

BETWEEN:

W. LAURENCE SWEENEY, CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1950
 June 6, 7,
 8 & 9
 Dec. 2

Appropriation—War Measures Act, R.S.C. 1927, c. 206—The Compensation (Defence) Act, 1940, 4 Geo. VI, c. 28—Compensation payable for ships appropriated—“Value to the owner”—Matters to be considered in determining value to the owner.

Under the War Measures Act, R.S.C. 1927, c. 206 respondent appropriated four vessels owned by the claimant or by companies in which the claimant owned all the issued capital stock. By agreement between the parties certain compensation was paid to the claimant at the time of acquisition of the vessels by respondent without prejudice to the claimant to regard such payment as not being full compensation. The matter now comes before the Court by way of reference by the Minister of Justice to have adjudicated the proper compensation payable to the claimant.

Held: That in ascertaining value in cases of compulsory taking the cost of the acquired property is not conclusive but should be considered.

2. That claimant is entitled to some allowance for services rendered by him during the construction of the vessels by way of inspection, supervision, the purchase of engines and equipment and for securing priorities in obtaining necessary goods and articles, together with incidental expenses incurred.
3. That as part of the operating expense claimant is entitled to an allowance for interest disbursed by him during the construction of the vessels.
4. That the claimant is entitled to the value to him of the property taken as it existed at the time of the taking excluding all appreciation due to the war; that there must be taken into consideration all advantages, present or future, which the property possesses for other possible purchasers as well as for the owner; that any special value to the owner is not a capitalized value of estimated savings or increased profits; that market value while not conclusive is of great importance; that damages as such are not recoverable to the extent that such damages would add to the actual value to the owner of the property.
5. That the claimant is entitled to include in the value to him not only the actual cost of construction and equipment but something additional by way of a sale-profit on vessels which he had constructed, and a further amount attributable to the fact that he would lose some operating profits which he was reasonably entitled to believe would accrue to him.

REFERENCE by the Minister of Justice under the War Measures Act to have determined the compensation payable for four vessels appropriated by the Crown.

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The action was tried before the Honourable Mr. Justice Cameron at Halifax.

F. D. Smith, K.C. and *A. J. Meagher* for claimant.

J. T. McQuarrie, K.C., R. T. Vaughan and *K. E. Eaton* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (December 2, 1950) delivered the following judgment:

Under the War Measures Act, 1927, R.S.C., ch. 206, the respondent in 1942 appropriated four vessels, two of which were owned outright by the claimant personally, the other two being owned by companies in which the claimant owned all the issued capital stock. By an agreement between the parties hereto dated February 28, 1947, (Ex. 1) the respondent paid compensation to the claimant therefor as follows:

<i>Name of Vessel</i>	<i>Date of Acquisition</i>	<i>Compensation Paid</i>
J. E. Kinney	6th October, 1942	\$ 79,881.13
Laurence K. Sweeney	29th June, 1942	84,085.40
W. D. Sweeney	6th October, 1942	100,850.06
M. 522	14th October, 1942	18,276.15
Interest at 3 per cent to the date hereof		38,041.38
		<hr/> \$321,133.12 <hr/>

It was a term of the said agreement that such payments would be made by the respondent and accepted by the claimant without prejudice to the right of the latter to regard the said sums as not being full compensation. The claimant did claim additional compensation and, pursuant to section 7 of The War Measures Act, the Minister of Justice referred the claim to this Court. The case came originally before my late brother, O'Connor, J., in June, 1948. Certain matters regarding the incidence of sales tax were not then disposed of and therefore judgment had not been delivered at the time of his death. The matter came before me at Halifax in June, 1950, and it was agreed by counsel for both parties that the evidence given at the original hearing should be considered as part of the

evidence, but that both parties would have the right to supplement it by further evidence, and that the respondent would have the right to cross-examine the claimant.

The claimant advances a claim for an additional \$193,866.88 and interest, the respondent submitting that the sums already paid are sufficient to satisfy all claims in respect of the vessels.

The matter falls for determination under the provisions of section 5(1) of The Compensation (Defence) Act, 1940, 4 George VI, ch. 28, the relevant part of which is as follows:

5. (1) The compensation payable in respect of the acquisition of any vessel . . . shall be a sum equal to the value of the vessel . . . no account being taken of any appreciation due to the war, . . .

“Acquisition” in relation to any vessel means the appropriation by or on behalf of His Majesty of the title to or the property in such vessel under the provisions of The War Measures Act and all four vessels in this case were so acquired.

The question for determination is, therefore, “the value of the vessel” and the statute provides no definition of that phrase. It is limited, however, by the negative phrase which follows: “No account being taken of any appreciation due to the war”.

While all four vessels were not absolutely identical, they were substantially the same in design, equipment, carrying capacity and power. They were of the schooner type, of wooden construction, having a length between perpendiculars of approximately 153 ft. and were powered by a single Fairbanks-Morse engine, developing 540 B.H.P. at 360 R.P.M. Ex. 5 and 6 are photographs of the *J. E. Kinney* and the *W. D. Sweeney* at the time of their launching. The carrying capacity was approximately 550 tons.

