BETWEEN:

MOLLY JAMES, ELAINE SIMPSON, REVA GOULD, ANITA ROSEN AND JULES JAMES .... PLAINTIFFS;

AND

CANADIAN NATIONAL RAILWAY COMPANY ..... DEFENDANT.

1963
Mar. 25-29
Apr. 1-5
16-19
23-26
29
1964
July 31

Expropriation—Expropriation Act, R.S.C. 1952, c. 106, ss. 31 and 32—Exchequer Court Act, R.S.C. 1952, c. 98, s. 49—General Rules and Orders, Rules 104 and 105—Determination of compensation—Determination of market value of land expropriated—Witnesses giving opinion evidence of land values must have practical experience operating in market as broker or dealer—Determining extent of injurious affection—Any increase in value of remaining lands to be considered in determining amount of injurious affection—Interest on amount of compensation.

The plaintiffs claim compensation for the expropriation by the defendant of about ten acres of land in two parcels, both of which were part of a tract of about three hundred acres of land owned by the plaintiffs in the Township of Vaughan, in the County of York, near Toronto, the defendant proposing to use the said lands for a new railway line in connection with the construction of a marshalling yard.

The evidence established that the plaintiffs were holding the lands for possible future residential development although at the time of expropriation no actual steps had been taken toward such development. There were no water or sewer services available and there were no plans that would provide any assurance that any such services would be available for these lands at any time in the foreseeable future. In addition, the Township of Vaughan had adopted a policy of discouraging residential development in areas including the three hundred acres owned by the plaintiffs until industrial development in the Township became such as to provide tax revenues sufficient to bear the cost of servicing such residential development. The only use that could be made of these lands immediately prior to the expropriation was for agricultural purposes, but it was agreed that the land had a higher value as a speculative holding for potential residential use some time in the future.

Held: That the compensation payable may be correctly determined by deducting from the market value of the lands belonging to the plaintiffs immediately before the expropriation the market value of the lands remaining to them immediately after the expropriation.

2. That in determining the market value of the land expropriated a determination must be made concerning the speculative market in residential land at the time of expropriation on the assumption that buyers and sellers knew the facts that were available at that time to those who conducted reasonably careful investigations and not on the assumption that such buyers and sellers had the benefit of the expert opinions given at trial.

3. That a witness has no status to be expressing opinions as an expert on land values unless he has had practical experience operating in

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the market as a broker or dealer, as opposed to academic training and experience as a valuator or appraiser.

4. That witnesses testifying as real estate experts should not take into account the opinions given by other expert witnesses in determining market values at the time of expropriation except where it has been shown that such opinions were actually factors in the market at that time.

5. That s. 49 of the *Exchequer Court Act* refers only to the advantage or benefit likely to accrue as a result of the expropriation in respect of any lands held by the plaintiffs *with* the lands injuriously affected and there were no such lands in this case.

6. That in estimating the extent of the injurious affection to the lands remaining to the plaintiffs, the deleterious influence of the railway on the potential value of the immediately adjoining land for residential purposes and the possible diminution in the value for subdivision purposes of the remaining lands must be appraised and from this must be deducted the amount by which the prospect of the coming of the railway increased the market value of the remaining lands.

7. That the practice of not allowing interest under s. 32 of the *Expropriation Act* to a former owner who was permitted to remain in possession after the expropriation in respect of the period for which he was permitted to remain in possession has no application in this case because it appears from the evidence that the lands expropriated were not being used at the time of expropriation, nor can the practice have any application to an award for injurious affection since the right to possession of land injuriously affected is not affected by the expropriation.

ACTION to have the amount of compensation payable to plaintiffs determined by the Court.

The action was tried by the Honourable Mr. Justice Cattanach at Toronto.

