BETWEEN:

NATIONAL CAPITAL COMMISSION ....PLAINTIFF;

AND

MARION MILLEN .....DEFENDANT.

1964

June 23-26, 29, 30

July 21

*Expropriation—National Capital Act, S. of C. 1958, c. 37—Determination of amount of compensation—Factors to be considered in determining compensation—Sentimental and emotional factors to be ignored—Only economic and pecuniary aspects to be considered.*

This is an action to determine the compensation payable to the defendant for the expropriation by the plaintiff of residential property owned by her, which consists of a house and lot of about 3.5 acres and which has a frontage of 400 feet on Woodroffe Avenue at a point 2.3 miles south of the southerly boundary of the City of Ottawa. The property was in an area that had been zoned for commercial and institutional purposes as well as for residential purposes and which was subject to a subdivision control by-law.

*Held:* That in determining the value of the expropriated property to the owner at the time of expropriation it must be assumed that the owner is a sensible, prudent person, interested only in the economic and pecuniary aspects of the matter and that any sentimental or emotional elements that might have some bearing on the particular owner's attitude towards the expropriated property must be ignored.

2. That the correct amount of compensation is what a reasonably prudent person in the defendant's position on the date of the expropriation, finding herself in possession but without title, would have paid for the property sooner than be ejected. In determining this amount the defendant would have to consider that if she moved from the property in question she would have to acquire equivalent premises, pay for temporary accommodation and storage of her furniture unless permitted to stay in the expropriated property until she acquired possession of other property and pay for moving expenses. In addition, her rugs, drapes and other furnishings almost certainly could not be fully utilized in another property and there would be the inconvenience and personal effort, miscellaneous expenses and general disruption of family life that are necessarily incidental to moving a family from one residence and neighbourhood to another.

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INFORMATION by the National Capital Commission to have the amount of compensation payable to defendant determined by the Court.

The action was tried by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

*G. W. Ainslie* and *M. L. Ainsley* for plaintiff.

*G. J. Gorman* and *P. B. Tetro* for defendant.

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

JACKETT P. now (July 21, 1964) delivered the following judgment:

This is an action to determine the compensation payable to the defendant in respect of property expropriated on June 13, 1961 under the *National Capital Act,* chapter 37, of the Statutes of Canada, 1958, which property, immediately, prior to the expropriation, belonged to the defendant.

At the request of the defendant, in which the plaintiff joined, the Court took a view, on the first day of the trial, of the expropriated property and certain properties in respect of which it was anticipated by counsel that evidence would be given by expert witnesses. This view was taken in the presence of counsel for both parties.

The expropriated land is part of a larger parcel, having an area of five acres, that was purchased by the defendant on June 19, 1952 for $1,500. In 1959, the defendant sold four lots off the parcel so purchased by her. The total of the proceeds from the sales of the four lots was $6,800. Each such lot was 100 feet by 150 feet. The portion of the original parcel that was remaining to the defendant after those sales contained 3.462 acres and is the property that was expropriated.

The expropriated land has a frontage of 400 feet on Woodroffe Avenue at a point that is 2.3 miles south from the southerly boundary of the City of Ottawa 3 miles south from the new expressway known as the "Queensway" and 3½ miles south from Carling Avenue. The property has a depth of 377.5 feet. The property was not part of a subdivision but, during the period that the defendant owned it, a residential subdivision, known as "Merivale Gardens", was established and partly built up adjacent to the four

lots that were sold by the defendant off her property. The expropriated property was in an area that had been designated as an area of subdivision controlled by a by-law that had the effect of prohibiting any sale of a small parcel or lot outside a subdivision without approval of a planning board. It was also in an area that had been zoned for commercial and institutional purposes as well as for residential purposes.

The property was not served by sanitary sewers, storm sewers or piped in water and any residence on it consequently had to be served by a private water well and septic tank. Under the zoning by-law, no building so served could be built on a property of less than 15,000 square feet.

At the time of the expropriation, there was, to the east of the expropriated property, the four lots that the defendant had sold, on which good residences had been or were being built, and beyond that the subdivision known as Merivale Gardens; to the north, was a property that had recently been acquired by the National Capital Commission and that had been maintained by the previous owner in a park-like state; to the west, across Woodroffe Avenue, which was an arterial highway, was a farm property that had recently been acquired by the plaintiff; and to the south, was a property with a residence, a stable, and an exercise track for horses, occupied by a trucker who kept two trucks there when not in use; and beyond that was a "Gas Bar" where gasoline, oil, soft drinks, etc., were sold.