As far as I am aware, section 5(1) has received judicial interpretation in one case only—*The King v. Northumberland Ferries Ltd.*, (1). Later herein I shall have occasion to refer to certain specific principles laid down in that case. It is sufficient at this point to state that in the Supreme Court all of the judges were of the opinion that in ascertaining “value,” the principle of “replacement

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(1) (1945) S.C.R. 458, reversing (1944) Ex.C.R. 123.

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value" or "re-instatement" was not applicable; and that it is the value to the owner that must be determined, but limited, however, by the words, "no account being taken of any appreciation due to the war."

I think it is well settled that in ascertaining "value" in cases of compulsory taking, the "cost" is not necessarily conclusive; but it must be kept in mind. In this case "cost" is of basic importance and was so considered by both parties at all stages. Following the acquisition of the vessels, the representatives of the respondent endeavoured to ascertain the established cost of each vessel to the claimant. Before the Advisory Board the claimant used his alleged costs as the foundation on which to establish value; and at the trial all the evidence as to value was related in one way or another to the cost of each vessel to the claimant, by whom or on whose behalf they had been constructed. It therefore becomes necessary to first ascertain the cost (and by that I mean the actual outlay) of each vessel to the claimant.

I shall consider first the *J. E. Kinney*. The claimant entered into a contract for the construction of its hull with Messrs. Smith and Ruhland (a well known firm of ship-builders at Lunenburg, Nova Scotia) at a cost of \$28,000. Construction was commenced in March, 1941, and was completed in December of that year and it was immediately put into operation by the claimant. The engine was purchased by him from Fairbanks-Morse and installed by Lunenburg Foundries. Ex. 12 is a statement submitted by the claimant showing the cost to be \$66,670.64. I have some doubts as to the complete accuracy of this statement due to the inefficient bookkeeping methods of the claimant but in the absence of any other evidence will accept it as reasonably correct. The claimant also installed on this ship certain equipment which he had purchased from the underwriters of another vessel (the *Student Prince*) which he had formerly owned and which had been wrecked, and for which he paid \$800 in all. It is not an easy matter to determine what amount should be added for this item. Before the Advisory Board the claimant gave its value at \$3,000 and at the trial he valued it both at \$6,000 and \$5,000. There is no other evidence on this point, but taking

everything into consideration, I think that its value to the ship was somewhat in excess of \$800, and for that item I shall allow \$2,000 in all. He also claimed \$700 for fuel oil and lubricating oil said to have been on board the ship when acquired, the amount of which is not seriously challenged. These three items aggregate \$69,370.64 and that amount, I find, represents the cost of the *J. E. Kinney* to the claimant. In his pleadings he asks for \$150,000; and at the trial he estimated the total cost to him at \$82,885.40, and the value at \$129,508.44. I shall have occasion later to refer to the manner in which he estimated both the cost and the value.

The *L. K. Sweeney* was identical in every way to the *J. E. Kinney*. The hull was constructed by Smith and Ruhland in 1941-2 at a contract price of \$34,000, and the engine was purchased by the claimant and installed by Lunenburg Foundries. At the time of its acquisition it was about completed but had not had a trial run. The claimant produced Ex. 7 as a statement of his costs and, while again I doubt its complete accuracy, I shall accept it as reasonably correct. From its total of \$77,985.40 I will deduct, however, an item of \$500, which amount was paid directly to the claimant and is said to have been for travelling expenses. That item and similar ones will be considered later. I find, therefore, that the actual cost of the *L. K. Sweeney* to the claimant was \$77,485.40. In his pleadings the claimant asserted the value to him at \$150,000. At the trial he estimated its cost at \$86,577.40, and the value at \$134,695.93. These estimates will be later examined.

I may note in passing that the difference (\$8,814.76) in the cost of the *J. E. Kinney* (excluding the item of \$700 for oil) and the *L. K. Sweeney* appears to be made up of two major items. The contract for the hull of the latter exceeded that of the former by \$6,000, and the cost of the engine was \$850 more; the balance no doubt arises through small differences in cost and installation of equipment.

In 1942 the claimant again entered into a contract with Smith and Ruhland for the construction of the hull of a new vessel almost identical with the others, and later called *M. 522*, at a price of \$35,000. At the date of acqui-

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sition on October 14, 1942, that vessel was in their yards only partially completed. The claimant had paid them \$17,000 on account and had also expended \$26.15 for incidentals and Government approval of the plans—a total of \$17,026.15, which amount I find as the actual cost of the vessel to him. The respondent took over the contract with Smith and Ruhland and the construction of the vessel was later completed. In his pleadings the claimant asserted a value of \$40,000; at the trial he placed it at \$39,322.27 and estimated the cost to him at \$20,625.15. These estimates will later be considered.

