paid for the land which could not have been realized otherwise than by disturbance. But since the amount of the claim was not disputed by counsel for the plaintiff, I have decided to accept it substantially.

Finally, there is the claim for so-called abandonment costs amounting to $1,066.86. This has no connection with the value of the land or any claim for disturbance. While its justification is not clear it was not disputed and I, therefore, take it into account.

In the result, I have come to the conclusion that the sum of $150,000 would be ample compensation to the defendant. It would cover all the factors of value to the defendant of the expropriated property to which it could be entitled including its claims for disturbance and abandonment costs. I, therefore, estimate the value of the expropriated property as at the date of the expropriation at $150,000.

I now come to the defendant's claim for a ten per cent additional allowance for compulsory taking. I dealt at length with the question of this allowance in *The Queen* v. *Sisters of Charity* (1) and incorporate herein what I said on the subject in that case. There I reviewed the jurisprudence on the additional allowance in England and in Canada and pointed out that neither in England nor in Canada has there ever been any Act of Parliament authorizing it or any rule of law requiring it and that its grant in Canada is based on a practice adopted from a similar practice in England. But the fact is that although the granting

(1) [1952] Ex. C.R. 113 at 131.

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of any allowance for compulsory taking was expressly prohibited in England by the Acquisition of Land (Assessment of Compensation) Act, 1919, in all cases where land was compulsorily acquired by any government department or any local or public authority, the practice of granting it still persists in Canada, under certain circumstances, as the result of recent decisions of the Supreme Court of Canada, in cases under the Expropriation Act even although such expropriations are by the Crown in right of Canada. Thus the practice still prevails in Canada under the circumstances referred to in cases where in analogous cases in England it would not be applicable.

The reason for the prohibition of the allowance by the Acquisition of Land (Assessment of Compensation) Act, 1919, in the case to which it applies is clear. The granting of the allowance was one of two prime causes of excessive awards under the Lands Clauses Consolidation Act, 1845, the other being excessive valuations of land, which militated against the success of many important public projects requiring the acquisition of land. There was such widespread objection on the part of the public to these excessive awards that when the Bill leading to the Act was before the British Parliament for consideration the provision prohibiting any allowance for compulsory taking was almost unanimously approved. This was a worth while reform in the public interest.

In my opinion, it would have been competent for the Courts in Canada to accomplish a similar reform in cases under the Expropriation Act without any legislative action since the English practice on which the Canadian practice was said to depend had ceased to exist in analogous cases, but it has been decided by the Supreme Court of Canada that under certain circumstances there should be an additional allowance for compulsory taking over and above the value of the expropriated property.

For my part, I could not see any justification as a matter of principle for giving the owner of expropriated property more than its value for that is what the additional allowance does. I am confirmed in this view by my later study of the origin of the English practice and the reason for it. In the *Sisters of Charity* case (*supra*), on page 132, I set out in part the report of the Select Committee of the House of Lords in 1845. A study of this report will show that it was considered to be quite in order to make railway company speculators pay for the land they required at least 50 per cent more than it was worth "for the compulsion only" to which its owner had to submit. While this percentage was later reduced to 10 per cent it is plain that the idea that speculators "have no right to complain of being obliged to purchase, *at a somewhat high rate,* the means of carrying on their speculation" lay back of the idea of the additional allowance. But it seems to me that it is singularly inappropriate to extend this idea of the propriety of "calling upon the speculators to pay *largely* for the rights which they acquire over the property of others", which may crudely but accurately be called a policy of "soaking" the speculators, to expropriations of property for public purposes lawfully made by the Crown in right of Canada under the authority of the Expropriation Act. It should also be remembered that the additional allowance was "for the compulsion only" as if the taking were a tortious act for which there should be compensation *per se.* Indeed, that idea was undoubtedly in the mind of Erle C.J. in the frequently cited dictum in *Ricketts* v. *Metropolitan Railway Company* (1):

> The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in *trespass* for expulsion; and so it has been determined in *Jubb* v. *The Hull Dock Company* (1846) 9 Q.B. 443.

(1) (1865) 34 L.J. Q.B. 257 at 261.

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It is time that this outmoded view should be rejected: *vide* also the comment to the same effect of Scott L.J. in *Horn* v. *Sunderland Corporation* (1). It is anachronistic to apply the philosophy that the compulsory taking of property is in the nature of trespass to the conditions of the present times when it frequently happens that the property of individuals has to be expropriated for important public purposes. There is no element of tort or delict in an expropriation under the Expropriation Act. It is the lawful exercise by the Crown in right of Canada of its right of eminent domain under the authority of an enactment of the Parliament of Canada. All that the owner is entitled to is such compensation as Parliament has decreed. There is no value in sweeping generalizations of inherent right to compensation. It is well to keep in mind the statement of Lord Romer, in delivering the judgment of the Judicial Committee of the Privy Council, in *Sisters of Charity of Rockingham* v. *The King* (2) where he said:

> Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute.

