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THE WINNIPEG SUPPLY & FUEL CO. LTD. (*Claimant*) ..... APPELLANT;

AND

THE METROPOLITAN CORPORATION OF GREATER WINNIPEG (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Expropriation—Part of claimant's property expropriated for traffic interchange—Misapprehension of evidence upon which valuation of damages based—Arbitrator's award reduced by Court of Appeal—Majority judgment of Court of Appeal also found to have overlooked or misapprehended material evidence—Compensation fixed by Supreme Court.

The appellant company owned a property at the north-east corner of Portage Avenue and Madison Street in the City of Winnipeg, having a frontage on Portage Avenue of 332.5 feet and a depth running along the easterly limit of Madison Street of 624.16 feet, containing 201,504 square feet. The respondent expropriated 55,521 square feet of the said property. The portion expropriated was at the south-west corner of the appellant's lands, *i.e.*, that portion immediately adjacent to the intersection of Portage Avenue and Madison Street and after the expropriation the appellant was left with only 193.43 feet frontage on Portage Avenue plus an additional frontage on a widened portion of that avenue, and with no frontage remaining on Madison Street. The property was taken so that the respondent could construct on it and on other property in the area a large traffic interchange.

The appraisers for both the appellant and the respondent were in agreement that the value of the property before the expropriation would have averaged about $2.85 per square foot. They differed, however, when they came to value what was left after the expropriation. The appellant's appraiser valued this at $1.25 per square foot, the respondent's appraiser at $2.60 per square foot. In their evidence before the trial judge the appraisers attempted to use the "before and after" method of arriving at the damages suffered by the appellant. That is they found the value of the property as a whole before the expropriation and then attempted to find the value of the property left after the expropriation, and by deducting the latter figure from the former, they purported to find the amount of damage that the appellant suffered by the expropriation. Having found that the evidence was not sufficient to apply the "before and after" method in a proper manner, the trial judge, taking part of the evidence of the respondent's appraiser, proceeded on a frontage basis and arrived at a valuation of $280,000. The majority in the Court of Appeal in reducing the award to $195,000 found error in the trial judge's method of valuation.

Held (Judson J. dissenting): The appeal should be allowed and the compensation fixed at $242,000.

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

Per Martland, Ritchie, Hall and Spence JJ.: The trial judge was entitled to fix a valuation for the premises which were expropriated rather than attempt a "before and after" method, but in so doing he had misapprehended the evidence upon which he based his valuation of damages. This placed the Court of Appeal in the position where it was necessary to "make its own valuation on a proper and recognized basis". The majority in that Court, accepting the evidence of the respondent's appraiser, turned back to the "before and after" method. If they were justified in accepting the said evidence it must be upon a consideration that that evidence was so plainly correct and of such preponderance that the finding of the trial judge could not be maintained in opposition to it.

An examination of the evidence of the respondent's appraiser showed that there was no sound basis for starting his calculation of injurious affection by deducting a certain amount from the artificial figure of $2.85 per square foot. Secondly, he was of the opinion that the value of the property after the taking had not been reduced in value except for the 25¢ per square foot reduction he allowed on the question of access. This opinion could not be supported by the evidence.

The majority judgment of the Court of Appeal had also overlooked or seriously misapprehended much material evidence of fact, and this Court, as was the Court of Appeal, was called upon to "make its own valuation on a proper and recognized basis". This task had already been done for the Court in the dissenting judgment of Schultz J.A. in the Court below, where, as here, the following elements were considered:—the construction greatly reducing the suitability of the remaining property for expropriation purposes, eliminating or lessening many of the advantages it possessed; the problem of access involved in the curving roadways having ostensible purpose of facilitating traffic; the change from a corner type property to a property abutting on a busy traffic interchange; the extremely wide frontage on Portage Avenue combined with the great depth being now reduced by about one-third, and left of irregular shape, including an unusable triangle and the great interference with access.

Schultz J.A. adopted two methods of considering the valuation, *i.e.*, a "before and after" method and the actual valuation of the property taken; by either method the valuation arrived at was roughly $242,000. In view of the fact that the latter calculation by frontage did not consider the injurious affection to the balance of the property, the valuation arrived at by fixing a deduction on square foot rate for the injurious affection of the property which remained was a sounder method. The reasons for judgment of Schultz J.A. were accepted in that they arrived at a sum of $242,000 particularly by the use of that method.

