BETWEEN:

HER MAJESTY THE QUEEN, on the information of the Attorney General of Canada ..... PLAINTIFF;

AND

THE COMMUNITY OF THE SISTERS OF CHARITY OF PROVIDENCE, ... DEFENDANT.

1951
Jan. 8-12, 15-18
1952
Apr. 3

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Hospital operated as charitable institution not an object of commercial dealing —Principle of re-instatement applicable to property of exceptional character—Depreciation inevitable notwithstanding maintenance— Depreciation to be ascertained from tables and actual condition of property—Ten per cent allowance for compulsory taking only in exceptional cases—Additional allowance applicable to whole amount of value to owner.

The plaintiff expropriated property in the City of Hull on which there was a hospital operated by a religious community of nuns on a non-profit basis as a charitable institution. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That the nature of the expropriated property takes it out of the class of properties whose value to their owners is measured by the ordinary economic and commercial tests of value. It is not of the kind that lends itself to commercial dealing but is of an exceptional character and its value to the owner must be measured by a standard that is appropriate to it.

2. That this is a case in which the principle of re-instatement should be applied and the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it.

3. That it is fallacious to assume that an asset can be so well maintained that it will remain in as good as new condition indefinitely. Depreciation begins from the moment of its first use and continues notwithstanding maintenance. *City of Knoxville* v. *Knoxville Water Co.* (1909) 212 U.S. 1. followed.

4. That although well recognized depreciation tables are of great assistance in ascertaining the amount of depreciation of an asset they ought not to be used by themselves. It is always necessary to make a careful examination of the asset and consider its structural and functional condition so that consideration may be given not only to the elapsed time of its expectancy of life according to the tables but also to the remaining life that may be expected in the light of its actual condition.

5. That it is only in cases where it is difficult by reason of certain uncertainties to estimate the amount of the compensation that there is ground for adding the ten per cent allowance for compulsory taking to the owner's indemnity. *The King* v. *Lavoie* December 18, 1950, unreported, followed.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

6. That the estimation of the compensation in the present case involves sufficient difficulty and uncertainty to bring it within the ambit of the rule in the *Lavoie* case.

7. That the amount found as the value of the expropriated property to its owner is an indivisible sum and the additional allowance for compulsory taking should be based on the whole of it rather than on only part of it.

INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

F. B. Major Q.C. and *J. Bertrand* for plaintiff.

P. Ste Marie Q.C. and *A. Taché Q.C.* for defendant.

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

THE PRESIDENT now (April 3, 1952) delivered the following judgment:

The information exhibited herein shows that the lands of the defendant described in paragraph 2 thereof were taken by His late Majesty the King for the purpose of a public work of Canada under the Expropriation Act, R.S.C. 1927, chap. 64, and that the expropriation was completed by the deposit of a plan and description of the lands in the office of the registrar of deeds for the registration division of Hull in the Province of Quebec, in which the lands are situate, on May 6, 1946. Thereupon, under section 9 of the Act, the said lands became vested in His Majesty and all the right, title and interest of the defendant thereto or therein ceased to exist and, under section 23, became converted into a claim to the compensation money which was made to stand in the stead of the property.

The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are brought for an adjudication thereon. By the information the plaintiff offered the sum of $735,676 but the defendant by its statement of defence

claimed $998,000. At the opening of the trial counsel for the defendant applied for and obtained leave to amend its statement of defence by claiming $1,450,614.

The expropriated property is well situated. It is on the east side of Laurier Street in the City of Hull and extends eastward to the Ottawa river. On the north it is bounded by Jacques Cartier Park and on the south by the convent owned by La Congrégation des Servantes de Jésus-Marie. There are two lots in the property the northerly one being Lot No. 219C with a frontage of 209 feet on Laurier Street and an area of 2·3 acres and the southerly one Lot No. 219D with a frontage of 251·5 feet and an area of 2·5 acres.

The defendant, a religious community of nuns devoted to charity, operates a general hospital, commonly called the Sacred Heart Hospital, on Lot No. 219D. It acquired this lot on August 7, 1911, as a gift from the City of Hull subject to certain conditions, one of which was that it should convert the house that was on the property into a hospital and enlarge it to meet the needs of the public. The present hospital is the result of additions and replacements. It may be considered in three sections. The most southerly one consists of the original house called the Champagne house which was built in 1901 or 1902 as a private residence and is now used as a residence for the nurses and the nuns. It is of ordinary brick construction. The main building, which is the hospital proper, was built at different times. The original building was erected in 1912. The north wing was built in 1924 with re-inforced concrete beams and slabs. The centre part, which was re-built in 1928 after a fire in 1926, has a steel frame and is fireproofed with tile and concrete. The south east wing, which was built in 1929, is of similar construction. The main building may properly be described as fire resistive. The third section, called the annex, is the service wing of the hospital. Part of it dates back to 1912 and the rest was built in 1926. It may also be described as of ordinary construction. A plan prepared by Mr. L. Sarra-Bournet sets out the details of the lay-out

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

of the hospital on its several floors and the plot plan shows the out-buildings and other out-door improvements on the premises as well as the hospital itself.

After the completion of the hospital in 1929 the defendant acquired Lot 219C on September 23, 1931, from H. Dupuis for $12,000. This lot is still vacant land being used by the defendant for a garden. It is surrounded by a metal fence.

The defendant's hospital has been recognized under the Public Charities Act of Quebec, R.S.Q. 1941, chap. 187, as a public charitable institution and it is admitted that it has always been operated without profit. It is the only general hospital in the City of Hull and serves not only the city but also the surrounding district. It is agreed that it is not large enough to meet the demands of the area it serves and is overcrowded.

After the expropriation the City of Hull, on September 30, 1946, sold to the defendant a property on the Mountain Road in Hull, containing 44·54 acres, for the sum of $1.00, it being understood that the defendant bound itself to build a new hospital and would start before January 1, 1949, and that if it did not do so the sale would be null and void. On November 24, 1948, the City of Hull extended the time for the commencement of the construction to January 1, 1951, and on January 16, 1951, the City granted a further extension to January 1, 1952. The property in question is admirably suited as a site for a hospital.

It was assumed during the case that the defendant will build a new hospital as soon as possible and a considerable portion of the defendant's claim was based on that assumption.

So far as I am aware this is the first time that a hospital voluntarily operated by a religious organization on a non-profit making basis as a charitable institution has been taken under the Expropriation Act. In my opinion, the nature of the expropriated property takes it out of the class of properties whose value to their owners is measured by the ordinary economic and commercial tests of value

laid down by the Judicial Committee of the Privy Council in the three decisions which settle the law on the matter, to which I referred in *The King* v. *Woods Manufacturing Co. Ltd.* (1), namely, *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2), *Pastoral Finance Association, Limited* v. *The Minister* (3), and *Vyricherla Narayana Gajapateraju* v. *The Revenue Divisional Officer, Vizagapatam* (4). The defendant's property is not of the kind that lends itself to commercial dealing but is of an exceptional character and its value to the owner must be measured by a standard that is appropriate to it. As I see it, this is a case in which the principle of re-instatement should be applied. This means that the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it. *Vide*—Cripps on Compensation, 8th edition, page 180; *London School Board* v. *South Eastern Railway Co.* (5); *Metropolitan Railway Company and Metropolitan District Railway Company* v. *Burrow* (6), the text of which judgment appears in the Appendix to Cripps (*supra*) at pages 906-916. The sum to be paid should, therefore, be sufficient to cover the realizable money value of the land, the replacement value of the hospital, being its reconstruction cost less its depreciation, the value of the other outbuildings and out-door improvements, all of these values being computed as of the date of the expropriation, the cost of moving to a new hospital and a sum equal to the increased cost of constructing a new hospital after the date of expropriation, the last item being included in the defendant's entitlement on the assumption that it will build a new hospital. The defendant should, therefore, receive the fair market value of the land, namely, its realizable money value as at the date of the expropriation, regardless of the fact that it may not have to buy a new site, together with such sum as would enable it to build just as valuable a hospital on a new site and move into it.