F. A. Brewin, Q.C. and *Gordon Atlin* for plaintiffs.

G. M. Cooper for defendant.

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

CATTANACH J. now (July 31, 1964) delivered the following judgment:

This is an action for compensation in respect of the expropriation by the defendant of a right of way for a new railway line through certain lands belonging to the plaintiffs in the Township of Vaughan in the County of York in Ontario.

The expropriation was effected by the filing of one plan and description on March 11, 1959 and by the filing of a second plan and description on October 16, 1961. By the first filing, the defendant took 8.34 acres of the plaintiffs'

land and by the second took an additional 2.0607 acres of their land. As far as the amount of compensation to which the plaintiffs are entitled is concerned, nothing turns on the fact that the 2.0607 acres were taken on October 16, 1961 instead of on March 11, 1959. I understand it to be common ground, and I so find, that the compensation payable would be exactly the same if the entire 10.4007 acres had been taken on March 11, 1959, and I propose, therefore, to consider the matter on that assumption.

The plaintiffs claim as compensation the market value of the land taken and the amount by which lands of the plaintiffs that were not taken were injuriously affected. In my view, the compensation payable may be correctly determined by deducting from the market value of the lands belonging to the plaintiffs immeditaely before the expropriation the market value of the lands remaining to them immediately after the expropriation.

Immediately prior to the expropriation, the plaintiffs owned 302.839 acres of land in the Township of Vaughan, being part of Lots 1, 2 and 3 in Concession 2. That property was bounded on the south by a road known as Steeles Avenue, which is the boundary between Metropolitan Toronto and the Township of Vaughan and is a major east-west traffic artery. On the east side, the property was bounded by Bathurst Street, which is a major north-south traffic artery. The property was acquired in 1947 or 1948 by the plaintiffs from Charles James who was the husband of one of the plaintiffs and the father of the others. At the time of the expropriation, there were two old barns and two old houses on the property. One barn was not being used, the other was being used for storage and the two houses were being rented at a total rent of about seventy dollars per month. Some hay was being cut by the tenants. Otherwise, the property was not being used. The plaintiffs were holding the property for development as a residential subdivision but no actual steps had been taken towards any such development. At the time of the expropriation, the Township of Vaughan was designated as a rural area and there were various conditions precedent involving various government agencies that had to be complied with before the plaintiffs' land could have been developed as a residential subdivision. Furthermore, at the time of the expropriation, there were no water or sewer services available and

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there were no plans which would provide any assurance, at the time of the expropriation, that any such services would be available for these lands in Concession 2 at any foreseeable time in the future. The Township of Vaughan was undertaking to provide such services in Concession 1, which adjoined Yonge Street and which was a development of many years' standing, but had adopted a policy of discouraging residential development in areas such as Concession 2 until industrial development in the township was such as to provide the tax revenues necessary to bear the cost of servicing further residential development. Immediately prior to the expropriation, the only current use that could be made of the land belonging to the plaintiffs was for agricultural purposes and for such use the land would not have been worth more than three hundred dollars per acre. It is agreed that the land had a higher value as a speculative holding for potential residential use sometime in the future.

When the defendant initiated the railway project that gave rise to the expropriation of some of the plaintiffs' land, namely a marshalling yard in the Township of Vaughan with incidental rail lines, there were two main consequences, as far as value of the plaintiffs' land is concerned (in addition to the actual taking of 10.4007 acres), namely,

a) the project was calculated to attract industry to the Township of Vaughan and thus generally raise the level of activity in the township and increase the demand for land for all purposes, and

b) the prospect of a railway adjoining one side of each of the two parcels of land remaining to the plaintiffs decreased the speculative value of the land that would be next to the railway for residential purposes.