The *W. D. Sweeney* was constructed throughout at the claimant's own shipyard at Yarmouth and it was the first vessel of this size he had ever built. It was almost identical in plan and equipment with the other three vessels. Construction was commenced in December, 1940, and when acquired by the respondent in October, 1942, was just completed. From the fact that it took twenty-two months to complete and from an examination of the pay sheets produced, it is very apparent that its construction was done in a leisurely fashion, only one or two workmen being engaged thereon at times. The claimant produced Ex. 8 as a statement of his costs, aggregating \$83,350.06. This is a summary only and is not supported by the production of any vouchers or original records, (except the contract for the engine with Fairbanks-Morse). Ex. 13 is said to be a statement of wages paid but I cannot relate its figures in any way to Ex. 8. The men in the claimant's employment were engaged on other enterprises as well as in the construction of this vessel and the only method of apportioning their wages was that the foreman indicated verbally to the bookkeeper the amount of such work to be charged to each job. To this amount of \$83,350.06 the claimant adds \$500 for spars and derrick, \$500 for deck houses, and \$65 for a windlass, a total of \$84,415.06. But that is not all. He said that following a practice which he alleged was in existence in Nova Scotia before the war, he, as builder of the vessel, was entitled to add to his costs the following items: 40 per cent of labour costs amounting to \$8,262.16; 10 per cent of cost of materials and equipment—\$6,375.85, and then 10 per cent

over all, a further item of \$9,905.30, making a grand total of \$108,958.37. It appears, therefore, that on this basis the cost of the *W. D. Sweeney* exceeded the cost of the *J. E. Kinney* (\$69,370.64), a similar vessel and built at a approximately the same time, by \$39,587.73, or about 57 per cent. That is difficult to understand in the light of the claimant's own statement that he had purchased all the lumber for the *W. D. Sweeney* in 1940 before there was any substantial increase in price, that the engine was purchased in December, 1940 (Ex. 9), at the same price as that of the *J. E. Kinney* engine, and that the whole construction was done with low cost labour and before costs of labour had advanced to any material extent.

Moreover, I find no support for his statement as to the practice of builders operating on a cost plus basis to add the percentages above mentioned. He himself admitted later that he had no personal knowledge that such was the case and that his evidence was purely hearsay. Mr. V. J. Price was the only witness called for the claimant who gave evidence on this point. For a few years after 1941 Price was office manager for Fairbanks-Morse at Shelbourne. That firm had certain cost plus work to do in connection with the construction of mine sweepers and he said that the practice then was to charge these rates, but only on extras and where there was a change from the original plan, and not on the ordinary construction.

I cannot accept Ex. 8 as constituting satisfactory proof that the amounts therein stated were in fact actually expended by the claimant. Throughout the trial the claimant referred to that exhibit and others as being the "audited costs," apparently intending to convey the impression that these statements had in fact been audited and approved by the auditors of the respondent. That, however, was not so. They were in fact presented to the auditors but were not accepted by them in the absence of proper bookkeeping records and vouchers. The auditors' mark merely indicates that they were examined and not that they were approved. There is no reason why the costs of the *W. D. Sweeney* should have exceeded those of the *J. E. Kinney*, unless it be the inexperience of the claimant in the construction of such vessels. The main

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item of expense would be the construction of the hull, the cost of the engine and its installation, and in the case of the *J. E. Kinney*, these costs and the profits of Smith and Ruhland and the Lunenburg Foundries were all included. In the absence of any satisfactory proof as to the actual outlay, I must find that the cost of the *W. D. Sweeney* in so far as it could be reflected in the value of the vessel did not exceed that of *J. E. Kinney*, (less oil), namely, \$68,670.64. It may be noted here that included in Ex. 8 is an item of \$1,150, paid to the claimant "for use of my own wharf." That item should be disallowed in any event, as it is apparently related to a period after the acquisition and with that I am not concerned. I would disallow also an item of \$886.87 paid to Fairbanks-Morse for interest. That item I shall consider later.

For the *W. D. Sweeney*, the claimant in his Statement of Claim asserted a value of \$175,000. At the trial he estimated it at \$175,372.45, and the actual cost at \$110,558.37; these estimates will be referred to later.

The following therefore is a summary of the actual costs of each vessel, the amount actually paid by the respondent, and the approximate percentage of the latter to the former:

Name of Vessel	Actual cost to Claimant	Amount paid to Claimant	Percentage of actual payment to actual cost
<i>J. E. Kinney</i>	\$ 69,370.64	\$ 79,881.13	110.82%
<i>L. K. Sweeney</i>	77,485.40	84,095.40	108.51%
<i>W. D. Sweeney</i>	68,670.64	100,850.06	146.86%
<i>M. 522</i>	17,026.15	18,276.15	107.34%

In estimating his costs, the claimant adds a very substantial amount for his own services in the supervision of construction, preparation of plans and specifications, office overhead and purchase of engines and equipment. These items he estimates as follows: *J. E. Kinney*—\$6,200; *L. K. Sweeney*—\$6,200; *M. 522*—\$3,100 and the *W. D. Sweeney* (for supervision only)—\$1,600.

