BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney General of Canada..... PLAINTIFF;

1948

Oct. 25, 26, 28, 29, Nov. 1-3, 8-10, Dec. 23

AND

WOODS MANUFACTURING COMPANY LIMITED..... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(a), 19(b), 47—No right to compensation except as conferred by ss. 19(a) and 19(b) of Exchequer Court Act—No right to compensation except for value of property—Evidence of municipal assessment inadmissible as proof of value—Right to compensation for loss by severance—Depreciation not prevented by maintenance—No intuitive power to estimate depreciation—Value of property to owner means realizable money value—Value of property in use not a test of value—Principle of reinstatement or replacement not applicable in determining amount of compensation—Unwillingness of owner to sell irrelevant—No right to compensation for loss by disturbance of business apart from value of property—Allowance for compulsory taking—No right to interest when owner left in undisturbed possession.

Plaintiff expropriated property in the City of Hull in two separate parcels on one of which there was a factory. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That sections 19(*a*) and 19(*b*) of the Exchequer Court Act not only confer jurisdiction upon the Court to hear and determine claims for compensation in respect of expropriated property but also establish rights to such compensation that would not otherwise exist, and the owner of expropriated property has only such rights as these sections confer.

2. That section 47 of the Exchequer Court Act permits compensation to the owner of expropriated property only to the extent of the value of the property as at the date of expropriation.

3 That evidence of municipal assessments is inadmissible as proof of the value of expropriated property, but may be helpful as a check against excessive valuations.

4. That when an owner's remaining property has suffered depreciation in value by reason of the severance from it of property formerly held with it the owner has a claim for loss by severance within the ambit of section 19(*b*) of the Exchequer Court Act.

5. That the assumption that a property can be so well maintained that it will remain as good as new indefinitely is erroneous. Depreciation goes on in spite of maintenance.

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6. That it is fallacious to assume that a person can by intuition determine the amount of depreciation in a building merely by looking at it, without calling to his aid either his own experience or the general experience applicable to similar buildings.

7. That the method of ascertaining separately the amount of each element or factor that should be taken into account in estimating the value of expropriated property and adding such amounts together to arrive at the amount of compensation payable to the owner is erroneous.

8. That the value of the expropriated property to the owner means its realizable money value.

9. That it is not the value of the property in use, but its value in exchange with all its attributes including its adaptability for profitable use, that is the measure of the compensation payable to the owner for its loss.

10. That neither the unwillingness of the owner to sell his property nor the price at which he would be willing to sell it has any bearing on its value.

11. That an owner's loss by disturbance of his business as the result of the expropriation of his property can be taken into account by the Court only to the extent that it would be considered by a purchaser in deciding how much he would be willing to pay for the property or affect the price which the owner might reasonably expect to receive for it if he wished to sell it.

INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

F. B. Major K.C., and *Louis Farley* for plaintiff.

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

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

THE PRESIDENT now (December 23, 1948) delivered the following judgment:

The Information exhibited herein shows that certain lands owned by the defendant were taken by His Majesty the King for the purpose of a public work of Canada under the Expropriation Act, R.S.C. 1927, chap. 64. The lands were taken in two expropriations, each completed by depositing a plan and description of the lands in the office

of the Registrar of Deeds for the registration division of Hull in Quebec pursuant to section 9 of the Act. The first plan and description was deposited on May 19, 1944. It covered the lands described in paragraph 5 of the Information, hereinafter referred to as the first expropriated property, as well as other lands owned by persons other than the defendant expropriated at the same time. The second plan and description, covering the lands described in paragraph 4 of the Information, hereinafter referred to as the second expropriated property, was deposited on May 7, 1946. Immediately on the deposit of these plans and descriptions the lands respectively covered thereby became vested in His Majesty and all the right, title and interest of the defendant thereto or therein ceased to exist. Thereafter, its claims in respect of the said lands were converted into claims to the compensation money pursuant to section 23 of the Expropriation Act whereby it was made to stand in the stead of the expropriated property.

The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are taken for an adjudication thereon. By the Information the plaintiff offered the sum of $329,-791.73, but the defendant by its amended statement of defence claimed $692,920.96. By a further amendment pursuant to leave granted at the trial it claimed an additional $33,341.62 in respect of the first expropriated property making the total of its claims come to $726,262.58.

The principles to be applied in determining the amount of compensation to be paid have been discussed in many cases, including *The King* v. *W. D. Morris Realty Limited* (1). There I referred to a number of English decisions and, at page 147, stated what I considered the two cardinal principles of expropriation law in relation to one another as follows:

> The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent value to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

And in *The King* v. *Thomas Lawson & Sons Limited* (2) I expressed the view that this is a correct statement of the

(1) (1943) Ex. C.R. 140. (2) (1948) Ex. C.R. 44 at 48.

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law, provided that the term "fair market value" is given the meaning defined in Nichols on Eminent Domain, 2nd Edition, page 658, as follows:

> By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.

and that the Court, in estimating the value of the property, is guided by the rule as stated by Nichols, at page 664:

> The tribunal which determines the market value of real estate for the purpose of fixing compensation in eminent domain proceedings should take into consideration every element and indication of value which a prudent purchaser would consider, . . .

And it is also clear that while the owner has no right to receive by way of compensation for the loss of his property more than its fair market value he is entitled to have such market value based on the most advantageous use to which the property is adapted or could reasonably be applied: *The King* v. *Manuel* (1), affirmed by the Supreme Court of Canada. In *The King* v. *Edwards* (2) I said that the best statement of this principle, frequently enunciated in this Court, is contained in Nichols on Eminent Domain, 2nd Edition, page 665, where the author says:

> Market value is based on the most advantageous use of the property. In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate text.

This broad statement assumes the amount of money that a purchaser, having carefully considered the advantages and possible uses of the property, including what is sometimes called its potentialities, would be willing to pay for the property in order to obtain it. It must not be forgotten, however, that, while consideration should be given not only to the present use of the property but also to its prospective advantages, it is only the present value, as at the date of expropriation, of such prospective advantages that falls to be determined: *The King* v. *Elgin Realty Company Limited* (3).

(1) (1915) 15 Ex. C.R. 383.
(2) (1946) Ex. C.R. 311 at 315.
(3) (1943) S C.R. 49.

It is also important to remember that the owner of expropriated property has no inherent right to compensation for the property lawfully taken from him. Nor has he any constitutional right, such as an owner has in the United States, to "just" or "reasonable" or "adequate" compensation. He has only such right as is conferred upon him by statute and no right at all apart therefrom. This basic principle was laid down by the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (1). There Lord Parmoor, speaking for the Committee, 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.

The Canadian statute upon which the defendant must rely for his right to compensation for his expropriated properties is not the Expropriation Act, under which they were taken, but the Exchequer Court Act, R.S.C. 1927, chap. 34. In the *Thomas Lawson & Sons Limited* case (*supra*) I dealt at considerable length with the legislative origin and history of these two enactments and am satisfied that nowhere in the Expropriation Act can any provision be found conferring the right to compensation upon the owner of property expropriated under it. Undoubtedly, there are several sections in it that assume the existence of such a right but the actual statutory right to compensation for property taken under the Expropriation Act or damage to property injuriously affected thereby can be found only in sections 19(*a*) and 19(*b*) of the Exchequer Court Act which provide as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose;
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

A review of the legislative origin and history of these sections shows that they not only confer jurisdiction upon the Court to hear and determine claims for compensation in respect of expropriated property but also establish rights

(1) (1922) 2 A.C. 315 at 322.

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to such compensation that would not otherwise exist. Furthermore, while sections 19(*a*) and 19(*b*) of the Exchequer Court Act establish the owner's rights to compensation, section 47 of that Act prescribes the standard by which the Court must measure the amount of compensation to which such owner is entitled. Its direction to the Court is as follows:

> 47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

In my judgment, this direction to use the standard set by the section is mandatory and the Court has no right to resort to any other standard, even although in a particular case it might consider that the application of the statutory standard would result in an amount which would fall short of full compensation to the owner for all the loss caused by the expropriation of his property. Where an owner makes a claim for property taken from him section 47 permits compensation to him only to the extent of the value of such property.

The expropriated properties are in the City of Hull in Quebec on the east side of Laurier Street, north of Verdun Street, and extend from Laurier Street to the Ottawa River. Their total frontage on Laurier Street is 456 feet and their total area 6·43 acres, of which Dalhousie Street, an unopened street, constitutes ·75 acres, leaving a net area of 5·68 acres. These are the measurements given by Mr. N. B. MacRostie and I accept them as correct. The first expropriated property, with a frontage of 343 feet on Laurier Street and a total area of 4 acres lies immediately south of the second expropriated property. It was vacant land, except as hereinafter set forth. Prior to its expropriation on May 19, 1944, it was held by the defendant with the second expropriated property as one property. On the second expropriated property the defendant had its buildings.

The defendant has its head office in Montreal where it has a factory at St. Lambert. It operates three industries, namely, a bag division with plants in St. Lambert, Toronto, Winnipeg and Calgary, a clothing and canvas division with

its main plant in Hull and a small one in Ogdensburg, New York, and a textile division with a cotton mill at Welland. The total magnitude of its business is from $12,000,000 to $15,000,000 per annum. At its Hull plant it makes heavy clothing for lumbermen and other workmen, sportsmen's uniforms and supplies, sporting goods, canvas tents and tarpaulins.

The defendant's statement of defence was framed as if there had been only one expropriation and counsel for the defendant began his proof of value of the land on such assumption and on the basis of its value as at May 7, 1946, the date of the second expropriation. I held that there were two expropriations, each completed by the deposit of a plan and description of the lands, and that the rights of the defendant to compensation in respect of the lands taken on May 19, 1944, must be determined as at that date. In my opinion, section 47 of the Exchequer Court Act, to which I have referred, makes this obligatory. Thereupon, the trial proceeded on the basis of there having been two expropriations, that of the 4 acres on May 19, 1944, and that of the remaining 1·68 acres with the buildings thereon on May 7, 1946.

When counsel for the defendant first sought to adduce evidence of loss through the severance of its property I ruled, on the objection of counsel for the plaintiff, that such evidence was not admissible on the pleadings as they stood. The following day counsel for the defendant applied for and obtained leave to make the amendment which appears as paragraph 4(*a*) of the last amended statement of defence. The defendant now makes a twofold claim in respect of the first expropriated property, namely, one for the property taken, a claim under section 19(*a*) of the Exchequer Court Act, and the other for damage to its remaining property as having been injuriously affected, a claim under section 19(*b*).

I find no difficulty in determining the amount of compensation to which the defendant is entitled in respect of the first expropriation. I shall deal first with the value of the 4 acres of land that was then taken. This was vacant land so far as the defendant was concerned except for a platform used by it for testing tents and a small bicycle shed for the use of its employees. Mr. W. J. McDougall,

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the comptroller of the defendant's Hull plant, valued these buildings at $800. Apart from this use of the land the defendant leased a portion of it to a tennis club charging a proportion of the taxes amounting to $40 per year and a small amount of space near the river to the Gatineau Boom Company at $100 per year. Otherwise, it made no use of the land except that it was available to its employees for recreational purposes. But there is no doubt that it was valuable to the defendant for a number of reasons including the fact that it was available for extension of its plant and afforded a measure of control against undesirable neighbours immediately adjacent to it.