Theoretically, the expropriation of a strip of land through the middle of the plaintiffs' land might have also effected a "severance" damage, that is, it might have decreased the speculative value of the land for residential subdivision purposes because the land might have had a lower speculative value per acre for subdivision purposes in two separate parcels than the speculative value per acre it would have had for subdivision purposes if it had been in a single block. While evidence was given that there was a possibility that severance would lessen the value of the land for subdivision purposes, no evidence was given that would lead to the conclusion that the speculative value per acre of this particular

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property for subdivision purposes would have been greater if the land had been in a single block than the speculative value per acre that it had divided into the two parcels into which it was in fact divided. In other words, no evidence was given that there was in fact any "severance" damage. In any event, any severance damage that there might have been was, on the evidence, taken into account in the views that were expressed as to the value of the land after the expropriation and the possibility of such damage is taken into account in the conclusion hereafter expressed.

By the Statement of Claim, the plaintiffs claim $700,000 by reason of the two expropriations, plus an additional $100,000 if satisfactory underpasses are not constructed linking the severed portions of the plaintiffs' lands together, with interest on the amounts of the compensation from the respective dates of the expropriations. The Statement of Defence contains no offer of compensation but a Confession of Judgment was filed on March 18, 1963, in the amount of $183,000.

On April 29, 1963, during the trial, the defendant filed an undertaking under section 31 of the *Expropriation Act,* R.S.C. 1952, c. 106, whereby it undertook to grant to the plaintiffs, without charge, such easements as are required for laying and maintaining pipes across or under the railway to be constructed on the expropriated land and undertaking also to consent to installation of such pipes. Pursuant to section 31 of the *Expropriation Act,* this undertaking has been taken into account in the conclusion as to injurious affection hereafter expressed.

Quite apart from evidence about the relevant facts as they existed in 1963 and evidence of persons who were put forward as real estate experts to express opinions as to the market value of the plaintiffs' lands before and after the expropriation, much time was spent at the trial while witnesses having special qualifications or experience expressed opinions on many different subjects. For example, there were scientific opinions concerning the effect of railway noise on persons living near a railway and the prospects of finding water on the plaintiffs' property, there were opinions of officials, past and present, from different government agencies as to whether different types of building development would be permitted or would take place and, if so, when, and there were opinions of railway officials as to the

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amount of traffic there would be on the proposed railway when it is built. I am unable to appreciate the relevance of much of this opinion evidence. In determining market value, I must make a determination concerning the 1959 speculative market in residential land on the assumption that buyers and sellers knew the facts that were available at that time to those who conducted reasonably careful investigations. I cannot assume that 1959 buyers and sellers had the benefit of the expert opinions that were given before me in 1963. That being so, I must disregard such evidence except to the extent that it has been shown that the opinions in question were readily available in 1959 to speculative buyers and sellers of potential residential property.

I must also make some general comment with reference to the real estate experts. My understanding is that a person qualifies to express an opinion as an expert on land values by having had experience operating in the market as a broker or dealer. By reason of that experience, he is in a position to express an opinion as an "expert" as to what buyers would have paid for the expropriated property at the time of expropriation and as to what sellers would have sold the expropriated property for at that time. Without that experience, I should not have thought that a witness has any status to be expressing such opinions as an expert or otherwise. In this case, the evidence as to the qualifications of the experts has emphasized the academic training and the experience of the witness as a valuator or appraiser and has minimized his practical experience in the market. Indeed, in one instance, the witness did not claim any such experience.

Another comment that should be made concerning the evidence of the real estate experts is that they all appeared to take into account the evidence given by the various other "expert" witnesses to whose evidence I have already referred, and, as I have already said, I am of opinion that opinions expressed by such experts in 1963 should not be taken into account in determining 1959 market value except where it has been shown that such opinions were actually factors in the market in 1959.

