1967
*June 14, 15, 16
1968
Jan. 23

CANADIAN MEMORIAL CHIROPRACTIC COLLEGE (*Claimant*) APPELLANT;

AND

THE CORPORATION OF THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Fee simple in strip of land through claimant's property expropriated for subway construction—Subsequent agreement that only subsurface easement would be taken—Compensation award.

Costs—Cross-appeal on question of costs—Refusal by Supreme Court of Canada to interfere with disposition made in Court of Appeal—Matter one of discretion for Court of Appeal.

The respondent municipality expropriated a portion of the premises of the appellant college for purposes of subway construction. An arbitrator awarded the appellant the sum of $770,000, which amount included $70,000 for business disturbance. On appeal the award was reduced to $143,500. This sum was made up of $100,000 for the land, $8,500 for additional maintenance during the construction period and $35,000 to cover inconvenience and disruption over a long period of time, including the possible additional expense of subfootings for any buildings which the college might erect over the subway in the future.

The notice of expropriation expropriated the fee simple in a strip of land through the centre of the college property. However, the Court of Appeal found that, as a result of negotiations, an agreement was reached that the municipality would take not the fee simple but a subsurface easement.

From the order of the Court of Appeal the college appealed to this Court. The municipality cross-appealed on the award of $100,000 for the value of the land and also on the question of costs.

Held: The appeal and cross-appeal should be dismissed.

As held by the Court of Appeal, what was taken, pursuant to the agreement, was a permanent exclusive right under the surface of the land. The compensation to be awarded was for the value of what was taken and an amount to represent the diminution in value, if any, in the remaining lands. The Court of Appeal awarded $143,500 as full compensation for the lands taken, including all damage necessarily resulting from the expropriation of the land, plus interest. This Court was of opinion that it should not interfere with that award.

As to the cross-appeal on the question of costs, it was held that this Court should not interfere in a matter of costs with a disposition made in the Court of Appeal. The matter was one of discretion for them.

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*PRESENT: Cartwright, Abbott, Judson, Ritchie and Spence JJ.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from and varying an arbitrator's award of compensation for expropriation.

H. G. Chappell, Q.C., G. F. Henderson, Q.C., and *June M. Bushell,* for the appellant.

W. B. Williston, Q.C., George Mace and *R. J. Rolls,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—An arbitrator awarded the Canadian Memorial Chiropractic College the sum of $770,000 for the expropriation of a portion of its premises in the City of Toronto. The amount included $70,000 for business disturbance. On appeal the award was reduced to $143,500. This sum was made up of $100,000 for the land, $8,500 for additional maintenance cost during the construction period and $35,000 to cover inconvenience and disruption over a long period of time, including the possible additional expense of subfootings for any buildings which the college may erect over the subway in the future.

The by-law of the municipality was passed on April 21, 1959, for the purpose of the construction of an east-west subway by the Toronto Transit Commission. This subway runs through the middle of the college property.

A brief description of this property is necessary. It has a frontage of approximately 70 feet on Bloor Street, by a depth of 217 feet. This property was acquired in 1955 for $55,000. There was an old three-storey building on the property at that time containing 37 rooms. It had been used as a rooming-house. Immediately after the acquisition of this property, at a cost of $159,650, the college constructed a building of brick veneer construction 60 feet by 90 feet in dimensions. This building was referred to throughout the proceedings as the Henderson Building, and it was in this building that the teaching was done. The old building was used for administration purposes.

In 1957, 1958 and 1959 the college purchased three old houses on Prince Arthur Avenue. These houses backed upon the original purchase on Bloor Street. The purchase prices were $19,600, $22,500 and $22,000, a total of

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$64,100. The result of these acquisitions was that in 1959, when the by-law was passed, the college owned a block of land having a frontage on the north side of Bloor Street of approximately 70 feet and on the south side of Prince Arthur Avenue of 61 feet 3 inches, and having an approximate depth of 385 feet. The total cost of the acquisition of all the lands and the cost of constructing the Henderson Building was $278,650. At the time of expropriation the Prince Arthur Avenue houses were not being used by the college. They had been purchased with an eye to expansion and they were rented at this time. The land expropriated was a strip approximately 80 feet in width through the centre of the land. It included the northerly 37 feet of the Henderson Building and the balance of the strip was vacant land behind the houses fronting on Prince Arthur Avenue.

The notice of expropriation expropriated the fee simple in this strip. The Court of Appeal, however, has found that, as a result of negotiations, an agreement was reached that the municipality would take not the fee simple but a subsurface easement. By an agreement in writing dated November 6, 1961, the college agreed to convey to the municipality a permanent subsurface easement for an amount to be determined by agreement or arbitration. The following are the terms of the agreement:

