

BETWEEN :

HIS MAJESTY THE KING, on the }
 Information of the Deputy Attorney }
 General of Canada,..... }

PLAINTIFF;

1951
 Oct. 15, 17,
 18
 Oct. 19

AND

NORTHERN EMPIRE THEATRES }
 LIMITED

DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, s. 47—Court may award less than amount of Crown's offer.

The plaintiff expropriated property in the settlement of South Porcupine. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held, that where the evidence in an expropriation case warrants an award of an amount less than that offered by the Information the Court is free to make such an award and is not bound by the terms of the offer.

2. That where the amount of the compensation to which the Court finds the defendant is entitled is less than the amount tendered by the Information the defendant is entitled to interest from the date of the expropriation only up to the date of the tender and the plaintiff is entitled to its costs subsequent to the service of the Information.

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

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

J. R. Langdon and *A. H. Laidlaw* for plaintiff.

S. C. Platus K.C. for defendant.

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

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On the conclusion of the trial the President (October 19, 1951) delivered the following judgment:

The Information exhibited herein shows that the lands described in paragraph 2 thereof were taken by His Majesty for the purpose of a public work under the Expropriation Act, R.S.C. 1927, chap. 64, and that the expropriation was completed by depositing a plan and description of the expropriated property in the office of Land Titles in and for the District of Cochrane in Ontario, in which the lands are situate, on October 16, 1950, pursuant to section 9 of the Act. Thereupon the lands became and are now vested in His Majesty and all the right, title or interest of the defendant therein or thereto was extinguished. Thereafter its claim was converted into a claim to the compensation money under section 23 of the Act which provided that it should stand in the stead of the expropriated property.

The parties have been unable 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 \$12,463, but the defendant by its statement of defence claimed \$23,000.

The expropriated property is in the settlement of South Porcupine and consists of three and a half lots at the southwest corner of Main Street and Commercial Avenue, lots 3 and 4 facing on Main Street and lot 5 and the west half of lot 6 on Commercial Avenue. It also includes land that was formerly a lane at the rear of lots 3 and 4 and excludes a strip of land reserved for a lane from the south side of lot 4 and the rear of the east half of lot 5. Altogether it has a frontage of 75·9 feet on Main Street and 175·0 feet on Commercial Avenue. At the date of the expropriation it was all vacant land except the west half of lot 5 which had a small frame dwelling on it facing on Commercial Avenue which had been rented at \$15 per month.

Mr. D. J. Mascioli, the managing director of the defendant, which operates moving picture theatres in Timmins, South Porcupine, Ansonville, New Liskeard and Sudbury, stated that the defendant acquired the lots in 1937 from Mr. Anthony Mascioli, a director of the defendant, who had bought them in his own name but on its behalf in

1936 from 3 separate owners, at a total cost of \$11,910.74, of which \$1,010 represented arrears of taxes from 1929 to 1935. Subsequently, arrangements for closing the lane at the rear of lots 3 and 4 and opening a new lane out of the south side of lot 4 and the rear of the east half of lot 5 were made with the Municipality of Tisdale, of which the settlement of South Porcupine is a part, which were concluded in 1944. Since then the defendant has held the property as a single unit. The property was acquired by the defendant for use in the future as a site for a moving picture theatre along more modern lines than the one which it now operates in South Porcupine when it should become necessary to do so and to ward off competition from any newcomer in the theatre business. It was a measure of foresight and protection. The defendant assembled the group of lots and the lane as a unit so that it would be able to build a theatre long enough for stores and a substantial lobby at the front and an adequate seating area behind it all on one floor so that it would not be necessary to build a balcony. Mr. Anthony Mascioli said that he could not remember what he had paid the individual owners of the lots, that the sum of \$10,900 was the total cost of acquiring the lots including commissions, fees and charges, and that he thought that he had taken the affidavits of value on the transfers to the defendant in 1937. The values thus sworn to by him as an officer of the defendant were \$5,000 for lots 3 and 4, \$1,300 for lot 5 and \$500 for the east half of lot 6, making a total of \$6,800. This I take as the defendant's own valuation of the several lots in 1937 when it took them over from Anthony Mascioli. Nothing was ever done with the property prior to the date of the expropriation. No steps were taken towards building a theatre on it and Mr. Mascioli could not, of course, say when in the future the construction of a theatre would be likely, but he did say that the defendant's theatre in South Porcupine, built in 1933, was not adequate, that it had only a very small lobby and limited facilities for its patrons, that they were increasingly going to Timmins to the better theatres there, that the theatre business at South Porcupine had been falling off during the last 2 or 3 years and that these facts tended to accelerate the possibility of building a new theatre in South Porcupine in the near future which could

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have been within 2 or 3 years. The building would also have been hastened if there were a threat of competition, which was unlikely. An improvement in conditions was another contingency that would have brought the construction nearer to realization.