My first task is to determine the value of the plaintiffs' property before the expropriation. On this question, there are four expert opinions:

1. *For the plaintiffs*:	
(a) Mr. Langer valued 302.839 acres at $4,000 per acre ..	$1,211,556
(b) Mr. Farr valued 145 acres at $4,500 per acre and 157.839 acres at $3,500 per acre	1,205,000
2. *For the defendant*:	
(a) Mr. Stewart valued 302.839 acres at $3,750 per acre ..	1,136,000
(b) Mr. Davis valued 302.839 acres at $3,800 per acre	1,151,000

In attempting to assess the relative merits of these opinions as to the 1959 speculative value of this property for residential purposes, one is confronted by the fact that each of the experts bases his opinion on certain sales of other land in the same general area and that there was, to all intents and purposes, no evidence available to them about such transactions except what could be learned from examining the deeds in the registry office. The special features of the land that was sold, the purpose of acquisition and the factors that caused the purchaser to want the particular parcel of land or the vendor to be prepared to sell at that time are unknown. It is therefore exceedingly difficult to intelligently weigh this evidence as to value before the expropriation. I cannot help noting, however, that the evidence of all these witnesses has this in common, that the sales that they rely on that might be regarded as supporting a value of over $3,500 per acre were sales of land that was either in Concession 1, where residential development was an accepted fact, and in a part of Concession 1 where the land got the benefit of the Yonge Street influence, or they were of relatively small parcels of land which may, as far as the evidence shows, have had an immediate use. In these circumstances, having regard to the onus that is on the plaintiffs, I cannot make a finding that the plaintiffs' property immediately before the expropriation was worth any more than the highest value put forward by the defendant. I am not overlooking the reasoning of the experts whereby they applied the Concession 1 transactions to the expropriated property. I realize that there were opinions that, having regard to the trend in prices, the sale prices could be adjusted upward in order to get 1959 Concession 1 prices and that other adjustments could be made to obtain Concession 2 market value. Having regard to the speculative nature of these values and the many imponderables concerning which there was not, and probably could not have been, evidence, and having regard to the generally unconvincing nature of the attempts to establish comparability

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between the expropriated property and the land that was the subject of such transactions, I cannot accept the opinions that the plaintiffs' land had a speculative value of $4,000 per acre before the expropriation. I should also say that I do not accept the evidence of certain unaccepted offers to buy land in the neighbourhood as being of any assistance. Assuming that unaccepted offers are acceptable evidence of value, the circumstances of the Chaplin offer were entirely too vague to be helpful and the other offer was not shown to have been made to a person with whom the offeror was dealing at arms' length. I therefore hold that the plaintiffs' property had a speculative value immediately before the expropriation of $3,800 per acre, or $1,151,000.

The next task is to determine the speculative value, in the market, of the lands remaining to the plaintiffs immediately after the expropriation. The conclusions reached by the various witnesses were as follows:

1. *For the plaintiffs*:	
(a) Mr. Langer	$ 900,000
(b) Mr. Farr	970,000
2. *For the defendants*:	
(a) Mr. Stewart	1,008,750
(b) Mr. Davis ($1,004,000 after the first expropriation less $8,000 for diminished value effected by the second expropriation)	996,000

Of these various amounts, it is clear that the plaintiffs are entitled to be paid for the 10.4007 acres of land actually taken at the market value I have already placed on the property before the expropriation of $3,800 per acre, or $39,522. The vital question is how much must be added to this amount for any decrease in the value of the land not taken by reason of the fact that a railway was to be built so as to separate the two parcels that remained. There is no doubt that the land *immediately* adjoining the site of the proposed railway was in fact seriously depreciated in value for potential residential purposes and it is to be assumed that this would have some effect on what a speculator would pay for it. On the other hand, there is no doubt that the marshalling yard project, of which this railway line was a part, had the effect of improving the value of land in this township for speculative purposes. While much evidence was given, none was of much assistance in respect of either factor on the question of quantum. No matter how each expert computed his amount, it was quite clear that they

were all doing what Mr. Farr did: namely, fixing an amount as a matter of judgment after discussing the factors that were, in his opinion, relevant. None of the experts pretended to have any specific experience that aided them in forming their judgment. None of them referred to comparable sales that could be regarded as being of any help. Each one performed arithmetical computations after assigning arbitrary reductions in value to arbitrarily determined areas of land adjoining the railway.