The experts referred to a variety of uses for which the land was adapted. Mr. N. B. MacRostie, for the defendant thought that it might conveniently have been subdivided. But Mr. W. H. Bosley, also for the defendant, rejected the possibility of its use for residential purposes. There were several factors making it undesirable for such purposes, such as the presence of the baseball park and the oil tanks of the Shell Oil Company and the Supertest Petroleum Company. In Mr. Bosley's opinion more could be got for the land for commercial or industrial use. He thought that it would have great advantage for a brewery or for a paper box factory or any other industry requiring a large supply of water and wanting the supply of labour that is available in Hull. Mr. E. S. Sherwood, also for the defendant, was of the same opinion and stressed in addition the central location of the site and its advertising advantages. For the plaintiff, Mr. T. Lanctot considered the frontage on Laurier Street as suitable for commercial or residential use and the balance as an industrial site, whereas Mr. S. E. Farley took a view similar to that of Mr. MacRostie and regarded the land as suitable for commercial and residential purposes. In my judgment, the opinions of Mr. Bosley and Mr. Sherwood as to the most advantageous use to which the property was adapted should be accepted.

Some sales of comparable property were referred to. The fullest particulars of such sales were given by Mr. Lanctot who said that he took the acreages involved in them from the registrar's office. There were three sales of property with frontages on Laurier Street. The first, registered April 8, 1929, was of 2·5 acres to the Supertest

Petroleum Company at $13,000, or $5,200 per acre; the second, registered September 3, 1931, was of 2·89 acres to the Shell Oil Company at $21,000, or $7,267 per acre; and the third, registered September 31, 1931, was of 2·4 acres to the Sisters of Charity at $12,000, or $5,000 per acre. The first two properties are south of the defendant's property and the third north of it. The average price paid for these properties works out at approximately $6,000 per acre, but I agree with Mr. Bosley that the price paid by the Supertest Company was low, so that I think it would be fair to take these sales as indicating an average somewhat higher than $6,000 per acre. In my opinion, these sales are of particular importance because they were all of large pieces of property fronting on Laurier Street and extending to the Ottawa River and, consequently, comparable with the defendant's property. The sales referred to serve to establish the market value of such properties at the time they were made. The Court is also fortunate in having reliable opinion evidence as to the rise in market values since that time. Mr. MacRostie said that if 1926 land values were taken as a base of 100 per cent, land values reached a low of 83 per cent about 1933 or 1934 and were not back to 100 per cent until 1940 or the beginning of 1941; they then rose steadily and had reached 113 per cent by 1944 and 133 per cent by 1946. Mr. Bosley put the increase up to 1944 at 10 per cent, as did Mr. Farley. Mr. Lanctot's evidence was similar to Mr. MacRostie's. He said that land prices from 1930 to 1940 or 1941 were at a low level, that they had gone down due to unpaid taxes, that in 1940 and 1941 the City of Hull had many vacant lots on its hands and that prices did not begin to increase until after 1940. He estimated that by 1944 there had been an increase of 15 per cent and by 1946 of 35 per cent.

I now come to the various valuations of the experts.

[The learned President here reviewed the various valuations.]

Evidence was also given of the municipal assessment of the land. In 1944 it was assessed at $14,550, which was said to be on the basis of two-thirds of its value. Subsequently, after a re-assessment of the City of Hull under the direction of Mr. Grandguillot, which was completed

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in 1947, the assessment for the year ending April 30, 1948, was $91,725. The subject of municipal assessments has frequently been referred to in the judgments of this Court in expropriation cases. A municipal assessment is levied against land so that it may bear its share of taxation for municipal purposes. It is not made with any thought of the ascertainment of the value of the land for the purpose of determining the amount of compensation payable to its owner when it has been taken under the Expropriation Act and, as a matter of strict law, evidence of it is inadmissible in proceedings for such a purpose. That is the view expressed in Nichols on Eminent Domain, 2nd Edition, page 1207:

> It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value in eminent domain proceedings. The assessment is *res inter alios*, and is inadmissible upon the general principles of the law of evidence.

Notwithstanding this, it has been the practice in this Court to receive evidence of municipal assessments and there is perhaps no harm in this, provided that it is kept in mind that such evidence cannot be accepted as proof of value. There may be cases where it is helpful as a check against excessive valuations. In the present case, the evidence of the 1948 assessment was clearly inadmissible. It was made approximately 3 years after the land had been expropriated and became vested in His Majesty and no longer subject to tax. Since the Court must estimate the value of the land as at the date of its expropriation, it seems to me that it must attempt to put itself in the same position as if it had heard the defendant's claim immediately after the expropriation. If it had done so evidence of the 1948 assessment would not have been available. It cannot have any greater relevancy now. If any assessment is to be considered at all it can only be the assessment for 1944. Counsel for the defendant did not venture, except indirectly, to make use of the assessment for 1948 as evidence of the value of the land taken in 1944. Even if it had been admissible it could not have served any such purpose, being completely out of line with the evidence of well qualified real estate experts. The indirect use of the evidence was as follows. Mr. Brunet was called to give evidence as to the cost of the demolition

of certain buildings on the second expropriated property and the value of such buildings, to which further reference will be made later. He had been the contractor who demolished the said buildings and constructed the new tarpaulin and waterproofing building and the new garage. Mr. Brunet is also the mayor of the City of Hull and it was during his administration that the re-assessment of Hull under Mr. Grandguillot was undertaken, whereby the total assessment of the City was increased from $18,000,000 to $36,000,000. Mr. Brunet stated that the prices of property in Hull had more than doubled between 1930 and 1946. He admitted that he was not a real estate man and it is clear that when he made his statement he had in mind the increase in the municipal assessment figures. Yet counsel for the defendant ventured to urge that the assessment figures and Mr. Brunet's statement were persuasive of the fact that land values had increased since 1930 to a much greater extent than the opinions of the real estate experts indicated. Even if the defendant were permitted in this indirect way to contradict the evidence of its own real estate experts, Mr. MacRostie and Mr. Bosley, it would be unsound to accept Mr. Brunet's expansive generalization, based as it was upon municipal assessment increases, as against the considered opinions of the well qualified real estate experts who gave evidence as to the increase in real estate values, and I decline to do so. In my view, counsel's argument on this point was without merit and I reject it.

It is not often that the Court has such useful basic material on which to form its estimate of the value of an expropriated property as it has in the present case. I think it would be reasonable to assume from the three sales to which the experts referred that at the time thereof the fair market value of the defendant's 4 acres would have been approximately $6,500 per acre. The experts, all well qualified, differed only very slightly in their opinions as to the amount of the increase in land values since then and up to 1944, the lowest estimate being Mr. Bosley's at 10 per cent and the highest Mr. Lanctot's at 15 per cent. If the highest figure is taken a valuation of approximately $7,500 per acre is reached. The application of this rate to the 4 acres taken results in a total valuation of $30,000. In my view, this is the highest estimate of the value of the defendant's

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4 acres as at the date of the expropriation that the Court should make. I consider it a fair estimate. To this amount there should be added $800 for the value of the buildings in accordance with the evidence of Mr. MacDougall. I therefore estimate the value of the first expropriated property as at the date of its expropriation at $30,800 and determine the amount of the defendant's claim to compensation for it accordingly.

The defendant's other claim in respect of the first expropriation is for damage and injurious affection of its remaining lands. Particulars of this are given in paragraph 4(*a*) of the last amended statement of defence, namely, $20,000 by the severance of the first expropriated property from the second whereby the latter was depreciated in value, $10,000 by the necessary demolition of certain buildings on the second expropriated property, and $3,341.62 as the cost of such demolition and other costs, making a total claim of $33,341.62.

I shall deal first with the claim for damage by severance. It is, I think, generally accepted that the total of the values of two parcels of land held separately may be less than the value of the two parcels held together as one property. Where that is so it is obvious that the owner suffers a loss when one of the parcels is severed from the other by its expropriation, over and above the value of such parcel. There is no specific mention of a loss by severance as a cause of action in either the Exchequer Court Act or the Expropriation Act, but if it exists it must be under section 19(*b*) of the former Act. The greater value of the two parcels held together over the total of the values of the parcels held separately is attributable to the property as a whole, and there is no loss of such additional value until after the severance has occurred. When it does take place by the expropriation of one of the parcels the owner suffers not only the loss of the value of the parcel taken but also the loss by the severance of it from his remaining property. His claim for value of the parcel taken is under section 19(*a*) and must be confined to its value as a separate parcel for it is taken as such. The only section under which he can claim for the loss by severance is, therefore, under section 19(*b*) on the ground that his remaining property has been injuriously affected. If it has suffered a deprecia-

tion in value by reason of the severance surely there can be no doubt that it has been injuriously affected. I had occasion recently to deal with the nature of the claim under section 19(*b*) in *The King* v. *Acadia Sugar Refining Company Limited* (1) and am satisfied that a claim for loss by severance, if substantiated, is within the ambit of the section. In the present case, I have no hesitation in finding that the defendant suffered a loss by the severance of its 4 acres from its remaining property and that such property was injuriously affected thereby. As laid down in *Sisters of Charity of Rockingham* v. *The King* (2) the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected. It is, therefore, only the quantum of the loss by severance that remains for consideration. Mr. Bosley thought that the depreciation in value of the defendant's remaining property was from $10,000 to $15,000 and later said that he would increase his figure of $30,800 for the 4 acres taken by one-third, or $10,000. There was some confusion in his evidence, for which I am afraid the Court was mainly responsible because of the questions put to him, as to whether he meant two amounts for loss by severance, one to be added to the value of the land taken and the other in respect of depreciation in value of the remaining land, or only one, but I am now satisfied that when Mr. Bosley added $10,000 to the value of the 4 acres he thought the land was worth that much more when joined with the land to the north and used in conjunction with the buildings there, and that he had in mind only one amount for the loss by severance, namely $10,000. If there was any doubt in the matter it was cleared by Mr. Sherwood. There was only one amount of loss by severance, namely, the depreciation in value of the defendant's remaining property. Mr. Sherwood thought that this came to from $10,000 to $15,000 and finally put it at $15,000. Both Mr. Lanctot and Mr. Farley agreed that there had been a loss by severance and put its amount at $10,000. Mr. Farley thought this would be the limit. On the argument Mr. Osborne, relying upon the evidence of Mr. Bosley and Mr. Sherwood, urged that the Court should accept the figure of $15,000 as the amount of the defendant's loss by

(1) (1947) Ex. C.R. 547. (2) (1922) 2 A.C. 315.