At the date of the expropriation, there was on the expropriated land a single family residence, an attached garage, a semi-circular asphalt driveway and a swimming pool. The residence and garage were approximately in the middle of the expropriated property being about 179 feet back from Woodroffe Avenue, on which they faced, 160 feet from the rear of the property, 165 feet from the north side of the property, and 144 feet from the south side of the property.

The residence is a one-story, two-bedroom bungalow with a screened porch and an attached two-car garage. It is a wooden structure. The exterior walls are partly composed of log siding and are partly of "featheredge" construction. The roof is covered with asphalt shingles. The exterior walls of the garage are of "featheredge" construction. Its roof is flat and consists of tar and gravel. There is a basement under part only of the house and it has not been finished.

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The house was built by the defendant and her husband, who acted as their own architect in the designing and supervising of construction except that they employed an architect to turn their plans into proper working plans. They also acted as their own main contractor, contracting out certain parts of the work, such as the excavation, stone work, framing, concrete in the basement, floor joists, rafters and plywood on the living-room walls.

The construction of the improvements on the expropriated property commenced in 1954. By 1957, the main part of the work was completed. No evidence was given as to the total cost to the defendants of the improvements, but the following costs were proven:

(a) the swimming pool, installed in the spring of 1959, together with an adjacent patio, cost $5,319.50;

(b) the asphalt driveway cost $995;

(c) an area at the rear of the house was sodded and seeded on June 22, 1959 at a cost of $225.

The expropriated property was assessed in 1960, for 1961, by the Township of Nepean as follows:

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| Land | $1,475.00 |
| Buildings | 3,325.00 |
| | $4,800.00 |

The defendant remained in possession of the expropriated property after the expropriation and was still in possession at the time of the trial. On September 28, 1961, the plaintiff paid to the defendant $22,500 on account of compensation.

By her pleadings, as amended at trial, the defendant claims the following amounts:

| | |
|---|---|
| Value to the defendant of the lands (being the cost of acquiring a similar parcel of land in a comparable location) | $ 28,000 |
| Cost of replacing improvements less depreciation | 36,000 |
| Inconvenience, loss of benefits due to location of land, moving costs and other expenses | 6,200 |
| TOTAL | $ 70,200 |

During argument, counsel for the defendant submitted

that, on the evidence, the defendant was entitled to $59,205, made up as follows:

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| Land | $ 19,500 |
| Improvements | 37,000 |
| Disturbance (goods, chattels and moving expenses) | 2,655 |
| | $ 59,205 |

By the Information, the plaintiff offered $42,000 by way of compensation. This is the full amount of the compensation the plaintiff was willing to pay voluntarily in respect of the expropriation of the property referred to above and there would have to be deducted therefrom the advance payment that I have mentioned.

The basis of "value to the defendant" of the land, apart from improvements, indicated by the Statement of Defence, i.e., "the cost of acquiring a similar parcel of land in a comparable location", has not been supported by the defendant's evidence. Evidence was led that in 1964 the defendant purchased a lot at Hog's Back on the Rideau Canal for a site for a new house at a cost of $10,200. The evidence did not, however, persuade me that this lot was "a similar parcel of land in a comparable location". Quite the contrary, my conclusion was that, apart from size, this lot was quite superior in every way to the expropriated parcel of land, and that its location adjacent to Canal Reserve land belonging to the National Capital Commission probably gave it much of the advantage of size that the expropriated property had. This 1964 transaction is no aid, in my view, to determining the compensation payable for the expropriation of the defendant's property in 1961.

Mr. Henry P. Wright, an appraiser called by the defendant, expressed the opinion that the expropriated property, apart from the improvements, was worth $19,500. In doing so, he took the position that the highest and best use of the land was as three lots for "custom built residences"—a centre one, for the improvements that were there at the time of the expropriation, and one on each side, each slightly narrower than the centre one. He also took the view that these lots were lots of the kind that would interest a very limited class of somewhat egotistical person desiring

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a site on which he could build a spectacular class of residence that would attract the attention of the passer-by. Purchases of lots on which to build houses for speculative purposes or on which more modest custom houses were to be built should therefore, in his opinion, be ignored. Moreover, he ruled out sales by subdividers on the ground that they tended to sell for low prices to get their lots moving. In his search for comparable properties, Mr. Wright went rather far afield, going as far as Rothwell Heights on the far side of Ottawa. I must say immediately that I was not satisfied by the evidence that the expropriated property was of the character that would attract the favourable notice of the limited class of persons to whom Mr. Wright referred. The evidence about the better parts of Rothwell Heights and the evidence about the expropriated property does not convince me that they are in any way comparable. Location, elevation, view and surrounding developments are some of the bases for comparison that indicate to me that sales in Rothwell Heights can be of no help in determining the land value of the expropriated property in 1961.