(1) (1949) Ex. C.R. 9 at 44.
(2) (1914) A.C. 569 at 576.
(3) (1914) A.C. 1083 at 1088.
(4) (1939) A.C. 302 at 312.
(5) (1887) 3 T.L.R. 710.
(6) (1884) The Times, Nov. 22.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

On this basis, counsel for the defendant gave particulars of the amounts of the various items in its claim, amounting in the total to $1,434,649.76 as follows:

INDEMNITÉ PÉCUNIAIRE RÉCLAMÉE PAR LA DÉFENDERESSE COMME COMPENSATION:

Pour la perte de:		
Bâtisses,		$1,177,426.00
Terrain,		72,400.00
Dépendances,		2,260.00
Tennis,		500.00
Clôture métallique,		2,100.00
Chemins—stationnement,		5,000.00
Trottoirs,		700 00
Monument,		600.00
Egout privé		1,000.00
Clôture de bois,		320 00
Arbres, arbustes, gazon, fleurs vivaces, nivellement, etc.		7,500.00
		$1,269,806.00
POUR		
Déménagement:		
Général:	$20,327.00	
Appareils spécialisés:	7,994.00	
Appareils de cuisine et de buanderie:	6,100.00	
	$34,421.00	34,421.00
		$1,304,227.00
POUR:		
Dépossession forcée, 10 pour cent		130,422.70
		$1,434,649.70

The Court took a view of the expropriated property in the presence of counsel for the parties.

I shall deal first with the value of the land. Opinion evidence on this was given by Mr. A. Guertin and Mr. B. Grandguillot for the defendant and Mr. Theo Lanctot and Mr. C. Lalande for the plaintiff. All were agreed that the value to be ascertained was the fair market value of the land as at the date of the expropriation and that the most advantageous use to which it could have been put was for residential purposes and all put forward its possible development for subdivision into lots for private dwellings.

Mr. Guertin proposed a plan of subdivision, Exhibit T, with a 50 foot street running east from Laurier Street immediately north of the convent to a projected 66 foot street parallel with Laurier Street and coming to a dead end at the north end of the property. There were to be 24 lots in this subdivision which he valued at 60 cents to 70 cents a square foot. These lots ran from a low of $3,000 for a 50 foot lot facing on Laurier Street to a high of $6,500 for a lot on the east side of the projected street with a frontage of only 40 feet. Mr. Guertin estimated that these lots could have been sold for a total of $86,000 from which he deducted expenses of $240 for surveys and $8,576 for selling commissions. This left a net valuation of $77,184. This is excessive. Mr. Guertin did not consider the prices paid by the defendant for lot 219C or by the Shell Oil Company or the Supertest Petroleum Company for similar parcels of land with frontages on Laurier Street and extending east to the river, and there were no sales of lots on which he could possibly come even near to a justification of his estimated values. It is doubtful, to say the least, whether such a subdivision with the backs of the houses on the lots on the east side of the projected street facing the river would ever have been permitted. And it is obvious that Mr. Guertin has had no experience in promoting subdivisions, for even if he could have sold the lots at his prices, he could not have made anything like a net $77,184 out of his gross sales of $86,000. Mr. Guertin's valuation would mean more than $16,000 per acre for the property, which is more than three times what the defendant paid for it in 1931. There is no evidence to warrant the assumption of any such increase in value. In my view, it would be unreasonable and unfair to accept Mr. Guertin's valuation and I have no hesitation in rejecting it.

For similar reasons I reject Mr. Grandguillot's valuation of $72,400. It struck me that he was mainly seeking to justify his figures in the municipal valuation which he had made for the City of Hull between 1943 and 1947. He adopted the amounts of 45 cents per square foot for the frontage on Laurier Street and 35 cents for the remainder of the acreage which he had used in his municipal valuation and applied them to a corrected area of 193,376 square feet which gave him a total valuation of $72,400, particulars of which are given by Exhibit U, as against the municipal

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

valuation of $70,540. He then sought to test his valuation by an estimate of what the sales of lots in a projected subdivision of the property would have realized. His proposed plan of subdivision, Exhibit X, was similar to Mr. Guertin's except that there were two streets running east from Laurier Street to the projected street parallel with it. This was superior to Mr. Guertin's plan in that there was no dead end street but it left less room for the lots. There were 24 lots on his plan, 7 with a frontage of 48 feet on Laurier Street to be sold at $3,000 each, 7 with a frontage of 48 feet on the west side of the projected street parallel with Laurier Street to be sold at $3,500 each and 10 with a frontage of 46 feet on the east side of this street and extending back to the river to be sold at $4,000 each. The total amount of these sales would come to $84,500 from which Mr. Grandguillot deducted $12,100 for expenses connected with promoting the subdivision such as costs of surveys, selling commissions, interest on capital and taxes during the selling period leaving $72,400 as the market value of the property. No provision was made in the estimate for the cost of roads, sidewalks or water and sewer services. Apart from the fact that it is doubtful that the proposed plan would have been feasible or permitted, Mr. Grandguillot had no support for his figures. He could not point to any sales of comparable property that came anywhere near them. He also disregarded the prices paid by the oil companies, to which reference will be made later, although he admitted that the land owned by them had greater value than the defendant's. It seems plain to me that Mr. Grandguillot's valuation of the land was excessive.

The valuations made by Mr. Lalande and Mr. Lanctot were not much better. Mr. Lalande put forward a plan of subdivision with his report, Exhibit 6, showing two streets running east from Laurier Street to a street along the river bank. The 24 lots on this plan faced either on Laurier Street or on the streets running east from it. Mr. Lalande priced these at 50 cents per square foot for all the lots except the corner ones which he put at 62½ cents per square foot. These prices came to a total of $66,275 from which he deducted $7,000 for charges leaving his valuation at $59,275. Mr. Lalande's plan is open to even more serious objection than the other two plans in that he has put one

of his lots right next to the water's edge and the road along the river could not be built except with a great amount of fill. Otherwise, his plan is subject to the same kind of criticism as the other two. Mr. Lalande did not consider the sales of parcels of land similar to the defendant's but admitted that its land was not as valuable as that of the Shell Oil Company or the Supertest Petroleum Company near the Interprovincial Bridge. He purported to rely on two sales of property on the west side of Laurier, which Mr. Guertin had also mentioned, one of Lot 68 on Laurier Street near Reboul Street to L. Bourguignon on February 16, 1940, at $1,400 which worked out at 22 cents per square foot and the other of Lot 140 on Laurier Street north of the hospital to R. Baillot on October 10, 1942, at $2,200 which worked out at 33·6 cents per square foot. These two sales do not provide any base for Mr. Lalande's estimate. Nor could he find any support in the sales of properties in other parts of the City of Hull, particulars of which were given on pages 2 and 3 of his report. He admitted frankly that these properties were not comparable to the defendant's land. Mr. Lalande's valuation cannot be adopted.

This leaves Mr. Lanctot's opinion. He valued the land fronting on Laurier Street at 50 cents per foot for a depth of 100 feet which came to $23,025 and the balance amounting to 3·46 acres at $9,000 per acre which came to $31,140, making a total valuation of $54,165. An alternative valuation was based on the same amount for the frontage on Laurier Street, for a depth of 100 feet together with ·216 cents per foot for the remainder for a further depth of 300 feet which came to $29,840.40 and 15 cents for a strip along the shore which was submerged at times which came to $1,913.88 making a total of $54,778.95. While I cannot accept Mr. Lanctot's valuation his report, Exhibit 4, does contain reliable information from which a fair estimate can be made. Mr. Lanctot, whose knowledge of real estate values in Hull is very considerable, stated that during the period from 1929-30 to 1940 the real estate market was on the decline but in 1940 there came a rise which up to 1944 he considered as being 15 per cent and then from 1944 to 1946 there was a further increase of 20 per cent. In my view, this estimate in the rise of real estate market

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

values is preferable to Mr. Lalande's estimate of an increase of 50 per cent. In valuing the frontage on Laurier Street Mr. Lanctot relied on the sale to Mr. Baillot, already referred to, which worked out at 33·6 cents per square foot in 1942 to which he added a 30 per cent increase up to 1946 which brought it up to 44·75 cents per square foot. On this basis he valued the frontage on Laurier Street at 50 cents. There is less exception to this part of his valuation than to his estimate of $9,000 per acre for the rest of the property. This amount was based on three sales of large parcels of property particulars of which he gave, namely, a sale to the Supertest Petroleum company, registered on April 8, 1929, of 2·5 acres at $13,000 or $5,200 per acre, a sale to the Shell Oil Company, registered on September 3, 1931, of 2·89 acres for $21,000 or $7,266 per acre and a sale to the defendant, registered on September 31, 1931, of 2·4 acres for $12,000 or $5,000 per acre. This works out at an average of somewhat less than $6,000 per acre and Mr. Lanctot applied more than his 35 per cent increase in value to get this up to $9,000 per acre. Mr. Lanctot was quite unjustified in applying the figure of $9,000 per acre, based as it was on the average of the three sales referred to and the increase in market values up to 1946, only to the land 100 feet back from Laurier. He was plainly in error in so doing, for the lands covered by these sales all had extensive frontage on Laurier Street. If he used the figure at all he should have applied it to the whole of the defendant's land.