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severance. There were several reasons why the 4 acres had special value to the defendant when held with its remaining property on which it had its plant, namely, that it provided room for possible plant extension, that it was a recreational ground for its employees, that it gave a measure of insurance and protection against undesirable neighbours, that it was a safeguard against obstruction of light and that it could be used as a parking area. I agree with Mr. Osborne's argument on this and assess the amount of the defendant's loss by severance at $15,000.

The rest of the defendant's claim for damage resulting from the first expropriation is of a different nature. The facts on which it is based can be put briefly. At the date of the first expropriation there were several buildings on the defendant's remaining property in addition to its main building. These were described in a report by Irish and Maulson, Limited, a firm of insurance brokers, filed as exhibit P, in which the buildings were referred to by numbers. Building No. 2 on the north side of the main building was a factory extension building used for cutting, sewing and finishing truck top tarpaulins; building No. 3 near the north-east corner of the main building was really two buildings, a 3-car garage and a wax storage shed; building No. 5 near the south-east corner of the main building was a hose house and building No. 6 near it a bicycle shed. About the end of 1944 and the beginning of 1945 these four buildings were demolished to make way for two new buildings, namely, the tarpaulin and waterproofing building and the garage. Mr. R. B. Moffit, the defendant's vice-president and comptroller, explained that it had been intended to put the new tarpaulin and waterproofing building on the property to the south of the main building, but when this was expropriated a new location elsewhere had to be found for it and it was decided that the only space available was the area to the north of the main building. This made it necessary to tear down the old factory extension building and the garage and wax storage shed. If the space occupied by these buildings had not been required for the new tarpaulin and waterproofing building they would not have been demolished but could have been converted into additional garage accommodation. But their demolition made the con-

struction of the new garage necessary. Mr. Moffit estimated the value of the demolished buildings at $10,000 which he thought was approximately their reconstruction cost less depreciation. He then gave particulars of the cost of demolishing the four buildings referred to, of moving 60 tons of wax from the wax storage shed, of excavation due to the new waterproofing plant, of relocating a hydrant, and of filling and grading the approach to the new garage, amounting in all to the sum of $3,341.62. Mr. Moffit's opinion as to the value of the demolished buildings and his statement as to the cost of their demolition received confirmation from Mr. R. Brunet who had carried out the demolition of the old buildings and the construction of the new ones. Under these circumstances the defendant claimed $10,000 for the value of the demolished buildings and $3,341.62 for the costs referred to as damages resulting from the first expropriation. While it is, no doubt, true, as Mr. Moffit said, that the defendant would not have demolished the old buildings or incurred the costs referred to if it had kept the four acres taken from it, I am quite unable to see how the so-called damage can be charged to the Crown over and above the value of the four acres taken and the loss by severance. The real reason for the loss of the value of the old buildings and the incurring of the costs is to be found elsewhere. Mr. Moffit admitted that the defendant would not have demolished the plant extension building to the north of the main building if it had not had plans for erecting a new tarpaulin and waterproofing building, that if it had retained the four acres to the south it would have put such new building thereon and left the old buildings intact, but that since it had lost the four acres that land was not available to it and it could not proceed with the construction of the new building on the new site selected for it without first demolishing the old buildings thereon, and that to that extent their demolition was related to the defendant's expansion activities. A similar statement is applicable in the case of the new garage and the demolition and incurring of costs that led to its construction. The conclusion I draw from these facts is that it would not be fair or reasonable to hold the Crown responsible for the damage thus claimed by the defendant. It has no just cause for complaint that it could not put the new tarpaulin

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and waterproofing building on the land to the south of the main building that was taken from it on the first expropriation, for the availability of such land to meet its requirements for expansion was one of the factors making for its value and loss by its severance and it will receive the money equivalent of such value in its place and compensation for such loss. If the expropriation had been the only thing that had occurred the alleged damage complained of by the defendant would not have happened. It was, therefore, not caused by the expropriation. If the defendant had not found it necessary for its own purposes to expand its plant by building the new tarpaulin and waterproofing building it would not have been necessary to demolish the old buildings or incur the costs referred to. The loss of the value of the old buildings and the incurring of the said costs were thus directly referable to the defendant's own actions, namely, its expansion activities. The alleged damage would not have happened otherwise. What the defendant is seeking to do is to hold the Crown responsible for a loss that would not have happened except for its own expansion activities. It has no right to make the Crown pay for what is in effect part of the price thereof. Moreover, there is another aspect of the matter. The construction of the new buildings on the defendant's remaining property resulted in an appreciation of its value which will have to be taken into account when its claim for the second expropriated property is being considered. Certainly, it cannot have both the amount of such appreciation and also compensation for a loss without which such appreciation could not have been realized. Under the circumstances, I have no hesitation in finding that this portion of the defendant's claim cannot be sustained.

The result is that the total amount of compensation money to which the defendant is entitled in respect of the first expropriation is the sum of $45,800.

The defendant has not made any use of the first expropriated property since its expropriation except that it continued to use the platform and bicycle shed above referred to until their demolition late in 1944. Apart from this it cannot, in my judgment, be said to have been in occupation or possession of the property after its expropriation. I do not think that this temporary use of the platform and

bicycle shed would warrant me in depriving it of any interest. Consequently, I award interest on the sum of $45,800 at the rate of 5 per cent per annum from May 19, 1944, to this date.

Now I come to the second expropriation of May 7, 1946. The defendant's claim in respect of the property thereby taken is exclusively under section 19(*a*) of the Exchequer Court Act; it cannot have any claim under section 19(*b*) for it had no remaining property that could have been injuriously affected. The whole of its property having been taken the measure of its entitlement to compensation is the estimate of its value which section 47 of the Exchequer Court Act requires the Court to make. The defendant's claim is put in paragraph 4 of the amended statement of defence as follows:

> 4. By reason of the expropriation, the Defendant has suffered loss to the extent of $692,920.96, which is the value of the said lands and buildings to the Defendant, and includes the replacement cost of the said buildings less depreciation; the value of the land including its possibilities for future development; and the inherent value to the Defendant of the said land and buildings which the Defendant would take into consideration in being willing to sell and move its business to a new location.

Particulars of the said claim were given as follows:

> (*a*) Construction of new buildings, $480,000.
> (*b*) Value of land, $80,000.
> (*c*) Loss and damage occasioned by disturbance, demolition, removal, depreciation, reinstatement, reconstruction and readjustment of its plant, equipment and goods and of certain equipment necessarily incidental thereto, $76,920.96.
> (*d*) $56,000 being 10 per cent by way of compensation for compulsory taking.

The claim of $80,000 for the value of the land is for the land taken by the first expropriation as well as the second so that the amount referable to the land of the second expropriated property must be reduced accordingly.

[The learned President here reviewed the various valuations.]

The municipal assessment for the land was $18,900 in 1944, 1945 and 1946, $26,600 in 1947 and $26,850 for the year ending April 30, 1948. I need not repeat what I said about the municipal assessment figures for the first expropriated property. It is equally applicable here.

If I were required to estimate the value of the land separately from the buildings, which is not the case, I think it would be fair to accept Mr. Lanctot's estimate of

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the increase of land values in 1946 over 1944 and apply the figure of $9,000 per acre to the acreage of 1·68 and thus reach a valuation of $15,120. For reasons similar to those expressed with respect to the land taken by the first expropriation I think that this amount would be the highest estimate of the value of the land that the evidence could properly warrant.

The next item in the defendant's claim is for $480,000 for the construction of new buildings. This involves consideration of two sub-items, namely, the reconstruction cost of the buildings and the extent of their depreciation. The sub-item of reconstruction cost will be dealt with first.

[The learned President here reviewed the evidence as to reconstruction cost of the buildings, particularly that of Mr. A. B. Doran, secretary-treasurer of the Doran Construction Company, and that of J. Adam, consulting architect to Robert A. Rankin and Company, and continued.]

The closeness of the two total estimates to one another is striking, the difference between them being only $750. Part of this is due to the fact that both experts obtained their information as to prices of materials and labour costs from similar sources, such as the subcontractors listed by Mr. Doran and the members of the Canadian Construction Association mentioned by Mr. Adam, and the rest to the care and accuracy with which both Mr. Doran and Mr. Adam took off their quantities. I could with equal propriety adopt the estimate of either of them, but I take the higher one, namely, Mr. Adam's amended estimate of $478,032.

There was not the same agreement between the experts on the subject of depreciation. Indeed, there was a wide divergence as to the extent of the depreciation of the main building. Mr. Doran's total figure for depreciation for all the buildings, as shown by Exhibit O, was $87,631, which he increased by $7,000 in respect of the elevator, making a total of $94,631, leaving a net figure for reconstruction cost of the buildings less depreciation of $381,153.14. The defendant's claim under this item is $480,000. On the other hand, the estimate of Robert A. Rankin and Company for depreciation of all the buildings, for which Mr. J. A. Coote was mainly responsible, as shown by Exhibit 10, page 4, was $187,296 which will be increased to $190,296 if Mr.

Adam's figure of reconstruction cost is increased by $3,000 in respect of the elevator, leaving a net figure for reconstruction cost less depreciation, which the plaintiff's experts described as depreciated value, of $287,736. There was little difference of opinion as to the amount of depreciation of the buildings other than the main one and I think it desirable to clear this matter out of the way before dealing with the depreciation of the main building. Mr. Doran's estimate of the depreciation of the tarpaulin and waterproofing building, the new garage and the old auto shelter, whose total reconstruction cost he figured at $49,601.66 was $4,080, leaving a net figure of $45,521.66. Robert A. Rankin and Company's estimate for the same buildings, whose reconstruction cost Mr. Adam estimated at $52,830, was $2,218, leaving a net figure of $50,612. If necessary this could properly be accepted as the amount of the reconstruction cost of the buildings other than the main one less depreciation. This leaves the figures for the main building as follows: namely, Mr. Doran's estimate of $90,551 for depreciation against a reconstruction cost of $426,181.38, leaving a net figure of $335,630.38, as against Robert A. Rankin and Company's estimate of $188,078 for depreciation against a reconstruction cost of $425,202, leaving a net figure of $237,124. These latter figures include those for the pent house and underground piping and an increase of $3,000 over Mr. Adam's estimate of reconstruction cost as shown by Exhibit 10.

I shall now deal more fully with the evidence of the various witnesses as to the depreciation of the main building. Mr. Doran's evidence was brief.

[The learned President here reviewed the evidence as to depreciation of the main building of Mr. Doran for the defendant and of Messrs. J. A. Adam, J. L. Bieler, G. B. Bolton and J. A. Coote for the defendant and continued.]

I have dealt with the evidence on depreciation at length because of the wide difference between the parties as to its extent and the controversy that has arisen on it. Depreciation means diminution or loss of value. As I see it, all of the witnesses have dealt with it relatively to reconstruction cost on the assumption that if reconstruction cost is equivalent to value then depreciation is diminution or loss of such value.

