1949

*Feb. 3, 4
*Oct. 4

DIGGON-HIBBEN, LIMITED .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Large business—Compensation—What is to be determined—Value to owner—Disturbance claim—Compulsory taking—Exchequer Court Act, R.S.C. 1927, c. 34, s. 47—Expropriation Act, R.S.C. 1927, c. 64.

In an expropriation of property on which a large business was being carried on.

Held: That what is to be determined is the value to the owner as it existed at the time of the taking and not to the taker; this value includes all advantages which the land possesses and should take into account losses by reason of disturbance.

Held: Also, that s. 47 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, neither declares the right of an owner to receive compensation nor defines the quantum but merely the date as of which the latter is to be determined.

Held: Further, that in the circumstances of this case an allowance of ten per cent of the value of the land for compulsory taking—although not a matter of right in all cases—should be made in addition to the amount awarded at the trial.

Per The Chief Justice and Locke J. (dissenting): An allowance of ten per cent for compulsory taking is not a matter of right and can only be justified as a part of the valuation and in the circumstances of this case should not be allowed.

*Present: Rinfret C.J. and Taschereau, Rand, Estey and Locke J.J.

Cedars Rapids Manufacturing and Power Co. v. *Lacoste* [1914] A.C. 569; *Pastoral Finance Assoc. Ltd.* v. *The Minister,* [1914] A.C. 1083; *Vyricherla Narayana* v. *The Revenue Officer,* [1939] A.C. 302; *Commissioners of Inland Revenue* v. *Glasgow and S.W.Ry.,* (1887) 12 A.C. 315 and *Irving Oil Co. Ltd.* v. *The King,* [1946] S.C.R. 551 referred to.

APPEAL from the judgment of the President of the Exchequer Court of Canada, Thorson J., awarding to the appellant the sum of $120,000 in full compensation for the property expropriated by the Crown under the *Expropriation Act,* R.S.C. 1927, c. 64. The Crown had offered $99,670, while appellant had claimed $232,165.34. The appellant appealed to this Court for an increase of the award granted by the Court below.

J. A. Byers for the appellant.

F. P. Varcoe, K.C. and *W. R. Jackett* for the respondent.

THE CHIEF JUSTICE (dissenting): I agree with the reasons of my brother Locke and would dismiss the appeal with costs.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.: In the case of *Irving Oil Company* v. *The King* (1), it was held that while an allowance of 10 per cent for compulsory taking is not a matter of right, in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here; in fact in the general character of the two situations there is no difference whatever. For that reason, I think the allowance should be made. The value of the land has not been specifically found by the President of the Exchequer Court, but a consideration of his reasons satisfies me that he had in mind something in the neighbourhood of $100,000. I would, therefore, add $10,000 to the amount awarded by him.

In the course of the trial and in his reasons, the President expressed certain views on that rule for determining compensation which defines it as the value of the land to the owner. This formulation not only contrasts the value to the owner as distinguished from the value to the taker, but

(1) [1946] S.C.R. 551.

1949

DIGGON-HIBBEN LTD. v. THE KING

Rand J.

embodies another sense; i.e. the content of value to the owner as against other possible owners. In *Pastoral Finance Association* v. *The Minister* (1), Lord Moulton stated it in the latter aspect in these words:

> Probably the most practical form in which the matter can be put is that they (the owners) were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

The question arises here in connection with the claim for disturbance of possession, including expenses of moving, damages to or loss of fixtures, and for interruption of business generally. The debate is whether these are to be taken as elements of the value of the land to the owner or items of an independent claim for damages. There is no serious dispute that they should be allowed; that they must be such as can be brought within the scope of the "value of the land to the owner" has not been questioned; and what is at issue in the particular items is in reality a conceptual refinement which is devoid of practical significance.

In *Vyricherla Narayana* v. *The Revenue Officer* (2), Lord Romer observed that the statement, "value to the owner" was not, in strictness, accurate. The land, for instance, he said, may have for the vendor a sentimental value far in excess of its market value. Accepting this as a proper correction in verbal accuracy, it does not affect the rule as adopted in this country, because value of that sort has never been taken to be within it. But I should remark that the precise question before Lord Romer was the basis of compensation when the only possible purchaser was the expropriating authority.