The evidence of these sales was given before me in the case of *The King* v. *Woods Manufacturing Co. Ltd.* (1) and Mr. Lanctot gave the same estimates of increases in real estate values as he gave in the present case. There was also evidence in that case, which was not before me in this one, that led me to the view that at the time of the sales the fair market value of the land of the defendant in that case was approximately $6,500 per acre. On that assumption and applying Mr. Lanctot's percentage of increase in market values I estimated the value of the 4 acres expropriated on May 19, 1944, at $7,500 per acre and that of the 1·68 acres expropriated on May 7, 1946, at $9,000 per acre. Although my estimate of the value of the expropriated property in that case was increased by the Supreme Court

(1) (1949) Ex. C.R. 21.

of Canada, I think I may fairly say that my estimate of the value of the land was accepted. Although on the evidence before me, taking $6,000 per acre as the average price of the three sales referred to and increasing this by 35 per cent, according to Mr. Lanctot's estimate, I could not reach an average of $9,000 per acre, there are such factors as proximity to the Park and a fine view of the Ottawa River and the cliff on the Ottawa side that would fairly warrant an estimate of $9,000 per acre for the defendant's land. The total area comes to 4·8 acres, almost 5 acres, so that a valuation of the defendant's land at $45,000 in round figures would be ample. I do not see how the evidence before me could possibly justify a higher estimate.

Opinion evidence of the value of the hospital was given by Mr. R. Brunet and Mr. A. Deschamps for the defendant and Mr. E. J. Bartley, Mr. J. Adam and Professor J. A. Coote for the plaintiff. They each made an estimate of reconstruction cost as of the date of the expropriation, then reduced this by the amount of depreciation which they considered appropriate and arrived at an amount which some of them described as depreciated value but which I shall refer to as replacement value. Mr. Brunet, a construction contractor and a former mayor of the City of Hull, said that he obtained the cubic contents of the building from Mr. Bournet and applied what he considered the proper unit price per cubic foot. On this basis he estimated the reconstruction cost of the Champagne house at $97,853.40, the main building at $755,715.28 and the annex at $106,676.64, making a total of $960,245.32. These amounts were reduced by his depreciation allowances, 25 per cent or $24,463.35 for the Champagne house, 15 per cent or $113,357.29 for the main building and 17 per cent or $18,135.03 for the annex, making a total of $155,955.67. This left $804,289.65 as the replacement value.

Mr. Deschamps, an outstanding construction engineer from Montreal with experience in hospital construction, followed the same method. He obtained the cubic contents from Mr. Bournet's plan and applied unit prices thereto which he considered proper, based on hospitals which he said were of similar construction. He estimated the reconstruction cost of the Champagne house at $90,605, the main

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

building at $694,591 and the annex at $93,576, making a total of $878,772, to which he added architect and engineer fees at 6 per cent, amounting to $52,706, making a total of $931,498. Mr. Deschamps and Mr. Brunet were in agreement as to their percentages of depreciation, having discussed the matter together. Mr. Deschamps' total allowance for depreciation, based on these percentages and applied only to the total of $878,772.00, came to $142,448. This left a replacement value of $789,050.00.

The witnesses for the plaintiff worked somewhat differently, Mr. Bartley and Mr. Adam dividing the work of estimating the reconstruction cost between them and both working under the supervision of Professor Coote who assumed responsibility for the depreciation estimates and the final valuation. The details of this composite valuation are set out in Professor Coote's report, Exhibit 2. Mr. Bartley surveyed the electrical and mechanical services in the hospital and estimated their reconstruction cost. He explained in detail how he proceeded to ascertain the quantities in the electrical system and that he had obtained the necessary prices from Mofax Electrical Limited one of the largest electrical firms in Montreal. His estimate for the electrical services came to $20,057. He followed a similar procedure with the mechanical services, particulars of which are set out on page 9 of Exhibit 2, and obtained the required prices from John Colford, a large heating and plumbing contractor in Montreal, except in the case of the boilers and the refrigeration where the information was obtained from actual suppliers. His estimate for the mechanical services came to $93,521. With an allowance of $7,000 for architect's fee his estimate of the reconstruction cost of the electrical and mechanical services came to $120,578.

Mr. Adam, an Ottawa architect of great experience, obtained plans of the building from Mr. Sarra-Bournet and other information from various sources. He also made a thorough examination of the building, ascertained the details of construction by inspection and took off the quantities of material in its several parts. To these he applied the current prices for material and labour obtained either from the actual suppliers or from contractors experienced in the various sub-trades. He estimated the reconstruction cost of the Champagne house at $74,699,

the main building at $556,309, the annex at $73,766 and the elevator and dumb waiter at $19,950, making a total of $724,724, which amount included an allowance for architect's fees and contractor's profit, to which he added $50,730 for what he called general conditions, making a total of $775,454. The total of this amount and that of $120,578 for the electrical and mechanical services, coming to $896,032, represents the estimated reconstruction cost of the hospital.

Professor Coote, a consulting engineer with Robert A. Rankin and Company of Montreal and formerly Assistant Professor of the Department of Mechanical Engineering of McGill University for 30 years until his retirement in 1948, was in charge of the valuations made for the plaintiff. He visited the hospital on numerous occasions and supervised and checked the work of estimating. Then in the light of his study and experience he determined the life expectancy of each of the items set out on page 7 of his report, Exhibit 2, and estimated the amount of depreciation of each. He estimated the useful life of the main building at 60 years and, because of its type of construction, applied a 4 per cent sinking fund curved line depreciation and reached his opinion of a 10 per cent depreciation for its 17 years of use. On the assumption that the Champagne house and the annex would be used as long as the main building he put their respective life expectancies at 87 and 63 years. Because both these buildings were of ordinary construction he applied a straight line depreciation to them and estimated a 51 per cent depreciation for the former and a 32 per cent one for the latter. He put the life of the elevator and dumb waiter at 40 years and its depreciation at 43 per cent. The depreciation for the electrical services was put at 43 per cent and for the mechanical services at the various rates shown on page 7 of Exhibit 2. Altogether Professor Coote's depreciation allowances came to $188,850, which left a replacement value for the hospital of $707,182.

This sum of $707,182 covers the same items as the estimates of $804,289.65 by Mr. Brunet and $789,050 by Mr. Deschamps. The difference is mainly due to the larger allowance for depreciation made by Professor Coote. The difference in the estimates of reconstruction cost namely, $960,245.32 by Mr. Brunet, $931,498 by Mr. Deschamps and

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

$896,032 by Mr. Bartley and Mr. Adam was not greater than might be expected. I am satisfied that Mr. Bartley and Mr. Adam were very thorough in their inspection and careful in their quantity surveys and, other factors being equal, I would attach greater weight to an estimate of reconstruction cost based on actual quantities and current prices for materials and labour than to one based on cubic contents and an assumed unit price per cubic foot. Against this in the present case there is the fact that Mr. Bartley and Mr. Adam did not have actual working plans and detailed specifications to help them in taking off the quantities. Moreover, I was impressed with Mr. Deschamps' statement that in this case he did not have to take off quantities since he had buildings of a comparable type and known actual costs to go on. This makes Mr. Deschamps' estimate preferable to Mr. Brunet's. While Mr. Deschamps' estimate is subject to some discount by reason of the fact that his cubic contents figure is 500 cubic feet higher than Mr. Sarra-Bournet's and that the hospitals he referred to as being of a comparable type to the building in question were more modern in construction, I have come to the conclusion that his estimate of reconstruction cost, namely, $913,498, is the one that ought to be accepted.

The amount to be allowed for depreciation is not as easy to determine. It is always difficult in the case of a building such as this to estimate its depreciation at any given time. Depreciation means diminution in value and the diminution may be due either to physical deterioration, commonly called depreciation by wear and tear, or simply depreciation, or to functional deterioration or reduced usability by reason of factors other than wear and tear, commonly referred to as obsolescence, or to both. Frequently obsolescence is more important than depreciation by wear and tear but both must be considered together in a proper appraisal of value. In estimating the amount of depreciation of an asset it is important to avoid errors that are surprisingly common. One of these is the assumption that the life of an asset can be prolonged indefinitely through maintenance. This widespread view found favour even with a court of such high standing as the Supreme Court of the United States as late as 1903 in *San Diego Land and Town Co.* v. *Jasper* (1).

(1) (1903) 189 U.S. 439.