These claims, in my opinion, are grossly exaggerated. There is no evidence as to the actual time spent by the claimant in these operations. The plans and specifications of the first vessel constructed—the *J. E. Kinney*—were

very sketchy and uncomplicated and were prepared at a total cost of \$25. My impression is that most of the work regarding the plans and specifications of the three vessels built by Smith and Ruhland was done by them without any separate charge. The Steamship Inspection Department appears to have waived the production of plans and specifications for the *L. K. Sweeney*, the *W. D. Sweeney* and the *M. 522* on the ground that they were identical to those of the *J. E. Kinney*.

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The claimant says that while the three vessels built by Smith and Ruhland were under construction he, as owner, visited their yards about once a month to see what progress was being made, to check on construction and to determine what changes, if any, should be made. How necessary these inspections were I do not know, but it is apparent that the claimant had complete confidence in the ability and trustworthiness of Smith and Ruhland, as is shown by the fact that he never felt it necessary to have a written contract with them and gave them new contracts from time to time. The only change he made as a result of these inspection visits was in the construction of the deckhouses.

Then it is stated that the claimant was a shrewd buyer, that he bought the engines and equipment at a minimum price and that he was able to secure priorities; but there is no evidence as to how much, if any, may have been saved by his special ability or exertion.

I believe, however, that some allowance should be made for these services. The type of vessel, while not entirely new, was larger than those previously constructed and I have no doubt the claimant showed some skill in the planning and by his efforts was able to secure good prices and in some cases the necessary priorities. In endeavouring to ascertain the amount which should be allowed I must keep in mind the evidence that the period for which the services extended was approximately twenty-two months, that in the main, they were the same for each vessel, and that the claimant throughout was engaged in many other enterprises—the operation of a marine railway, a ship repair yard and the maintenance and operation of fifteen fishing and freight vessels.

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There is evidence that in Canada a naval architect might charge 5 per cent of the cost of the construction of a hull. I think that charge, however, is referable to the complete preparation of the plans and specifications of a vessel of a new type and it may also include the complete supervision of all construction.

Taking all these matters into consideration I think that full justice will be done to the claimant if I make a total allowance of \$3,000 for all these services and any expenses incidental thereto, that amount to be apportioned as follows: to the *J. E. Kinney*—\$1,000; to the *L. K. Sweeney*—\$750; to the *W. D. Sweeney*—\$750 and to the *M. 522*—\$500.

The claimant also claims as part of the cost of construction, interest at 5 per cent per annum up to the date of acquisition of the vessels, on the amounts he had paid out during the course of construction. As a matter of fact no interest was disbursed by him except in regard to the unpaid amounts due to Fairbanks-Morse for the engines. I am inclined to the view that some such allowance should be made as part of the operating expense. The evidence as to the amounts claimed is very meagre and unsatisfactory, but under all the circumstances, I shall dispose of this claim as follows:

(a) No further allowance will be made in regard to the *L. K. Sweeney* as the claimant has already been allowed \$1,392 for interest in the statement, Ex. 7. That amount, as computed by Sweeney, did include interest beyond the date of acquisition, but on the whole, it represents a fair interest charge for the average outlay made during construction.

(b) For the *M. 522*, I shall allow \$308.46, as claimed in Ex. 14.

(c) For the *J. E. Kinney*, I shall allow the same amount as previously allowed for the *L. K. Sweeney*, namely \$1,392.

(d) For the *W. D. Sweeney*, I shall allow interest at 5 per cent for ten months (which would be the average time for the construction of such a vessel) on \$35,000 (being approximately one-half of the ascertained actual cost), namely \$1,458.36.

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While the *W. D. Sweeney* was built in the claimant's own yards, I do not think that anything further should be added to its costs, in respect of overhead, supervision or builder's profit. I have fixed its cost at the same figure as that of the *J. E. Kinney*, mainly because of the unsatisfactory evidence adduced by the claimant as to its actual costs. All these items for overhead, supervision and builder's profit were included in the ascertained cost of the *J. E. Kinney*. Had there been satisfactory evidence as to the actual cost of the construction of the *W. D. Sweeney* I would have adopted one or other of the methods followed by W. C. McKay and Sons Limited (shipbuilders of Shelbourne N.S.), as given by Mr. C. McKay. In one method (of which Ex. A. is an example), that company for the construction of a hull on a cost plus basis, charged a fee of \$1,500 for the use of its shipyards, plant and machinery, depreciation, wear and tear, plus 10 per cent of the cost. Mr. McKay stated that in pre-war days, on a firm contract for the construction of a hull, his company in executing a contract for \$35,000 would expect to make \$5,000, which latter amount included overhead. Even if further amounts were allowed on one or other of these bases, the result would not assist the claimant to establish a value for the *W. D. Sweeney* in excess of that already paid him.