It would seem, however, that the meaning of Lord Moulton's language has been somewhat misconceived by the President. In the present case these questions were asked:

> Q. Are you able to express an opinion as to whether a purchaser would be willing to pay more than $98,670 for the property in view of the fact that the defendant would suffer some loss or disturbance rather than fail to get the property?
>
> A. No, I think that would be—the defendant might not then be a willing vendor.
>
> Q. How much do you think a prospective purchaser who is anxious to get the property might be prepared to pay to the vendor in view of the disturbance factors that are present?
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> A. Yes, I think he would pay more for it.

(1) [1914] A.C. 1083. (2) [1939] A.C. 302.

And in the reasons there is the following:

In arriving at this valuation, Mr. Winslow did not take any disturbance to the defendant into account, but expressed the opinion that an anxious purchaser might be willing to meet the owner's disturbance claims by paying from $10,000 to $20,000 more than the amount of his valuation sooner than fail to obtain the property.

It is obvious that the purchaser will pay according to the strength or value of his interest or his "anxiety" to obtain the property and to nothing else. He is not concerned with the consequences of disturbance to the owner. The statement means, as Mr. Varcoe on the argument frankly conceded, that the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it. It is assumed, in the situation here, that he is to continue in business. In this we have no need of an imaginary market, purchase, or interest; we have the real interest of the owner, and its measurement in value is the task for the Court. The rule applies to cases such as this where the possibilities of the land for which the claim is made are actually realized by the owner in the use to which he has put it: *Irving Oil Company* v. *The King* (*supra*). A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes; and this Court in the case mentioned was confirmed in its conception of the rule by the fact that in the definition of the word "land" in the Expropriation Act the word "damages" is included, a word which does not appear in the definition clause of the English Act. But all such subsidiary items involved in the disturbance of possession and the direct result of the forcible taking become embraced within the actual value of the land to the owner as fully as any other feature of it. I do not mean to imply that this rule is a formula for all cases. There are so many different situations to be met in the use of lands, that in some of them, as for example, those calling for reinstatement, or that dealt with in The Prince's Street Gardens Arbitration, reported in Cripps on Compensation, 8th Ed., at p. 916, in both

1949

DIGGON-HIBBEN LTD. v. THE KING

Rand J.

of which values other than commercial or economic are present, its application would be difficult if not impossible.

Section 47 of the *Exchequer Court Act* has been drawn into the question. In *Toronto* v. *Brown* (1), Duff, J. in a review of characteristic authority, treats a right to compensation as the necessary implication and assumption of the Expropriation Act, in which, if I may say so, I think him entirely right. Section 47 is a procedural provision which, likewise assuming that right, fixes the time as of which the compensation is to be ascertained; but that it is intended to constitute the provision from which alone the right arises and that it contains a precise and restrictive definition of the compensation to be made is an interpretation for which neither in its history nor in its language is there any warrant.

I would, therefore, allow the appeal with costs and vary the judgment below by adding to it the sum of $10,000.

ESTEY J.: His Majesty The King in the right of the Dominion of Canada under the provisions of the *Expropriation Act,* R.S.C. 1927, c. 64, as of February 18, 1946, expropriated lots 1599, 1600, 1601 and 1602 in the City of Victoria.

The appellant owned these lots and thereon conducted a wholesale and retail business in books, stationery, business supplies, office furniture, a lending library, and also operated printing presses and equipment for catering to many types of printing requirements.

Section 23 of the *Expropriation Act* provides:

> 23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property.

Section 2(*d*) of the *Expropriation Act* defines "land" as follows:

> 2. In this Act, unless the context otherwise requires:
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> . . . . . .
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> (*d*) "land" includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act.

(1) (1917) 55 S.C.R. 153 at 189.

When the parties failed to agree as to the compensation the Attorney-General for Canada commenced these proceedings under sec. 19(*a*) of the *Exchequer Court Act*:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) Every claim against the Crown for property taken for any public purpose.

Then sec. 47 of the *Exchequer Court Act* specifies that the value shall be determined as of the date the property was taken.

The decision in *Irving Oil Co. Ltd.* v. *The King* (1) determines the issues in this case. There, as here, a business was operated on the premises and it was held, in accord with the established principles, that the compensation awarded included the value of the land, the cost of moving and other expenses and damages (as this word is used in 2(*d*)) and 10 per cent for compulsory taking. Kerwin, J., with whom the Chief Justice agreed stated at p. 556:

> . . . the principle in this class of case is that the displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which compensation was claimed was directly attributable to the taking of the lands.

