Case and Comment

EXPROPRIATION — VALUE — INJURIOUS AFFECTION — SECTIONS 11-13, N. B. EXPROPRIATION ACT.

The recent case of *Charles H. Llewlyn and A. Ross Walker v. The Crown In The Right of The Province of New Brunswick*[1] is of practical importance for future expropriation hearings. It also shows the inadequacies of certain provisions of the New Brunswick Expropriation Act.[2]

The Lieutenant-Governor in Council, pursuant to this Act, authorized the expropriation of a large tract of the claimants' land in the City of Fredericton. The purpose of the expropriation was the construction of the Trans-Canada highway. The claimants' remaining land was completely severed by the highway. Approximately seven weeks after the order in council authorizing the expropriation was recorded in the Registry Office for the County of York, the Lieutenant-Governor in Council ordered that this portion of the highway be designated as a controlled access highway. Section 13B of the Highway Act[3] provides that no person shall, without first obtaining a permit from the Minister:

> (a) construct, use or allow the use of any private road, private entranceway or gate which, or any part of which, is connected or opens on a controlled access highway;
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> (b) sell or offer or expose for sale any vegetables, fruit, meat, fish or other produce or any goods, wares or merchandise upon or within one hundred and fifty feet of the limit of the controlled access highway; and
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> (c) place, erect or alter any building, structure or fence or any part thereof or place any tree, shrub or hedge or any part thereof upon or within one hundred feet of any limit of a controlled access highway[4]

The claimants, who were subdividers and contractors, claimed compensation on the basis of the land actually taken and damages for severance and the restricted use they could make of their remaining land. They were awarded compensation for the

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1. Not reported.
2. R.S.N.B., 1952, c. 77.
3. R.S.N.B., 1952, c. 103.
4. As enacted by (1955) 4 Eliz. II, c. 52, s. 2, as amended by (1957) 7 Eliz. II, c. 41, s. 4.

land taken and damages for severance, but the arbitrators were unanimous in holding that they could not award compensation respecting the land injuriously affected by the highway being declared a controlled access highway. They said:

> While the public work for the construction of which the acquisition of the expropriated land was deemed necessary was the by-pass, there is no evidence before us of the existence, as of August 17, 1957,[5] of any likelihood that the by-pass would be declared a controlled access highway. That declaration was made seven weeks after the effective date of the expropriation. The by-pass could have been carried through to completion without any such declaration having been made. See *The King v. Halin*, (1944) S.C.R.

In *Halin v. The King*,[6] the Crown expropriated a portion of the claimant's land surrounding an airport to enlarge its runways. The claimant sought compensation for the land taken and for damages alleged to have been caused to the remainder of his lands. The damages resulted from certain orders in council and zoning regulations passed by the federal authorities setting restrictions on the height of buildings on land adjoining airports. It was held, however, that it was not the expropriation that had injuriously affected the claimant's adjoining land, but regulations passed under another statute. Thus the claimant was not entitled to damages resulting to the residue of his property.

The decision in the instant case is obviously of great practical importance when one considers the rapid expansion of highways in this province and the desirability of having certain portions declared controlled access highways.

Also of interest is the method of assessing compensation to be awarded a claimant. In the instant case the arbitrators followed the *Halin* case, but that case it should be observed was concerned with the federal Expropriation Act, a statute that, unlike the New Brunswick statute, deals with compensation in general language. Under the federal statute compensation is made up of the value of the land actually taken and damages to any remaining land.[7] There is no set procedure in the Act for determining the value of the land actually taken, but the courts have evolved certain tests. Under these, the value of the lands taken is to be determined as of the date of the expropriation. It is the fair value to the owner of the land, not the value to the taker. Rumours of an intended expropriation and the public work often enhance the value of the land in that vicinity, but this enhancement is not

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5. Date of recording of the order in council authorizing the expropriation.
6. [1944] S.C.R. 119; [1944] 1 D.L.R. 625.
7. *Irving Oil Co. Ltd. v. The King* [1946] S.C.R. 551; [1946] 4 D.L.R. 625, per Estey, J.

to be taken into account in determining the value of the land taken. In *Lucas and the Chesterfield Gas and Water Board*,[8] it was said:

> The decided cases . . . lay down the principle that where the special value exists only for the intended purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it.