It is well settled that the owner of expropriated property is entitled to have its 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. 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 test.

The same author also points out, at page 664, that "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". The Court must also, in accordance with the views expressed by Rand J. in the Supreme Court of Canada in *Diggon-Hibben Ltd. v. The King* (2), in addition to the elements and indications of value which a prudent purchaser would consider, take into account every factor of value involved in the concept of value to the owner whether it would affect the judgment of the purchaser or not. But it must not be forgotten that, while consideration must be given not only to the present use of the property but also to its potentialities and prospective advantages, it is only the present value, as at the date of the expropriation, of such potentialities and prospective advantages that falls to be determined: *The King v. Elgin Realty Company Limited* (3). And it should also be noted that the onus

(1) (1915) 15 Ex. C.R. 333.

(2) (1949) S.C.R. 712.

(3) (1943) S.C.R. 49.

of proof of value in expropriation cases lies on the owner of the expropriated property.

There is no dispute as to some of the advantages possessed by the property. It is two blocks north of the corner of Main Street and Bruce Avenue, the principal intersection in the settlement, Bruce Avenue being its main business street. It is thus reasonably centrally located. Its location also derives some benefit from the fact that it is immediately opposite the new Tisdale Township Municipal Building. Moreover, it has the advantage of being at a corner and having a lane all along its south boundary. There is also the fact that the property, being all held in one unit, lends itself to development, such as for a theatre, that would not be possible on a narrower or shallower piece of land. In addition, the property is served with good roads and water and sewer facilities. All of these considerations are factors of value to be taken into account.

As is not uncommon in expropriation cases there was a sharp conflict of opinion between the experts for the defendant and those for the plaintiff. Evidence and valuations were given for the defendant by Mr. J. E. Sullivan and Mr. J. W. Spooner, both of Timmins, and for the plaintiff by Mr. L. Sauder, Mr. F. Mills, Mr. B. Levinson and Mr. F. A. Holmes, all of South Porcupine. While, generally speaking at any rate, all the experts agreed on the advantages I have referred to and said that they had taken them into account in their valuations there was a sharp disagreement on the uses to which the property could have been advantageously put. Mr. Sullivan thought that by reason of its nearness to the business section and its size it could have been used as a site for a hotel, a motel, a large corner store or an apartment house but that its most advantageous use would have been for a moving picture theatre and stores in conjunction with it. Mr. Spooner was of a similar opinion. He thought that its best use would have been for a modern theatre with stores but that it could also have been used for a mercantile building or a modern hotel. The witnesses for the plaintiff were all of one mind in their opinion that the site could not have been advantageously used for a hotel, a motel, an apartment block or a general store. Mr. Sauder said that the property was outside the business section of the

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settlement and not a good site for any business. The others took a similar view. Mr. Mills thought that the site was not suitable for a hotel, a motel, an apartment block or a general store and Mr. Levinson considered it a poor location for any of these purposes. These witnesses know the situation in South Porcupine thoroughly and I have no hesitation in accepting their opinion. I cannot imagine any prudent person embarking upon any of these suggested developments in view of existing conditions. Such uses of the property may be put to one side. The view taken by the Court of the expropriated property and its surroundings confirms this opinion. This leaves only the suitability of the property for the use for which it was acquired, the likelihood of its being put to such use in the future and its value, as at the date of the expropriation, in the light of the likelihood or otherwise of such use.

Aside from the suggestions by Mr. D. J. Mascioli that certain factors tended towards the acceleration of the construction of a new theatre the evidence against the likelihood of such construction in the near future was overwhelming. Mr. Sullivan for the defendant saw no immediate need of a new theatre but a possible need in the future in 10 or 15 years and no need at all if South Porcupine did not boom. Mr. Spooner did not venture any opinion on the subject. But the witnesses from South Porcupine were clear in their opinions. While Mr. Sauder agreed that the most advantageous use of the property would have been for a theatre, he could not see any demand for a new theatre in 1950 and could not see how another theatre would ever be a paying proposition. The theatre business in South Porcupine was not good for a number of reasons which he enumerated. Mr. Mills thought that the property might have possibilities as a theatre site in the future and that its best use would have been to keep it vacant until needed for a new theatre, but said that there was no need of another theatre in South Porcupine at the present time and could not see any need for the next five years or for 10 years unless there was further development. Mr. Levinson said that there was no need of a new theatre now or in the future, that the present theatre was adequate for South Porcupine and that it could not support another one. Mr. Holmes

was of the opinion that there was no need of a new theatre now or in the future. Under the circumstances, while I agree that the expropriated property would have been a suitable site for a moving picture theatre I think that the evidence is conclusive that the likelihood of its use for such purpose in the near future was very remote.