Rand J., at p. 561:

> The clause "shall stand in the stead of such land or property" can only mean that, with the compensation money in the hands of the owner, he is in the equivalent position of holding his land or property instead of the money. He is, therefore, under that section, in the sense indicated, to be made economically whole.

The well-known cases of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2) and *Pastoral Finance Assoc. Ltd.* v. *The Minister* (3) were cited and followed. It is the value to the owner and not the market value or value to the purchaser that must be determined. In the determination of that value to the owner various items may be considered and these will vary according to the circumstances of particular cases. The total of the items that may properly be taken into account determines the value to the owner. *Commissioners of Inland Revenue* v. *Glasgow and S.W. Ry.* (4). There the land was acquired under statutory authority and the jury in assessing the compensation made the award under three headings. The precise question there determined was that the £9499 8s. 3d.,

(1) [1946] S.C.R. 551.
(2) [1914] A.C. 569.
(3) [1914] A.C. 1083.
(4) (1887) 12 A.C. 315.

1949

DIGGON-HIBBEN LTD. v. THE KING

Estey, J.

being the compensation for loss of business, should be regarded as part of the consideration in determining the stamp duty. Lord Halsbury at p. 321 stated:

> Now the language of the legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the goodwill" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation.

The learned President with respect to the property accepted the evidence of Mr. Winslow. There was a substantial difference in the values expressed but Mr. Winslow was not at great variance with some others. In any event, the learned President heard the witnesses and had the benefit of a view of the premises, and I think his conclusion with respect to the value of the property should be accepted:

> I was very favourably impressed by the evidence given by Mr. Winslow on behalf of the defendant. He made a valuation of the property as a whole of $98,670.
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> . . . . . .
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> Having regard to the evidence given, the opinions of the experts, the view taken by the Court and the arguments of counsel, and having taken into account the various factors and elements of value that have been brought to the attention of the Court, including the defendant's claims for disturbance, I have come to the conclusion that if I were to award the defendant the sum of $120,000 for the expropriated property this would adequately cover every element of value that could properly be taken into account, and at the same time meet the tests of value that the governing cases lay down. I think that a prudent purchaser, anxious to obtain the property, might well have been willing to pay that amount rather than fail to obtain it.

The learned President considered the losses and expenses under the heading of "Disturbance Allowance" and stated he would not fix the amount thereof higher than $20,000. The items claimed under this heading by the appellant totalled $99,714. The first of $4,000 covered surveys, plans and appraisals and executive time searching for suitable premises. The evidence disclosed that much of this work was undertaken in order to effect improvements in the general conduct of the business quite apart from

any question of expropriation. Even if in an appropriate case some such an allowance might have been made, the evidence here does not establish the actual work and the cost thereof in that connection. In fact the appellant's witness admitted that only a minor part thereof was claimed and suggested the amount of $850 but did not in any way indicate what this covered or how it was computed. I am therefore in agreement with the learned President's refusal to allow this amount.

The balance of $95,714 included actual moving expenses and increased cost resulting from moving. Since the hearing before the learned President the appellant has altered its plans with the result that counsel reduced many and abandoned certain of the items that were pressed before the learned President, until the items, apart from those to be immediately discussed, totalled between $20,000 and $25,000.

The other items making up the total of $95,714 consisted mainly of claims based upon an estimated loss of sales and consequent loss of profits over a period of five years. A perusal of the evidence submitted to establish this loss is not convincing apart from that incurred in the actual moving and allowed for under a separate heading. In fact the secretary-treasurer of the appellant when asked: "The move might be beneficial?" replied: "I admit that possibility also but I put in a figure because there is a possibility of a loss." Moreover, counsel for the appellant informed us that since the hearing other premises have been obtained which it may be assumed are more satisfactory. Quite apart from this latter factor, however, I am in agreement with the learned President that upon the evidence the items are not established and cannot be allowed.

The learned President made no allowance for compulsory taking. He apparently adopted a valuation of the property at about $100,000 and stated that he could not fix the disturbance allowance higher than $20,000 and allowed as a total compensation $120,000.