In *Cedar Rapids Manufacturing and Power Company v. Lacoste*,[9] the Privy Council in discussing value to the owner states that the

> . . . price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any such undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

The public work, then, can neither diminish or enhance the value of the claimant's land. However, in *Sidney v. North Eastern Railway*,[10] it was argued that land suitable for a reservoir may have an enhanced value because only that land was suitable for a reservoir for any intending purchaser. In his judgment Rowlatt, J. said:

> But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.[11]

Thus, the value of the land taken is to be determined before any scheme has been proposed, or ignoring the scheme and bearing in mind that the land may have been bought for that particular purpose by other persons and enhanced by any normal increase in value up to the date of the actual recording of the order in council. Bearing these principles in mind, a good test to apply is: What would the owner as a prudent man at the moment of expropriation pay for the property rather than be ejected from it?[12]

Are any of these principles affected by the New Brunswick Expropriation Act? The relevant sections read:

> 11. The arbitrators shall appraise and determine the fair value of each parcel of the land as of the date of the recording

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8. [1909] 1 K.B. 16, per Fletcher Moulton, L. J., at p. 31.
9. [1914] A.C. 569, at p. 576.
10. [1914] 3 K.B. 629.
11. *Ibid.*, at p. 636.
12. *Diggon-Hibben Ltd. v. The King* [1949] S.C.R. 712; [1949] 4 D.L.R. 785.

> of the Order in Council; and the owner or owners thereof shall be entitled to be paid the sum awarded by the arbitrators, whose decision shall be final and not subject to appeal except on a matter of law.
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> 12. The arbitrators shall consider the advantage, as well as the disadvantage, of the public work as respects the land of any person through which the same passes, or to which it is contiguous or as regards any claim for compensation for damages caused thereby; and shall in assessing the value of any property taken or in awarding the amount of damages, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by the public work.
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> 13. The arbitrators in awarding the amount to any claimant for injury done to the land, and in estimating the amount to be paid for lands taken shall assess the value thereof as at the time when the injury complained of was occasioned or the lands taken, and not according to the value of adjoining lands at the time of making the award.[13]

Sections 11 and 13 and the first portion of section 12 appear to codify the principles enunciated above, but the latter portion of section 12 appears to introduce a new principle. In part it says that the arbitrators shall, in assessing the *value of any property taken* or in awarding the amount of damages, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by the public works. Thus, the arbitrators in assessing the value of the land actually taken, must consider the advantages accrued or likely to accrue to such person, but only consider injuries already accrued. The Act does not mention injuries or damages likely to accrue to such person.

Thus, at the date of the expropriation the arbitrators could come to the conclusion that the highway will be an advantage to the claimant in opening that area for development and reduce the assessment of the value of land taken accordingly. This would be extremely unfair to the claimant, especially if at the date of the hearing the highway had already been deemed a controlled access highway. The arbitrators would not be able to take this into consideration since the value of the land is determined at the date of the recording of the order in council and this was not an injury already occasioned.

In the present case, although the evidence was not presented from this point of view, the arbitrators were of the opinion that there was no enhancement because of the highway, but this might well be different under slightly altered circumstances, especially if the land was inaccessible from another existing highway. Hodgins, J. A. in *Re Toronto and Hamilton Highway Com-*

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13. R.S.N.B., 1952, c. 77.

mission and Crabb[14] thought access to a highway was a benefit to a person or his estate and even thought there was an advantage gained by proximity.

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BAILEES — POWER OF SALE — LIENS — SECTIONS 5-9, LIENS ON GOODS AND CHATTELS ACT — R.S.C. ORD. 50, R. 2.

The purpose of this note is to discuss certain defects in the law regarding the rights of bailees to sell bailed property. The facts of *Sachs v. Miklos*[1] provide a convenient point of departure. In 1940 the defendant consented to store in her house furniture belonging to the plaintiff without making any charge for the service. In 1943 the defendant required the room in which the furniture was stored. She obtained from the plaintiff's bank manager an address where he might be found, wrote to him twice and attempted more than once to communicate with him by telephone. The letters having been returned to her, she sent the furniture to the second defendants, a firm of auctioneers, who sold it for £15. In 1946 the plaintiff demanded the return of his furniture and then brought action. The defendants, the bailee and the auctioneers, were both found liable in conversion because they were found not to be agents of necessity, since there was no emergency and the goods were not perishable.

At common law a bailee's power of sale was restricted to situations of necessity and possibly only to carriers. Further, the power was limited to perishable goods and could only be exercised in the best interests of the owner, not of the bailee. In addition a real necessity had to exist for the sale and it had to be practically (commercially) impossible to get the owner's instructions in time as to what should be done.[2]

Recent statutes, however, have made provision giving powers of sale to certain bailees. Examples are the Inn-Keepers Act[3] and the Warehouseman's Lien Act.[4] The Liens on Goods and Chattels Act[5] contains more general provisions. It first gives a lien to persons who have done work on chattels, jewellers, wharfingers and gratuitous bailees, and then provides a power of sale for these persons. The lien of the gratuitous bailee and the power of sale

14. (1916) 37 O.L.R. 656.

1. [1948] 2 K.B. 43.

2. *Sims v. Midland Ry.* [1913] 1 K.B. 103; for a discussion of agency of necessity, see Cheshire and Fifoot, The Law of Contract (1956), 4th ed., pp. 387-8.

3. R.S.N.B., 1952, c. 111, s. 2.

4. R.S.N.B., 1952, c. 247, s. 4.

5. R.S.N.B., 1952, c. 131, ss. 2, 3, 4, 5 and 9.