Per Judson J., *dissenting:* The "before and after" approach was the only possible approach in this case. The land taken, had it stood alone, would have been close to being unmarketable. No one would have paid $280,000 for it and there was no suggestion that it could have been sold separately. The majority in the Court of Appeal were correct in accepting the evidence of the respondent's expert in preference to that of the claimant's expert. The latter expert had made five basic errors in arriving at his opinion of value.

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APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from an expropriation award by Solomon Co.Ct.J. Appeal allowed, Judson J. dissenting.

Clive K. Tallin, Q.C., and *J. McJannett*, for the appellant.

D. C. Lennox and *F. N. Steele*, for the respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the claimant from the judgment of the Court of Appeal for Manitoba pronounced on December 31, 1964. By that judgment the Court allowed an appeal by the present respondent from the judgment of His Honour Judge J. R. Solomon pronounced on March 18, 1964, in which he had fixed the damages of the claimant for the expropriation of part of its property by the respondent at $280,000.

The Chief Justice of Manitoba, with Mr. Justice Guy and Mr. Justice Monnin concurring, allowed the appeal from a judgment of the County Court Judge by reducing the amount of the said damages to $195,000. Mr. Justice Schultz dissenting would only have varied the judgment of the trial judge by reducing the damages allowed from $284,000 to $242,000.

It would seem that no purpose can be served by a review of the jurisprudence in reference to the variation by the Court of Appeal of an award made by an arbitrator. Sufficient to say that the Court of Appeal has jurisdiction to act when the arbitrator has proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact. With respect it would appear that both of those grounds for variation of award were present in this case.

The appellant owned a property at the north-east corner of Portage Avenue and Madison Street in the City of Winnipeg, having a frontage on Portage Avenue of 332.5 feet and a depth running along the easterly limit of Madison Street of 624.16 feet, containing 201,504 square feet. By By-law No. 202, registered in the Winnipeg Land Titles Office on June 26, 1962, the Metropolitan Corpora-

tion of Greater Winnipeg expropriated 55,521 square feet of the said property. The portion expropriated was at the south-west corner of the appellant's lands, *i.e.*, that portion immediately adjacent to the intersection of Portage Avenue and Madison Street and after the expropriation the appellant was left with only 193.43 feet frontage on Portage Avenue plus an additional footage to which reference shall be made hereafter on what turns out to be a widened portion of Portage Avenue, and with no frontage remaining on Madison Street.

The extent of and the effect of the expropriation may best be visualized by a scrutiny of Schedule B of Exhibit 23 a plan attached to the report of the appraiser who gave evidence for the respondent. What remained was a property consisting of 145,983 square feet having an average width of about 210 feet by a depth of 646 feet but being irregular in shape on both the south limit and the west limit and including a sharp triangle where the property ran out to Madison Street at a point.

The purpose of the expropriation is in the present case most important. The property was taken so that the Metropolitan Corporation of Greater Winnipeg could construct on it and on other property in the area a large traffic interchange providing a new access to the St. James Bridge which crosses the Assiniboine River to the south of Portage Avenue. The effect of this interchange construction will be considered in some detail hereafter.

Before the learned County Court Judge evidence was given by appraisers called both on behalf of the claimant and on behalf of the respondent Corporation. Those witnesses were in substantial agreement that the property expropriated was in the middle of a very rapidly growing commercial area and in fact the appraiser for the municipal Corporation the respondent, swore that since 1960 the property in the area had, in many cases, more than doubled in value. They were in agreement that the value of the property before the expropriation would have averaged about $2.85 per square foot. From that point, however, the witnesses varied most startlingly. The appraiser for the claimant put the value of the premises which remained after the taking at only $1.25 per square foot, while the appraiser called for the respondent municipal Corporation put the value of the property which remained at $2.60 per

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square foot. Commenting on that evidence the learned County Court Judge said:

> I am satisfied that both appraisers placed such value on the subject property after expropriation which would reflect the claims of their respective clients. I am satisfied that the value of the subject property after expropriation is more than $1.25 per square foot but less than $2.60 per square foot if the formula the appraisers used is to be applied for arriving at the value of the expropriated land.