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Before I consider the specific valuations of the experts I should review the evidence relating to general business conditions in South Porcupine and the state of the real estate market there and also refer to such evidence of sales as was given.

There was a difference of opinion as to business conditions in South Porcupine. There is no doubt that improvements have taken place there in recent years, such as the paving of streets and sidewalks, the improvement of highways, the extension of water and sewer facilities, the construction of a new municipal building and a new school, the erection of some new business buildings and the renovation of others and some extensions in the residential and business sections. The population of the settlement has grown from 3,112 in 1937 to 4,301 in 1950. But it cannot be said that business conditions in South Porcupine were good. This was admitted by Mr. Sullivan. The gold mining industry was having difficulties, miners were hard to get, mining costs were going up, there were occasional rumours of shutting down mines and the industry was continuously asking for higher prices for gold. Mr. Spooner was more optimistic. He said that the number of mines had increased and that they would continue in production for another 20 years and that South Porcupine was progressing. While Mr. Sauder thought that the mines in the South Porcupine area were good for another 30 years he could not see why South Porcupine would ever become much larger or that business in it would improve. It was too close to Timmins and its residents were increasingly going there for shopping and business purposes. Mr. Mills said that the condition of the gold mines was on the decline during the past 10 years, that this had an adverse effect on South Porcupine and that business conditions there were not good. Mr. Holmes thought that business had been bad there for the past 5 years and could not see any prospect of improvement. Mr. Levinson stated that business conditions had been

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very poor since 1942. In my opinion, the settlement is in a condition of uncertainty and living in the shadow of the future when the mines will in due course be depleted.

The evidence on the state of the real estate market in South Porcupine was also conflicting. Mr. Sullivan could not give any percentage of increase in land values in 1950 over 1937 but said that "probably land like that was 3 or 4 times its former value". He could not come closer than that. This was only a guess. On cross-examination he admitted that market values in the settlement were only fair and that the condition of the real estate market was quiet. Mr. Spooner expressed the opinion that property values in South Porcupine had increased by from 100 per cent to 150 per cent from 1937 to 1950 but admitted that they had been going down since 1946. The evidence of the plaintiff's witnesses was in sharp conflict. Mr. Sauder, who has lived in the settlement since 1911, said that there was no real estate market in 1950 especially for vacant land and that the situation had been the same for 4 or 5 years during which time there had been only 4 or 5 sales. In his opinion, the value of vacant land was not as high in 1950 as it had been in 1937. There had been a boom in 1937, which had started in 1936 and lasted a year or two, since which time there had been a slump in land values up to the present. I formed a favourable opinion of Mr. Sauder as he gave his evidence and am satisfied that he gave a true picture of real estate conditions in South Porcupine. Mr. Mills, whose knowledge of land values in the settlement is extensive, said that the demand for land was very low and on the downward grade since 1945 and was of the opinion that there had been very little change, if any, in land values in 1950 as compared with 1937. They were about the same. There had been no enhancement in values. He produced a graph showing a decline in the number of land transfers during the past few years. Mr. Levinson, who also impressed me favourably as a person who knew the situation as it really was, said that real estate conditions in South Porcupine in 1950 were very poor, that there had been an improvement in 1945, 1946 and 1947, but that after that there had been a recession and that, except on Bruce Avenue, vacant land in South Porcupine had decreased in value in 1950

as compared with 1937. There had been very little new construction, only 24 new units in the past 5 years. Mr. Holmes also stated that real estate conditions in South Porcupine had been terrible for 5 or 6 years and did not see any prospect of improvement.

