E. R. HABLIZEL AND KATHERINE HABLIZEL (*Claimants*) ..... } APPELLANTS; 1960 *Nov. 22, 23

AND

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) } RESPONDENT. 1961 Apr. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Strip of land—Non-conforming use of remaining land—Basis of valuation by Court of Appeal upheld.

The appellants owned certain lands, roughly triangular in shape, on which they grew and sold nursery stock. As the nursery business had been established prior to the passage of a by-law which zoned the property for single family detached residences, it was a legal non-conforming use of the land. A municipal by-law expropriated a strip from the frontage of the land for a grade separation and the subsequent raising of the grade cut off access to the street. The appellants could not get out on the second side of their property because of a railway line, nor for business purposes on the remaining side, where they had sold a parcel of land but had made no reservation for right of access for business purposes. The purchaser had conveyed a one-foot reservation to the township, which initially permitted the reservation to be crossed for any purpose, but later only on condition that the appellants used their property in conformity with the zoning by-law. As a result, the appellants could use the land only for residential purposes. The appellants appealed to this Court from a judgment of the Court of Appeal reducing the amount of the award made by the arbitrator in arbitration proceedings resulting from the expropriation.

Held: The appeal should be dismissed, subject to a correction in the item of land for growing purposes.

The only difference in the amount of compensation between the arbitrator and the Court of Appeal was in the value of the land. The former reached his figure by allowing a specified amount per foot on an assumed frontage, whereas the Court of Appeal separated the value of that part of the land used as a sales station from that part used for growing purposes.

The Court of Appeal was right in its finding of error in the award of the arbitrator in his finding of value to the owner based on a valuation of land as though it were open for unrestricted commercial development, whereas it had but a limited non-conforming use.

The Court of Appeal correctly regarded the earnings record of the business as significant in arriving at value to the owner. This evidence had been overlooked by the arbitrator. The appellant's evidence of higher earnings to be attributed to the business based upon an annual accretion in the value of the inventory, which did not show in the income tax return, was not entitled to any weight.

Evidence of value of commercial property used for a sales station, and evidence of value of commercial properties in the neighbourhood had little or no relation to the valuation of the appellant's non-conforming user, when the only alternative use to which the land would be put was for residential purposes.

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Abbott and Judson JJ.

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APPEAL from a judgment of the Court of Appeal for Ontario, reducing the amount of the award of the arbitrator in arbitration proceedings. Appeal dismissed.

B. W. Grossberg, Q.C., and *H. J. Bliss*, for the claimants, appellants.

A. P. G. Joy, Q.C., and *G. M. Mace*, for the contestant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellants were the claimants in arbitration proceedings resulting from the expropriation of part of their lands on the south side of Dundas Street in the Township of Etobicoke. The arbitrator awarded them the sum of $143,000. On the appeal of the municipality the Court of Appeal reduced this to $55,825. The appellants now seek to have the arbitrator's award restored or, in the alternative, an increase in the amount awarded by the Court of Appeal.

In 1936, the appellants purchased a parcel of land containing 8.77 acres for the sum of $4,000. In 1953, they sold 6 acres for $45,000. They were then left with a parcel of 2.77 acres roughly triangular in shape and fronting on Dundas Street. The frontage on Dundas Street was 563 feet but because of the shape the usable frontage has been taken to be about 400 feet.

The appellants grew and sold nursery stock on the premises. They also had a larger property at Caledon which they used for the growing of other stock which they used in their landscaping business.

The lands on Dundas Street were zoned by the municipality for single family detached residences. The nursery business was established before the zoning by-law was passed and was therefore a legal, non-conforming use of the land.

On March 6, 1956, the Municipality of Metropolitan Toronto passed a by-law which expropriated a strip of land on the Dundas Street frontage containing .773 acres for a grade separation at the railway. The subsequent raising of the grade on Dundas Street has cut the appellants off from access to that street. They cannot get out on the east side because of the Canadian Pacific Railway line; they cannot get out on the south side for business purposes because of their sale of the 6 acres. When they sold this property they

made no reservation of a right of access for business purposes. The purchaser of the 6 acres conveyed a one-foot reservation to the Township of Etobicoke and this blocks the end of Cedarcrest Drive which was established on the six-acre subdivision. The township permitted the reservation to be crossed for any purpose up to October 31, 1958, but only afterwards on the condition that the appellants used their property in conformity with the zoning by-law. The appellants were, therefore, finally in this position. They had a house on a two-acre lot which they could use only for residential purposes. They had no access to Dundas Street and they could not continue their business on the property.