Taking into consideration the additional items which I have just referred to, the total cost of the four vessels would respectively be as follows:

<i>Name of Vessel</i>	<i>Actual Outlay</i>	<i>Services Rendered by the Claimant</i>	<i>Allowance for Interest</i>	<i>Total Cost</i>
<i>J. E. Kinney</i>	\$ 69,370.64	\$ 1,000.00	\$ 1,392.00	\$ 71,762.64
<i>L. K. Sweeney</i>	77,485.40	750.00		78,235.40
<i>M. 522</i>	17,026.15	500.00	308.46	17,834.61
<i>W. D. Sweeney</i> as fixed:	68,670.64	750.00	1,458.36	70,879.00

The cost of the four vessels having been so ascertained, I now turn to the question of the value of each to the owner.

The claimant for many years had been engaged in the operation of fishing and freight vessels and since 1924 had operated some sixty-five different ships. In 1942, he owned and operated about fifteen. In 1936, he decided to purchase a vessel of larger size than those he had previously

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used and to use it to carry freight to and from the West Indies and Newfoundland, operating out of Nova Scotia ports. Due to the obsolescence of the old type of three and four-masted schooners, competition was lessening and he says he found the operation very successful. In 1940, he decided to expand these services and he therefore planned to construct three or four more vessels of a somewhat larger capacity and to put them into the same service. The *J. E. Kinney*, immediately following its completion in December 1941, was placed on that run and it was the claimant's intention to use the other three vessels for the same purpose.

He says that with the considerable number of ships at his disposal, the facilities of his repair yard and marine railway, and his long years of experience as a ship operator, he was able to give good service, secure large quantities of freight and that his operations were very successful.

In considering the claimant's own estimate of the value to him of the vessels, I shall keep in mind his admission that he had never sold vessels of this type and size, that he knew of no one else who had done so, that he did not pretend to know what a purchaser would be willing to pay and that he would not express any opinion on the market values except to say that in wartime and due to the war, such prices were fantastic. His estimate of value to him was arrived at by taking the costs to him and by adding an allowance for estimated loss of profits and a further allowance for normal profits on the sale.

In regard to the first item—loss of profits—he says that while he was unable to secure replacements for the four vessels due to war controls and priorities, he estimated that in normal times it would take one year to replace each vessel by constructing a new one. He states that in pre-war years it was normal to make profits which, in four years, would completely reimburse him for the cost of the vessel; and that the ten months operation of the *J. E. Kinney* confirmed him in this opinion. He says, therefore, that his loss of profits for one year would be 25 per cent of the cost of the vessel and that this percentage should be added as part of the value to him for the *J. E. Kinney*, the *L. K. Sweeney* and the *W. D. Sweeney*. For the *M. 522*

which had been six months under construction, but was incomplete, he adds only one half of the allowance he had made for the *L. K. Sweeney*—\$10,759.67. To the total so ascertained he adds a further item of 25 per cent thereon for profit on the selling of the ships. He puts the claim in this way:

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I take into consideration the fact that I should have made a profit on the selling of my ship. In other words I did not want to sell my ship just for the sake of the revenue, just for the matter of selling my ship rather than working it for a year. I took it that in a normal case a person wanting to buy my ship, in addition to what I should have been earning with her, should pay something extra that I would have been willing to sell her for . . . and for that I made an allowance of 25 per cent.

The total claimed for one year loss of profit exceeds \$80,600, and for profit on sale exceeds \$95,200; a grand total of profit of approximately \$175,800. That figure represents approximately 75 per cent of the total proven cost of the vessels.

I consider the amount of these claims to be grossly exaggerated and quite fantastic. The evidence is that in 1942 the sale price of vessels may have increased by as much as 50 per cent beyond the prices existing in 1939, and all occasioned by the war. Moreover, I must decline to accept the claimant's evidence as to the profits made by him in pre-war operations or in the operation of the *J. E. Kinney* as indicating that he could expect to have the capital cost returned in four years. Admittedly his statement failed to take into account any allowance whatever for depreciation or income tax. His statement of profits was quite unsupported by documentary proof of any sort, although his records were said to have been readily available. At the request of his counsel he gave his estimate without reference to records or documents. In the absence of any supporting evidence as to his profits, and being of the opinion that throughout the whole of his evidence he was quite willing to exaggerate and pyramid all his costs and estimates wherever it was to his financial advantage to do so, I must decline to accept his statement as to his profits. Moreover, in one or two of the income tax returns referred to at the trial, it was shown that one of his operating companies—the Nova Scotia Shipping Company—in 1938 (and I think also in 1939) operated at a loss. If

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there were in fact any profits after making due provision for income tax, depreciation, maintenance, insurance and the like, no satisfactory proof thereof has been furnished to me.

He considered the second addition of 25 per cent to be the normal profit that an owner would expect to make. It is nothing more than a guess and the claimant personally gave no evidence which would support such a percentage where the factor of "appreciation due to the war" is eliminated.