There was very little evidence of actual sales of property in South Porcupine. Mr. Sullivan admitted that there were not many sales and only two sales were cited by Mr. Spooner. One of these was a sale of 56 feet on the south side of Bruce Avenue to Sam Bucovetsky Limited in 1947 for \$8,500. Of this property 40 feet was used as the site of a new store and 16 feet was sold for \$2,800. The second sale was of 50 feet on the north side of Bruce Avenue near the corner of Main Street to Mr. E. Grant in 1950 for \$5,000. Particulars were given by Mr. Mills of a third sale of 100 feet with a 14 room building on it at the corner of Crawford Street and Bloor Avenue in 1949 or 1950 for \$7,000.

I now come to the specific valuations made by the various experts. Mr. Sullivan valued the property at \$1.60 per square foot for an area of 13,256 square feet making a total valuation of \$21,209.60. Mr. Spooner built up his valuation in an elaborate manner. He took the sale to Sam Bucovetsky Limited as a base, assumed that the frontage of the expropriated property was equal in value to that of the Bucovetsky property, worked it out at \$1.48 per foot for a depth of 100 feet, multiplied this by 75.9 feet, giving \$11,233, added 38 per cent for the additional depth of the lots on Main Street by reason of the lots on Commercial Avenue, amounting to \$4,268, added a further \$3,000 for corner influence, making a total of \$18,501. To this he added 25 per cent for what he called utility or plottage value, amounting to \$4,625, and \$1,000 for the building, making a total of \$24,126. Then he took the sale of the Grant lot as a base, which worked out at \$100 per foot, multiplied this by 75.9 feet, giving him \$7,590, adding 38 per cent for depth, \$2,884, and \$3,000 for corner influence, making a total of \$13,474. Then he assumed that the expropriated property had a value one-third greater than that of the Grant property, amounting to \$4,491, making a total of \$17,965, to which he added 25 per cent

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for plottage, amounting to \$4,491, and \$1,000 for the building, making a total of \$23,456. The average of these two totals came to \$23,791 from which he arrived at his valuation of \$23,000. He said, after much hesitation, that he thought he could have sold the property in 1950 for \$23,000. It struck me that he did not have much confidence in this opinion.

The valuations put forward by the experts for the plaintiff were in sharp contrast. Mr. Sauder valued the lots making up the expropriated property individually at a total of \$3,400 and the building, which was in a dilapidated condition, at \$1,152, making a total of \$4,552. In his opinion, the market value of the property would be increased considerably if it was taken as one block of land and he put its value as a unit at twice the amount of the total of the values of the separate lots, namely, at \$6,800, to which he added \$1,152 for the building, making a total of \$7,952. But, in his opinion, the highest amount that the property could have been sold for in October, 1950, was \$6,000. Mr. Mills valued the lots individually at \$3,405 and the building at \$1,050, making a total of \$4,455, and put a value of two and a half times that amount for its value as a unit, making a valuation of \$11,137. He could not explain why he had done this, nor can I. It was his opinion that the highest amount for which the property could have been sold in 1950 was \$5,000. Mr. Levinson valued the lots and building individually at a total of \$3,200 to \$3,300 which he increased by 50 per cent because of the property being in one unit, making his valuation come to \$4,800 or \$4,900. He did not think he could have sold the property in 1950 and doubted whether he could have got over \$5,000 for it. Finally, Mr. Holmes put a valuation on the lots taken individually at a total of \$3,765 and \$750 for the building, making a total of \$4,515, and added 100 per cent as their increased value as a unit, making his valuation come to \$7,530. He thought it would have been difficult to sell the property in 1950 at a reasonable price.

I have no hesitation in rejecting the valuation made by Mr. Sullivan. In the first place, land in this part of the country is never sold on the basis of a price per square foot. Mr. Sullivan had never made such a sale or heard

of one. All sales are on the basis of a price per foot of frontage. Moreover, Mr. Sullivan had no basis at all for his valuation. He could not support it by any evidence of sales of comparable property. He had no record of any such sales and did not know of any. His valuation of the property should be dismissed as worthless. Likewise, I am of the view that Mr. Spooner's valuation was grossly excessive. There was a basic error in his assumption that the frontage of lots 3 and 4 of the expropriated property was equal in value to that of the Bucovetsky property or even that of the Grant property. These properties faced on the main business street of the settlement whereas the expropriated property was outside the business section. All the witnesses from South Porcupine were definitely of the view that each of the properties on Bruce Avenue was much more valuable per foot of frontage than lots 3 and 4 of the expropriated property and I agree with them. Then Mr. Spooner had no right to add both 38 per cent for depth and 25 per cent for plottage and his addition of \$3,000 for corner influence was wholly arbitrary. In my judgment, the acceptance of Mr. Spooner's valuation or anything like it could not possibly be justified.

