

BETWEEN:

HER MAJESTY THE QUEEN, on the }
Information of the Deputy Attorney }
General of Canada }

PLAINTIFF;

Ottawa
1967
May 15-17
May 18

AND

HENRI SYLVIO GAUTHIER and }
THÉRÈSE GAUTHIER }

DEFENDANTS.

*Expropriation—Business property in commercial area taken by Crown—
Compensation for business disturbance—Principles for determining.*

In 1960 the Crown expropriated a parcel of land measuring 34½ feet by 69 feet in a commercially developed part of Ottawa. The owner carried on a wholesale tobacco and confectionery business in a building on the property and leased apartments on the upper floors at low rentals. The Court fixed the market value of the property at the time of expropriation at \$48,000 and allowed an additional \$4,000 for business disturbance, for which defendant had asked \$13,485.

Held, the amount to be allowed for business disturbance in this case is the amount over and above the property's market value which a reasonably prudent business man carrying on the business which the

1967
 THE QUEEN
 v.
 GAUTHIER
 et al.

owner carried on would have insisted upon receiving before selling the property, *viz* (a) the cost of acquiring equally suitable premises, (b) the cost of moving and re-establishing the business, (c) an amount to offset potential loss of business and increased costs during the transitional period, and (d) an amount to offset any apprehended depreciation in the profitability of the business from the change of location.

ACTION to determine compensation payable on expropriation of property.

Mrs. E. M. Thomas, Q.C. for appellant.

Gaston Carbonneau for defendants.

JACKETT P. (orally):—This is an action by the Attorney General of Canada to obtain a determination of the compensation payable in respect of a parcel of land that belonged to the defendant, Henri Sylvio Gauthier, and that was taken on June 20, 1962, under the *National Capital Act*¹ by the National Capital Commission for the purposes of that Act.

The parcel of land so taken is situate in the City of Ottawa on Sussex Street between George Street and York Street. It is about sixty-five feet north of George Street. It is rectangular, having a frontage on Sussex Street of 34½ feet and a depth of 69 feet and has therefore a total area of 2,380.5 square feet.²

¹ Chapter 37 of the Statutes of Canada, 1958.

² Mr. Gauthier's paper title was a title to an area that was 34 feet by 66 feet. By virtue of the possession by Mr. Gauthier and his predecessors in title of the building, which was 34½ feet by 69 feet and therefore encroached on the adjoining premises, Mr. Gauthier had, immediately prior to the expropriation, a possessory title to the area covered by the building that was not included in the land to which he had a paper title. This area was not taken by the plan and description filed on June 20, 1962. Theoretically, Mr. Gauthier was left with a possessory title to a strip of land 66 feet by ½ foot and a strip of land 3 feet by 34½ feet. The taking of the area that was expropriated left these remnants no value to Mr. Gauthier. Mr. Gauthier is therefore, strictly speaking, entitled to the value to him of what was taken and the value of what was left to him as injurious affection. It was agreed that payment of compensation should be made conditional on Mr. Gauthier giving Her Majesty a quit claim deed of what was left to him and that compensation should be assessed as though the whole of his property had been expropriated, which is equal to that which I have said he is strictly speaking entitled to. I have therefore worded my reasons as though the whole of his property had been expropriated.

The evidence as to the neighbourhood in which the expropriated property was situated is reasonably accurately summarized by borrowing the following description from the report of one of the real estate witnesses:

1967
 THE QUEEN
 v.
 GAUTHIER
 et al.
 ———
 Jackett P.

The subject property is located in a neighbourhood which is bounded by St. Patrick Street on the north, Dalhousie Street on the east, George Street on the south and Sussex Street on the west.

The neighbourhood dates back approximately 85 years and many of the buildings constructed in that period still remain. Some buildings have been torn down or demolished by fire and a limited number of new structures have taken their place. Some have been converted to parking lots to provide off street parking for Rideau Street one of the more dynamic commercial sections of the City of Ottawa.