Counsel for the claimant submits that Sweeney's evidence as to these additions is corroborated by that of Captain I. W. Horton. I have read the latter's evidence very carefully. Captain Horton was at one time a master mariner and since 1937 has been district manager for Fairbanks-Morse for Nova Scotia. He appears to have owned some diesel power motor ships at one time. His firm supplied the engines for the four vessels and while engaged in their installation he made some inspection of the hulls in a general fashion. He was never engaged in the West Indies shipping trade and had no knowledge of profits made in that service. As a shareholder in a company operating ships, he says that on one occasion he had his capital returned in two years, but that period included one year before and one year during the war. How extensive his holdings were or where the vessel operated is not shown. He explains that that was not always the experience of ship operators in that area, that in many cases owners suffered losses. I think Captain Horton's personal knowledge of the financial success or otherwise as to the operation of freighters in pre-war days was so limited that it would be quite unsafe to draw any general conclusion from the one instance he cited.

My recollection of Captain Horton's evidence is that he had practically no experience or personal knowledge of the sale of ships of this or any other type. However, he was asked his opinion as to the method used by the claimant, that of adding the two items of 25 per cent each to the original cost, and he agreed that he would be inclined to

follow the same lines, *basing that opinion entirely on Sweeney's statement that the latter could recover his capital cost in four years.* He said:

My idea would be that at the time of the sale, today, I would estimate a profit on the sale of 25 per cent roughly. If I could replace the ship today I would still consider that profit on the absolute sale and the other 25 per cent would be caused by the reason that it would take me approximately a year to build another ship and in that year I would lose revenue.

In cross-examination, Captain Horton said that the out of pocket cost to the owner, plus 25 per cent, would be a reasonable quotation for the selling. A little later he said he was basing that on the return of capital during the war. Finally, when asked his opinion of the value of these four ships, he said:

I haven't anything particular except that I know the value of the machinery which we quoted on, and I have an idea of the value of the hulls, but I have had no reason to place a figure on it.

It will be seen, therefore, that Captain Horton lacked a general knowledge as to profits, had no experience in regard to the sale of ships, and that in cross-examination, he materially altered his original opinion as to value, and finally declined to place any specific value on any of the vessels. I consider therefore that his evidence on these matters does not in any way corroborate or support that of the claimant. The other two witnesses called by the claimant were not asked to place a value on the vessels.

Before considering the question as to what amount, if any, the claimant may be entitled to, in excess of his costs, I think I should state that in this case, where the vessels were acquired from the original owner, that he is entitled to be paid at least the actual cost to him (less proper depreciation, if any), although to some extent the cost of labour and material may have been increased due to war conditions. In determining the value of properties expropriated, the approach should be one which would not tend to victimise the owner. It is not necessary to consider the effect of the Compensation (Defence) Act, 1940, in cases, where, at the time of acquisition, the property had already changed hands at values which were enhanced due to the war. Here the vessels had not been previously sold, except that in two cases they were transferred to com-

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panies or corporations in which the claimant had the controlling interest. No ships would have been built privately in wartime had they been liable to acquisition at prices less than the actual cost to the builder.

In the Northumberland Ferries case (*supra*), there were no specific claims for loss of profit or profit on sale. Certain general principles were laid down in that case, however, which are of assistance in reaching a conclusion in this case. Kerwin, J. said at p. 485:

The shipowner is also entitled to be paid the present value of the vessel (as of a date immediately prior to the outbreak of war), including the future advantages of the ship but only in so far as they help to give it that present value.

and at p. 490, he said:

Under the Expropriation Act, damage to the owner is relevant and even there it is only in exceptional circumstances that it has been awarded: Cripps on Compensation, 8th Edition, pp. 180 and 181. But over and above that, the proviso in subs. 1 of s. 5 of the Compensation (Defence) Act prevents its application. How can the value of a ship be reinstated when the court is prohibited from giving any effect to appreciation due to the war?

In the same case Hudson, J. at p. 495 said:

With respect, I am of the opinion that this award failed to give due weight to the cost of the vessel to the respondents. It was acquired only a few months before the war, . . . It is true that the price paid by the owner is not necessarily evidence of its value but, under the circumstances here, it seems to me that apart from the offers and counter offers of the parties it is the only real evidence of value which we have. All else is speculative and more or less influenced by war conditions, and excluded under section 5 of the Compensation (Defence) Act.

Rand, J. stated at p. 505:

But under the enactment with which we are dealing, it is not a matter of damages generally; compensation, it is true, but the precise measure is prescribed: value to the owner. The replacement cost of the same vessel with a deduction for physical depreciation or obsolescence cannot be said to have no relevancy to market value; but it is simply one of the aggregate of elements that determines price. Estimates of market value should be made by those who, through experience or acquaintance with similar or analogous transactions, are capable of judgments cognate with those of prudent purchasers and susceptible of analysis and exposition; but this, though at times difficult, is scarcely satisfied by a melange of notions crowned with a guess. And, as laid down in *Pastoral Finance Assn. Ltd. v. The Minister, supra*, the special value to the owner is not a capitalized value of estimated savings or increased profits; it is an addition to the ordinary market price which a prudent purchaser, contemplating all of the risks and circumstances in which his investment and prospective use are to be placed, would, if necessary, be willing to pay.