I adopt herein the reasons for judgment of Schultz J.A. in the Court of Appeal for Manitoba when he said:

> . . . Where the experts' opinions vary as much as they do here the question of their competence, credibility and the weight of their testimony is primarily for the trial judge. This Court has consistently adhered to the policy of not requiring a trial judge to believe evidence which he finds unconvincing and of declining to substitute its judgment for his upon issues which it is his function to determine. The learned trial judge has made it convincingly clear that he could not and did not accept either of the valuations submitted by the appraisers as to the loss in value to the claimant's property as a result of the expropriation, and, with respect, I do not think this Court can disregard his finding in that regard. Having reached that conclusion, the learned trial judge proceeded to make his award on a basis I will discuss later.

In their evidence before the learned County Court Judge, both the appraisers called on behalf of the appellant and the appraiser called on behalf of the respondent Corporation had attempted to use the "before and after" method of arriving at the damages suffered by the appellant. That is they found the value of the property as a whole before the expropriation and then attempted to find the value of the property left after the expropriation, and by deducting the latter figure from the former, the appraisers purported to find the amount of the damage that the appellant suffered by the expropriation. As Schultz J.A. remarked in his reasons for judgment in the Court of Appeal of Manitoba:

> . . . Theoretically, but only theoretically, the 'before and after' method is ideal, for the result presumably includes in one lump sum all of the factors of compensation requiring consideration, namely, value of the land taken, plus severance damage to the remainder, less special benefits arising out of the taking.

Having expressed his dissatisfaction with the evidence of the expert witnesses as to the value of the property after expropriation in the terms which I have quoted above, the learned County Court Judge then turned to part of the evidence given by the appraiser for the respondent municipal Corporation. That expert witness, one Farstad, had tried various methods of arriving at his result and in one of

those methods he divided the property into a strip of 332.6 feet in length and 120 feet in depth along the north side of Portage Avenue and then another strip commencing at the rear of the first on Madison Avenue of 410 feet in length by about 111 feet in depth and then the balance of the property to the rear of the two pieces which he found amounted to about 97,140 square feet, and he placed values before expropriation of $1,000 per frontage foot for the 332.6 feet fronting on Portage Avenue and $350 per frontage foot for the 410 feet fronting on Madison Street, and $1 per square foot for the 97,140 square feet in the inside property, thereby arriving at a total value of the land before expropriation of $573,240.

The learned trial judge simply applied these frontage values to the property taken describing it as 141.17 feet on Portage Avenue and 410 feet on Madison Street and, allowing the Portage Avenue feet at $1,000 per frontage foot, obtained a damage of $141,170 and allowing the $350 rate to the 410 feet frontage on Madison Street, found a damage of $143,500. Those two amounts he totalled to $284,670 and then deducted therefrom the $4,670 because a part of the frontage taken on the Portage Avenue side was only to a very short depth.

It will be seen that the County Court Judge thereby deserted the "before and after" method of arriving at the damages. Of course, the County Court Judge was entitled to refrain from adopting that method when he found that the evidence was not sufficient for him to apply it in a proper manner.

With respect I agree with the Chief Justice of Manitoba when he said:

> I am of the opinion that the learned County Court Judge oversimplified his valuation. He disregarded the approaches of the appraisers of both sides and simply adopted figures that had been mentioned in one of the appraisal reports.

It should be noted that the learned County Court Judge in proceeding in the said fashion fell into these errors of principle or failure to comprehend the evidence:

(1) By applying the valuations to the expropriated property without considering any injurious affection on the balance of the property he arrived at a result which failed to give due weight to the latter factor.

(2) Secondly, and most important, he did not realize that the appraiser giving the evidence had given such frontage valuations on the basis

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that the premises were to be sold in one lot including the large square foot area to the rear of both frontages. It should be noted that the said appraiser in giving evidence said:

> In my opinion if it had been, and this does not mean that it would have been sold in separate parcels, I merely indicated values to the overall development of this whole site based on probable values indicated on Portage Avenue, that is, the property had a value as high as $1,000 per foot for which 332.6 feet was $332,600. The Madison Street frontage averaged 410 feet at $350 per foot for a value of $143,500 and the remaining inside land of 97,140 square feet at $1.00 per square foot amounting to $97,140 *for a total of $573,240*. (The italics are my own.).