The allowance for compulsory taking is founded upon a long established practice in the Courts and is granted as part of the compensation. It is a factor in the compensation separate and apart from what would be included as

1949

DIGGON-HIBBEN LTD. v. THE KING

Estey, J.

disturbance allowance. So well established was the practice in Great Britain that as early as 1890 when it was deemed undesirable to make this allowance in connection with certain properties a statute was enacted to that effect (s. 21, of the *Housing of the Working Classes Act,* 1890, 53 & 54 Vict., c. 70). It was there provided that when land was taken in an unhealthy area no "additional allowance in respect of compulsory purchase" shall be made. The distinction between the allowance for disturbance and that for compulsory taking was emphasized in Great Britain in 1919 with the passage of the Acquisition of Land (*Assessment of Compensation Act,* 1919) where in sec. 2(1) it is specifically provided that an allowance for compulsory taking is not permitted under that Act while in sec. 2(6) it is specifically provided that rule 2 should not affect the allowance for disturbance. This provision is dealt with in *Horn* v. *Sunderland Corp.* (1). In this Court the allowance for compulsory taking was granted in *Irving Oil Co. Ltd.* v. *The King* (2) and prior thereto in *The King* v. *Trudel* (3); *The King* v. *Hunting, et al* (4); *The King* v. *Hearn* (5).

The amount allowed may be varied and there are cases where, having regard to the circumstances, no allowance should be made, but, with great respect, the circumstances in this case do not distinguish it from these cases in which an amount for compulsory taking was allowed. This amount is computed on a percentage of the value of the land, and therefore the sum of $120,000 should be altered by adding thereto the sum of $10,000 for compulsory taking.

The judgment appealed from should be so varied and the appellant should have its costs of this appeal.

LOCKE J. (dissenting): This is an appeal from a judgment of the Exchequer Court whereby it was found that the amount of compensation to which the appellant was entitled for its property in the City of Victoria, expropriated by the Crown under the provisions of the *Expropriation Act,* R.S.C. 1927, cap. 64, was the sum of $120,000. The lands taken consisted of Lots 1599, 1600, 1601 and

(1) (1941) 2 K.B. 26.
(2) [1946] S.C.R. 551.
(3) (1914) 49 S.C.R. 501.
(4) (1917) 32 D.L.R. 331.
(5) (1917) 55 S.C.R. 562.

1602, constituting a rectangular block having a sixty foot frontage on Government Street and a like frontage on Langley Street. Upon this property there was a two-story building wherein the appellant has carried on since 1919 the business of a wholesale and retail dealer in books, stationery, office furniture and other like supplies, and has operated a printing establishment. The information filed by the Crown alleged that a sum of $99,670 was sufficient to compensate for the taking of the said lands and premises and for the loss and damage alleged to have been caused by such taking. The appellant by its defence asserted that it was entitled to the sum of $232,165.34 and interest. Particulars of this claim furnished by the appellant were as follows:

1. Value to the owner of the said lands and premises and compulsory dispossession of the same	$132,451.00
2. Surveys, plans and search for new and suitable premises	4,000.00
3. Actual moving costs resulting from the expropriation	41,710.31
4. Increased costs of operations resulting from the removal	54,004.03
	$232,165.34

As to the value to be assigned to the land, the buildings and certain fixtures forming part of the freehold which the appellant would be unable to remove and as to the value of which there was no conflict, there was the usual wide divergence of opinion among the expert witnesses called. For the owners, Mr. George A. Okell, a former city assessor for the City of Victoria, was of the opinion that if $10,000 to $15,000 was spent upon the building the revenue returns from rental would justify a valuation of from $180,000 to $185,000, while admitting that at the time of expropriation in 1946, when business rentals were subject to the Rental Regulations, he did not think it could have been sold for that amount. The building on the property was a composite of three buildings erected on Lots 1599, 1600 and 1601 some forty or fifty years ago, and a structure erected on Lot 1602 in 1932 at a cost of