Kellock, J. said at pp. 509, 510:

The learned trial judge took the view that the principles applicable are those which have been applied in fixing compensation under section 23 of the Expropriation Act, R.S.C. 1927, chapter 64. Whatever may be the position under the Expropriation Act, it is erroneous, in my opinion, to apply the principles applicable under that Act, to a case arising under The Compensation (Defence) Act, 1940, the provisions of which are not the same but narrower in scope.

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Where the value of the thing taken, whether it be land or other property, is being determined without regard to the question of damages suffered by the owner, over and above the value of the thing taken, as in the case at bar, the matter is governed, in my opinion, by those principles. The owner is entitled to the "value to him" of the property taken, as it existed at the date of the taking. There must be taken into consideration all advantages, present or future, which it possesses for other possible purchasers as well as for the owner himself, but there is to be excluded from consideration any special value to the person exercising the power of compulsory taking where that value exists only for him in connection with the scheme for which the property is taken. I am not intending to do anything more than to epitomize what is found in the authorities to which I have referred, as I understand them. Lord Moulton, in delivering the judgment of the Judicial Committee in *Pastoral Finance Association v. The Minister*, (1914) A.C. 1083 at 1088, summed up the matter in this way:

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.

It appears, therefore, that damages, as such, are not recoverable in these proceedings, at least to the extent that such damages would add to the actual "value to the owner" of the property; that the claimant is entitled to the "value to him" of the property taken as it existed at the time of the taking (excluding all appreciation due to the war); and that there must be taken into consideration all advantages, present or future, which the property possesses for other possible purchasers as well as for the owner; and that any special value to the owner is not a capitalized value of estimated savings or increased profits. Market value, while perhaps not always conclusive, I consider to be of great importance.

The evidence establishes that in a favourable seller's market, the owner of a vessel, in considering an offer to purchase, would take into consideration a temporary loss of profit, and if he were the builder of the vessel as well, he would also endeavour to secure something in excess of

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his actual costs. There is no doubt that in 1942 the market value of practically all types of vessels had been greatly increased due to the unusual demand created by war conditions, and I think that had the claimant's vessels not been taken over he would have been able within a short time after their completion to sell them at a substantial profit. Moreover, with his experience and skill in operating, it is probable that with freight rates greatly increased due to the war, he could have operated them profitably.

But such favourable conditions were brought about by the war and prior thereto they were far different. None of the other witnesses had any experience either before or during the war in the operation or sale of vessels of this particular type and size. But the evidence as a whole indicates that under pre-war conditions, the business of carrying freight in that area was depressed, some shipyards were idle, freight rates were low and while some firms made profit, many others sustained losses. One of the claimant's own witnesses stated that with a subsidy he just about broke even. Another witness said that had the war not brought about increased freight rates, he would have gone "broke." Conditions were then far from favourable.

The witnesses, with varying knowledge and experience, endeavoured as best they could to envisage a theoretical market in which the claimant with all his experience, skill and equipment, was the owner and intending vendor of the vessels, and the market was not affected by the impact of the war. Excluding the claimant's own estimate of "value," which I reject as biased and grossly exaggerated, the highest "value" placed by any of the witnesses was that of Horton who, while declining to name any specific figure for any vessel, was of the opinion that such value would be the costs plus an addition of 25 per cent. His opinion to some extent, however, was based on the return of capital during the war.

Mr. Thomas Barrie, a ship surveyor and appraiser, residing in Boston, Mass., gave evidence for the respondent. He has had wide experience in appraising values for underwriters, but while he knew this type of vessel, his experience with wooden vessels generally was quite limited and he

had no personal knowledge of conditions in Nova Scotia. He said that he would not pay more than the actual cost of a vessel ready to go to sea but which had not had a trial run. He said that in 1939, these vessels would not have sold for more than the actual cost of construction and equipment, but, that included in the cost, there would be some profit to the builder-owner on the sale. He added that in 1939 the delay in replacing a vessel which had been sold would not be a factor in fixing the sale price.

Mr. E. R. Huntingdon, Port Warden and Harbour-master of Sydney, N.S., was at one time a qualified ship's master for all types of vessels and later a ship surveyor for many years. He has had considerable experience in valuing ships and was familiar with this particular type. He said that under pre-war conditions, shipping companies anticipated being able, out of profits, to write-off their capital costs in eighteen years, but that many failed to do so. He would be inclined to pay slightly more than the cost to acquire a new vessel ready for sea, but if it had had no trial run, would make a deduction up to 10 per cent.