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On the evidence, I have no hesitation in rejecting Mr. Doran's estimate of $90,551 for the depreciation of the main building and its equipment. It is unfortunate that his evidence on the subject was so sketchy. No particulars of his estimate were given except that $7,000 was attributable to the elevator. Apart from this it is impossible to say how much of the remaining $83,551 is applicable to the other mechanical equipment in the building and how much to the building itself, so that it is not possible to compare his estimate with those of the witnesses for the plaintiff. Put in terms of percentage of reconstruction cost Mr. Doran's total estimate comes to just a little over 21 per cent for a building that was 39 years old and mechanical equipment of various ages. It is highly likely that the portion applicable to the building itself apart from the equipment in it would not exceed depreciation at the rate of ½ per cent per year. So far as I can recall, no expert in any expropriation case before me has ventured as low an estimate of depreciation as this. It is also interesting to note the wide difference in the defendant's attitude in the matter of depreciation according to the circumstances. In its income tax returns it has for many years claimed depreciation allowances on the basis of an implied depreciation of its building at the rate of 2½ per cent per annum, but when it claims compensation for its value on the basis of its reconstruction cost less depreciation it contends that the depreciation has been only at the rate of ½ per cent per annum or less. But, quite apart from these considerations, I think that Mr. Doran's estimate was erroneous and that if the defendant were to receive for the loss of its building the amount of its reconstruction cost less only the amount of depreciation estimated by him it would get far more than it is entitled to even on the highest basis of compensation that its counsel could suggest. There are several reasons for this conclusion.

The sketchiness of Mr. Doran's evidence and its lack of particulars is not the only reason for saying that his estimate of depreciation is not entitled to the same favourable comment as his estimate of reconstruction cost. It was based upon a number of fallacious assumptions. One of them was the statement that because of the high standard of maintenance the life of the building was indefinite.

The assumption that an asset can be so well maintained that it will remain as good as new indefinitely is both erroneous in fact and contrary to judicial opinion. Maintenance may affect the rate of incidence of the depreciation but cannot prevent it. The depreciation of which Mr. Adam spoke, not always readily evident on an inspection, goes on in spite of maintenance. Moreover, there was nothing exceptional in the maintenance of the defendant's building to take it out of the operation of the forces that normally result in depreciation. On this point I accept the evidence of Mr. Adam. The judicial opinion to which I refer is that of the Supreme Court of the United States, expressed in decisions on rate cases. As late as 1903 an assumption similar to that underlying Mr. Doran's statement found favour with that Court. In *San Diego Land and Town Co.* v. *Jasper* (1) it had to consider a bill in equity by a water company complaining that the rates fixed for the supply of water by it were so low as to amount to confiscation of its property. It was conceded that the company was entitled to a fair return upon the value of its property, but the contention that in estimating such value there should be an allowance for depreciation over and above the allowance for repairs was rejected. *Vide* also *Cedar Rapids Water Co.* v. *Cedar Rapids* (2). It was not until the decision in *City of Knoxville* v. *Knoxville Water Co.* (3) that the true character of depreciation was fully understood. This was also a case in which a water company complained that its water rates were fixed so low as to deny it a reasonable return upon its property. It was laid down by Mr. Justice Moody, who delivered the opinion of the Court, that in estimating the value of a plant for rate fixing purposes the cost of reproduction was not a fair measure of value, unless a substantial allowance was made for depreciation. It was also held that a sufficient amount should be allowed from the earnings of a public service corporation for making good depreciation of plant and replacing deteriorated portions thereof. The decision clearly recognizes that the depreciation of an industrial plant begins, notwithstanding repairs to it, from the moment of its first use. At page 13, Mr. Justice Moody said:

(1) (1903) 189 U.S. 439.
(2) (1902) 118 Iowa 234 at 263.
(3) (1909) 212 U.S. 1.

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A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning.

This opinion repudiates the assumption that a property can be kept in substantially as good as new condition indefinitely by means of maintenance. Its depreciation goes on continuously, notwithstanding the repairs made to it. The inevitability of depreciation in an old building and its equipment beyond that which has been overcome by repairs and replacements was also fully recognized by Mr. Justice Hughes in *The Minnesota Rate Cases* (1), in which *City of Knoxville* v. *Knoxville Water Company* (*supra*) was followed.

It is also fallacious to assume, as counsel for the defendant did, that a builder, even of Mr. Doran's ability, can by intuition determine the amount of depreciation in a building merely by looking at it, without calling to his aid either his own experience or the general experience applicable to similar buildings. The fact that depreciation is constantly going on although the signs of it may not be readily apparent makes resort to experience imperative. There is no such thing as an intuitive power to estimate the extent of the depreciation of a building like the defendant's merely by looking at it. Experts frequently express opinions as to the depreciation of a building but the value of their opinions depends largely upon their experience. From this point of view I do not consider Mr. Doran's estimate of depreciation as weighty as Mr. Adam's. Mr. Doran's qualifications as a builder are undoubtedly of a high order and his estimate of the reconstruction cost of the building was sound, but I do not think he was as well qualified as Mr. Adam, an architect of long experience, to estimate the extent of its depreciation. Certainly, his evidence on it was not as complete or as satisfactory as Mr. Adam's. The latter mentioned several indications of physical deterioration that were not referred to by Mr. Doran. Moreover, Mr. Adam

(1) (1913) 230 U.S. 352 at 456.

expressed the opinion that there was nothing exceptional about the maintenance of the building, and that while it was well maintained its maintenance was not beyond what might normally be expected. This was the evidence of a careful and experienced architect and I accept it. The view of the building taken by the Court confirms my opinion of its accuracy. As between Mr. Doran's estimate of depreciation and Mr. Adam's I have no hesitation in preferring Mr. Adam's. I was favourably impressed with the careful manner in which he gave his evidence and his reasons for his estimate.

Both Mr. Doran and Mr. Adam confined their estimates to physical depreciation. In addition, there is unquestionably obsolescence in the building, notwithstanding Mr. Moffit's evidence as to its suitability for the defendant's business. Not only is there Mr. Coote's clearly expressed opinion that there is such obsolescence but there is also Mr. Doran's statement that he would not suggest that type of building if he were building a new one. Moreover, there is Mr. Moffit's own admission that if the defendant were putting up a new building it is probable that it would be a more modern type of building than the present one. I do not think there can be any doubt that this would be so. Moreover, I do not believe that anyone who saw the building could fairly form any opinion other than that there is a good deal of obsolescence in it.

Mr. Osborne contended that there had been failure on the part of the plaintiff's witnesses to appreciate the nature of depreciation and that this nullified their evidence on it. I do not think so. On the contrary, as I have already indicated, it was the evidence of the defendant's witnesses on the subject that was faulty. Mr. Osborne referred particularly to Mr. Bieler's evidence as to the boilers and made much of the fact that he had put a scrap value on them, although they were in serviceable use, and seemed to urge that this error on his part was so fundamental as to destroy the evidence of the plaintiff's witnesses on depreciation. If there was any error of valuation on Mr. Bieler's part in respect of the boilers, which is by no means indisputable, counsel made far too much of it. The error, if any, is confined to the valuation of the boilers, and does not affect any of the other valuations; all that is involved is the

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quantum of the valuation of the boilers. Their value may possibly be greater than scrap, but it cannot be very substantial. If Mr. Bieler, instead of basing his estimate solely on the age of the boilers, as it seems to me he did, had examined them carefully, as he should have done, and then estimated their likely life in the light of their actual condition and the fact that they mutually insured one another, and then placed a valuation on them little fault, if any, could have been found with his valuation. If he had followed a course similar to that taken by Mr. Coote with regard to the main building after a careful examination of it he would not have left himself as open to attack as he did. Too much emphasis must not, however, be put on the fact that the boilers are still in use, particularly since their pressure has had to be reduced and the length of the defendant's tenancy of the expropriated property is uncertain. Under the circumstances, it is natural that it should wish to keep them as long as possible, even although an element of risk is involved in so doing. Certainly if they have not already reached the end of their useful life, such end cannot be very many years away. A prospective purchaser would not pay much for them, if, indeed, he would pay anything at all. Unfortunately, we have no evidence from the defendant that would be helpful in enabling the Court to estimate what the depreciated value of the boilers was.

Mr. Osborne contended that Mr. Coote had no knowledge of real estate values and no special knowledge of the kind of business carried on by the defendant and that since he lacked these qualifications his opinion of the depreciated value of the building was worthless. I disagree. I considered Mr. Coote well qualified as an expert in the matters on which he expressed his opinions and was favourably impressed with his explanation of the considerations that led him to his conclusions. Indeed, I have not heard the difficult question of depreciation more fully discussed in this Court than it was by Mr. Coote in the present case. In my judgment, he was a competent and reliable witness. He dealt with the depreciated value of the building in relation to its reconstructed cost, so that if such cost represents value then the depreciation spoken of by him represents loss or diminution of such value. His opinion

as to depreciation on such a basis is, therefore, relevant on whatever basis of value the defendant's claim to compensation is put. If reconstruction cost less depreciation represents value to the owner then Mr. Coote's estimate of depreciated value is on precisely the same basis as that contended for by the defendant, and if it is only a factor of value to be taken into account then his estimate is also helpful. Mr. Coote need not be an expert in real estate values or know the defendant's business to give weight to his opinions.

Mr. Osborne also contended that Mr. Coote had made a statistical or accountant's approach to his estimate and that it was not proved to be an accurate representation of the depreciation of the building. I can best deal with this argument by referring to Mr. Coote's evidence on his cross-examination. I thought that instead of being shaken in any way he strengthened his opinions.

[The learned President here reviewed the evidence of Mr. Coote and continued.]

It may be that Mr. Coote's estimate does not exactly represent the actual depreciation that has taken place in the building. That would not be surprising since exact proof of that fact is impossible. The Court must act upon the best evidence that is available, realizing that the actual amount of depreciation can only be estimated and that the best estimate can only be an approximation.

On the evidence I have come to the conclusion that Mr. Coote's estimate of $159,780 for the depreciation of the main building is a conservative one and is the best evidence that is available. I see no reason why it should not be accepted. This would leave the depreciated value of the building at $200,898.

If the estimate of the depreciated value of the mechanical equipment in the main building were increased by $2,000, this would, in my opinion be ample allowance for any possible undervaluation by Mr. Bieler.

The estimates of the depreciation of the pent house and the underground piping, as shown on page 4 of Exhibit 10 come to $2,824, leaving a depreciated value of $4,576.

The total of the estimates of the depreciation of all the buildings and mechanical equipment thus comes to $188,296, as against a reconstruction cost of $478,032, leaving a depre-

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ciated value of $289,736. If I were called upon to estimate the value of the defendant's building and mechanical equipment on the basis of reconstruction cost less depreciation this would be the highest figure at which, in my judgment, such estimate could reasonably be put.

The defendant also claimed compensation for certain fixtures not included in the mechanical equipment in the building. The valuation placed on these by Mr. G. Bilodeau, after allowance for depreciation, was $435.