Under these circumstances, I have never been able to see why the owner of expropriated property should receive more than his property is worth. And since there was no Act of Parliament or rule of law compelling me to make an additional allowance for compulsory taking I could not see any reason for applying in Canada a practice borrowed from England which had ceased to exist there in analogous cases, particularly when I considered the additional allowance for compulsory taking an improper one. I, therefore, never allowed it in any expropriation case coming before me until after the decision of the Supreme Court of Canada in

(1) [1941] 2 K.B. 26 at 46. (2) [1922] A.C. 315 at 322.

Diggon-Hibben Limited v. *The King* (1) in which an appeal from my judgment was allowed because I had refused to grant any additional allowance and an additional allowance of $10,000 was added to the amount of my award.

The *Diggon-Hibben* case (*supra*) followed the decision in *Irving Oil Company Limited* v. *The King* (2) and then came the latest pronouncement of the Supreme Court of Canada on the subject in *The King* v. *Lavoie* (3). In this case, Taschereau J., delivering the unanimous judgment of the Court, laid down the following rule:

> Le contre-appellant soumet, en second lieu, qu'il a droit à un montant supplémentaire de 10 p. 100 de la compensation accordée, pour dépossession forcée. Ce montant additionnel de 10 p. 100 n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile, par suite de certaines incertitudes dans l'appréciation du montant de la compensation qu'il y a lieu de l'ajouter à l'indemnité. (*Irving Oil Co.* v. *The King* 1946, S.C.R. 551; *Diggon-Hibben Ltd.* v. *The King* 1949, S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle. Il n'a pas été démontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

This statement in the *Lavoie* case (*supra*), which is now the leading Canadian case on the subject, is in sharp conflict with that of Fitzpatrick C.J. in *The King* v. *Hunting et al* (4), the previous leading Canadian case on the subject, where he expressed the following opinion:

> The allowance of 10 per cent for compulsory purchase has become so thoroughly established a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case.

The statement of Fitzpatrick C.J. in the *Hunting* case (*supra*) was in accord with the English practice that then prevailed for the decision was prior to the enactment of the Acquisition of Land (Assessment of Compensation) Act, 1919. The same cannot be said of the recent decisions of

(1) [1949] S.C.R. 712.
(2) [1946] S.C.R. 551.
(3) [December 18, 1950], unreported.
(4) (1917) 32 D.L.R. 331.

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the Supreme Court of Canada to which I have referred. In restricting the grant of the allowance as it has done and in deciding that there should be an additional allowance for compulsory taking only in the circumstances which it has specified it has, in effect, created new law. In this connection I repeat what I said in the *Sisters of Charity* case (*supra*), at page 145, namely, that I have made a careful search of the authorities on the subject of the additional allowance for compulsory taking in England, Canada, Australia and New Zealand and have found no case prior to the *Diggon-Hibben* case (*supra*) in which the application of the additional allowance has been restricted to cases of difficulty or uncertainty or difficulty by reason of uncertainty in estimating the amount of the compensation. I am satisfied that there is no such case. Moreover, there was nothing in the English practice to warrant such a restriction and there is no Canadian statutory enactment or prior rule of law that supports it. The test thus laid down by the Court for determining in what circumstances the additional allowance should be granted is entirely of its own creation without any precedent for it. In this connection I repeat what I said in the *Sisters of Charity* case (*supra*) that the decision in the *Lavoie* case (*supra*) is a marked advance towards recognition that the former practice of giving every owner of expropriated property ten per cent more than its value to him simply because it was expropriated cannot be defended. My only criticism of the decision is that it did not do away with the allowance altogether, as could have been done.

Since the decisions in these cases I have in compliance with the direction of the Supreme Court of Canada granted the ten per cent additional allowance for compulsory taking in those cases where the circumstances were, in my opinion, similar to those referred to by Taschereau J. in the *Lavoie*

case (*supra*): *vide The King* v. *Northern Empire Theatres Limited* (1): *The Queen* v. *Charron et al* (2); *The Queen* v. *Sisters of Charity of Providence* (3); *The Queen* v. *Super Service Stations Limited et al* (4); and *The Queen* v. *Cowper et al* (5). The total amount of my additional allowances in these cases has thus far come to slightly over $135,000. I have refused the additional allowance in all other cases on the ground that they did not, in my judgment, come within the confines of the *Lavoie* case (*supra*). I should add that in each case where I granted the allowance I expressed the opinion, as I have the right to do, that it was an unwarranted bonus and that the granting of any additional allowance should be prohibited. In view of the recent decisions of the Supreme Court of Canada it is apparent that such prohibition can come only by way of legislative action similar to that taken in England in 1919. In the interests of fair valuations such reform is long overdue.