Mr. Wright also referred to sales of lots in two nearby subdivisions, Pine Glen Annex and Grenfell Glen, certain sales in an area some two or three miles further from Ottawa on Woodroffe Avenue, and a sale of one of the lots that adjoined the expropriated property. I have carefully considered Mr. Wright's evidence about these sales and I have not been able to convince myself that his conclusions based on them as to the value of the expropriated property, divided into hypothetical building lots, represent what a willing purchaser would have paid to a willing vendor for the expropriated property, without any of its improvements, in 1961.

Eldon H. Petry, an appraiser, gave evidence for the plaintiff as to the value of the expropriated land apart from the improvements in 1961. In his view, the land, apart from improvements, had a value at that time of $12,000. He referred to a number of sales of lots in subdivisions in the immediate general area which, in his opinion, had sufficient in common with the expropriated land to make a useful comparison possible. The sales upon which he placed greatest weight were of lots in a nearby good class subdivision, Grenfell Glen, having residences of the same general class as the expropriated residence. These lots had,

however, only a 100 foot frontage and a 150 foot depth compared with the 400 foot frontage and 377.5 foot depth of the expropriated land. In the absence of more helpful evidence, I accept Mr. Petry's evidence that the sales upon which he relied are the most useful and I am satisfied that his basis for allowing for the differences between the lots that were sold and the expropriated land is, if anything, favourable to the defendant.

After carefully reviewing the reasoning of the expert witnesses and giving consideration to the relevant characteristics of the expropriated land, I am satisfied that its market value, apart from its improvements, in 1961 was not higher than $12,000. It is inconceivable to me that a reasonably prudent person would, at that time, have paid more than $12,000 for this lot for a single residence on a very busy arterial highway without any real protection against the possibility of inferior developments on surrounding properties. On the other hand, if the property were to be divided into three lots, it would cease, in my view, to have any of the attributes of an "estate like" property on which the defendant bases her claim to a high market value for her land. I, therefore, accept the plaintiff's submission that the value of the land alone was $12,000.

Having concluded that the property, had it been clear of improvements in 1961, would have had a value of $12,000 in the market, I must next consider by what amount the market value was increased by reason of the improvements that were on it at that time.

Four different witnesses gave evidence as to the replacement cost of the improvements. In so far as their evidence depends on their estimate of replacement costs, I do not accept the evidence of Mr. Wright for the defendant or that of Mr. Petry for the plaintiff having regard to the fact that each party has produced an experienced contractor who has given evidence as to actual replacement cost.

Mr. Benson for the defendant gave evidence that, in 1964, he would have undertaken to rebuild the defendant's house and other improvements with materials that were the same as those that were in them for $38,799. In presenting this estimate in the course of his evidence, he said that he had prepared it very rapidly and that there should be deducted from that amount $448 for errors he had since discovered, leaving $38,351. He further expressed the opinion that, in

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1961, the material costs would have been approximately the same as in 1964 but that the cost of labour would have been $840 less, and, on cross examination, he admitted claiming $480 too much for profit, resulting in a 1961 replacement cost, according to Mr. Benson, of about $37,000. (This probably contains an allowance for the swimming pool that, according to Mr. Benson's evidence, is somewhat excessive but I cannot determine how excessive. In the use I make of this evidence, the precise amount is not of very great significance.)

Mr. Johnson, for the plaintiff, gave evidence that he would have tendered to replace the defendant's improvements in 1961 for $29,440. He did not include anything for certain improvements, i.e., sodding, trees and sidewalks. On cross examination, it appeared that he had estimated on a less precise basis than Mr. Benson, had omitted one or two matters entirely and had underestimated on others. On the other hand, he did give evidence that made it appear entirely probable that some of Mr. Benson's allowances were on the excessive side. In addition, Mr. Benson himself gave evidence that his estimate was for a quality of workmanship superior to that which had gone into the improvements on the expropriated property.

The evidence is not such that I can determine replacement cost of the improvements with precision. Weighing all the evidence, I am of opinion that the improvements could have been replaced in 1961 for an amount in the neighbourhood of $34,000.

Having concluded that the cost of replacing the improvements in 1961 was $34,000, I still have to come to some conclusion as to the amount by which the improvements increased the amount that a willing purchaser would have paid to a willing vendor in 1961 over and above the market value of the unimproved land of $12,000.

Evidence that was given as to depreciation was not very helpful. A witness for the plaintiff deducted 5 per cent from cost for depreciation but this did not represent anything other than physical depreciation and was not intended to represent an opinion as to market value. Mr. Wright for the defendant adopted a text book percentage of 8.9 per cent if the assumption is that the improvements were three years old in 1961, and of 11.7 per cent if they were four years old. Considering the history of the construction as

detailed in the evidence of the defendant, I think the latter hypothesis is the right one and, on that basis, the depreciation would be 11.7 per cent of 34,000 or close to $4,000. Putting myself in the position of a potential purchaser in 1961, I think that this is not an undue amount to take off replacement cost in deciding how much I would be prepared to pay for this four year old house and other improvements in addition to $12,000 for the value of the land.