The arbitrator accepted the appellants' submission that the highest and best use of the land before the expropriation was for the nursery business and determined the compensation on that basis as follows:

Value before expropriation—Land	$120,000.00
Buildings	35,000.00
	$155,000.00
Less value after expropriation—	
Land and buildings	25,000.00
	$130,000.00
Compulsory taking 10 per cent.	13,000.00
Total	$143,000.00

The Court of Appeal also valued the land before expropriation on the basis of its business use but divided it into two parts and made separate valuations of that part of the land used for the growing of stock and that part used for its sale. On this basis, the Court of Appeal determined the compensation as follows:

Land for sales station purposes (approximately ½ acre)	$ 30,000.00
Land for growing purposes (about 1½ acres)	10,750.00
Buildings	35,000.00
	$ 75,750.00
Less value of remaining property	25,000.00
	$ 50,750.00
Compulsory taking 10 per cent.	5,075.00
Total	$ 55,825.00

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It is apparent from these figures that the only difference between the learned arbitrator and the Court of Appeal is in the value of the land—in the one case $120,000 and in the other $40,750. The arbitrator reached his figure by allowing $300 per foot on an assumed frontage of 400 feet. The Court of Appeal, being of opinion that the appellants were carrying on a combined business, allowed $30,000 for that part used as a sales station, calculated on the basis of $300 per foot frontage of 100 feet and $7,500 per acre for that part used for growing purposes.

The Court of Appeal found error in the award of the learned arbitrator in his finding of value to the owner based on a valuation of land as though it were open for unrestricted commercial development, whereas it had but a limited non-conforming use. What is being expropriated here is a strip of land containing .773 acres and the non-conforming use. The task of determining value to the owner, on the evidence given in this case was not an easy one but evidence of value based upon a right of commercial development could be of no assistance. In my respectful opinion the Court of Appeal was right in approaching the problem as it did. The compensation of $30,000 as the value of the land attributable to the sales station was generous, based as it was upon the high figures which were given for commercial land. The value of $7,500 per acre for land used for growing purposes was the highest permitted by the evidence and on this point, as is pointed out in the reasons of the Court of Appeal, there was no contradiction.

The learned arbitrator made a finding that the claimant as a prudent man would pay $143,000 rather than be deprived of the property expropriated. To me this is a startling figure. I cannot see how the claimant or any prudent man in his position could possibly think of paying such a sum. The Court of Appeal correctly regarded the earnings record of this business as significant on this point. The income tax returns, which included earnings attributable to the Caledon property, showed the following net earnings:

1951	$3,801.18
1952	4,347.84
1953	4,514.01
1954	4,925.04
1955	4,641.77
1956	3,678.13
1957	7,116.02

In arriving at these earnings no deductions were made for wages of the claimant nor for interest on invested capital. I think that it is clear on these statements that the business was doing nothing more than producing a modest wage for one of the owners. Yet the original award gives the owners a sum which would produce, if invested at 5 per cent per annum, more than the entire business ever brought in, and that, without risk or the necessity of working. In addition they are left with the house and 2 acres.

The appellant submits that the Court of Appeal was in error in its emphasis upon the significance of the earnings of the business as shown by the income tax statements and also in its failure to attribute higher earnings to the business based upon an annual accretion in the value of the inventory which did not show in the income tax return. On the second point it is quite impossible to come to a conclusion which differs from that of the arbitrator and the Court of Appeal. Neither tribunal thought that the evidence on this matter, which came entirely from the appellant, was entitled to any weight. I am also of the opinion that there was no error in the Court of Appeal in its estimate of the importance of the earnings from the business in arriving at value to the owner and that this evidence was overlooked by the arbitrator when he made his finding that the appellant "as a prudent man would pay $143,000 rather than be deprived of the property expropriated".

The award of the arbitrator ignored the fact that the use of the land was a non-conforming use and that the only change that could be made was to a use for single family detached residences. The Court of Appeal was right in its opinion that evidence of value of commercial property on Yonge Street, used for a sales station, and evidence of value of commercial properties in the neighbourhood had little or no relation to the valuation of the appellant's non-conforming use when the only alternative use to which the land would be put was for residential purposes as above defined.

My conclusion therefore is that the Court of Appeal was correct in its review of this award and that no error has been shown except in the item of land for growing purposes (about $1\frac{1}{2}$ acres)—$10,750. Both parties agree that this figure, as a matter of calculation, should be approximately

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$18,000. The parties can agree on the precise figure and the total amount to which the award should be increased. Subject to this, the appeal should be dismissed with costs.

It should be noted that both the arbitrator and the Court of Appeal made a 10 per cent allowance for compulsory taking. The arbitrator stated that loss of stock and merchandise arising out of business disturbance was included in this item. There was no cross-appeal on this point. I mention this matter because the propriety of this allowance is under consideration in this Court in two other reserved cases and has not been raised in this case.

Appeal dismissed with costs.

Solicitors for the appellants: Levinter, Grossberg, Shapiro & Dryden, Toronto.

Solicitor for the respondent: C. Frank Moore, Toronto.

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*PRESENT: Kerwin C.J. and Locke, Abbott, Martland and Judson JJ.