The next item in the defendant's claim is for its prospective loss by disturbance of its business when it has to move from the premises. So far, of course, there has been no such loss. On the contrary, the defendant has been carrying on its business as if there had been no expropriation of its property and has been left in undisturbed occupation and possession of it free of rent. But Mr. Moffit explained that it had not been possible to make any arrangement with the Crown for any definite period of tenancy so that its right of occupancy is terminable at the Crown's pleasure. Mr. Moffit further stated that ever since the expropriation the defendant has been searching for another plant or a suitable site for a new one. In 1946 it examined the Hull Iron and Steel Company's plant in Hull. Later in the same year it bought a site in Overbrook but subsequently decided that it would not be suitable. In 1947 it discussed a possible location with Mayor Brunet. It has also considered the possibility of moving to its old Mullins Street plant in Montreal. It has still no plant or site in mind. If it cannot find a suitable building it will have to acquire a site and construct a new one.

No loss by disturbance having actually been incurred the evidence on this item had to be by way of estimate of the loss that will be likely when the defendant has to move. The particulars of the estimate prepared by the defendant appear in detail in Exhibit Q, which was carefully explained by Mr. Moffit. It was estimated that it would take approximately two months to measure up, template and layout machinery on the floor plan of another building and that this would cost $1,000. The cost of disconnecting, connecting and running in machines was put at $4,270. An estimate of $6,550 had been obtained from the firm of Mahoney and Rich for moving the machinery, stock and

other movables. It was considered that the physical move would take two weeks, that an additional week would be required for preparatory work before the move and that it would take another week after it before the new plant was operating. There would, therefore, be a shut down of four weeks due to the moving and there would be a loss of profit due to non-production as well as a continuing cost of fixed charges during this period. The loss of profit was estimated at $13,193.80 and the cost of the fixed charges at $20,571. It was also thought that about 20 per cent of the employees would leave when the defendant moved and that as a result there would be expense in training replacements, and loss of profit and loss on fixed charges due to low production during such training period, the total of the estimated loss under this head coming to $13,778.46. Finally, it was considered that there would be an average decline of 20 per cent over a period of 13 weeks in the efficiency of the employees remaining with the defendant and moving from one plant to another and the loss of profit and on fixed charges on this score was put at $17,557.70. The total of these various amounts comes to $76,920.96. To this must be added the sum of $2,550 as the depreciation in value of certain chattels, not fixtures, as a result of moving them from the old building into a new one. This was in accordance with the evidence of Mr. Bilodeau. That makes the total claim for loss by disturbance amount to $79,470.96. Mr. Moffit's estimates received general confirmation from Mr. C. L. Rousseau who considered most of them reasonable and some conservative. Nor was any substantial attack made on them by Mr. Coote. While he questioned the amount of the first item his only real challenge was in respect of the inclusion of certain items under the head of fixed charges, such as unemployment insurance, depreciation, light, heat and power, insurance and taxes, and special repairs. Some of these, like depreciation, he thought ought to be excluded altogether, and others reduced by reason of the plant not being in production during the move or dependent in amount upon when it was made.

While I thought that there was merit in some of Mr. Coote's criticisms it is impossible without further enquiry, which would serve no useful purpose now, to determine

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to what extent, if any, the amount of the claim should be reduced by reason of them. But that is the least of the Court's difficulties. Even if it were conceded that the owner of expropriated property had a right to compensation for loss by disturbance of his business, how is the amount of the defendant's claim under this head to be determined, since no loss has as yet been incurred and the date at which it will occur, if it does occur, is not known and cannot be ascertained? These considerations led counsel for the plaintiff to point out several factors that might affect the quantum of this item of the defendant's claim. Some of the estimates of prospective loss depend on estimates of the time it will take to do certain things, which may prove too high, and others on the time of year in which the move is made and whether it is made in a period of full production or of holidays or shut down. Loss of prospective profits is claimed on the assumption that they will continue at the same rate as heretofore, whereas it may happen that at the time of the move the defendant will be operating at a loss as it did, for example, in 1938. Moreover, if the move is made to some nearby site in Hull the estimates of prospective loss through loss of employees and reduced efficiency of production as a result of moving may be too high. There are even more serious difficulties in the way. Even if the defendant were entitled to compensation for loss by disturbance of its business, it has no right to receive now the full amount of its claim for a loss that will happen only in the future, if it happens at all. It is surely not entitled to more than the present value of such prospective loss. Yet how is such present value to be ascertained? It is impossible to say now when the defendant will have to move. It may not be disturbed in its occupation of the premises for many years. Who is to say that its experience may not be similar to that of the persons who still carry on uninterrupted businesses on properties on the south side of Wellington Street in Ottawa although their properties were expropriated in 1938? Moreover, who can tell what the future may bring? Before the time when the defendant has to move it may decide against continuing in business in which case it will suffer no loss by disturbance, or business adversity may fall upon it which may affect its position. These considerations show the impossibility of determining

now the amount of compensation which ought to be paid to the defendant in respect of this item of its claim, if it has any right of action in respect of it, and I shall not attempt any assessment of it. All I can do at the moment is to say that the amount of its claim under this head, if all the assumptions on which it is based prove true, will be $79,470.96.

Subject to this, the maximum amounts which I would estimate for the various items of the defendant's claim, if I were required to do so, omitting for the moment the item of an allowance for compulsory taking, would be $15,120 for the land, $289,736 for the buildings and mechanical equipment, $435 for the fixtures, and $79,470.96 for the loss by disturbance of business, making a total of $384,-761.96.

Very important evidence touching the value of the expropriated property as a whole was given on behalf of the defendant by Mr. Bosley and Mr. Sherwood. Mr. Bosley said that its main building had been built for use as a factory and served its purpose well. It had a total floor area of approximately 80,000 square feet. In Toronto, buildings similar to it in construction and condition were being sold in 1946 at or about $3.00 per square foot. On this basis he put a valuation of $240,000 on the main building and the land. To this amount he added $40,000 as the cost of the new tarpaulin and waterproofing building and the new garage, making his total valuation come to $280,-000. This was his opinion of the market value of the property. He did not think that the owner could reasonably expect to get more than that in the market. If he wanted "to sell at the market" that was all he could get, unless he could find a purchaser who would pay a premium. He could not tell what a purchaser would be willing to pay, for that would depend on the urgency of his need. He thought that he could have sold the property for the amount of his valuation and that it would have been a judicious deal for the purchaser. He would have advised a client to pay $280,000 and go higher than that if he needed it urgently; 10 per cent more would not be an unreasonable premium to pay, but as a real estate broker he would not advise him to go higher than that. On the other hand, he would have advised the defendant not to

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take $310,000 for the property, for it could not hope to reinstate itself at that figure. While Mr. Bosley thought he could help the Court by saying what he thought was the market value of the property, he could not put a price on its value in use. Mr. Sherwood's evidence was along similar lines. He thought that the defendant's building was ideally suited for the purpose for which it was being used. His valuation was on the basis of $3.50 per square foot of floor space, which came to $280,000 for the main building with the land, to which he added $35,000 for the other buildings, making his total valuation amount to $315,000. He felt reasonably sure that this amount or better might have been obtained for the property. He would have advised a prospective purchaser that if it suited him and he really wanted it and did not have to do too much altering of it to suit his requirement he could easily pay 10 per cent more for it. If, however, he had been asked to advise the defendant whether to accept an offer of such an amount he would have advised that if it was going to close up its business it was not a bad offer but that if it intended to continue in business it had better not accept it. The opinions of these two experts are entitled to considerable weight. In addition to their opinions as to the value of th property as a whole, further so-called over-all valuations were offered. Mr. Moffit expressed the view that he would not advise the defendant to sell unless the offer to buy was a very substantial one and that a minimum of $700,000 should be set as a selling price. The only comment that I need make on this evidence is that Mr. Moffit's figure of the amount at which the defendant would be prepared to sell is merely a restatement of the amount of the defendant's claim in a different form. Mr. C. L. Rousseau's so-called over-all valuation may also be dealt with briefly. He was asked to say how much he would advise a purchaser to pay for the defendant's property. In effect his final answer, after first saying that he would advise him to buy it as cheaply as possible, was that he would recommend the total of the value of the land and the buildings and the amount of the loss by business disturbance. On the assumption put to him by Mr. MacTavish that the proof of these amounts came to $621,000, he said that he would have advised a purchaser to pay that amount. Mr. Rousseau was a most obliging witness. He would have adopted as

the price he would have recommended to a purchaser whatever amount Mr. MacTavish had proved as the total of the various items in the defendant's claim. This was merely a statement that he would have recommended whatever amount the application of the principle of reinstatement would work out at. There was no independent judgment on his part.

It was contended for the defendant that the Court should find the amounts of the several items in its claim as given in the particulars, add them together and award the total as the amount of compensation to which the defendant is entitled. I am unable to accept this view. The danger of an excessive award resulting from such a method of ascertaining separately the amount of each element or factor that should be taken into account in estimating the value of an expropriated property and adding such amounts together has frequently been stressed in this Court. Moreover, I think that the method is an erroneous one. That was the view of Audette J. in *The King* v. *Manuel* (1) where he said:

> the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the land—although all these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation.

I followed this opinion in *The King* v. *Edwards* (2):

> The Court is not directed to estimate the value of the component parts of the property separately, "although all these elements must be taken into consideration"—and it should not do so; it must estimate the value of the property as a whole, for it is the whole property, and not its component parts separately, that has been expropriated, and its value as such is indivisible.

And in *The King* v. *Thomas Lawson & Sons Limited* (3) I pointed out that there is a difference between taking elements of value into account in estimating the value of a property and merely adding the amounts of such elements together. The estimate of value which section 47 of the Exchequer Court Act requires the Court to make is a global one, not the addition of a number of separate estimates. The difference in a given case might prove to be of great importance.

In the course of an able argument, Mr. Osborne put forward what was basically the same contention in a

(1) (1915) 15 Ex. C.R. 381 at 386.
(2) (1946) Ex. C.R. 311 at 327.
(3) (1948) Ex. C.R. 44 at 104.

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number of forms. He realized, of course, that if the requirement of section 47 of the Exchequer Court Act was to be complied with he must relate the defendant's claim for compensation to the value of the expropriated property. This was essential. He, therefore, had to put his case, in whatever form it took, on the basis of a right to compensation according to the value of the property. I shall not attempt to set out his argument in detail. I think it will be sufficient, at this stage, if I merely outline his main contentions. He relied upon the established rule that the Court must estimate the value of expropriated property on the basis of its value to the owner, not its value to the expropriating party. This led him to what was perhaps his main contention, namely, that the expropriated property in the profitable use to which it was being put had a special value to the defendant and that it was entitled to compensation for its loss on the basis of its value to the defendant in such use. An alternative contention was that the defendant should be compensated for all loss resulting from the expropriation and that the word "value" in section 47 of the Exchequer Court Act must be interpreted accordingly. He would not concede that there could be any case where the estimate of value of an expropriated property could fall short of full compensation to the owner for all loss resulting from its expropriation. There was thus no difference between the concept of compensation on the basis of the value of the property and that of compensation on the basis of reinstatement or replacement. His alternative contention, therefore, was that the principle of reinstatement or replacement should be applied in the determination of the amount of the defendant's compensation or, put in other words, that it should be compensated for all loss resulting from the expropriation. In effect, this contention meant that compensation on the basis of "value of the expropriated property" meant the same thing as compensation for "all loss resulting from the expropriation of the property". It followed that in estimating the value of an expropriated property on which a business is conducted the Court must award compensation to the owner for any loss by disturbance of the business that results from the expropriation. Finally, counsel attempted to reconcile the market value test with the compensation one by urging that if the market value of the property was to be taken

as the measure of compensation regard should be had, not only to the price at which a purchaser would be willing to buy, but also that at which the owner would be willing to sell and that, since an owner would not be willing to sell at a price that would result in a loss to him, market value meant the same thing as compensation for all loss.