My conclusion is that the market value of the expropriated property in 1961 was $42,000. This conclusion, in my view, is supported by Mr. Petry's evidence of four sales of comparable residential properties in nearby subdivisions in 1961. These sales were made at prices ranging from $34,000 to $39,400. Based on these sales, Mr. Petry expressed the opinion that the expropriated property had a value in 1961 of $38,000. Having regard to the very great difficulty involved in making a comparison between residential properties, I am not prepared to agree that this opinion establishes the value of the expropriated property, but this evidence does establish that it is not unreasonable to conceive of such residences having been sold at prices in the neighbourhood of $40,000 and I therefore regard it as supporting evidence for my conclusion on other evidence that the market value of the property in 1961 was $42,000. I obtain some support for my conclusion that the market value of this property does not exceed $42,000 from other evidence of the experts. Mr. Wright said that, if the defendant had gone to him and told him she must sell the property, he would have advised her to divide the land into three lots facing on Woodroffe Avenue and put up for sale the centre one with the improvements on it, keeping the other two lots for future disposition. In his view, she should have put up the residence lot in June, 1961 for $40,000 in the expectation that she might have to reduce it by 5 per cent, that is to $38,000, and indeed, that, by September, she might have to come down to $32,000 or $33,000. Mr. Petry, the plaintiff's expert, says he would have advised the defendant to list the property as it was expropriated at $38,000 and that she would have been wise to accept any offer over $35,000.

I now come to the final question. What was the value of the expropriated property to the defendant in 1961? I am conscious that, in deciding this question, I must do so on the assumption that the defendant is a sensible, prudent

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person interested only in the economic and pecuniary aspects of the matter and that I must ignore any sentimental or emotional elements that might have some bearing on the particular defendant's attitude towards the expropriated property. Having that consideration in mind, I have to decide what a reasonably prudent person in the defendant's position on June 13, 1961, finding herself in possession but without title, would have paid for the property sooner than be ejected.

There are several facts and opinions in the record that have to be taken into consideration in this connection. For example:

(1) if the defendant suddenly ceased to have the right to occupy the expropriated property, she would have to contemplate

(a) acquiring equivalent premises which, in theory at least, she could do for the market value of the expropriated property, i.e., $42,000;

(b) unless she and her family were permitted to remain on in the expropriated property during the period necessarily involved in finding, and acquiring possession of, equivalent premises, paying for temporary accommodation for herself and her family and for storage for her furniture and other goods and effects (in the case of an expropriation, she would know that she would have no right to continue in possession after the expropriation but that, ordinarily, the Crown suffers the former owner to remain for unspecified periods);

(c) paying moving expenses;

(d) the almost certain impossibility of utilizing to advantage in different premises rugs, drapes and furnishings of all kinds that have been acquired for the expropriated property; and

(e) the inconvenience and personal effort, the miscellaneous expenses and the general disruption of family life that are necessarily incidental to moving a family from one residence and neighbourhood to another residence and neighbourhood; and

(2) Mr. Petry says that, if he were advising the defendant on a sale with immediate delivery of possession, he would advise her that it would have to be for

something more than $41,300 and he could not say how much more.

In taking such matters into consideration, the prudent owner would estimate, as well as he could, the factors that can be estimated and would give effect in some rough and ready way to the other factors in deciding on a total lump sum that he would be prepared to pay in addition to market value rather than be ejected from the property. Here, I am in a position to make a finding that the loss in respect of unsuitability of personal property of all kinds and the cost of moving would be somewhere between $2,000 and $2,500. I am of opinion that a prudent person, knowing that it was going to cost him $42,000 to obtain equivalent premises and that it was going to cost between $2,000 and $2,500 to reestablish his family in those premises, and knowing that, if he were to give up the premises he was occupying, he would be embarking on a course of action that might lead him into substantial additional expenses as well as considerable discomfort for, and strain on, all the members of his family, would be prepared to pay $46,000 for title to and immediate right to possession of the property in which he is established rather than give up the premises either immediately, or at some indefinite time according to the whim of a government department. I therefore find that the value of the expropriated property to the defendant in 1961 was $46,000. There will therefore be judgment in favour of the defendant for $46,000 (less the advance payment of $22,500 and without interest) and costs. If there is any difficulty in settling the minutes of judgment, the matter may be spoken to.

*Judgment accordingly.*