In my opinion, the question I have to decide comes to this: having accepted the view, put forward by the defendant, that a speculator in 1959, before the expropriation, would have paid $1,151,000 for the plaintiffs' property to hold it in the expectation of disposing of it for residential development at some indefinite time in the future, I must form a judgment as to how much less he would have paid immediately after the expropriation for what was remaining to the plaintiffs.

If a speculator would have paid $1,151,000 for this 302.839 acre parcel of land at a time when it was suitable only for future residential purposes and when such purposes were being discouraged by the authorities until supporting industry should come to the township, I find it hard to believe that he would not pay at least $1,000,000 for the 292.4383 acres that were left after the expropriation, when he would have become aware that a large marshalling yard was to be built in the township and that the yard could be calculated to attract a substantial amount of new industry. While he would know, at that time, that he would get some 10 acres less land and that some part of the land would be less valuable for residential purposes, he would also know that the prospect was that residential development would take place much sooner than was otherwise the prospect and that the period he would have to hold the land before he migth hope to realize on his speculation was therefore substantially reduced. I do not think that the matter may be determined any more precisely than that.

This would result in an award, in the total amount of $151,000. As this is less than the award that would have been made on the evidence of the defendant's witness, Davis, and as it is not a matter that can be decided with any exactitude I am adopting his figure of $155,000. I therefore determine that the compensation payable is $155,000 of

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which $39,522 is the value of the land taken and the balance is injurious affection to the land not taken.

Before leaving the question of injurious affection, I must refer to section 49 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which reads as follows:

> 49. The Court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit special or general, accrued or likely to accrue, by the construction and operation of the public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected.

There was much argument as to whether this section applies to a Canadian National expropriation, either of its own force or by virtue of the provisions of the *Canadian National Railways Act*, S.C. 1955, c. 29. I do not need to decide this question as, on my reading of section 49, even if it is applicable to a Canadian National expropriation, it has no application to the facts of this particular case. The application contemplated by the parties was that section 49, if applicable, requires that the Court, in determining compensation to be paid to the plaintiffs for the 292.4383 acres injuriously affected by the construction of the new railway project, take into account and consideration by way of set-off any advantage or benefit likely to accrue by the construction and operation of the railway project to those 292.4383 acres of land. What the section says, however, is that what is to be taken into account is the advantage or benefit likely to accrue "in respect of any lands" held by the plaintiffs "*with* the lands so . . . injuriously affected". There were no such lands here and, therefore, section 49 has no application.

That, of course, does not mean that the benefits in respect of the 292.4383 acres of land flowing from the railway project are not to be taken into account. What has to be decided is what was the extent of the injurious affection to the lands remaining to the plaintiffs. On the one hand, the deleterious influence of the railway on the potential value of immediately adjoining land for residential purposes and the possible diminution in value per acre for subdivision purposes of the two remaining blocks must be appraised. On the other hand, there must be deducted from that amount the amount by which the prospect of the coming of the railway increases the market value of those two blocks. The actual

injurious affection is the net amount by which the 292.4383 acres of land diminished in value by reason of the expropriation. It would be fallacious to say that there was injurious affection in a greater amount. No statutory provision is necessary to require that all relevant factors be considered in determining what was the actual injurious affection. This is what I have done to the best of my ability in reaching the conclusion that I have expressed above.

The plaintiffs ask for interest on the compensation awarded under section 32 of the *Expropriation Act,* R.S.C. 1952, c. 106, which reads in part as follows:

> 32. (1) Interest at the rate of five per cent per annum may be allowed on such compensation money from the time when the land or property was acquired, taken or injuriously affected to the date when judgment is given; but no person to whom has been tendered a sum equal to or greater than the amount to which the Court finds him entitled shall be allowed any interest on such compensation money for any time subsequent to the date of such tender.