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

$8,000. As to these buildings, Mr. Charles F. Dawson, District Resident Architect at Victoria of the Department of Public Works for Canada, was of the opinion that they had outlived their usefulness. He had examined them and estimated that in 1946, at the time of the expropriation, it would have cost $54,349 to replace them with similar new construction and considered that from that figure there should be a deduction of 40 per cent for depreciation In addition, the witness estimated the value of the boiler room on the property, which was of more recent construction, at $5,000 and the value of the fixtures which would be left by the appellant when vacating at $10,750. Mr. James G. Watts, an employee of an appraisal company, estimated the depreciated value of the buildings as approximately $52,000. Of the witnesses called for the Crown, Mr. F. E. Winslow, the local manager of the Royal Trust Company and who had occupied that position for something more than thirty years, considered the market value of the property, including the fixtures, to have been $98,750 as of the date of the expropriation. He further expressed the opinion that a purchaser anxious to obtain the property might have paid from $10,000 to $20,000 in excess of that amount for vacant possession. Mr. F. B. J. Stephenson, the manager of a company engaged in the real estate business in Victoria and who had been engaged in that occupation for some thirty years, valued the property at $102,970, including his own valuation of the fixtures of $7,500, and expressed the opinion that he could have sold the property for that amount in February, 1946. Mr. H. C. Holmes who had had a long experience in real estate in Victoria, arrived at a valuation of $110,000 basing this on what he considered would be the net rental return from the property, which he considered would be roughly 4 per cent of the figure mentioned. In addition to this evidence, it was shown that the property was assessed by the City of Victoria at $38,870 and that upon the books of the appellant company the land was carried at $15,805.14 and the building at $30,784.22, a total of $46,589.36, against which depreciation had been taken over the years in the amount of $7,728.11, showing a net book value of $38,861.25.

In the particulars of the appellant's claim to the amount claimed for the lands and premises there was added an amount for compulsory dispossession, the total being $132,451. The remainder of the claim consisted of three items, the first being for surveys, plans and expenditures in searching for new and suitable premises in the sum of $4,000. Under a general heading purporting to show actual moving costs, in addition to estimated cartage of $1,200, there were large items such as a prospective lag in sales in the appellant's new premises during the first year of $25,000, an estimated loss of gross income on sales during a period of from five to ten days while moving in the sum of $5,809.15 and an estimated loss of 10 per cent on five years advertising in the sum of $2,500. It was shown that in anticipation of the expropriation the appellant had been able to acquire other premises on the east side of Government Street within a block of its present location known as the Five Sisters Block where all of its activities other than the operation of the printing plant could be properly accommodated, and that nearby it had been able to acquire a suitable building for the printing establishment. The third item designated "Increased Costs resulting from Moving" claimed at $54,004.03 consisted of an estimate of the additional costs of operation in the new premises for five years.

The learned trial judge, while finding that the appellant would undoubtedly suffer some loss through the disturbance resulting from having to move its business, considered that the claims made were excessive. As to the item of $4,000 for surveys, plans and search for new and suitable premises, he considered that the claim was not proven, except in respect of certain items which might be taxable as part of the costs of the proceedings. As to the claim under the heading "Actual Moving Costs", he considered the items for loss of fixtures in moving, for a 10 per cent loss on five years advertising, and the claim for loss of sales during the first year should be excluded, and that the item of $5,809.15 for loss of gross sales during moving was excessive. As to the item for loss of fixtures in moving in the amount of $1,424.53, the claim was abandoned in the argument before this Court and no evidence was given as to the net loss which would result from the

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

anticipated lag in sales or as to the net profit lost by reason of the anticipated loss of gross income on sales during the period of moving. As to the claim for increased costs of operation resulting from the removal, the learned trial judge found that no such claim had been substantiated and that, while there would be some loss through moving and some increased cost of operation due to the fact that the printing plant would be operated in a different building from the retail store and at a distance from it, against such loss and increased expenses there would be several offsetting advantages. The evidence established, in his opinion, that the Five Sisters property was more valuable for the appellant's purposes than its old location and he thought it probable that the losses from disturbance and the increased cost of operation would be more than offset by the resulting advantages of better premises and a better location. While considering that in determining the compensation he was not required to fix the amount of the defendant's claim for disturbance under the various headings separately, he said that, if he were, he could not fairly fix the amount higher than $20,000.

The principle to be followed in determining the compensation to be paid to an owner whose property is compulsorily taken cannot be more briefly or clearly expressed than in the judgments of the Judicial Committee in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1) and in *Pastoral Finance Association* v. *The Minister* (2). It is the value to the owner as it existed at the date of the taking and not the value to the taker which is to be determined. That value consists in all advantages which the land possesses, present or future, and it is their present value that is to be determined. As stated by Lord Moulton in the *Pastoral Finance* case (2), probably the most practical form in which the matter can be put is that the owner is entitled to be paid what a prudent man in his position would have been willing to pay for the land sooner than fail to obtain it. This formula was applied by Duff J. in *Lake Erie and Northern Railway Company* v. *Bradford and Galt Golf and Country Club* (3), and has been consistently followed in the decisions of this Court. It is a thing of value capable of being expressed in money for

