

Fraser v. The Queen [1963], S.C.R. 455

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Commentary

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In this case, Her Majesty in right of Canada expropriated 12.8 acres of what, for all purposes but one, was waste land and offered compensation of \$50 per acre. The land itself was not required for the purposes of the project. However, the area expropriated consisted substantially of a particular kind of rock which due to its proximity to the site of the proposed Canso Causeway was the ideal building material for the project.

It was essentially because building material had been expropriated, albeit in the form of land, that the majority allowed the appeal. In fact, one of the grounds of appeal was that the learned trial judge had failed to give sufficient weight to the value of the special adaptability of the land for the causeway construction. The Respondent on the other hand contended that as the value of the property was solely and exclusively related to the scheme of constructing the causeway, this consideration should have been excluded, since this would be an evaluation to the taker, rather than to the dispossessed. "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme

underlying the acquisition." *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands* [1947] A.C. 565 at 572.

The question, then, was whether the creation of a market solely by the act of the expropriating authority can be taken into consideration in determining the value of the land taken where no other comparable market was readily available to the owner.

Counsel for the respondent sought to support his stand by the case of *Cedar Rapids Mfg. and Power Co. v. Lacoste* [1914] A.C. 569. Taschereau J. drew on that case for his two propositions in *R. v. Elgin Realty Co. Ltd.* [1943] S.C.R. 49 at 52 "1. The value to be paid for is the value to the owner as it existed at the date of taking, not the value to the taker. 2. The value to the owner consists in all the advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. The future advantages therefore may be taken into account in determining the value of the property, but insofar only as they may help to give to the property its present value." This statement, it is respectfully submitted, is of no help whatsoever in trying to ascertain the value to the owner because examination shows the argument is circular. As soon as future advantages are taken into consideration, new elements have been introduced which have not yet been realized. As such they can be capitalized over any given number of years and this capitalized value can be discounted, but in doing so the "value to the owner" has been abandoned in favour of the "market value". The owner may be far more inclined to hold on to his land, either as a capital asset in his business, or as an investment.

Ritchie J., in the instant case at p. 472, after examining a number of cases states:

None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of the expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after the expropriation and as an integral part of the scheme devised by that authority.

At 475, in summarizing the relevant paragraph in *Cripps on Compulsory Acquisition*, his Lordship states: "The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the powers of expropriation had been exercised." The question that of necessity ought to be asked then is "Who would under these circumstances have been a possible purchaser and for what motives?"

It is submitted that no purchaser would have been found willing to pay more than the waste-land price of about \$50 per acre, unless such purchaser had a particular motive, and this more likely than not would have been the well-founded expectation that at some future

time the Canso Causeway would become a reality and the land in question would be required for the purpose or at least a market would be established for the rock in the land. This reasonably explains why the appellant held on to the land and paid taxes on it year after year. The land must have been worth it to him.

Judson J. by holding the land in question was waste land and the owner entitled to \$50 per acre has in effect abandoned the "value to the owner test", because the value to the owner could never be imposed by a third party against the owner's judgment of what the land is worth to *him*, and it would be unrealistic to call in aid a person who has no vision of the land's potential. At 463 his Lordship says that it was the task of the trial judge to find the value to the owner, yet by awarding \$640 he would in effect have forced the appellant to make a gift of his property for the benefit of the public and of the Crown. What exactly is the law?

On the facts it may be difficult to distinguish this case from *Vezina v. The Queen* (1889) 17 S.C.R. 1. In that case, however, part of the land at least was used directly for the undertaking, a railway, and it could well be argued that the gravel expropriated there was an appendage of the land actually required, whereas here, had the building material been obtained from some other source, the appellant's land would not have been required at all.

The realization that the Crown was here expropriating "rock in situ" rather than waste land therefore seems a satisfactory solution.

It has to be kept in mind that the majority of expropriation cases are settled on the basis of market value. Wherever ordinary residential, industrial or farming properties are expropriated and an equally suitable replacement can be found for roughly the price of the compensation payment, the value to the owner is exactly the market value of the land. These cases never reach the courts, but they are also governed by law under one or several federal or provincial Acts.