The outstanding statement that the owner of expropriated property should receive by way of compensation the money equivalent of his property is that of Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board* (1) where he said:

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

With respect, I am unable to agree with the first sentence in this statement. Certainly, some of the principles referred to were not as well settled as Fletcher Moulton L.J. thought they were, for 30 years after his statement some of the views expressed by him were formally disapproved by Lord Romer, speaking for the Judicial Committee of the Privy Council, in the *Vyricherla* case (*infra*). And there is still controversy as to the extent of the owner's right to compensation for the loss sustained by him as a result of the expropriation of his property. Nevertheless, the statement remains a basic one. It seems clear that the equivalent of which the statement speaks is the money equivalent of the land. It is the loss of the value of the land that is to be replaced by its equivalent in money, so that the total value of the owner's property remains the same. It is only the form of the property that is changed; instead of the land, the owner has its money equivalent. It is also clear that the money equivalent referred to is the market value of the land, that is to say, the amount of

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

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money the owner could turn it into if he offered it for sale. Its worth to him in money is not what he thinks it is worth but what he could get for it. This statement is not affected by the requirement that the money equivalent of the land is estimated on its value to the owner and not on its value to the purchaser. This does not mean, as has been frequently contended, that the value of the land to its owner is something more or other than its market value. Certainly, Fletcher Moulton L.J. did not think so; he thought of the requirement as a restrictive one, namely, that the owner had no right to share in the value of the land to the expropriating party; what he meant was that the money equivalent of the land was to be determined without regard to what its value to the expropriating party might be. Finally, there is nothing in the statement to support the contention that the owner of expropriated property is entitled to compensation for all loss consequent upon its expropriation. Indeed, the statement is, in my opinion, by implication, if not expressly, contrary to any such view. It is only for the value of the land that the owner is to receive its equivalent in money.

The insistence upon the requirement that the Court must estimate the value of the expropriated property on the basis of its value to the owner, and not its value to the expropriating party, has given rise to much confusion. It has frequently been contended, as, in effect, it was in the present case, that if a property has a special adaptability for a particular purpose the owner is entitled to compensation in respect thereof in addition to the market value of the property. The contention is wholly erroneous. It has been held in numerous cases that the special adaptability of a property for a particular purpose is no more than one of the factors of value that a prospective prudent purchaser would take into account in deciding how much he would be willing to pay for it. Its special adaptability is, therefore, an element of value, but no more than that, which must be taken into account by the Court in its estimation of the value of the property, for it would affect the quantum of money into which the owner could turn the property if he were to offer it for sale. It is not the purpose of the requirement either to enhance or reduce the amount of compensation to which the owner is entitled.

Its effect is frequently restrictive as *In re Lucas and Chesterfield Gas and Water Board* (*supra*) and in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (*infra*), where it was insisted upon in order to ensure that the owner of the expropriated property did not participate in the value of the scheme for which his property was taken. On the other hand, it may be a measure of fairness to the owner to protect him from having to bear any part of the loss in value that might result from the scheme for which his property was taken, as, for example, when property with valuable buildings on it is required for park or road purposes necessitating the demolition of the buildings. The real purpose of insisting upon the requirement is one of fairness, both to the owner and to the expropriating party, by ensuring that the value of the property is estimated without regard to its value to the expropriating party in the scheme for which it was taken, except to the extent referred to by Lord Romer in the *Vyricherla* case (*infra*). For further elaboration of the purpose of the requirement I refer to what I said on the subject in the *Thomas Lawson & Sons Limited* case (*supra*), at pages 78-79.

The next matter to consider is the construction that has been placed on the meaning of the term "value to the owner". By reference to what standard is its amount to be determined? I dealt with this matter at some length in the *Thomas Lawson & Sons Limited* case (*supra*), at pages 69 to 82, and incorporate what I said there in these reasons for judgment. I need, therefore, only summarize the effect of the decisions. In the case of *In re Lucas and Chesterfield Gas and Water Board* (*supra*), in which Fletcher Moulton stated that the money equivalent of the land was estimated on the value to the owner, and not on the value to the purchaser, it was clear that even although the land had special adaptability for a particular purpose its value to the owner was confined to its market value. That means that it cannot be more than it would fetch in the market. The view that the value of the land to the owner means what he could get for it in money was put very concisely by Shearman J. in *Sidney* v. *North Eastern Railway* (1) where, after stating that "special adaptability is nothing more than an element of market value" and that it is

(1) (1914) 3 K.B. 629 at 641.

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"merely one kind of special value which is likely in the market to attract a class of purchasers who would come into competition", he said:

> The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

There are three decisions of the Judicial Committee of the Privy Council which, in my opinion, settle the law on this matter. That the value of the land to the owner is the amount of money that he could get for it in a competitive field is to be deduced from the decision in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1). There Lord Dunedin made it plain that the amount of the value of the land to the owner is not the price which he places upon it but the amount that he could realize for it in money if he tried to sell it. At page 576, he said:

> 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 . . . 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.

Thus the value of the land is the price that someone would give for it. Lord Dunedin then continued:

> That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

And at page 579, he put the question thus:

> The real question to be investigated was, for what would these subjects have been sold, had they been put up to 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.

The second Privy Council decision to which I refer is *Pastoral Finance Association, Limited* v. *The Minister* (2). There Lord Moulton rejected the contention of the owners of the expropriated property that the capital amount of certain savings and additional profits which they would make in their business if it were transferred to the expropriated property should be added to its market value. At page 1088, he said of these savings and profits:

> 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

(1) (1914) A.C. 569. (2) (1914) A.C. 1083.

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.

It is clear, I think, that the words "a prudent man in their position" must mean "a prudent purchaser in a position similar to theirs". Otherwise, the phrase would not make sense. Later, Lord Moulton makes it clear that the special adaptability of the land in question, namely, the likelihood of savings and additional profits if the business were carried thereon, was not regarded as something apart from the land but rather as an element of value which a prudent purchaser would take into account and which "would guide him in arriving at the price which he would be willing to pay for the land." The third Privy Council decision is *Vyricherla Narayana Gajapateraju* v. *The Revenue Divisional Officer, Vizagapatam* (1). There Lord Romer said, at page 312:

> 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 must alike be disregarded. Neither must be considered as acting under compulsion.

While I think that the tests of value in these three decisions, although put in somewhat different forms, are basically the same, I must say that, in my opinion, the form suggested by Lord Moulton in the *Pastoral Finance Association Limited* case (*supra*) is the least valuable of the three, because of the difficulty of applying it. In the present case, Mr. Bosley put his finger on this difficulty when he said that he could not say what a purchaser would be willing to pay for the defendant's property sooner than fail to obtain it, without knowing what was in the purchaser's mind and how urgent his need for the property was. The test put by Lord Romer in the *Vyricherla* case (*supra*) is, I think, a better one. It is simpler and capable of application with greater ease and certainty.

On the strength of the decisions I came to the conclusion in the *Thomas Lawson & Sons Limited* case (*supra*), at page 80, that the term "value to the owner", as applied to property expropriated under the Expropriation Act might be defined as follows:

> It has no technical or special meaning. It does not mean the owner's own estimate or opinion of its value, or its sentimental or intrinsic value, but only its "worth to him in money". This assumes that a money

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

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equivalent for the property can be obtained. Its value to the owner means, therefore, its realizable money value, as at the date of its expropriation. The amount of such money value is to be "tested by the imaginary market which would have ruled had the land been exposed for sale", as suggested by Lord Dunedin, and cannot exceed the amount which a prudent man in the position of the owner "would have been willing to give for the land sooner than fail to obtain it", as Lord Moulton put it, or "the price which a willing vendor might reasonably expect to obtain from a willing purchaser", as Lord Romer defined it.

I then expressed the opinion that this definition of "value to the owner" is essentially the same as that of "fair market value", as given in Nichols on Eminent Domain, 2nd Edition, at page 658, which I set out earlier in this judgment. I ought also to refer to a statement by the same author, at page 661:

> It has never been disputed that when property taken by eminent domain is of such a character that its market value can be estimated with reasonable accuracy, such value is the measure of compensation. The use of market value as a test in land damage cases preceded the publication of judicial decisions in this country, so that we find it looked upon as an established principle in the earliest reported cases.

In the present case, there is no reason for taking the defendant's property out of the ambit of realizable money value or fair market value as the measure of the defendant's right to compensation for it.

It follows from what I have said that Mr. Osborne's contention that the defendant's property had a special value to it because of its profitable use and that it was entitled to compensation for its loss on the basis of its value to the defendant in such use cannot be sustained. There are several reasons for this conclusion. There is a fundamental difference between the value of a property for a particular use and its value in such use. Its adaptability for profitable use is not the same thing as its profitable use. The former is an attribute of the property and consequently an element of its value, but the latter may depend largely, if not wholly, on factors extraneous to it. It is impossible to say how much of the profitable use made of a property is attributable to the property itself and how much to the industry, skill or good fortune of the owner. Yet the value of the property in use may be due to both. One of the objections to any attempt to determine compensation on the basis of the value of the property to the owner in use is the impossibility of estimating its money equivalent. No expert could assist the Court in the matter. Certainly

Mr. Bosley, with all his experience, said that he could not state any figure for the value of the defendant's property in use. Nor could any one else do so. But, even if the value in use could be estimated in terms of money, it would not be a proper basis for determining compensation in so far as it depends on factors extraneous to the property. While the owner is entitled to have the adaptability of his property to profitable use considered as an element of its value to him since that would influence a prudent person in deciding how much he would be willing to pay for it, he has no right to compensation for factors making for its profitable use that depend on his own qualities or are otherwise extraneous to the property, for they have not been expropriated. There is an illustration in Nichols on Eminent Domain, 2nd Edition, at page 662, of how absurd it would be to make the amount of compensation payable for a property dependent on the profit or lack of profit made by its owner in use:

> It might well be that two rival tradesmen held adjacent lots of land on the same street, similar in all respects, upon which they maintained their respective shops. One of them, by reason of shrewdness, foresight and good fortune might be deriving a large return from his business and would doubtless be unwilling to sell his land, and thus break up his established trade, for a sum considerably in excess of its market value, while the owner of the adjacent store, who found himself losing money from day to day, might be glad to dispose of his property at considerable sacrifice. If, however, the two stores are taken by eminent domain, the measure of compensation would be the same in each case.