I must now decide whether the additional allowance should be granted in the present case and have concluded that it must be. Notwithstanding my own opinion that the sum of $150,000 which I have found as the value of the expropriated property to the defendant is, to say the least, ample and that any additional allowance would be an unwarranted bonus, I find that the estimation of the amount of the compensation in this case involves sufficient difficulty and uncertainty to bring it within the ambit of the rule in the *Lavoie* case (*supra*). Consequently, an additional allowance of ten per cent must be added to my estimate of the value of the property. I must now determine the amount to which the ten per cent should be applied. Counsel for the defendant contended that it should be applied to the whole amount of the defendant's claim,

(1) [1951] Ex. C.R. 321 at 333.
(2) [March 24, 1952], unreported.
(3) [1952] Ex. C.R. 113 at 148.
(4) [June 18, 1952], unreported.
(5) [1953] Ex. C.R. 107 at 113.

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including its claim for disturbance, notwithstanding the comments made by Rand J. in the *Diggon-Hibben* case (*supra*). I agree with his contention for reasons similar to those which I set out in the *Sisters of Charity* case (*supra*), at page 147. I have found the value of the expropriated property to the defendant at $150,000 and add ten per cent of this amount, or $15,000, as the additional allowance for compulsory taking, making my total award come to $165,000.

The value of the whole expropriated property having been determined, it is necessary for limited purposes to determine the separate value of the service station portion of it. The reason for this may be put briefly. In accordance with its usual policy in operating its service stations the defendant had leased the Laurier Street service station to a tenant and this arrangement was not interfered with after the date of the expropriation. For a period of time the defendant continued to collect the rents of the service station from its tenant without paying any rent to the Crown. But by a lease, dated April 25, 1949, between His late Majesty the King and the defendant it was required to pay $25 per month for the property on a month to month basis, commencing March 10, 1949, the rental being subject to the following qualification:

> Provided, however, that the rental aforesaid shall be adjusted to amount to the sum of five per cent per annum of the compensation value fixed and adjudged by the Exchequer Court of Canada upon the premises hereby devised together with an amount equivalent to any municipal and school taxes which may be levied against the property as a result of this lease payable monthly.

In view of this provision it becomes necessary to determine the amount of compensation for the service station portion of the expropriated property. This is not difficult. The defendant valued the service station and the facilities and equipment that went with it, exclusive of the land, at $12,472.21. Mr. Sherwood valued the building at $13,237 and the land at $5,874 or a total of $19,111. Mr. Hadley

put the building at $13,769.50 and the land at $6,265.60 making a total of $20,035.10. Mr. Bosley valued the land at $5,874 and the building at $12,000 or a total of $17,874, which he put at $18,000 in round figures. He thought that the defendant could easily have sold the station for that amount if it had wished to do so, which was not likely unless it could have obtained another station in exchange. But on that basis his opinion was that $18,000 would be a fair consideration for the service station property. For the plaintiff, Mr. Farley and Mr. Lanctot valued the building on much the same basis as the defendant at $12,685.55 and the land at $4,053.06 or a total of $16,738.61. In my opinion, Mr. Bosley's valuation was a fair one and I determine the value of the service station property at $18,000 to which there should be added its share of the additional allowance of $1,800 making a total for the service station property of $19,800. This, I assume, will be the amount on which the rent for the service station property will be adjusted as from March 10, 1949.

There remains the question of interest. It is the settled practice of this Court that there should be no allowance of interest to the owner of expropriated property when he has been left in undisturbed possession of the property without payment of any rent. So far as the bulk storage plant portion of the property is concerned the evidence is that while the defendant did not turn it over to the Crown until March 8, 1949, it had closed the plant on April 30, 1948, and made no further use of it for its own purposes after that date. In my judgment, the interest on the amount of compensation for this portion should run from May 1, 1948. As for the service station portion of the property there should be no interest prior to March 10, 1949, but there should be interest on the amount of compensation for this portion from March 10, 1949. This will really balance the amount of the rent for the period that the defendant was in occupation under the lease. There will, therefore, be

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interest at the rate of five per cent per annum on $145,200 as from May 1, 1948, and on $19,800 as from March 10, 1949, in each case of the date hereof.

There will, therefore, be judgment declaring that the expropriated property is vested in Her Majesty as from April 2, 1946; that the amount of compensation to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $165,000 with interest as indicated; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.