(3) The learned trial Judge fixed the frontage on Portage Avenue taken in the expropriation at 141.17 feet and although he allowed $4,670 off the value of such frontage, by such allowance he failed signally to reflect the fact that of that frontage 46.39 feet were taken only to a depth of about 50 feet so that the effective taking away of Portage Avenue frontage, remembering that the balance fronted on Portage Avenue as widened, was only 94.78 feet.

To summarize, the learned County Court Judge was entitled to fix a valuation for the premises which were expropriated rather than attempt a "before and after" method, but in so doing he misapprehended the evidence upon which he based his valuation of damages.

Under such circumstances I agree with the Chief Justice of Manitoba when he stated:

> This places this Court in the position where it must make its own valuation on a proper and recognized basis.

The Chief Justice then turned back to the "before and after" method of arriving at a quantum of damages. This course the Chief Justice was entitled to take as was the County Court Judge in his refusal to use that basis, the latter being of the opinion that the evidence upon which it could be used had not been given. The Chief Justice continued:

> .....I favour the appraisal arrived at by Mr. Farstad, the appraiser for the respondent, The Metropolitan Corporation of Greater Winnipeg. He has made several approaches, all of which are reasonable, well-balanced, and would stand scrutiny. In his summary of values Mr. Farstad proposes:
>
> | | |
> |---|---|
> | Value before the taking | $ 575,000 |
> | Value after the taking | 380,000 |
> | Difference, including all damages to the remainder | $ 195,000 |

I have already quoted and adopted the statement of Schultz J.A. as to the task of the Court of Appeal in

considering the finding of a trial judge as to the testimony given by expert witnesses. Therefore, it is my view that if the majority of the Court of Appeal were justified in accepting the evidence of Mr. Farstad, it must be upon a consideration that that evidence was so plainly correct and of such preponderance that the finding of the learned County Court Judge could not be maintained in opposition to it.

Let us examine the evidence of Mr. Farstad leading him to give the results quoted by the Chief Justice of Manitoba. The value before taking of $575,000 was arrived at, as I have said, by two methods: Firstly, by taking $1,000 per frontage foot for 332.6 feet on Portage Avenue, plus $350 per frontage foot for 410 feet on Madison Street, and then $1 per square foot for 97,140 square feet of the back property, and also by hitting a mean between $2.75 and $3 a square foot for the whole property. Since $575,000 for 201,594 square feet is at the rate of $2.85 per square foot, one wonders whether the evidence is not an example of what Schultz J. A. was referring to when he said:

> Any result can be predetermined by simply altering any one of such factors.

What must be realized is that this sum of $575,000 is in fact the total of three valuations, *i.e.*, 332.6 feet frontage on Portage Avenue by a depth of 120 feet at $1,000 a foot; 410 frontage feet on Madison Street by a depth of 111 feet, at $350 a foot; and 97,140 square feet to the rear at a rate of $1 per square foot. If the square foot rate of the 332.6 frontage feet on Portage Avenue were taken on this basis, it would be, not $2.85 per square foot, but $7.14; and if the square foot rate of the 410 feet frontage on Madison Street were taken at this rate, it would not be $2.85, but $3.51. It must also be remembered that all of the property expropriated was within those two pieces of frontage. I am therefore of the opinion that there was no sound basis for Mr. Farstad starting his calculation of injurious affection by deducting a certain amount from the artificial figure of $2.85 per square foot.

Secondly, Mr. Farstad only allowed a deduction of 25¢ per square foot from that figure of $2.85 per square foot to cover the injurious affection of the land and it was put by

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counsel for the respondent the evidence would seem to justify the view that the whole of that 25¢ was attributable to the reduced access to the new property. Yet Mr. Farstad, even on examination-in-chief, described the property remaining as

> A long narrow strip of land remaining for eventual development.

In cross-examination Mr. Farstad attempted to maintain that the property before taking was also "narrow to some extent for certain types of development", yet he admitted that the original frontage on Portage Avenue of 332 feet was more than a full city block. He further admitted in cross-examination that although the premises had been suitable for a super market or a motor hotel development, and perhaps even a department or discount store or high-rise apartment, that it was no longer suitable for the same range of commercial or industrial or even residential development. His actual reply was:

> There would be some restrictions against some of these things, yes. There would be a lesser number of potential developments on the site.