What possible justification could there be in determining the compensation to be paid to each tradesman on the basis of the value of his property to him in use? Why should one get more for his property than the other? The adaptability of each property for profitable use is the same; the difference in the profit made in its use is due to factors wholly extraneous to it. Considerations of this sort led Nichols to say, at page 663:

> What is sometimes called the "value in use" is everywhere repudiated as the test.

With this opinion I entirely agree. It is not the value of the property in use, but its value in exchange, with all its attributes, including its adaptability for profitable use, that is the measure of the compensation payable to the owner for its loss.

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Related to this contention is the submission that, if the market value of the property is taken as the measure of the compensation to be paid to its owner, regard should be had not only to the price at which a purchaser would be willing to buy but also to that at which the owner would be willing to sell. The objections to this argument are obvious. The price at which the owner would be willing to sell his property cannot be the criterion of his entitlement. To admit such a subjective test would be tantamount to making him the arbiter of the amount of his compensation. Nor can his unwillingness to part with his property be considered. An owner cannot increase the value of his property by being unwilling to sell it. The fact is that neither the unwillingness of the owner to sell his property nor the price at which he would be willing to sell it has any bearing on its value. The statement of Lord Romer in the *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 does not mean that the owner must be willing to sell at such price. It is the price which he might reasonably expect to receive from a willing purchaser if he were willing to sell. Lord Romer makes it clear that the disinclination of the owner to part with his property must be disregarded, and it is equally clear that the price at which he would be willing to sell it is not necessarily the same as that which he might reasonably expect to receive for it. A more definite and more objective standard than the one implied in the submission is necessary. It must be assumed, I think, that when Parliament directed the Court to measure the amount of compensation to be paid to the owner of expropriated property by the value of such property, meaning its value to the owner, it intended to supply the Court with a test by which the amount of compensation could be ascertained with reasonable certainty and without regard to the personality of the owner or any factors extraneous to the property. In the case of a commercial property such as the defendant's the test of realizable money value established by the cases referred to meets the requirements which Parliament must have had in mind.

The remaining contentions on behalf of the defendant may be dealt with together, namely, that the right to

compensation for expropriated property on the basis of its value to the owner means the same thing as the right to compensation for all loss resulting from the expropriation and that the defendant is consequently entitled to compensation for the loss it will suffer by the disturbance of its business when it is required to move. These contentions involve questions of difficulty that are still the subject of controversy. I dealt with similar contentions in the *Thomas Lawson & Sons Limited* case (*supra*) but their importance warrants further discussion of them. I am quite unable to accept the view that the right to compensation on the basis of the value of the expropriated property means the same thing as the right to compensation for all loss resulting from the expropriation. That would be tantamount to saying that although the Court, in determining the amount to be paid to the owner of expropriated property, must estimate the value of such property it should, nevertheless, apply the principle of reinstatement or replacement in determining the amount of his compensation. In the *Thomas Lawson & Sons Limited* case (*supra*), at pages 83-90, I rejected such a view. There I expressed the opinion that the principle of reinstatement or replacement, being the cost of placing the owner of expropriated property in the same or as advantageous position as he occupied before the expropriation, is not applicable in determining the amount of compensation to which the owner is entitled. I put this opinion on the ground that the amount of his compensation is confined to the value of the property, with the result that if the cost of reinstatement or replacement should happen to exceed such value the owner would have no statutory right to the excess and the Court no lawful authority to award it. I found support for this conclusion in the judgment of the Supreme Court of Canada in *The King* v. *Northumberland Ferries Limited* (1) in which that Court, reversing the judgment of Angers J. in this Court (2), held unanimously that the principle of reinstatement or replacement was not applicable in determining the amount of compensation payable to the owner of two vessels appropriated by the Crown under the War Measures Act, R.S.C. 1927, chap. 206, when the measure of the compensation payable in respect of the acquisition of a vessel so appropriated was fixed by section 5(1) of

(1) (1945) S.C.R. 458 (2) (1944) Ex C.R. 123

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The Compensation (Defence Act, 1940), as "a sum equal to the value of the vessel, . . . no account being taken of any appreciation due to the war". It seems to me that similar reasoning must lead to the exclusion of the principle of reinstatement or replacement in determing the amount of an owner's claim for property expropriated under the Expropriation Act, once it is made clear, as was not done in the *Northumberland Ferries Limited* case (*supra*) either in this Court or in the Supreme Court of Canada, that the measure of the owner's right to compensation is fixed by section 47 of the Exchequer Court Act as the value of the property.

I have already referred to the statement of Lord Parmoor in *Sisters of Charity of Rockingham* v. *The King* (*supra*) that compensation claims are statutory and depend on statutory provisions and that "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", and expressed the opinion that when property has been expropriated under the Expropriation Act the owner's rights to compensation in respect thereof are only those which he enjoys under sections 19(*a*) and 19(*b*) of the Exchequer Court Act. These are the sole sources of his statutory right to compensation. We are not here concerned with any claim under section 19(*b*), for the whole of the defendant's property was taken and it has no remaining property that could be injuriously affected. That leaves only the effect of section 19(*a*) to be considered. It is the only statutory authority for the owner's right to compensation when the whole of his property has been expropriated. He has only such rights as it vests in him and he is not entitled to any rights that are not within its ambit. Section 19(*a*) empowers the owner to make a claim against the Crown "for property taken for any public purpose". That gives him a right to compensation for the property. But his right is confined to compensation *for* the property. He is not given any right to claim for anything else. In this view, section 19(*a*) does not give him any right to compensation for loss apart from the property. Then section 47 of the Exchequer Court Act, which is under the heading "Rules for adjudicating upon claims," directs that the Court, in determining

the amount to be paid to any claimant for any land or property taken, shall estimate the value thereof at the time when it was taken. It seems to me that it is as plain as language can make it that the amount of compensation payable to the owner of expropriated property is thus limited to its value as at the date of its expropriation. Such value is the statutory measure of the owner's right to compensation and the Court must not use any other. There is no broad right "to be made economically whole". I am inclined to the view that the limitation of which I speak is inherent in the language of section 19(*a*) itself but, if that is not so, there can be no doubt that it is set by section 47.

In this view of the law, the contention that the owner of expropriated property has a statutory right to compensation for all loss resulting from the expropriation is untenable. A right to compensation on the basis of the value of the expropriated property is not the same thing as a right to compensation for all loss nor is it permissible to contend that it is inclusive of it. The concept of value cannot be stretched to include what is not value. It may well be that an owner may suffer loss in consequence of the expropriation of his property over and above the value of the property as defined by the cases I have referred to. If he does, I am unable to find any statutory right to compensation for such loss. If section 47 of the Exchequer Court Act does not have the purpose and effect of limiting the owner's right to compensation to the value of the property I am unable to see any reason for its enactment. To contend that the owner has a right to compensation for all loss resulting from the expropriation would be to regard the section as meaningless verbiage. If Parliament had intended such a wide right to compensation, what would be the sense of requiring the Court to estimate the value of the expropriated property since such value would be an element of the owner's loss without any such direction? To my mind, the conclusion is inescapable that Parliament intended to limit the owner's right of compensation to the value of the property and did not intend to give him any right to compensation for loss apart from such value. Certainly, no such right can be based on section 19(*a*) or section 47 of the Exchequer Court Act.

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Nor, in my opinion, can any such statutory right be found anywhere else. I say this with due regard for the contrary opinion expressed by Rand J. in *The King* v. *Irving Oil Company Limited* (1) that there was authority for such a right in section 23 of the Expropriation Act. In that case, after stating that the provisions of the Expropriation Act dealing with compensation are in general language, and setting out the definition of "land" in that Act, Rand J. said, at page 560:

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

Then he referred to the opening statement in section 23 of the Act:

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

And said of the section, at page 561:

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

I must say that I find myself in disagreement with this interpretation of section 23 of the Expropriation Act and the conclusion that under it the owner of expropriated property is "to be made economically whole." In the *Thomas Lawson & Sons Limited* case (*supra*), at pages 90-100, I outlined the legislative origin and history both of the definition of "land" and of section 23 of the Expropriation Act and my reasons for being unable to read the section as Rand J. did. Since then, I have considered the matter further but have not altered my opinion. In view of the full discussion of the matter in the case referred to I need do no more than merely enumerate my reasons for differing from the opinion referred to. In the first place, it must be kept in mind that the statutory scheme relating to the expropriation of property, originally enacted by the Public Works Act of 1867, Statutes of Canada, 1867, chap. 12, is not wholly embodied in the Expropriation Act. Part

(1) (1946) S C R 551.

of it is in the sections of the Exchequer Court Act to which I have referred. Failure to appreciate this fact contributed, I think, to the assumption that section 23 of the Expropriation Act is the statutory authority for the payment of compensation to the owner of property expropriated under that Act and the source of his statutory right to compensation for it. A study of the purpose for which the section was introduced and its place in the statutory scheme relating to the expropriation of property establishes beyond dispute that there is no basis for any such assumption. There was a right to compensation for expropriated property under certain sections of the Public Works Act of 1867, the forerunners of sections 19(*a*) and 19(*b*) of the Exchequer Court Act, several years before the predecessor of section 23 of the Expropriation Act was even thought of. There was thus never any need to look to it either as the source of the right to compensation or as the statutory measure of it. I also suggest that the place of the section in the statutory scheme cannot be ascertained by looking only at the first sentence in the section and concentrating on the statement that the compensation money "shall stand in the stead of such land or property", without looking at the rest of the section to see what the purpose of that statement is. The whole of section 23 reads as follows:

> 23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or incumbrance upon such land or property shall, as respects His Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty

The predecessor of this section was first enacted as section 1 of an amendment of the Public Works Act of 1867, enacted in 1874, Statutes of Canada, 1874, chap. 13. Without repeating what I said about the history of the section in the *Thomas Lawson & Sons Limited* case (*supra*) I think I may fairly say that if the section is read in the light of the setting in which its predecessor first appeared it will be seen that the purpose of the provision that the compensation money "shall stand in the stead of the land or property" was to preserve the rights of those who had had claims to or incumbrances upon the expropriated property

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by converting them into claims to the compensation money. Without some such provision there would have been nothing to which such claims or incumbrances, which became extinguished as against the property upon its expropriation, could attach. It was for this purpose that the compensation money, whether agreed upon or adjudged, was substituted for the expropriated property and made to stand in its stead. The section must not, therefore, be read as an assertion, even by implication, of any principle or standard for the determination or measurement of the amount of the compensation. It is not concerned with the right to compensation or its amount, but only with the status of the compensation money, after it has been agreed upon or adjudged, and its substitution for the property as a base to which former claims against the property may attach after its expropriation. This view of the section is wholly consistent with the rest of the legislative scheme. There is no suggestion that the word "compensation" is a dominating or controlling term. It is used only in the expression "compensation money" and is descriptive of the amount which has been agreed upon or adjudged. So far as it has been adjudged, the reference cannot be otherwise than to an adjudication pursuant to the direction given by section 47 of the Exchequer Court Act. Thus the "adjudged" compensation money referred to in section 23 of the Expropriation Act, which is to stand in the stead of the expropriated property, must mean the amount of compensation that has been "adjudged" by the Court pursuant to section 47 of the Exchequer Court Act, that is to say, the value of the expropriated property as estimated by the Court. Under the circumstances, the suggestion that, under section 23 of the Expropriation Act, the owner of expropriated property "is to be made economically whole" seems to me untenable.