(1) [1914] A.C. 569.
(2) [1914] A.C. 1083.
(3) (1917) 32 D.L.R. 219, 229.

the owner to be permitted to continue in possession in the operation of his business and to avoid the cost of moving and such disruption as might be caused by having to do so. That value is clearly to be included in determining what the property is worth to the owner (*Commissioners of Inland Revenue* v. *Glasgow and South Western Railway Company* (1); *Horne* v. *Sunderland* (2)). In addition, if a business location is a particularly favourable one in which to carry on operations for the owner and another equally satisfactory location is unobtainable, the lands have an added value to him, the present worth of which should be calculated. In the present matter, the claimant sought to establish by evidence that the property expropriated was a more favourable place for the carrying on of its business than the Five Sisters property situated on the opposite side of Government about a block away, but there was evidence on the point indicating that the contrary was the case, which the learned trial judge has seen fit to accept. The claim that the value of the expropriated premises should be increased on the ground that it was a more profitable location for the operation of the appellant's business than other available property failed. Admittedly, moving costs would be incurred and while no evidence was given as to what loss of profit would be suffered during the five- or ten-day period of moving, the evidence merely being that of the estimated loss of gross income on sales during the period, undoubtedly some loss would be caused. It has been made clear in the reasons for judgment that a substantial allowance has been made for what may be called disturbance, in determining the value of the property to the owner. Whether the learned trial judge intended to indicate by the statement that, if he were required to fix the amount of the claim for disturbance separately he could not fairly fix the amount higher than $20,000, this amount formed part of the value assigned to the property is not clear. I agree that it was unnecessary to itemize the various amounts the sum of which totalled the amount awarded. It is clear that consideration has been given to the various factors which might be relevant in determining the value of this property to the owner and I think no case has been made for interference with the amount of the award.

(1) (1887) 12 A.C. 315, 323. (2) (1941) 2 K.B. 26, 32.

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

In the reasons for judgment of the learned trial judge it is said, *inter alia,* that the standard by which the right to compensation for property expropriated is to be measured is prescribed by section 47 of the *Exchequer Court Act.* In my opinion, this is error. The section which is one of a group falling under the heading "Rules for Adjudicating upon Claims" does nothing more than to declare the date as of which the value of the land taken is to be determined. It had its origin in sec. 17 of the *Government Railways Act* 1881 which read:

> The arbitrators, in estimating and awarding the amount to be paid to any claimant for injury done to any land or property and in estimating the amount to be paid for lands taken by the Minister under this Act, or taken by the proper authority under any former Act, shall estimate or assess the value thereof at the time when the injury complained of was occasioned, and not the value of the adjoining lands at the time of making their award.

In the *Official Arbitrators Act,* cap. 40, R.S.C. 1886 (with minor changes which did not affect its meaning), the section was reenacted as sec. 16. When the latter statute was repealed by the *Supreme and Exchequer Court Acts,* cap. 16, Statutes of 1887, these provisions were reenacted in sec. 32, omitting the words "and not according to the value of the adjoining lands at the time of making their award", which were apparently regarded as redundant, and in this form are continued in sec. 47 of the present *Act.* The terms of the section, as originally enacted, indicate clearly the purpose of the section and its meaning has not been affected, in my opinion, by the omission of the above mentioned words. If I were of the opinion that the learned trial judge in determining the quantum of the compensation awarded had considered that this was limited in any manner by anything in sec. 47, I would consider that the award should be set aside and that there should be a rehearing, but I think it is clear from the context that this is not so. While indicating his opinion that sec. 47 limited the amount of the compensation, the learned trial judge proceeded to say that under its terms it was the value to the owner which was to be determined and while I disagree with his opinion that the matter is affected by sec. 47 except in the manner indicated, in the result it is clear that this has not affected the quantum of the award.

(1) (1917-18) 56 S.C.R. 376.

As to the claim for an allowance of ten per cent for compulsory taking, this is not a matter of right (*The King v. Larivée*) (1) and can only be justified as a part of the valuation (Cripps on Compensation, 8th Ed. p. 213) and in the circumstances of this case there should be, in my opinion, no such addition to the award.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Moresby, Farr, Byers & Moresby.*

Solicitors for the respondent: *Straith, Pringle, Ruttan & Gouge.*