> By Indenture dated the 6th day of November, 1961, duly executed by the College under its corporate seal and the signatures of its President and Secretary-Treasurer, the College agreed to grant a permanent sub-surface easement under the lands more particularly described therein, and below a place more particularly described therein, for an amount to be determined either by mutual agreement or by arbitration. The said grant contained, inter alia, the following terms and provisions:
>
> WHEREAS the Metropolitan Corporation requires a sub-surface easement under the lands hereinafter described; and
>
> WHEREAS the Metropolitan Corporation has agreed to pay the sum of $10,000.00 to the Grantor as part payment on account of the ultimate compensation which may be found to be payable for the easement as hereinafter mentioned.
>
> THEREFORE the Grantor agrees to grant a permanent sub-surface easement under the said lands more particularly described as follows:
>
> . . . to The Municipality of Metropolitan Toronto for an amount to be determined either by mutual agreement between the parties or by arbitration;
>
> The said sum of $10,000 is to be paid to the Grantor by the Metropolitan Corporation upon the delivery of this Agreement to the Metropolitan Corporation as part payment on account of the ultimate

compensation which may be found to be payable as aforesaid for the easement required by the Metropolitan Corporation under the said lands and the said sum of $10,000.00 shall be deducted from the ultimate compensation.

The balance of the said compensation shall be paid to the Grantor upon delivery to the Metropolitan Corporation of a transfer of the easement required including the consent of any parties who may have an interest in the said lands.

The municipality made payments on account from time to time totalling $50,000.

The Court of Appeal held, and with this I agree, that

Pursuant to the agreement what was taken was a permanent exclusive right under the surface of the land. The compensation to be awarded is for the value of what was taken and an amount to represent the diminution in value, if any, in the remaining lands.

The Court of Appeal put a value of $100,000 on the land taken and added to that the two items already mentioned totalling $43,500.

Three witnesses connected with the college in an official capacity gave evidence of the figures that they would have paid to avoid the expropriation and its attendant frustration. These figures were: $900,000, $1,000,000, $1,000,000. In the appellant's factum filed on this appeal, these figures were built up to $1,599,155.67. All these figures are meaningless. One big item in them is the claim for the demolition and rebuilding of the Henderson Building. Instead of the rear 37 feet of the Henderson Building being torn down, it was underpinned and the subway construction went on on that basis. The head of Cloke Construction Company, the firm that built the Henderson Building, said that the necessary repairs to the Henderson Building could be done at the cost of $9,029. Another contractor said it could be done for $9,780.

In any event, any claim for damage done during the course of construction of the subway was not before the arbitrator. This claim under the existing legislation could only be made against the Toronto Transit Commission. A writ was issued but no statement of claim was ever filed.

In spite of the length of the arbitration, on which I shall comment later, there was very little evidence given on the subject of the value of the lands expropriated. Mr. H. L. Croft, the appraiser called on behalf of the college, gave his opinion that the value of the lands expropriated by By-law

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No. 955 was $123,420 for the 82 foot strip. If the lands on either side of the subway were returned to the college after completion of the construction, Mr. Croft was of the opinion that the lands taken would have a value of $99,509. These amounts are based upon his definition of market value, and take into account the damage to the land from all causes including not only the value of the land actually taken but also injurious affection to the land remaining arising out of the expropriation.

It was argued by Metro that Mr. Croft's opinion was erroneous because he admitted that two of the comparable sales he used were in an area governed by zoning which permitted a greater use of the lands than the college's lands and further because he made no adjustments for depth in his comparables. He further assumed that the whole fee in the land was expropriated, whereas this was not the case, and he did not consider that the college could still enjoy the use of the lands over the subway structure.

Mr. P. J. Garton, an appraiser called by Metro, valued the loss of the permanent subsurface easement, including loss from all causes including damage to the remainder, at $44,100 plus the sum of $4,196 as the value of the temporary working easement, making a total of $48,296.

Based on this evidence, the municipality has cross-appealed on the award of $100,000 for the value of the land. The submission is that the Court of Appeal erred in awarding to the college the sum of $100,000 as the value of the subsurface easement based on the market value of the fee of the lands as determined by its highest and best use. It may be that the Court of Appeal took a somewhat generous view of the evidence in favour of the college. Its award is $143,500 as full compensation for the lands taken, including all damage necessarily resulting from the expropriation of the land, plus interest at 5 per cent per annum on the unpaid balance of compensation from December 15, 1959, until the date of payment. I do not think that this Court should interfere with this award.

There is also a cross-appeal on the question of costs. The arbitration took 55 days to complete. Thirty-seven days were taken up with a consideration of damage to the Henderson Building. There are 52 volumes of evidence, comprising 6,920 pages. According to the calculation of

counsel for Metro, 4,940 of these pages were taken up with this irrelevant evidence. Objections were made from time to time by counsel for Metro but were overruled. There are also eight volumes of exhibits, comprising 1,255 pages. The order of the Court of Appeal allows the appeal with costs but only allows Metro half the cost for the transcript of evidence and the preparation of the appeal books.

The college has been awarded its costs of the arbitration. It might well have been ordered to pay the costs for 37 days of this hearing or have been deprived of costs for those days. However, I do not think that we should interfere in a matter of costs with a disposition made in the Court of Appeal. The matter is one of discretion for them. But in view of the favourable disposition of costs in the Court of Appeal, I would not allow the college any costs of the cross-appeal, which, in any event, took but a short time in this Court.

I would dismiss the appeal with costs and I would also dismiss the cross-appeal but without costs.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the appellant: Chappell, Walsh & Davidson, Toronto.

Solicitor for the respondent: A. P. G. Joy, Toronto.