The By-Ward Market located to the east of the subject and the Rideau Street commercial section is considered to be the main contributing factor for the commercial overflow in this neighbourhood.

The subject property fronts on Sussex Street which carries two way traffic to the City of Hull, numerous (*sic*) legations, Government buildings and the City Hall. This street is developed commercially on the east side within the neighbourhood and a row of temporary Government buildings occupy the west side. The east side has been static for some time due to the heavy traffic and parking restrictions.

The best commercial establishments in the neighbourhood are located on George Street, York Street, Dalhousie Street and the By-Ward Market where on street parking is provided. These, however, are only secondary to the establishments on Rideau Street. In addition to the commercial which usually provides residential accommodation above ground floor level, some residential is to be found. Residential accommodation in the older structures is for the most part occupied by the lower income bracket.

There were, at the time of the expropriation, no legal restrictions on the use that could be made of property where the expropriated property was except that there appears to have been a requirement that an organization called the "Building Appearance Committee" approve external design and materials.

At the time of the expropriation there was on the property a building that had been erected about 1879. It was in part a three-storey structure but had only one storey in the rear. The upper floors were, at the time of the expropriation, used as small, low-rental apartments. The ground floor and basement were used by the defendant, Henri Sylvio Gauthier, for a business that he carried on under the name of Eastern Sales Company.

From 1940 to 1945, Mr. Gauthier occupied the premises in question for the purposes of his business as a tenant. In 1945, he purchased that property for the sum of \$7,500.

1967
 THE QUEEN
 v.
 GAUTHIER
et al.
 Jackett P.

The business that Mr. Gauthier so carried on was that of a wholesale merchant who bought and sold tobacco (including cigarettes) and confectionery. His business was not, however, a typical wholesale business in that a substantial part—maybe 10 per cent—of his sales were made to persons who came to his premises in person and purchased goods that they carried away by hand. Another peculiarity of his business was that it involved frequent deliveries of goods to the premises when they were received from manufacturers and removal of such goods from the premises when they were taken away on the defendant's or customer's delivery trucks, but there was only one entrance, which was on Sussex street where parking was prohibited. This, however, as things worked out, was not disadvantageous because the parking of delivery vehicles during "on-loading" and "off-loading" was "tolerated" while all ordinary parking was prohibited, with the result that access to the premises in fact was better than it would have been on streets nearby where parking was "permitted". (There is a question in my mind as to whether this somewhat precarious state of affairs could have been relied on to continue indefinitely.)

The assessed value of the land for municipal taxes was

Land	\$ 7,000
Building	13,200
Total	<u>\$20,200</u>

The parties are agreed that the bare land market value of the expropriated property at the time of the expropriation was \$10 a square foot, which makes a total of \$23,805 for the 2,380.5 square foot area thereof. As it crystallized at trial, there is, however, a difference between the parties of \$32,185. The parties disagreed as to the market value at the time of the expropriation of the expropriated property as improved by the building that was on it at that time. The plaintiff said that that value was \$46,000 and the defendant said that it was \$64,700, making a difference of \$18,700. In addition, the defendant said that, by reason of business disturbance, the property had a value to him as an owner in possession at the time of the expropriation of \$13,485 over and above its market value. The plaintiff said that there was no such special value to the defendant as an

owner in possession. These two sums of \$18,700 and \$13,485 make a total amount in dispute, as I have indicated, of \$32,185.

1967
THE QUEEN
v.
GAUTHIER
et al.
—
Jackett P.
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So far as the market value of the property as improved is concerned, there is no sale of a comparable property that gives any clear and definite lead toward a conclusion as to the amount for which, in June 1962, a willing vendor would have sold to a willing purchaser both being influenced by such knowledge of the relevant factors as were known to the general public at that time. Some conclusion must, however, be reached on that question having regard to such information as is available.