There is no scientific formula for the valuation of land; granted, qualified appraisers will be able to give some more or less definite figure for the value of the land and they will be able to substantiate their findings with the consideration of a number of factors regarding the present or future value of this particular parcel, but the result will always be the market value. Appraisers are reluctant or may even refuse to attempt to attach to the value of the land the little extra which the concept of "value to the owner" imports. Consequently there is neither any scientific application of the formula laid down by Rand J. in *Hayden Warehouses & Storage Ltd. v. Toronto* [1953] 1 D.L.R. 81 at 82: "The task of the tribunal is to determine compensation, not market or other values: these latter are only items or elements that make up compensation. Market value may be the sole determinant and be equivalent to compensation, but it is not necessarily so." However, the value to the owner is generally speaking

more or less a function of the market value, rising and falling with the latter, but never dropping below it. The "value to the owner" test is a strictly subjective approach to the problem, whereas "market value" would be the objective approach. A court or a competent board giving a final award will more nearly approximate an objective valuation, simply because the court will substitute its judgment for what the land may be worth to the owner, his asking price.

A compensation award in expropriation cases should be "just", not only to the owner of the land, but also to the expropriating authority (Thorson P. in *Queen v. Supertest* [1954] Ex. C.R. 105, at 110). In other words it should also be fair in the interest of the public, yet at the same time it should not require the owner to bear a heavier burden than that carried by everybody else.

A number of different valuation tests have been used in the past and various formulas were employed to arrive at some base figure. Although our present test "value to the owner" seems to be entrenched short of legislative action, it is not consistently followed.

Two recent cases of the Supreme Court of Alberta should be mentioned. *Calgary Power and Big Lake Farming* (1963), 37 D.L.R. (2d) 265 contains the following statement: "Recent sales in the area should serve as a guide to the valuation, regardless of the fact that they (the parcels of land in question) had acquired a speculative value." In *City of Edmonton v. Hicks* (1963), 39 D.L.R. (2d) 55 at 63, "The compensation to which the appellants are entitled in this case is the fair market value of the land subject to the restrictions on its use imposed under the general plan," a general development plan for the entire area.

Recent sales, speculative value, restrictions under a development plan, all these are incidents of the market value and under the *Hayden Warehouses* formula they are the component of the compensation due, and they form the basis upon which these cases were decided. It is submitted that also the Exchequer Court and the Supreme Court have essentially adopted the market value test while particularly the latter is still paying lip service to the "value to the owner" test. *Ferguson v. City of Halifax* (1963), 38 D.L.R. (2d) 445, a Supreme Court of Nova Scotia decision and *Town of Carman v. Johnson* (1963), 38 D.L.R. (2d) 752 a decision of the Court of Appeal for Manitoba both proceed on the premise that the possible future value of the property is to be rejected, and yet this is one of the essential ingredients of the value to the owner. The Ontario Court of Appeal in *Re Loblaw Groceries Co. Ltd. and Minister of Highways for Ontario* (1964), 42 D.L.R. (2d) 17 does take the future value into consideration in the case of an expropriated owner who had the means to realize otherwise its plan in the near future.

Generally, the courts try to arrive at a "fair" valuation which is found by considering market value, potentialities within reason,

value to the owner and the special adaptability of the property for his specific purposes and the injurious affection to adjoining land retained by the owner as well as other considerations. The contentious issue of the 10% allowance for compulsory taking which had been affirmed by the Supreme Court in the *Woods Manufacturing* case, rejected by the President of the Exchequer Court in the *Supertest* case and apparently abandoned by the Supreme Court in the *Drew* case, does not seem to be altogether dead, but only moribund. In the *Drew* case Locke J. stated that in order to justify the additional 10% there must be special circumstances. Almost exactly one year later the Ontario Court of Appeal in *Re Eix and the County of Waterloo* ([1963] 1 O.R. 389) awarded the 10% for compulsory taking in a case the report of which does not lend itself to the inference of "special circumstances" as the land in question was a narrow strip of farmland required for the widening of a highway.

"Market value" alone might not always do justice to the owner, either because there is no market in the sense that a buyer with whom the owner would at least negotiate could readily be found or else because the land in question has for the owner some peculiar value. However, if the Supreme Court found a way of rejecting the "10% formula", it might well also find occasion to substitute the "market value" test for that of "value to the owner" and the lament of Thorson P. in the *Supertest* case with regard to the difficulties of ascertaining the several items and of then applying them as a yardstick might once more have far reaching effect. The most sensible solution, it is submitted, would be for the legislature to take the initiative and consider seriously legislation similar to the English Acquisition of Land (Assessment of Compensation) Act of 1919 which without unduly restricting the owner's rights has contributed greatly to settle this nettlesome area of the law. E. von K.