Indeed, it was not until 1909 that the inevitability of depreciation was properly understood. In that year the Supreme Court of the United States in the leading case of *City of Knoxville* v. *Knoxville Water Co.* (1) laid down certain principles that have never since been judicially disputed. It is now settled that it is fallacious to assume that an asset can be so well maintained that it will remain in as good as new condition indefinitely. Depreciation begins from the moment of its first use and continues notwithstanding maintenance. The inevitability of depreciation was frankly recognized by Mr. Deschamps, as was to be expected from a person of his eminence. But, on the other hand, it does not follow that the amount of depreciation can be ascertained merely from depreciation tables. While well recognized tables are of great assistance since they are based on recorded experience they ought not to be used by themselves. It is always necessary to make a careful examination of the asset and consider its structural and functional condition so that consideration may be given not only to the elapsed time of its expectancy of life according to the tables but also to the remaining life that may be expected in the light of its actual condition. On the evidence, I have no hesitation in preferring the depreciation estimates of Professor Coote and his associates to those of Mr. Brunet and Mr. Deschamps or of Mr. Guise. In the first place it seemed to me that Professor Coote, by reason of his long study of the theory and principles underlying this difficult subject as well as his actual experience as a consultant had a greater knowledge and better understanding of it than the others. Secondly, and this is a more important reason, his opinion, supported as it was by Mr. Bartley and Mr. Adam, was based on a more careful examination of the facts. I found it more realistic and more convincing. There was not much difference regarding the main building. Mr. Brunet and Mr. Deschamps both put its depreciation at 15 per cent, Mr. Brunet saying this was mostly due to obsolescence and Mr. Deschamps setting it at 9 per cent for obsolescence and 6 per cent for depreciation by wear and tear. Neither could assign any specific reason for the 15 per cent except that Mr. Brunet said that it worked out approximately at 1 per cent per

(1) (1909) 212 U.S. 1.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

year. I may say, in passing, that I do not agree with Mr. Brunet's statement that there was no appreciable depreciation to be seen. Professor Coote found only a 10 per cent depreciation for this part of the hospital due both to wear and tear and to obsolescence and inadequacy. Mr. Adam thought that there was a 17 per cent depreciation mainly because of obsolescence. It was not functioning properly in the light of provincial requirements, not enough cubic space per bed for the number of beds and not enough light. There was a greater discrepancy of opinion in the case of the other buildings. Mr. Brunet and Mr. Deschamps put the depreciation of the Champagne house at only 25 per cent although it was 44 or 45 years old and not up to modern standards. This was admittedly low. The estimates of 51 per cent by Professor Coote and 50 to 55 per cent by Mr. Adam struck me as much nearer reality. In my view, Professor Coote's estimate was reasonable. Nor can the estimate of 17 per cent for the annex be supported. This was only 2 per cent higher than that for the main building notwithstanding that it was only of ordinary construction and part of it was 34 years old. While it is true that the upper floors have had less use than the main building, as Mr. Deschamps pointed out, that is not true of the rest of the annex, particularly of the kitchen. Mr. Adam found signs of wear and tear in the annex. The galleries on the east side were very much depreciated. Moreover, the annex was of a type of construction which in relation to the main building would not have been permitted in 1946. Professor Coote also pointed out that as a service wing it was not up to date. The corridors and stairs were narrow, the kitchen was old and there were several signs of overcrowding. The wing would not have been adequate for any extension of the hospital. Indeed, it was obsolete for a modern hospital. Professor Coote's estimate of a 32 per cent depreciation was a fair one. Neither Mr. Brunet nor Mr. Deschamps made any check of the electrical and mechanical services. There, in effect, I find that the evidence of the plaintiff's witnesses was not seriously challenged notwithstanding the opinion of Mr. Guise, which I am unable to accept. Mr. Bartley said that the electrical services were pretty close to a minimum standard for that type of building and were only in fairly good order, there being evidence of deterioration through lack of maintenance

in the distribution panel and wiring. In his opinion, the heating services were adequate at the time of their installation. The piping and radiators were in good condition but the boiler room was only in fair to poor condition, there being evidence of lack of running maintenance, one of the boilers requiring a complete rebuilding. The steam and condensate system was in good condition. The plumbing services were reasonably good, the system being in good order having regard to its age. Mr. Adam thought that the mechanical services were obsolescent and Professor Coote considered that the electrical and mechanical services were not up to the mark of a modern hospital. I agree. I am satisfied that Professor Coote sought to be fair in his estimate of depreciation and I accept his total allowance of $188,850 for depreciation as reasonable. The deduction of this figure from Mr. Deschamps' estimate of $931,498 for the reconstruction cost of the hospital leaves $742,648 as its replacement value as at the date of expropriation. To use round figures, I put this value at $750,000.

There was very little difference of opinion over the value of the out-buildings and other out-door improvements. Most of the witnesses confined themselves to estimates of the values of these items after due allowances for depreciation and their evidence may be summarized briefly. The out-buildings at the back (dependances) were valued at $2,260 by Mr. Brunet, $1,450 by Mr. Grandguillot and $2,113 by Mr. Adam. Both Mr. Brunet and Mr. Grandguillot valued the tennis court at $500. The metal fence surrounding Lot 219C was valued by Mr. Brunet at $2,320 and by Mr. Grandguillot at $2,100. Mr. Grandguillot valued the driveways at $5,000, the walks at $700, the monument at $600 and the wooden fence at $320. His first estimate of the value of the private drainage at the back (égoût privé) was $4,500 but he later corrected this to $1,000. Mr. Adam did not value several of these items separately, but included the fences, driveway, tennis court, etc., and drainage together with their reconstruction cost and then he and Professor Coote put their depreciated value at $10,000. This total, which did not include anything for the monument, is almost identical with the total for the corresponding items put forward by Mr. Grandguillot. Finally, Mr. Grandguillot valued the trees, lawns, shrubs,

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

flower beds, etc., at $7,500, which is too high, whereas Mr. Lalande and Mr. Lanctot put this item at $3,621, which is too low. Mr. Grandguillot's original figures for all these items came to $22,570 but he corrected this by eliminating his first item of $900 and reducing his figure for the private drainage by $3,500, leaving a corrected estimate of $18,170. In my view, it would be fair to fix the value of these items in round figures at $17,500.

I next come to the cost of moving to a new hospital. Mr. J. R. Fournier, an experienced mover, estimated the cost of moving from the present site to the proposed site on the Mountain Road at $20,327.50, the details of which are given in Exhibit V. Against this there was Mr. L. Grondin's estimate of $17,058. I see no reason why I should not accept Mr. Fournier's estimate. To this amount must be added the cost of dismantling, transporting and re-installing certain special hospital equipment, such as tables, X-ray apparatus, sterilizers, operating room lights, centrifuge and hydrotherapeutic apparatus. Mr. L. Lamalice valued this equipment at its 1946 value and took 30 per cent of it as the cost of the moving (déménagement), which came to $11,992.10. But since the cost of actual transport was included in Mr. Fournier's estimate, Mr. Lamalice's estimate must be reduced by one-third which left his figure at $7,994, to cover dismantling, re-installing and risk of breakage. There was also the cost of dismantling and re-assembling the kitchen and laundry equipment, which was not included in Mr. Fournier's estimate. Mr. Grandguillot estimated the depreciation value of this equipment at $24,500, particulars of which appear in Exhibit Z1, and then expressed the opinion that the cost of dismantling and re-assembling with an allowance for breakage would come to $6,100. While Mr. Grandguillot was not an expert in this field and his estimate is open to some doubt on this account, there was no contrary estimate. The three items mentioned come to a total of $34,421.

There remains the claim for the amount required to meet the increased costs of construction after the date of the expropriation. Mr. Sarra-Bournet said that it would take a year for the preparation of plans for a hospital like the present one and Mr. Deschamps agreed. I accept this statement. Mr. Brunet said that it would take 24 to 30

months to build a new hospital. Mr. Deschamps put the required time at 2 years. During all this time the costs of construction were steadily rising, and the defendant is entitled to an allowance for such rise on the application of the principle of re-instatement. The defendant confined its claim for this item to the difference between the cost of construction in May, 1946, and the cost of construction in December, 1948. This, in my opinion, was a reasonable view of the time it would take to draw the necessary plans and specifications and construct a new hospital. The evidence of Mr. Deschamps and Mr. Adam establishes that in Quebec the construction cost index rose from 151·5 in May, 1946, to 191·5 in December, 1948, an increase of 40 points and a percentage increase of 26·4 per cent. If this percentage is applied to the reconstruction cost of $931,498 which I have found, as I think it should be, the result amounts to $245,915.47. If the same percentage is applied to the sum of $17,500, being the value of the out-buildings and other out-door improvements, as I think would be fair, there is a further item of $4,620. These two items make a total of $250,535.47.