Again, Mr. Farstad admitted that although there was a frontage remaining on Portage Avenue, as a result of the expropriation, there was no frontage remaining on Madison Street as the side there was not on a street. This I shall deal with later when I speak of the question of access.

Why then did Mr. Farstad find that the value of the property after the taking had not been reduced in value except for the 25¢ reduction he allowed on the question of access? It would appear from a perusal of the evidence that Mr. Farstad arrived at this conclusion by considering that many of the properties bordering the north side of Portage Avenue west of Madison Street had been removed so that now it was possible to see the subject property from the St. James Hotel site some distance east of it, and that therefore the property had an "advertising value" and a "corner influence" which it had not possessed before.

In evidence, Mr. Farstad, when asked what effect the demolition had upon the subject property, answered:

> A. This has really opened up the area completely. From the St. James Hotel to the subject property there are no more buildings.
>
> Q. When you used the words opened up, what do you mean?
>
> A. In other words, you now have a complete view of the property from any point at the St. James Hotel or as you are driving by.

And further:

Q. Yes, it is not on a street. Would you say that frontage that is not on a street has any great value as commercial or industrial use?

A. I would say this property has after because of the fact that it can be seen. Access of course is a problem but this does still have corner influence in a sense.

Q. There might be some corner influence?

A. There is.

Q. But it would not be worth $350 a foot?

A. It could well continue to be worth $350 to some potential buyer.

Q. But not to many?

A. Maybe not to some.

To the Court in answer to the question:

Q. You were considering by putting this loop or this interchange that this might better the location to some extent; is that your opinion?

A. That is right, sir, because of the opening up of the demolition of the buildings to the west. So some of this was betterment in my opinion. And I know this is purely a matter of opinion.

It would appear that Mr. Farstad's evidence is based on a view of the property after demolition had proceeded so that the whole area was a bare flat one and did not take into consideration that that area did not so remain, but in it there was placed a very large overpass and interchange. Although the only exhibit which showed the site after the construction will have been completed is Exhibit 19, and that is a plot plan without elevations, it is apparent that the plan was to have Portage Avenue cross over the level of Kensington Street. Through the area Portage Avenue would appear to have two lanes, one for eastbound and one for westbound traffic, each about 51 feet wide with a median strip running down the centre some 7 feet wide. The "corner influence" and the "advertising value" would be with reference to those persons who are proceeding from west to east on Portage Avenue approaching the premises from Queen Street or one of the streets to the north. Those persons would be driving on the right hand or southerly side of the street with a 7-foot median to their left, then another 50 feet of pavement and in addition some type of railing must run along the northerly side of the bridge over Kensington Street.

Moreover, the subject property will be right at this great interchange and under such circumstances I cannot see that there is any advertising value which will make any marked difference in the damage caused by the expropriation.

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Drivers of vehicles eastbound on Portage Avenue will have little opportunity to look to their left across median, pavement and bridge rail to observe the subject property. Drivers of vehicles northbound under the underpass will not even be able to see the subject property as they will be running in a channel some thirteen feet deep. Drivers of vehicles winding their way up the loops from the underpass to Portage Avenue will be too much engaged to look around at properties. I am therefore of the opinion that the so-called advertising value of the property has been much exaggerated.

What remains is a property not one of the largest available in that area of Portage Avenue, as the evidence showed it was before the expropriation, and which was about 330 feet on Portage Avenue by 645 feet odd in depth, but a property of only an average width of 211 feet with less frontage on Portage Avenue and which, on its southerly and westerly borders, is of uneven contour and includes a sharp triangle which will be most difficult to develop.

When one turns to the question of access, an even more startling situation is revealed. Exhibit 12, a sketch, illustrates the access prior to the taking and shows a total of five accesses, two directly from Portage Avenue and three directly from Madison Street on a level. In addition there was one other access from a lane running easterly from Madison Avenue and then turning southerly into the property. That lane was only 30 feet wide to the corner and from there westerly only 20 feet. It was said that the lane was of little use as an access and one cannot imagine a long vehicle negotiating that sharp turn into a 20-foot roadway with any success. The access after the taking is illustrated in Exhibit 13. The two entries from Portage Avenue have been reduced to one. There is an entry and an exit into the southerly or outer loop of the interchange and there remains the access to the rear through the lane which I have described.