One of the witnesses, Louis Titley, who is a real estate broker with long experience in Ottawa and in the particular part of Ottawa with which we are concerned, appears to have thought that a sale would not be comparable unless it was a sale "of property being sold against an owner occupier's interest". This of course confuses "market value" with value to the particular owner. Mr. Titley did not, therefore, put forth any sale as being comparable as far as market value is concerned. He did, however, express an opinion based on an "Income Approach to Value". Without analyzing his figures in detail, I note particularly that he formed an opinion that the business part of the building on the expropriated property had a fair rental value of \$6,612 per annum and that a potential purchaser of this particular property would have been prepared to pay an amount over and above the value of the bare land in respect of the building on the basis that would be recoverable out of revenues from the property as improved by the building over a period of twenty years. (This period is apparently referred to as the "economic life" of the building.) Mr. Titley formed an opinion, based on his "Income Approach", that the market value of the land and building in June, 1962, was

Land	\$23,100
Building	41,600
Total	<u>\$64,700</u>

The principal witness on market value for the plaintiff was James A. Crawford, a real estate dealer who also had

1967
THE QUEEN
v.
GAUTHIER
et al.
Jackett P.

had a great deal of experience in Ottawa and the area in question. I was particularly impressed with Mr. Crawford's evidence in that he based his conclusions on his experience as to how persons contemplating the purchase of this class of property in that particular part of Ottawa came to their decisions as to what they would be prepared to pay for particular properties.

Recognizing that there were no comparable sales that gave an obvious indication as to market value of the land and building, Mr. Crawford nevertheless made an analysis of sales that have a reasonable degree of comparability. That analysis, in my opinion, is of very real assistance in that it gives some indication as to what has happened in the market. The result of that analysis was to bring Mr. Crawford to a figure of \$20 per square foot for the expropriated property in June, 1962.

As I understand it, this is the amount that would be indicated for the expropriated property by the prices paid for the properties that were the subjects of the sales analyzed after making appropriate allowances, in the light of his long experience, for each of the significant differences—e.g. time, location, physical development—between the subjects of those sales and the expropriated property as and when expropriated. That figure of \$20 per square foot would give a market value of \$47,610 for the expropriated property at that time.³

Mr. Crawford himself did not regard the result so reached as being as good an indication of market value as that which he obtained on his estimate of value by the "Income Approach". The significant differences between his analysis on this approach and that of Mr. Titley were with reference to the question as to what constituted a fair annual rental for the business part of the premises, which he put at \$5,400, and as to the period during which a potential purchaser would expect to recover the part of the purchase price paid for the building, i.e. the economic life of the building, which he put at ten years. These two differences were the principal factors which brought him,

³ Mr. Crawford had understood that the area of the expropriated property was 2,244 square feet and that its value, on this approach, was therefore about \$45,000.

on this approach, to a market value of \$46,000 rather than the amount of \$64,700 reached by Mr. Titley by an otherwise parallel line of reasoning.

1967
THE QUEEN
v.
GAUTHIER
et al.
Jackett P.

It should be emphasized that Mr. Crawford's own view as a real estate man was that the amount of \$46,000 is the best estimate that can be made of the market value of the expropriated property in June, 1962.

The east side of Sussex Street between George Street and St. Patrick Street was at the time of the expropriation predominantly commercial on the ground floor level and has been aptly described by at least one of the witnesses as having been "static" for some time. There is no indication in the evidence that there was any potentiality for property in this area, in the contemplation of those who might be regarded as constituting the market at that time, that would affect market value. In other words, the 1962 use was the highest and best use of the property in this area in so far as possible use was reflected in market demand. There is no suggestion that property in this area was being purchased for other uses of a higher and better character or that speculators considered purchasing such property at that time by reason of potentialities for higher and better uses. As already indicated, the area could be described as "static" and there is no evidence of a tendency for land or building prices in the area to be on the increase during any period of years immediately before or immediately after the date of the expropriation.