The total of these items, $45,000 for the land, $750,000 for the hospital building, $17,500 for the out-buildings and other out-door improvements, $34,421 for the cost of moving and $250,535.47 for the additional cost of construction comes to $1,097,456.47, which I put in round figures at $1,100,000. On the application of the principle of re-instatement I estimate the value of the expropriated property to the defendant at this amount. In my judgment, this is amply sufficient to cover all the factors of value to the owner that ought to be taken into account and, but for recent decisions of the Supreme Court of Canada dealing with an allowance for compulsory taking, it would be the amount of compensation money to which I would find the defendant entitled.

This leads me to consideration of the defendant's claim for a 10 per cent allowance for compulsory taking and the jurisprudence on it. There is no Act of Parliament either in England or in Canada authorizing such an allowance and there is no rule of law requiring it. Its grant is entirely a matter of practice adopted in Canada from a practice in England that has been abolished there in the great majority

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

of cases for over 30 years. While the English practice was general and uniform the same cannot be said of the Canadian one. The decisions of this Court on when there should be such an allowance have been conflicting and there has been lack of consistency in those of the Supreme Court of Canada. It would, I think, be an understatement to say that the state of the Canadian law on the subject is unsatisfactory. In view of the importance of the matter and the need for reform it is, I think, desirable to outline the English practice with its present limited extent and then review the decisions on its Canadian derivative.

It is not clear when the English practice first arose except that it was prior to The Lands Clauses Consolidation Act, 1845. In that year a Select Committee of the House of Lords considered the principles adopted by surveyors in assessing compensation for the compulsory taking of lands under various Acts authorizing their acquisition for undertakings of a public nature and reported in part as follows:

> Upon the question of severance and damage, the committee are of the opinion that it is impossible to establish any fixed rate upon which the damage arising from severance, and other injuries to property, can be assessed and compensated.
>
> With respect to the land, etc. actually taken, the witnesses who were examined state, that, to the marketable value of the property taken, they add, in their valuations, a percentage, on the ground of the sale being compulsory. The amount of this percentage varies with the views of the different witnesses, whose evidence will be found in the Appendix; but the committee are of opinion that a very high percentage, amounting to not less than 50*l* per cent upon the original value ought to be given in compensation for the compulsion only to which the seller is bound to submit, the severance and the damage being distinct considerations. In some of the evidence it appears to the committee that a very unfair view is taken of the injury done to proprietors, and of the compensation due to them.
>
> The committee are of opinion that many cases occur in which it is necessary to consider the land, etc., not merely as a source of income, but as the subject of expensive embellishment, and subservient to the enjoyment and recreation of the proprietor.
>
> Public advantage may require all these private considerations to be sacrificed; but as it is the only ground on which a man can be justly deprived of his property and enjoyments, so, in the case of railways, though the public may be considered ultimately the gainers, the immediate motive to their construction is the interest of the speculators, who have no right to complain of being obliged to purchase, at a somewhat high rate, the means of carrying on their speculation.
>
> It is to be observed, that the price of the land purchased, and the compensation for that which is injured, form together but a small proportion of the sum required for the construction of a railway, so that no

apprehension need be entertained of discouraging their formation, by calling upon the speculators to pay largely for the rights which they acquire over the property of others.

This extract from the Committee's report is set out in Hodges on Railways, 6th Edition (1876), at page 202. Greater detail of the report, Sessional Paper, 1845, No. 184, will be found in Shefford's Law of Railways, 4th Edition (1865), Vol. II, at page 228. It is manifest from the report that the Committee did not attempt to justify the allowance on any ground other than that of being compensation "for the compulsion only" and made no pretence that any principle of valuation was being established. It is plain that they thought that speculators who were promoting undertakings of a public nature should pay the owners of the lands required for them more than they were actually worth. It seems to have been considered that the taking savoured of tort. In any event, the compensation was set at the value of the lands plus the additional allowance because they were taken against the owner's will. There was no other reason for the allowance.

The next text-book reference is in Lloyd on Compensation, 6th Edition (1895), at page 71, where the author, after referring to the above Committee's recommendation that not less than 50 per cent upon the original value ought to be given as compensation for the compulsion, said:

> Recent experience has shown that such estimate is an exaggerated one; and 10 per cent is considered a sufficient compensation for the compulsory sale in addition to the assessed value in the case of house property; but in respect of agricultural lands as much as 25 per cent is sometimes given.

Here again the allowance was considered as additional to the value of the land.

Then there is the following statement in Hudson's Law of Compensation (1905), Vol. I, at page CLVII:

> As a matter of custom, an addition of a certain percentage should be made to the value of the property taken (but *not* to any sum claimed for injurious affection), where the promoters are purchasing under compulsory powers. This percentage varies from 10 per cent upwards, according to the nature of the property taken. Where the land has reached its true value and been applied to its most profitable user (such as building), 10 per cent is generally accepted as being proper and sufficient, but where, for instance, land is clearly applied to some purpose giving it a present value below that which will arise in the future when it is put to some more profitable use although no actual calculation of this enhanced value is possible at the moment, it is customary to add more than ten per cent as a solatium to the owner for the loss of the additional, but distant, value which attaches to the land of which he is being deprived.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

This statement is further confirmation of the fact that the allowance was additional to the value of the land. It is also interesting to note that the addition was a matter of custom. There was no attempt to lay down any principles for determining when it should be given. It was always given.

I now come to statements in the English text-books of a later date. In Cripps on Compensation, 8th Edition (1938), the author says, at page 213:

> The fact that lands have been taken under compulsory process does not alter the principle of valuation, and the customary addition of 10 per cent can only be justified as a part of the valuation and not as an addition thereto. In practice the 10 per cent is applied to the value of the lands only, and not to incidental damage, this percentage may be taken to cover various incidental costs and charges to which an owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation.

And there is a similar statement in Arnold on Damages and Compensation, 2nd Edition (1919), at page 248. These two statements differ from the previous ones. It seems to me that in the statement that the customary addition of 10 per cent can only be justified as a part of the valuation and not as an addition thereto there was a recognition that a valuation of lands based on their value plus a fixed percentage of their value simply because they were taken against the owner's will was contrary to principle and an attempt was made to rationalize the allowance as a principle of valuation and make it cover various incidental costs and charges.

There is a dearth of English judicial decisions on the subject. This is, no doubt, largely due to the fact that the amount of compensation to be awarded in cases under The Lands Clauses Consolidation Act, 1845, was not a matter for the judges but was to be assessed by justices of the peace, arbitrators or surveyors under section 63 or by arbitrators or juries under section 68. In *Lock* v. *Furze* (1) there was a recognition of the practice of making the allowance, although it was held not to be applicable to the facts of that case, and in *In Re Wilkes Estate* (2) Hall V.C. referred to it as "the additional 10 per cent for compulsory purchase" and dealt with it in the same way as the rest of the purchase-money. Later, there was an attempt in

(1) (1865) 19 C.B.N.S. 94.

(2) (1880) 16 Ch. D. 597.

Jervis v. *The Newcastle and Gateshead Water Company* (1) to obtain a judicial decision on the legality of the additional allowance but it failed because it was held that the transaction under review was not a compulsory purchase and it was, therefore, unnecessary to consider the legality of the additional allowance. I have not been able to find any other English decision bearing on the matter, but there is an Irish decision in which there are some *obiter dicta* on it. In *In re Athlone Rifle Range* (2) the Master of the Rolls held that an addition of 20 per cent to the purchase price of rents reserved under a lease was made without authority and then, at page 437, said:

> As regards compensation for land (as distinct from rent) taken compulsorily, arbitrators in the same way as juries do frequently add something for the annoyance of being disturbed in the possession, and the difficulty and delay in procuring other suitable premises, and they are not legally bound to treat the case as exactly the same as an ordinary case of vendor and purchaser where both parties are willing to contract; but I cannot say that even in respect of actual occupation of lands in point of law an allowance of 20 per cent additional is a reasonable allowance. I am sure it is unreasonable in respect of a rent charge.

Vide also *Lord Mayor of Dublin* v. *Dowling et al* (3) where the allowance was recognized.