A similar criticism is applicable in a degree to a statement of my own in *The King* v. *W. D. Morris Realty Limited* (1) in which, after stating that in expropriation proceedings the question of value of the expropriated property must be regarded from the point of view not of the expropriating party but of the owner, I said, at page 46:

> This cardinal principle is clearly adopted in the Expropriation Act itself by its provisions in section 23 that the compensation shall stand

(1) (1943) Ex. C.R. 140.

in the stead of the expropriated property and generally by its description of the compensation money as the amount to which the defendant is entitled. Indeed, the principle is inherent in the term "compensation" itself.

My only comment on this statement is that, if I had then studied section 23 of the Expropriation Act and its purpose in the statutory scheme relating to the expropriation of property as carefully as I have done since, I would not have made it.

This brings me to the contention that the defendant is entitled to compensation for loss by disturbance of its business when it has to move, over and above the value of the land and buildings. The question whether the owner of expropriated property has any right to compensation for loss by disturbance of his business in consequence of the expropriation of his property has been the subject of controversy. If I were dealing with the matter *de novo*, in the light of the statutory enactments and without regard to the judicial decisions, I would have no hesitation in holding that the owner has no right to compensation for such loss. In my view, the law on this subject is the same in Canada as it is in the United States. There can be no dispute as to what the law is in that country. Nichols on Eminent Domain, 2nd Edition, lays it down clearly, at page 366:

it is well settled that when land occupied for business purposes is taken by eminent domain, the owner or occupant is not entitled to recover compensation for the destruction of his business or the injury thereto by its necessary removal from its established location.

And he says, at page 698:

There is one form of pecuniary injury, often of a crushing character, incident to the taking of real estate by eminent domain, which the most liberal constitution makers have not yet guarded against and which, except in a few cases of a very unusual character, is not regarded as a basis of a legal claim for damages in any state in the union—namely, the injury to the business conducted upon the land taken.

I am unable to find any more statutory authority for granting compensation for the destruction of the owner's business or injury to it in Canada than there is constitutional or statutory recognition of it in the United States. I put my reason for this opinion briefly. The disturbance of the owner's business is a different thing from the expropriation of his property, even although it follows as a consequence thereof, so that if his right to compensation is confined to the value of the property, as it plainly is, it cannot extend to such a different thing as loss by the dis-

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turbance of his business. That such loss is something other than the value of the property seems obvious. Let us assume that two properties of equal value have been expropriated. The owner of one intends to continue in business and will suffer loss by disturbance; the owner of the other does not intend to continue in business and will not suffer any loss. If the right to compensation is confined in each case to the value of the property by what authority can the first owner claim a larger amount of compensation than the second? He cannot impart any increase of value to his property by his intention to continue in business any more than he could do so by being unwilling to sell it. If he suffers loss by disturbance of his business such loss is in respect of a matter personal to himself and not part of the value of the property. Thus, while Parliament has given the owner the right to compensation for the loss of his property, and decreed that such compensation must be equal to its value, it has not given him any right to compensation for any personal loss such as loss by disturbance of his business.

But while that would be my view of the state of the law if I were free in the matter—and I do not say that I am not—I am also of the opinion that I ought not to disregard the fact that there are numerous decisions of this Court, as also of the Courts in England, wherein effect has been given in varying degrees to claims for loss by business disturbance. The state of the case law on this subject cannot be described otherwise than as being chaotic. In the *Thomas Lawson & Sons Limited* case (*supra*), at pages 55-68, I dealt with this deplorable condition and incorporate herein my remarks relating thereto. There I pointed out that the judgments of this Court in which claims for loss by disturbance were considered fell into two classes, namely, those of Burbidge J., who justified the allowance of compensation for loss by disturbance on the ground that it is an element of the value of the expropriated land and those of Cassels J. and other judges of this Court, who considered that the rights of the owner were not confined to the value of the land but extended to compensation for all damage resulting from the expropriation in addition to such value. The two views expressed in these classes

of cases are not, in my opinion, reconcileable with one another. After examing the authorities I came to the following conclusion, at page 68:

> Having regard, therefore, to what I consider the plain terms of section 47 of the Exchequer Court Act and the weight of judicial authority, I have no hesitation in holding that when property is expropriated under the Expropriation Act the owner's claim to compensation for it is confined by section 47 of the Exchequer Court Act to the value of the property as estimated by the Court, meaning thereby its value to the owner, and not to the expropriating party; that, if the owner has suffered any loss by disturbance or otherwise resulting from the expropriation, the Court, in estimating the value of the property, may take such loss into account only to the extent that it is an element in its value, but not otherwise; and that the owner has no independent cause of action for damages for such loss apart from such value.

I must confess that it was not without doubt that I went even as far as this, and I would not have done so except for some of the judicial decisions to which I referred.

An interesting explanation of how the claim for loss by disturbance came to be recognized at all in view of the absence of statutory authority for it was given by Scott L.J. in *Horn* v. *Sunderland Corporation* (1). After pointing out that in the Land Clauses Act of 1845 there is no express provision giving compensation for disturbance he said, at page 43:

> If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1.) for the value to him of the land, and (2.) for injurious affection to his other land, it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (1.), that is, the fair purchase price of the land taken. That conclusion is consonant with all the decisions, so far as I can discover.

This is, I think, the only possible justification for giving any effect to a claim for loss by business disturbance. I should, therefore, if I am to be guided by the authorities, avail myself of the judicial eyesight of which Scott L.J. spoke and thereby discern in section 47 of the Exchequer Court Act, although I am unable to do so with my own eyes, the right of the owner of expropriated property to have his loss by disturbance of his business taken into account by the Court as a factor or element of value in the estimate of the value of the property which the Court must make. It may be, for example, that in a particular case a purchaser would be influenced in the amount which he would be willing to pay for the property by the factor

(1) (1941) 2 K.B. 26.

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of the disturbance in business of its owner. To the extent of such influence it would be a factor or element of value to be considered. Mr. Moffit suggested such a possibility in the present case and it was also envisaged in Mr. Bosley's evidence and perhaps also in Mr. Sherwood's. Whether a purchaser would be influenced by such a consideration to pay a higher price for the property than otherwise would depend, as Mr. Moffit said, on the urgency of his need for it. It is obvious, as Mr. Moffit admitted, that it would be difficult to determine how far a purchaser would go by reason of such a factor. It is also plain that the extent of its influence on the amount which a purchaser would be willing to pay for a property or a vendor might reasonably expect to receive for it is not capable of precise measurement; it might be substantial or, on the other hand, negligible or even non-existent. It might well be that in a given case the loss by business disturbance would be greater than the value of the property and be so high that it would be quite unreasonable to expect that anyone would be willing to pay it in order to obtain the property. In such a case it would be absurd to contend that it could be considered as a factor or element of its value. It is only to the extent that it would be considered by a purchaser in deciding how much he would be willing to pay for the property or affect the price which the owner might reasonably expect to receive for it if he wished to sell it that may be taken into account by the Court.

While I am prepared to go as far as this, notwithstanding the difficult speculative element involved therein, there is no justification in going farther and attempting to discern in section 47 something that is not there at all, namely, a right to compensation for loss by disturbance of business, over and above the value of the property. Section 47 of the Exchequer Court Act does not permit the Court, in estimating the value of the expropriated property, to take into account matters that are not factors or elements of its value. Certainly, it may not automatically add the amount of the claim for loss by disturbance of business to the amount which would otherwise fairly represent the value of the land. To do so would be to read the word "value" in section 47 as if it meant "value plus loss by disturbance". The judicial eyesight must not become so keen as to discern any such distortion of its meaning.

It is in this state of the law that the Court must consider the item in the defendant's claim relating to its prospective loss by disturbance of its business.

It follows from what I have said that there are circumstances under which the owner of expropriated property may suffer loss by reason of the expropriation of his property without any right to compensation for it. That is so in the case of his loss by disturbance of his business to the extent that it is not a factor or element of the value of the property. It seems to me that this state of the law is unsatisfactory and that Parliament might well consider appropriate measures for its correction. The simplest course, in my opinion, would be to confer upon the owner the right to compensation for loss by disturbance of his business as an independent cause of action quite apart from the value of the property. But if Parliament were to give favourable consideration to such a change in the law I venture the suggestion that it would be wise to confer the right only after the loss has occurred or its quantum can be determined with certainty. The difficulty there would be in determining the amount of compensation payable to the defendant in the present case in respect of its claim for prospective loss, by disturbance of its business, if it had an independent cause of action for it, is an excellent example of the wisdom of such a provision.

Under all the circumstances, I have come to the conclusion that if I were to award the defendant the sum of $350,000 for the second expropriated property this would adequately cover every factor or element of value, including that of loss by disturbance of business, that could properly be taken into account and, at the same time, meet the tests of value to which I have referred. I, therefore, estimate the value of the second expropriated property as at the date of its expropriation at the sum of $350,000, and determine the amount of compensation to which the defendant is entitled accordingly.

In addition to the items of the defendant's claim which I have discussed it also claimed an allowance of $56,000 for compulsory taking. I dealt briefly with the claim for an allowance for compulsory taking in the *Thomas Lawson & Sons Limited* case (*supra*), at page 106, and repeat my observations herein. Mr. MacTavish sought to make a

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special case for the allowance in the present case but I find no justification for it. Where all the factors of value, including a claim for loss by disturbance, have been taken into account, and adequate compensation has been awarded, as I think has been done in the present case, I can see no justification for granting any additional allowance for compulsory taking and I have not done so. To grant the defendant in the present case an allowance of 10 per cent for compulsory taking would amount to giving it a bonus that would be wholly unwarranted. I repeat the suggestion that I have made previously that Parliament might well take steps to abolish any allowance for compulsory taking in Canada, as was done in England by the Acquisition of Land Act, 1919.

There remains only the question of interest. The defendant has been left in undisturbed occupation and possession of the expropriated property ever since the date of its expropriation, without payment of any rent for it. Under these circumstances, in accordance with the established rule of this Court, it is not entitled to any allowance of interest: *The King* v. *Manuel* (1); *The King* v. *Edwards* (2).

There will, therefore, be judgment declaring that the property described in paragraph 5 of the Information is vested in His Majesty the King as from May 19, 1944, and that described in paragraph 4 as from May 7, 1946; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $45,800 for the first expropriated property, together with interest thereon at the rate of 5 per cent per annum from May 19, 1944 to this date, and the sum of $350,000 for the second expropriated property, without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

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(1) (1915) 15 Ex C.R. 381. (2) (1946) Ex. C.R. 311.