Exhibit 19, the plot plan, illustrates the first three of these accesses after the taking. It will be noted that the accesses on to the loop are of very little value for either northbound or southbound traffic on the loops. The northbound traffic is running in a loop of an interchange and drivers would find, I think, some hazard in even turning right into the premises at the most westerly of the two cuts

in the curve. Similarly, a driver leaving the premises through the most easterly would find difficulty in driving into the traffic along that loop. The entry for the person who had been northbound and who came through the interchange, swung around the inner loop and then dived—and I think that is an appropriate word—through the opening in the median across the outer loop and into the subject property would be most hazardous. Moreover, these two accesses cut into the property from the outer loop are subject to future action by the municipality should the traffic conditions show that their use was causing an obstruction to traffic, and the claimant has been warned that action will be taken to close the accesses in such event.

I am of the view, therefore, that there has been a very serious limitation in the access to the property by the replacement of the three straight entries on to Madison Street, a two-way street, with these two provisional and conditional cuts from a loop into the property and of the elimination of one of the two access entries from Portage Avenue.

It would seem, therefore, that again Mr. Farstad's opinion that such interference with access only made a diminution of 25¢ per square foot in the value of the property ascertained cannot be supported by the evidence. I am in agreement with the view expressed by Schultz J.A., when he said:

> . . . The difficult conditions existing in regard to access after the taking would unquestionably be considered as having some element of hazard by a prudent investor as compared to the situation before expropriation when northbound traffic was completely free of any such hazards.
>
> Southbound traffic had direct access to the property via Madison Street prior to the taking. This approach is now eliminated and access from the north much longer and more circuitous.

I am, therefore, of the opinion that the majority judgment of the Court of Appeal of Manitoba has also overlooked or seriously misapprehended much material evidence of fact, and that this Court, as was the Court of Appeal of Manitoba, is called upon to "make its own valuation on a proper and recognized basis". It would appear, however, that that task has already been done for us in the dissenting judgment of Schultz J.A., in the Court of Appeal for Manitoba. The learned Justice of Appeal has considered all of the elements to which I have referred

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hereinbefore, *i.e.*, the construction greatly reducing the suitability of the remaining property for expropriation purposes, eliminating or lessening many of the advantages it possessed; the problem of access involved in the curving roadways having ostensible purpose of facilitating traffic; the change from a corner type property to a property abutting on a busy traffic interchange; the extremely wide frontage on Portage Avenue combined with the great depth being now reduced by about one-third, and left of irregular shape, including the unusable triangle to which I have referred and the great interference with access. The learned Justice of Appeal adopts two methods of considering the valuation. In the first place, taking the $2.85 average valuation arrived at by Mr. Farstad by the arithmetical calculation to which I have referred above, he then reduced it by a factor for injurious affection of the property which remained for all of these reasons, *i.e.*, a "before and after" method. The learned Justice of Appeal, however, adopts, in my view, a much more realistic factor than that given by Mr. Farstad and adopted in the majority judgment of the Court of Appeal for Manitoba. In the evidence, as given by Mr. Farstad, appears this sentence:

> And with all this it is my opinion that the remaining land after the taking was worth $2.60 a square foot, which is only 25 *per cent* per square foot less than the $2.85 I gave or $379,555, make it $330,000.

This is, of course, an obvious error. $2.60 is only 8.7 per cent less than $2.85.

It may be that the error is that of the stenographer; on the other hand, the words "per cent" might have been said. It may be that the majority of the Court of Appeal were misled in considering that a 25 per cent reduction had been allowed rather than only a 25 cents reduction. At any rate, a reduction of 8.7 per cent, in my view, is not realistic and I am ready to agree with Schultz J.A. that a proper and realistic reduction is the 20 per cent reduction which he was ready to allow, *i.e.*, to value the property remaining after expropriation at $2.28 per square foot which would give a valuation of the damages caused at $241,445. Schultz J.A., however, realized that such procedure was subject to the many difficulties inherent in the "before and after" method

and therefore preferred to use the same method as used by the trial judge, *i.e.*, the actual valuation of the property taken. Noting that the true frontage on Portage Avenue was not 141.17 feet but only 94.78 feet, the learned Justice of Appeal was ready to allow $1,000 per foot for that frontage, *i.e.*, $94,780, and then the same $350 for the 410 feet frontage on Madison Street, *i.e.*, $143,500, and then added an amount for the narrow strip erroneously included in the frontage by the learned trial Judge and fixed that amount at $4,000 to arrive at a total of $242,000. So that, by either method, Schultz J.A.'s valuation arrives at roughly $242,000, an amount which he would have been ready to allow. In view of the fact that the latter calculation by frontage foot does not consider the injurious affection to the balance of the property, a subject which was very carefully dealt with in the reasons of Schultz J.A., I am of the opinion that the valuation arrived at by fixing a deduction on square foot rate for the injurious affection of the property which remains is a sounder method and I am ready to accept the reasons for judgment of Schultz J.A. in that they arrive at a sum of roughly $242,000 particularly by the use of that method.