I greatly prefer the evidence and opinions of the witnesses for the plaintiff to those of Mr. Sullivan and Mr. Spooner. I have already mentioned that I was favorably impressed by Mr. Sauder and Mr. Levinson. As I listened to their evidence and that of Mr. Mills and Mr. Holmes the impression grew on me that these men really knew the situation in South Porcupine and were giving the Court a true account of it. In my judgment, their opinion of what the property could have been sold for in 1950, namely, \$5,000 or at the most \$6,000, ought to be accepted. There is one other factor to be considered. Counsel for the defendant stressed the difficulty of assembling lots into a unit that would be adequate in length and width as a site for a theatre and evidence was put forward that there was no other site. I find it difficult to accept this evidence that no other suitable site could be found. Mr. Sauder said that he could assemble a block of 125 feet frontage and 94 feet in depth with some buildings on it partly vacant that would have to be wrecked that would be just as good a site

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for a theatre as the expropriated property or better. And Mr. Holmes also thought that he could find a suitable location.

As I view the evidence that I consider credible, I find myself unable to arrive at an estimate of value equal to the amount of the plaintiff's offer of \$12,463 contained in paragraph 4 of the Information and I am faced with the question whether I may make an adjudication in a sum less than the amount of such offer. I found myself in a similar situation in an expropriation case which I heard in Regina in 1943. There I had some doubt that I could make such an award and did not do so. On further consideration of the matter on my return to Ottawa I came to the conclusion that there was no bar to such a course if the evidence justified it. There are two ways in which the amount of compensation money to which the owner of expropriated property is entitled can be determined. One is by agreement and the other by adjudication and the two are exclusive of one another. Where proceedings are taken for an adjudication as is the case here it is the duty of the Court to follow the rules laid down by the Exchequer Court Act, R.S.C. 1927, chap. 34, for adjudicating upon claims. Under that head of the Act section 47 provides 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.

As I read this section, it is the duty of the Court to estimate the value of the expropriated property as at the date of the expropriation and to make an award accordingly. This necessarily implies an adjudication based on evidence. It follows, I think, that an award of a larger amount than the Court thinks is warranted by the evidence would not be an adjudication based on the evidence. It was urged that the Court could not go below the amount of the offer by reason of the fact that in paragraph (b) of the prayer of the Information a declaration is sought that the sum of \$12,463 is sufficient and just compensation but the answer to that is that paragraph (c) asks that it may

be declared "what amount is a sufficient and just compensation". This declaration is sought in case the prior one is not granted and I can see no reason why the amount declared to be sufficient and just should not just as possibly be less than the amount offered as more. Nor can the statement that the Crown is willing to pay a certain amount bind the Court. When the offer is not accepted the road is clear and there must be an adjudication by the Court without regard to its amount. I am, therefore, of the opinion that where the evidence in an expropriation case warrants an award of an amount less than that offered by the Information the Court is free to make such an award and is not bound by the terms of the offer.

In the present case, I have come to the conclusion that the amount of compensation money to which the defendant is entitled is less than the \$12,463 offered by the Information but, in view of recent judgments of the Supreme Court of Canada, more than the amount of \$6,000, which is all that the property could have been sold for, to cover factors of value to the owner in excess of realizable money value, such as the special purpose for which the defendant acquired the property. Since the amount of such value to the owner is a matter of uncertainty it would also seem that the case falls within the principle stated by Rand J. in *Diggon-Hibben Ltd. v. The King* (1) and calls for an allowance of 10 per cent for forcible taking, which I consider an unwarranted bonus that ought to be abolished.

In my opinion, the sum of \$11,000 would be sufficient compensation to the defendant for the loss of the expropriated property and adequate to cover every factor of value that the property possesses, including its value to the owner and including the allowance of 10 per cent for forcible taking, and I make an award accordingly.

In view of the fact that the amount of compensation money to which the Court finds the defendant entitled is less than the amount tendered it by the Information the defendant is entitled to interest at the rate of 5 per cent per annum from the date of expropriation only to March 28, 1951, the date of the tender.

And for a similar reason the plaintiff is entitled as against the defendant to its costs subsequent to the service of the Information.

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There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from October 16, 1950; 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 \$11,000 with interest thereon at the rate of 5 per cent per annum from October 16, 1950, to March 28, 1951; and that the plaintiff is entitled to costs as indicated to be taxed in the usual way.

Judgment accordingly.