The practice which gave the owners of lands that were compulsorily taken at first 150 per cent and later 110 per cent of what they were worth merely because they were taken against the owner's will is now in effect in England in only comparatively few cases. From time to time Parliament recognized that there was no justification for the allowance and prohibited it by statutory enactment as, for example, by section 21 of the Housing of the Working Classes Act, 1890, and by section 9 (10) of the Local Government Act, 1894. The greatest limitation of the practice came in 1919 when the allowance was abolished in all cases where land was acquired by any government department or any local or public authority. This was done by rule 1 of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, which read as follows:

> 2. In assessing compensation, an official arbitrator shall act in accordance with the following rules:
>
> (1) No allowance shall be made on account of the acquisition being compulsory;

(1) (1896-97) 13 T.L.R. 14 and 312.
(2) (1902) 1 Ir. 433.
(3) (1880) L.R. Ir. 6 Q.B. 502.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

I think it may fairly be said that Parliament took this step because it recognized that the practice of automatically giving the owner of lands required for public purposes 10 per cent more than their realizable money value inevitably led to excessive awards and could not be justified. Thus the English practice came to an end and in all the cases to which the Act of 1919 applied and since most cases of compulsory taking are under this Act it may be said that the practice has largely ceased in England. It continues, however, as Cripps points out, at page 265, in cases that still come under the Lands Clauses Consolidation Act, 1845, and in such cases the 10 per cent allowance is always added to the value of the land taken compulsorily.

But although the additional allowance has been abolished in England in all cases of expropriation by the government or any local or public authority the practice of granting it still persists in Canada in certain cases under the Expropriation Act notwithstanding that all expropriations under it are made by the Crown in right of Canada. During recent years this Court substantially discontinued granting any additional allowance for compulsory taking, but this trend has been partly reversed by the recent decisions of the Supreme Court of Canada in *Irving Oil Company Limited* v. *The King* (1), *Diggon-Hibben Ltd.* v. *The King* (2) and *The King* v. *Lavoie* (3).

The importance of the subject merits a review of the Canadian jurisprudence on it. I have already pointed out that there is no statutory support for the practice, the only reason for it being the English practice to which I have referred. It is also a fact that it has not been as generally applied as it was in England. There are many cases both in this Court and in the Supreme Court of Canada in which an additional allowance of ten per cent for compulsory taking has been granted without any comment at all or with merely a reference to it as the "usual" allowance for compulsory taking as, for example, in *The King* v. *Torrens et al* (4). These present no difficulty, apart from the question of the propriety of the allowance, for they are strictly in accord with the English practice. But at an early date attempts were made in this Court—and later in

(1) (1946) S.C.R. 551.
(2) (1949) S.C.R. 712.
(3) Dec. 18, 1950, unreported.
(4) (1917) 17 Ex. C.R. 19 at 31.

the Supreme Court of Canada—to justify the additional allowance on some ground of principle other than merely that of compensation for compulsory taking and to determine when it should and when it should not be granted. There was nothing in the English practice to support any such distinction. In England, as we have seen, the additional allowance was always granted—until it was abolished except in the few cases referred to. It seems to me that in these attempts there was an implicit recognition that the general practice of giving every owner of expropriated property ten per cent more than its value merely because it had been expropriated could not be justified in principle. But when the attempts were made differences of opinion and confusion arose. The extent of the differences can best be illustrated by contrasting almost the first decision on the subject with almost the last. In *Symonds* v. *The King* (1) Burbidge J. held that the additional allowance for compulsory taking should be added only "in cases where the actual value of lands can be closely and accurately determined", but that where that cannot be done, and the price allowed is liberal and generous there is no occasion to add anything for the compulsory taking. On the other hand, in *Diggon-Hibben Ltd.* v. *The King* (2) Rand J. held that the practice of making the allowance applied in certain circumstances presenting difficulty or uncertainty in appraising values. There could not be a greater difference of view.

In between these opposites the decisions both of this Court and of the Supreme Court of Canada show a great variety of reasons for granting or withholding the allowance, some of which are irreconcilable with one another. I shall deal first with the cases prior to *The King* v. *Hunting et al* (3). In several cases the "usual" ten per cent for compulsory taking was allowed merely because the land had been taken against the will of the owner: *Belanger* v. *The King* (4); *The King* v. *Carrieres de Beauport Cie* (5); *The King* v. *The Hudson's Bay Co.* (6); *The King* v. *Patrick King* (7); *The King* v. *Bowles* (8); *The King* v. *Grass* (9). These cases were all strictly in accord with the English

(1) (1903) 8 Ex. C.R. 319 at 322.
(2) (1949) S.C.R. 712 at 713.
(3) (1916) 18 Ex. C.R. 442; (1917) 32 D.L.R. 331.
(4) (1917) 17 Ex. C.R. 333 at 350.
(5) (1915) 17 Ex. C.R. 414 at 425.
(6) (1916) 17 Ex. C.R. 441 at 445.
(7) (1916) 17 Ex. C.R. 471 at 481.
(8) (1916) 17 Ex. C.R. 482 at 486.
(9) (1916) 18 Ex. C.R. 177 at 197.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

practice. But several other reasons for granting the additional allowance appear in the cases. For example, it has been given for contingencies, moving, good-will, etc, *The King* v. *Condon* (1); for contingent items, *The King* v. *Macpherson* (2); for the good-will of a hotel because its value could not be moneyed out with precision and any loss and all other expenses incidental to the closing down of a going concern, *The King* v. *The Carslake Hotel Co.* (3), affirmed by the Supreme Court of Canada (4); for the compulsion and to cover all other unforseen incidentals including moving, *The King* v. *Blais and Vadeboncoeur* (5). These cases are related to one another in that in them the allowance was granted as compensation for disturbance of various kinds. But the presence or absence of disturbance was not a determining factor for it was granted in several cases where there was no disturbance, as for example, in the case of vacant land that was part of a timber limit, *The King* v. *The New Brunswick Railway Co.* (6); in the case of properties from which there had been revenue, *The King* v. *Hearn* (7); in the case of vacant lands that were particularly suitable for warehouse site purposes, *The King* v. *Vassie & Co. et al* (8). And there were cases where the allowance was granted not as compensation for disturbance but in addition to an award for it, *The King* v. *Courtney* (9); *The King* v. *Jalbert et al* (10). Then there were cases in which it was held that no allowance should be given, as, for example, when the owner has made no use of the property and derived no revenue from it but bought it for speculative purposes, *Raymond* v. *The King* (11); in the case of properties that yielded practically no revenue and were not occupied, *The King* v. *Hearn* (12); because the property had been bought for speculative purposes in the expectation of its expropriation, *The King* v. *Picard* (13); in the case of property which the owners had been trying to sell for a number of years, *The King* v. *McCarthy* (14), affirmed by the Supreme Court of Canada (15), without

(1) (1909) 12 Ex. C.R. 275 at 282.
(2) (1914) 15 Ex. C.R. 215 at 232.
(3) (1915) 16 Ex. C.R. 24 at 33.
(4) June 13, 1916, unreported.
(5) (1915) 18 Ex. C.R. 63 at 66.
(6) (1913) 14 Ex. C.R. 491 at 497.
(7) (1916) 16 Ex. C.R. 146 at 175.
(8) (1917) 17 Ex. C.R. 75 at 83.
(9) (1916) 16 Ex. C.R. 461 at 464.
(10) (1916) 18 Ex. C.R. 78 at 80.
(11) (1916) 16 Ex. C.R. 1 at 22; (1918) 59 Can. S.C.R. 62.
(12) (1916) Ex. C.R. 146 at 176.
(13) (1916) 17 Ex. C.R. 452 at 460.
(14) (1919) 18 Ex. C.R. 410 at 436.
(15) Oct. 11, 1921, unreported.

any reference to this point. Yet the allowance was granted in *The King* v. *Blais et al* (1) "to cover all incidental expenses occasioned by the expropriation and for the compulsory taking against the will of the owners, who were desirous to hold the property for speculative purposes." The refusal to grant the additional allowance was a departure from the English practice.

It is plain that up to this date there had been no success in this Court in establishing any general ground of principle for the application of the additional allowance apart from that of compensation for the compulsion only.

In the Supreme Court of Canada there were no pronouncements by way of attempted justification of the additional allowance prior to the decision in *Dodge* v. *The King* (2) where Idington J. said:

> There may be added, as usually is added, a percentage to cover contingencies of many kinds.

There were other cases in which the additional allowance was granted without comment as in *The King* v. *Trudel* (3) and in *The King* v. *Hearn* (4) where the Court reduced the amount awarded by this Court but included ten per cent for the compulsory taking without distinguishing, as this Court had done, between the properties that yielded revenue and those that did not.