There was considerable discussion during the argument as to interest. Counsel finally expressed the view that the interest adjustments could be left to their consultation and, if necessary, they could speak to the Court later.

I would allow the appeal and fix the compensation at $242,000; the claimant is entitled to the arbitration costs as provided in the trial Court; there should be no costs in the appeal and the claimant should have the costs of the appeal to this Court.

JUDSON J. (*dissenting*):—The majority of the Court of Appeal in reducing the award of the arbitrator from $280,000 to $195,000 found error in his method of valuation. The case was put before him by both experts in the same way. They valued the whole property before expropriation at approximately the same figure—in one case $2.85 per square foot and the other, $2.60 per square foot. They differed when they came to value what was left after the expropriation. The claimant's expert valued this at $1.25

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per square foot, Metro's expert at $2.60 per square foot. The arbitrator did not think that the figure of $1.25 was of any use to him. On the other hand, he expressed dissatisfaction with the $2.60 figure but perhaps not quite as emphatically. He then took part of the evidence of Metro's expert and arrived at this valuation:

Portage Avenue:	141.17 feet at $1,000 per ft.	$ 141,170
Madison Street:	410 feet at $350 per ft.	$ 143,500
		$ 284,670

from which he deducted the sum of $4,670, leaving him with a round figure of $280,000.

The Court of Appeal thought this was an oversimplification of the problem and that it involved the misuse of the expert's figures that were given for an entirely different purpose:

> These values of $1,000 per foot and $350 per foot respectively were mentioned by Mr. Farstad, the appraiser for The Metropolitan Corporation of Greater Winnipeg, respondent, in his appraisal report, Exhibit 23, but not for the purpose for which they were used by the learned County Court Judge. Farstad used these figures as part of his "before and after" approach. One need only look at the plan and see how narrow and poorly proportioned the expropriated land is, to realize that it could not, standing by itself, be worth the $280,000 value attributed to it by the learned County Court Judge. The learned Judge did not allow, in his assessment of compensation, anything for injurious affection to the remaining parcel but simply sought to value the expropriated part and the evidence does not support his figure.

I agree with this criticism. I do not think that it was open to the arbitrator to deal with the problem as he did, having regard to the evidence before him. In my opinion, the approach of the experts was the only possible approach in this case. Metro took an irregular piece of land which, had it stood alone, would have been close to being unmarketable. This is the point of the criticism of the Chief Justice. No one would have paid $280,000 for this parcel of land and there was no suggestion in the evidence that it could have been sold separately. This emphasizes that the "before and after" approach was the only possible one in this case, and we have this common element that both experts were very close together in their valuation of the whole parcel.

The Court of Appeal, therefore, began with the figure given by Metro's expert of $575,000. They also accepted

this expert's valuation of the property after the taking, and the difference was $195,000. They had good reason for rejecting the low valuation of $1.25 per square foot for the remainder of the property which was made by the claimant's expert. As pointed out by counsel for the respondent, this expert made five basic errors in arriving at his opinion of value. These errors were:

(a) The zoning of the area was stated to be M2.

(b) The area of land being appraised incorrectly contained land which was not owned by the Claimant as at the date of the valuation.

(c) The estimate of value before the taking was based on an incorrect land area which did not include all of the land which was actually owned by the Claimant.

(d) One of the advantages attributed to the site before the taking, namely frontage, was incorrect with reference to the number of thoroughfares and actual frontage.

(e) There was an error of omission in that no reference was made to the access to the site from the public lane off Madison Street, either before or after the taking.

The issue in this appeal is whether the majority in the Court of Appeal were right in accepting the evidence of Metro's expert in preference to that of the claimant's expert. There is no doubt in my mind that they were.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

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