Mr. W. S. MacDonald, of Halifax, called by the respondent, has had long experience as a ship broker, ship owner and manager. He had no knowledge of the sale of any new wooden vessels in Nova Scotia during the last twenty years. He operated three and four-masted schooners of about 450 tons capacity, and said that in operating such sail vessels it was anticipated that the cost would be recovered out of profits in ten years, but that in many cases it took much longer. Due to the necessity of repairs and maintenance, wooden vessels such as Sweeney's, could not operate more than ten months in a year.

It will be seen, therefore, that there is not a great deal of evidence which would furnish a clear indication of the value of the individual vessels to the claimant. That is doubtless caused by the fact that this type of vessel was somewhat novel and that very few new vessels, if any, had been sold in Nova Scotia in the last twenty years.

After full consideration of all the facts and doing the best I can with the limited evidence available, I have reached the conclusion that the claimant is entitled to include in the "value to him" not only the actual cost

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of construction and equipment but something additional by way of a sale-profit on vessels which he had constructed, and a further amount attributable to the fact that he would lose some operating profits, which he was reasonably entitled to believe would accrue to him. In the absence of any specific evidence as to what sale profit a builder-owner would be entitled to receive, or what profits Sweeney could have made under normal conditions, it is not an easy matter to determine just what amounts should be added for these items. I think the answer may be found somewhere between the figure of 25 per cent given by Horton, and the actual costs, or something a little above costs, given by the other witnesses. I have reached the conclusion that the addition of 15 per cent to the actual ascertained costs of construction and equipment would give to the claimant compensation equal to the full "value to him" of the two vessels which were practically completed and ready for sea when taken over—namely, the *L. K. Sweeney* and the *W. D. Sweeney*.

For the *J. E. Kinney* I would add a similar percentage. But that vessel had been in use for ten months and I accept the evidence, that for wooden vessels that is the maximum use to which it could be put in one year. I accept also the evidence that it is common practice when selling vessels, to allow a 10 per cent deduction for depreciation for the first year's use, in normal times. Sweeney himself had given evidence to that effect when he appeared before the Advisory Board, although he altered that opinion before me. For the *J. E. Kinney* therefore, there will be a net addition of 5 per cent to the ascertained cost.

Something less, however, should be allowed for the *M. 522*. Its hull was only partially complete, and I am satisfied that a vendor would not expect to receive, and a purchaser would not expect to pay, very much beyond the actual outlay in such a case. I shall allow in this case an addition of 10 per cent.

I am not overlooking the fact that in the case of the *L. K. Sweeney* or the *W. D. Sweeney* (or perhaps both), there had been no trial run, and the evidence is that in such a case a purchaser would be more wary and inclined to pay less. Sweeney himself said that he had never bought

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a vessel which had never had a trial run. But all these vessels were later put in service and there is no evidence that there was any defect disclosed, such as might have been discovered on a trial run. Therefore, under all the circumstances, I make no deduction for that factor.

Adding these percentages to the actual total ascertained cost, the following results appear:

<i>Name of Vessel</i>	<i>Total Cost</i>	<i>Additional Value Added to Claimant</i>	<i>Total Value to Claimant</i>	<i>Amount Paid to Claimant</i>
<i>J. E. Kinney</i>	\$71,762.64	\$ 3,588.13	\$75,350.77	\$ 79,881.13
<i>L. K. Sweeney</i>	78,235.40	11,735.31	89,970.71	84,085.40
<i>M. 522</i>	17,834.61	1,783.46	19,618.07	18,276.15
<i>W. D. Sweeney</i>	70,879.00	12,631.85	83,510.85	100,850.06

From the above table it will be seen that for the *J. E. Kinney* and the *W. D. Sweeney*, the claimant has already been paid sums in excess of their total value; and that for the other two vessels the "values" exceed the amounts which have been paid—in the case of the *L. K. Sweeney* by \$5,885.31 and the *M. 522* by \$1,341.92.

In my opinion it is not open to me to consider the payments as a whole but rather in relation to individual vessels.

There will therefore be judgment declaring that as to the *J. E. Kinney* and the *W. D. Sweeney*, the claimant has already received full compensation and is entitled to nothing further in respect thereof; and that he is entitled to be paid for the *L. K. Sweeney* the additional sum of \$5,885.31, with interest at 3 per cent from June 29, 1942, and for the *M. 522*, an additional \$1,341.92 with interest at 3 per cent from October 14, 1942.

The amounts which I have found as payable to the claimant constitute but a small fraction of his original claims. Much unnecessary time was taken up at the trial with the presentation of the greatly exaggerated claims put forward by him. Under all the circumstances, I think that the respondent should pay only one-half of the taxed costs of the claimant.

At the trial there was some discussion as to the possibility of the Department of National Revenue asserting a claim for sales tax in connection with these vessels, either against the claimant personally or against his builders,

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Messrs. Smith and Ruhland. At the trial it was stated that no such claims now existed as against the claimant personally and I am now advised that no such claims are now asserted as against Smith and Ruhland. For that reason I have not taken the item of sales tax into consideration.

Judgment accordingly.