Market value of land with an old building on it is not something that can be computed mathematically. It must be recognized that, within broad limits, it must be estimated arbitrarily. After considering and weighing, as best I can, all the evidence, I decide that the market value of the expropriated land with the building on it, at the time of the expropriation, was \$48,000. In doing so, I have studied with care Mr. Crawford's analysis of the most comparable sales and I have found his income approach a very useful aid. I prefer his income approach to that of Mr. Titley because I accept his judgment as to what is a reasonable rent for the part of the premises used for the business and as to the remaining economic life of the building from a possible purchaser's point of view as being sounder and more in accordance with the realities of the market place.

1967
 THE QUEEN
 v.
 GAUTHIER
 et al.
 Jakkett P.

The remaining question is: What amount, if any, should be allowed for what is commonly referred to as business disturbance? In my view, this question, in this case, resolves itself to this: What amount, if any, over and above the market value of the expropriated property, would a reasonably prudent business man in Mr. Gauthier's position (i.e. carrying on this particular business in these premises that belonged to him) have insisted upon receiving before he would have sold the property? Obviously, a person owning the property in which he is carrying on a business that he intends to carry on indefinitely will not, if he finds the property suitable for his business, sell that property unless he is offered an amount that will cover

- (a) the amount of the cost of acquiring premises equally suitable for his business,
- (b) the amount of the cost of transferring his business (including moving expenses and all costs incidental to re-establishing his business),
- (c) an amount to offset potential loss of business and increased costs during the transitional period, and
- (d) an amount to offset any apprehended depreciation in the profitability of his business as a result of a change in the location of his business.

In my view, one cannot determine mathematically any of these amounts as factors in determining the price that a business man owning his own premises would insist on before he would agree to sell. It is, nevertheless, necessary to determine as closely as possible what price would persuade a reasonably prudent man in that position to sell. The matter must be approached in a reasonable way and on the assumption that the former owner is not going to be unreasonable.

On all the evidence, I have come to the conclusion that a reasonable assessment of the amount for which a reasonably prudent business man in Mr. Gauthier's position would have thought that he could obtain equivalent premises (with equivalent rentable apartments) is the amount at which I have assessed the market value of the expropriated property, namely, \$48,000, and that a generous, but not

excessive, estimate of the amount that such a man could reasonably have insisted upon to cover the other factors to which I have referred is \$4,000.⁴

1967
THE QUEEN
v.
GAUTHIER
et al.
Jackett P.

In making this assessment, I have had in mind the obvious expenses and losses involved in moving the business, but I have not accepted as having been established, that there were no suitable alternative premises in the By Ward Market area, and I have not found therefore that, in alternative premises, there would be higher permanent costs or permanent loss of customers. I recognize, however, that a reasonably prudent business man would have apprehensions along these lines although he would also recognize that he might be able to take advantage of a move to make his operation more efficient and to attract new customers. On the other hand, I have, I think rightly, had in mind that it was reasonable for Mr. Gauthier to feel, as he did, that, at his age in 1962, he preferred to live out the balance of his business life in the premises where he was and with the arrangements and goodwill that he had built up over the years and that it would therefore have been probable that a reasonably prudent man in his position might well have refused to move voluntarily for as low a price as a younger man would accept.

I therefore assess the compensation payable for the expropriation of the defendant's property at \$52,000.

The parties are agreed that, on October 28, 1965, the defendant Henri Sylvio Gauthier was paid on account of such compensation the sum of \$37,500 and that, prior to that date, the defendant is to be regarded as having continued in possession of the expropriated property but, on and after that date, the plaintiff is to be regarded as having been in possession. The defendant is therefore entitled to be paid the balance of \$14,500, together with interest at the rate of 5 per cent per annum, on such amount from October 28, 1965 to this day. The defendant is also entitled to its costs of this action to be taxed.

⁴In my view, if the cost of acquiring equally suitable premises had been less than the market value of the expropriated property, the former owner would have been entitled to the amount arrived at by this approach or the market value, whichever is the greater.