For all practical purposes, we have here three separate amounts of compensation money in respect of which interest might be awarded under section 32, viz.:

(a) market value of land taken on March 11, 1959, namely 8.39 acres at $3,800 per acre, which is	$ 31,692;
(b) market value of land taken on October 16, 1961, namely 2.0607 acres at $3,800 per acre, which is	7,830;
(c) injurious affection as of March 11, 1959, which is	115,478;
TOTAL	$155,000.

The practice of not allowing interest under section 32 to a former owner who was in possession at the time of the expropriation and who was permitted to remain in possession after the expropriation for the period in respect of which he was allowed to remain in possession has no application here. It can have no application in respect of an award for injurious affection because the former owner's right to possession of land injuriously affected is not affected by the expropriation. It has no application to the compensation for the lands taken because, while the evidence is not as explicit as it might be, it would appear that these lands were not being used at the time of the expropriation. The only evidence of user is that of Mr. James that there were certain buildings on this property which were being rented before the expropriation and were still being so rented by the plaintiffs at the time of the trial in 1963. On the other hand, a railway witness gave evidence that the defendant

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took possession of the expropriated property in November, 1961. The property being rented must therefore have been property that was not expropriated and there is no evidence of the plaintiffs making any use of the expropriated property after the expropriation. Interest is therefore allowed on $7,830 from October 16, 1961, and on to the balance of the award from March 11, 1959, in each case to the date of this judgment.

I come now to the question of costs. On March 18, 1963, a Confession of Judgment was filed by the defendant whereby the defendant confessed judgment "in the amount of $183,000 plus costs to be taxed or fixed". A copy of this document was served on the solicitors for the plaintiffs on March 19, 1963. Prior to that time the case had been set down for trial and, by a consent order, it had been adjourned to the General Sittings that had been fixed to commence at Toronto on March 25, 1963. At the opening of the trial on that day, the plaintiffs moved to strike out the Confession of Judgment on the ground that it did not allow the plaintiffs fifteen days within which to accept or reject.

The relevant rules read as follows:

RULE 104
Confession of Judgment

The defendant may at any stage of the proceedings in an action, file in the office of the Registrar a confession of judgment either for a part or the whole of the plaintiff's claim; and the plaintiff may, at any time within fifteen days after he had received notice of such confession, file a statement in writing of his acceptance or refusal of such confession of judgment, and in the event of acceptance the Court or a Judge may order that judgment be entered accordingly.

In the event of the plaintiff giving notice within the time limited to the defendant of his refusal of the offer to confess judgment the case shall proceed to be heard and determined in the ordinary manner.

RULE 105
Effect of offer as to costs

If in the final disposition of any such action, wherein such confession of judgment has been made and refused by the plaintiff as in the preceding rule mentioned, the plaintiff does not recover a larger sum than the one so offered, not including interest from the date of such offer, the defendant, whatever the result of the action, shall be entitled to his costs by him incurred after the date of the filing of such confession.

At that time, the plaintiffs were offered, and refused, an adjournment. Counsel for the plaintiff also indicated to the Court at that time that he was instructed to reject the Confession of Judgment. I took no action on that motion and indicated that I would reserve the question of costs until

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delivering judgment but that my then inclination was to regard Rule 105 as not applying in the circumstances.

As the amount of the award, plus interest at 5% to the date that the Confession of Judgment was served on the plaintiffs exceeds the amount in the Confession of Judgment there is no need to consider further the possible effect of the Confession of Judgment on costs.

Judgment therefore goes in favour of the plaintiffs in the sum of $155,000, with interest at 5% per annum on $7,830 from October 16, 1961, to the date of this judgment and interest at 5% per annum on the balance from March 11, 1959, to the date of this judgment. There will also be a declaration that the plaintiffs are entitled, in addition, to the benefit of an undertaking filed by the defendant at trial respecting an easement and the plaintiffs are entitled to have their costs. If there is any difficulty in settling the minutes of judgment, the matter may be spoken to.

Judgment accordingly.