I shall now refer to the *King* v. *Hunting et al* (5) which, until recently, was the leading Canadian case on the subject. In this Court Cassels J. allowed full compensation to each of the owners of the expropriated properties and, in addition, allowed each one ten per cent for the compulsory taking. On an appeal to the Supreme Court of Canada the legality of this additional allowance was challenged by counsel for the Crown but it was upheld by a majority of the Court, a variety of reasons being given by the several judges. Fitzpatrick C.J. expressed his opinion as follows, at page 331:

> If there is to be any limit to litigation there must be some finality in the determination of law and in rules of practice. The allowance of 10 per cent for compulsory purchase has become so thoroughly established

(1) (1915) 18 Ex. C.R. 67 at 71.
(2) (1906) 38 Can. S.C.R. 149 at 156.
(3) (1914) 49 Can. S.C.R. 501 at 517.
(4) (1917) 55 Can. S.C.R. 562 at 576.
(5) (1915) 18 Ex. C.R. 442; (1917) 32 D.L.R. 331.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case. At the time of the passing of the Consolidated Lands Clauses Act, 1845, it was suggested that 50 per cent should be the allowance for compulsory purchase; this, however, was too high and long experience has proved that 10 per cent is a reasonable sum to add to cover anything not included in the actual valuation. That owners may have such further claims if they are to be fully compensated for the taking of their property may, I think, be seen in the present cases, where they have been brought before two Courts before they can recover the compensation to which they are entitled. I suppose it is well known that the costs they can recover from the Crown do not represent the expense to which they are put in such litigation. That this charge should be open to dispute and be specially fixed in each case would be, I think, disastrous. The 10 per cent allowance does not, of course, profess to be anything but a covering charge, and perhaps there might be cases in which it ought not to be allowed. In ordinary cases such as the present and where allowed by the Judge, I do not think it should ever be questioned in this Court.

It appears from these reasons that, notwithstanding the statement in Cripps to which I referred earlier, the ten per cent allowance is not part of the valuation of the lands but is a "covering charge" additional to it "to cover anything not included in the actual valuation". There is no indication of what is included in this coverage except the reference to the expenses of litigation beyond the costs recoverable from the Crown. Idington J. thought that the usual ten per cent should be added as "compensation for compulsory taking". He agreed that there is no rule of law rendering it an invariable consequence of compulsory taking but thought that in the majority of cases it "is no more than justice demands". Then there are generalizations in his reasons which suggest that the allowance may be for disturbance. Duff J., as he then was, simply dismissed the appeal. Anglin J., as he then was, put the case differently from the others. After some general observations, in the course of which he stated that the inconvenience and possible loss attendant upon disturbance is not the only element involved in the ten per cent allowance, which has now become customary, that in some instances it has been allowed on the expropriation of vacant land, *vide The King* v. *New Brunswick Railway Co.* (1), and that an element present in every case is the inconvenience and possible loss

(1) (1913) 14 Ex. C.R. 491 at 497.

in finding a satisfactory re-investment, he laid down the following principles, at page 333:

> Compensation should cover not merely the market value of the land, but the entire loss to the owner who is deprived of it. It must, therefore, usually exceed the market value, though it may occasionally be less, as where the land taken is, while in the owner's hands, subject to depreciatory restrictions from which it is relieved when expropriated. The 10 per cent allowance is of course independent of and additional to any sum in excess of market value to which the owner may be entitled because of special adaptability of the expropriated premises to his purpose.

It is clear from these reasons that Anglin J. considered that the 10 per cent allowance is independent of and additional to not merely the market value of the expropriated property but its value to the owner. Then Anglin J. expressed the opinion that when such an important item of convenience and possible loss as disturbance in occupation, involving the finding of other suitable premises, is wholly absent, as it was in the case before the Court, a substantial reduction in the allowance of ten per cent may well be made and proceeded to divide the ten per cent as follows, at page 335:

> After giving careful consideration to the various elements in respect of which the 10 per cent is allowed, I would fix the allowance (in addition to market value and for special adaptability) at 4 per cent for disturbance in actual occupation, including the inconvenience of finding other suitable premises, and 6 per cent to cover all other expenses, damage and inconvenience to the deprived owner entailed by the taking of his property. Like the 10 per cent itself this 4 per cent is of course an arbitrary figure. While no authority can be cited to support it, reason demands that, where there is no actual disturbance of possession, the allowance for compulsory taking should be less than where that serious inconvenience is suffered, and the division of the "additional allowance" of 10 per cent into two parts, ascribing 4 per cent to damage caused by actual eviction, and 6 per cent to other damage occasioned by the taking of the property, will probably at least work approximate justice in the majority of cases.

There is, of course, no judicial authority for this division and there was nothing in the English practice to warrant it. But the division is interesting because of its implicit recognition that the granting of an allowance in terms of percentage over and above the value of the expropriated property to the owner merely because it had been taken from him is not reasonable or consistent with principle. Brodeur J., dissenting from the other judges, was of the opinion that since the owners of the expropriated property had received a liberal compensation for it without having suffered any disturbance they were not entitled to any

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

additional allowance. I have set out the reasons of the several judges without attempting to deduce the *ratio decidendi* of the decision other than that the granting of the additional allowance was, for various reasons, approved.

After the decision in the *Hunting* case (*supra*) there were numerous cases in this Court in which the additional allowance for compulsory taking was granted or refused on various grounds as, for example, in *The King* v. *Lynch's Limited et al* (1); *The King* v. *The Royal Scotia Yacht Squadron et al* (2). Indeed, it would be fair to say that prior to my coming to the Court it was granted more often than it was refused. Thereafter, the practice of this Court went the other way. I made it a rule not to grant any additional allowance for compulsory taking in the expropriation cases that came before me and the other judges of this Court followed a similar course with the exception of Angers J. who continued the former practice. As I saw it, the Court was not obliged in law to grant any additional allowance. No Act of Parliament, either English or Canadian, authorized it and no rule of law required it. The only reason for granting it was the English practice to which I have referred. But that practice had been formally abolished in England in 1919, which was subsequent to the decision in the *Hunting* case (*supra*), in the case of all expropriations of the same kind as those made in Canada under the Expropriation Act and I could not see any reason why a practice should continue to be maintained in Canada when the English practice on which it was dependent had itself ceased to exist. Moreover, considerations of principle similar to those that led to the abolition of the practice in England weighed strongly with me, namely, that where property has been lawfully expropriated by the government pursuant to an Act of Parliament and Parliament has determined that the compensation payable to its owner shall be measured by the value of the property to him the Court ought not to give him ten per cent more than its value. Consequently, since the owner had no legal right to an additional allowance for compulsory taking I did not give him any. It was, and still is, my view that where all the proper factors of value have been taken into account and adequate com-

(1) (1920) 20 Ex. C.R. 158 at 163. (2) (1921) 21 Ex. C.R. 160 at 162.

pensation has been awarded there is no justification in principle for any additional allowance for compulsory taking and that such an allowance is an unwarranted bonus. I have, therefore, felt it my duty on several occasions to criticize the additional allowance as contrary to principle and urge its abolition: *vide The King* v. *Thomas Lawson & Sons Limited* (1); *The King* v. *Diggon-Hibben Limited* (2); *The King* v. *Woods Manufacturing Co. Ltd.* (3). I am not alone in my criticism of the allowance. Its propriety has been challenged in a number of cases: *vide re Watson and City of Toronto* (4); *In re Wilson and The State Electricity Commission of Victoria* (5).

I now come to the decisions of the Supreme Court of Canada partially reversing the trend that was being followed in this Court. The first was in *Irving Oil Company Ltd.* v. *The King* (6). There an appeal from O'Connor J. of this Court was allowed and his award increased. In the increase there was a ten per cent additional allowance for compulsory taking but no reason for granting it was given except that of Kerwin J. who said, at page 556:

> Under the circumstances of this case, the appellant is entitled to ten per cent for compulsory taking.

No general rule for granting or refusing the additional allowance was laid down. But a general rule was enunciated in *Diggon-Hibben Ltd.* v. *The King* (7). There an appeal from my judgment, in which I had declined to grant any additional allowance for compulsory taking on the ground that it would really be a bonus, was allowed and an additional allowance of ten per cent on a portion of the amount which I had found as the value of the property to the owner was added to my award. Rand J., speaking also for Taschereau J., put the reason for granting the allowance as follows, at page 713;

> In the case of *Irving Oil Company* v. *The King* (6), it was held that while an allowance of 10 per cent for compulsory taking is not a matter of right, in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here; in fact in the general character of the two situations there is no difference whatever. For that reason, I think the allowance should be made.

(1) (1948) Ex. C.R. 44 at 106.
(2) April 15, 1948, unreported.
(3) (1949) Ex. C.R. 9 at 59.
(4) (1916) 38 O.L.R. 103 at 111.
(5) (1921) V.L.R. 459.
(6) (1946) S.C.R. 551.
(7) (1949) S.C.R. 712.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

Estey J. agreed with Rand and Taschereau JJ. in adding the allowance to the amount of my award but not for the same reasons. He put his decision on the basis of the general practice. At page 719, he said:

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

Later, at page 720, he said:

> The amount allowed may be varied and there are cases where, having regard to the circumstances, no allowance should be made, but, with great respect, the circumstances in this case do not distinguish it from these cases in which an amount for compulsory taking was allowed.

The question came before the Supreme Court of Canada again in *The King* v. *Lavoie* (1). There the Crown appealed from the judgment of Angers J. of this Court and the owner of the expropriated property cross-appealed. The appeal and the cross-appeal were both dismissed. One of the grounds of the cross-appeal was that the owner was entitled to an additional allowance of ten per cent for forcible taking and that this had been denied by Angers J. On this point, Taschereau J., who delivered the unanimous judgment of the Court, laid down an important general rule in the following terms:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10 pour cent de la compensation accordée, pour dépossession forcée. Ce montant additionnel de 10 pour cent n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter a l'indemnité (*Irving Oil Co.* v. *The King* (2); *Diggon-Hibben Ltd.* v. *The King* (3)). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle. Il n'a pas été démontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

Thus in this case the Supreme Court of Canada adopted, with variations, the rule enunciated by Rand J. in the *Diggon-Hibben Ltd.* case (*supra*) rather than the reasons given by Estey J.

I shall deal briefly with the variations referred to. The rule laid down by Rand J. in the *Diggon-Hibben Ltd.* case (*supra*) did not mean that the ten per cent additional allowance for compulsory taking was to be applied in all

(1) Dec. 18, 1950, unreported. (2) (1946) S.C.R. 551.
(3) (1949) S.C.R. 712.

cases of difficulty or uncertainty in appraising values for, as I read his reasons, he limited its application to circumstances of difficulty or uncertainty such as were found in the *Irving Oil Company* case (*supra*). If his language were construed strictly there would be very few cases in which the practice would apply. But in the *Lavoie* case (*supra*) the application of the practice was not confined to the circumstances such as were found in the *Irving Oil Company* case (*supra*) and, to that extent, it was put on a somewhat wider basis. But the *Lavoie* case (*supra*) also held that not all cases of difficulty or uncertainty in estimating the amount of the compensation warrant the granting of the additional allowance for it emphasized that it is only in cases where it is difficult by reason of certain uncertainties to estimate the amount of the compensation that there is ground for adding the additional allowance to the owner's indemnity. Thus, while the limits for the application of the additional allowance were not fixed with precision it is made clear that the range of cases in which it should be granted is a narrow one.

The decisions lend themselves to several comments. The first is that the Supreme Court of Canada has broken new ground. I have made a careful search of the authorities on the subject of the additional allowance for compulsory taking in England, Canada, Australia and New Zealand and have found no case prior to the *Diggon-Hibben Ltd.* case (*supra*) in which the application of the additional allowance has been restricted to cases of difficulty or uncertainty or difficulty by reason of uncertainty in estimating the amount of the compensation. There was nothing in the English practice to warrant such a restriction and there is no Canadian statutory enactment or prior rule of law that supports it. The test laid down by the Court for determining in what circumstances the additional allowance should be granted is thus of its own creation.

The second comment is that, although the Supreme Court of Canada asserted in *Stuart* v. *Bank of Montreal* (1) that it was bound by its previous decisions save, as Duff and Anglin JJ., stated, in very exceptional circumstances, the Court did not in the *Lavoie* case (*supra*) consider that it was bound by its previous decision in the *Hunting* case

(1) (1909) 41 Can. S.C.R. 516.

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

(*supra*) but felt free to overrule it without doing so expressly. Certainly, the decisions in the two cases cannot both stand. It cannot be the rule, as Fitzpatrick C.J. put it in the *Hunting* case (*supra*), that the additional allowance for compulsory taking is so thoroughly established and of such general application that it should not be questioned in any ordinary case and at the same time also be the rule, as Taschereau J. put it in the *Lavoie* case (*supra*), speaking for the whole Court, including the Chief Justice and Rand J., who had also been in the *Diggon-Hibben Ltd.* case (*supra*), that the additional allowance is permissible only in cases where it is difficult by reason of uncertainty to estimate the amount of the compensation. It is not possible to reconcile these two decisions. To the extent that they are inconsistent with one another the *Hunting* case (*supra*) must be regarded as having been overruled by the *Lavoie* case (*supra*). The latter now takes the place of the former as the leading Canadian case on the subject. That being so, it is a matter for regret that it has not been reported.

The decisions have served a useful purpose in brushing aside several confusing statements both in this Court and also in the Supreme Court of Canada. Now certain propositions are established beyond dispute. One of these is that the additional allowance for compulsory taking is not in lieu of an allowance for disturbance, as some of the cases suggest, but is separate and apart from it. It is also settled that the additional allowance for compulsory taking has no place in ordinary expropriation cases. It is no longer the general rule to grant it. Indeed, it is to be granted only in the exceptional circumstances mentioned in the *Lavoie* case (*supra*). This radical change is not only a great departure from the original English practice and a sharp reversal of the opinions expressed in the *Hunting* case (*supra*), but is also, in my opinion, a marked advance towards recognition that the former practice of giving every owner of expropriated property ten per cent more than its value to him simply because it was expropriated cannot be defended. The recognition will not be complete until the additional allowance is abolished altogether.

It is apparent from this review that the Canadian law relating to the additional allowance for compulsory taking has had a chequered career. I must now decide whether such allowance should be granted in the present case. I have come to the conclusion that it should be. Notwithstanding my own opinion that the sum of $1,100,000, which I have found as the value of the expropriated property to the defendant, is ample compensation to it and that any additional allowance would really be a bonus, I find that the estimation of the amount of the compensation involves sufficient difficulty and uncertainty to bring the case within the ambit of the rule in the *Lavoie* case (*supra*). Consequently, an additional allowance should be added to my award.

I must next decide its amount. This has given me concern. In the *Diggon-Hibben Ltd.* case (*supra*) the Supreme Court of Canada, in allowing the appeal from my judgment, added only $10,000 to the amount of my award, although I had found $120,000 as the amount of compensation money to which the defendant was entitled. With great respect, I question the correctness of the basis of the computation. It would seem more appropriate, once it was decided to grant the ten per cent additional allowance, to attach it to the whole amount of my valuation instead of to only part of it and make it $12,000 instead of $10,000. In fixing the latter amount Rand J. suggested that I had found the value of the land at $100,000. I cannot agree. I did not separate my award into one amount for the value of the land and another as an allowance for disturbance. I made only one award for the value of the expropriated property. In the course of my judgment I stated my opinion that it is the duty of the Court to estimate the value of the property as a whole rather than to attempt to assess the amounts of the several factors that ought to be taken into account in arriving at the estimate of value which section 47 of the Exchequer Court Act directs the Court to make and that the amount of such estimate is a global sum. My award of $120,000 was my estimate of the value of the property to the defendant after taking into account the various factors and elements of value that were brought to the attention of the Court, including the defendant's claim for disturbance. To take

1951

THE QUEEN v. SISTERS OF CHARITY OF PROVIDENCE

Thorson P.

only $100,000 of my estimate as the value of the property suggests that the remaining $20,000 was for something other than its value. My award did not lend itself to any such partition. It was an indivisible amount and all of it, in my opinion, represented the value of the property. It is the established rule in England in cases under the Lands Clauses Consolidation Act, and, in my judgment, the rule is the same in Canada in cases under the Expropriation Act, that a claim for disturbance is not a separate head of compensation, such as a claim for damages for injurious affection, but is merely one of the factors of value of the property to the owner that is to be taken into account in determining the amount of the compensation. This was the view taken by the Court of Appeal in *Horn* v. *Sunderland Corporation* (1). And it is consistent with the statement of Lord Halsbury L.C. in *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (2). I am, therefore, of the opinion that since an additional allowance for compulsory taking is to be granted it should be based on the whole of the amount which I have found to be the value of the expropriated property to its owner rather than on only part of it. By the application of the principle of re-instatement I have found this value at $1,100,000. Consequently, I award ten per cent of such value, or $110,000, as the additional allowance for compulsory taking, making a total award of $1,210,000.

While I regard this additional allowance of $110,000 as a bonus and grant it only because of the rule laid down by the Supreme Court of Canada in the *Lavoie* case (*supra*), my objection to it in the present case is eased by the fact that it will be used by the defendant in furtherance of the charitable purposes for which it was formed.

The defendant has been left in undisturbed occupation and possession of the expropriated property ever since the date of its expropriation, without payment of any rent. Therefore, under the long established practice of this Court, it is not entitled to any interest.

(1) (1941) 2 K.B. 26.

(2) (1887) 12 A.C. 315 at 320.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in Her Majesty as from May 6, 1946; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $1,210,000 without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.