Ottawa
1968
Sept. 30,
Oct. 1-4
Nov 18

BETWEEN:

NATIONAL CAPITAL COMMISSION .....PLAINTIFF;

AND

BENJAMIN MARCUS .....DEFENDANT.

Expropriation—Market value of expropriated parcel—Principles governing determination—Parcel taken for national capital's Green Belt—No immediate requirement for parcel.

Evidence—Expert witnesses—Valuation of expropriated land—Evidence of sales of comparable property—Hearsay—Admissibility of—Exchequer Court Rule 164B.

On these proceedings to determine the market value of a 13½ acre parcel of vacant land expropriated by the National Capital Commission in June 1961 for the national capital green belt evidence of expert witnesses was given by affidavit under Exchequer Court Rule 164B and *viva voce*. The owner's two experts valued the parcel respectively at $67,500 and $54,000 and the Commission's expert at $27,000 All three experts based their valuations on sales of comparable properties but none adequately explained the reasons for his conclusion. One of the comparable properties reported on by the experts was a 10 acre parcel acquired in April 1961 for $50,000 by a lumber company as a site for a building supply business. That parcel's characteristics were similar to those of the expropriated 13½ acre parcel.

Held, the 13½ acre parcel should be valued at $30,000 The only real difference between it and the 10 acre parcel acquired by the lumber company two months earlier was that there was a present requirement for the latter while merely a possibility of the 13½ acre parcel being required, which lessened its immediate value. *Cedars Rapids Mfg and Power Co. v. Lacoste* [1914] A.C. 569; *Fraser v. The Queen* [1963] S.C.R. 455, applied.

Held also, the evidence of the expert witnesses as to sales of comparable properties based on information received from persons not called to testify (although not relied on for the purpose of testing the experts' opinions, for which purpose it was admissible though hearsay: *City of Saint John v. Irving Oil Co.* [1966] S.C.R. 581) was admissible, on the footing of an implied agreement by the parties, to establish the basic facts of those transactions.

INFORMATION to determine compensation payable for expropriated land.

Eileen M. Thomas, Q.C. for plaintiff.

K. E. Eaton and *T. A. MacDougall* for defendant.

JACKETT P.:—This is an information under the *National Capital Act*, chapter 37 of the Statutes of 1958, and the *Expropriation Act*, R.S.C. 1952, chapter 106, to determine the compensation payable for certain property in the

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Township of Nepean in the County of Carleton, expropriated by the National Capital Commission on June 14, 1961.

It is common ground that the only question that has to be decided is the market value of the property in question at the time of the expropriation. Such property, at that time, was vacant land and was not being used by the owner.

By the information it is made to appear that the plaintiff is willing to pay $29,000 (less an advance payment made on October 5, 1961, in the sum of $22,500) as compensation for the property in question. By the defence the defendant claims that he is entitled to compensation in the sum of $75,000 (less the aforesaid advance payment) with interest.

There has been filed an agreement of facts by which it was agreed that the lands in question (hereinafter referred to as the "expropriated property" or the "subject property") consisted of $13\frac{1}{2}$ acres, were vacant, unserviced and unimproved, and were generally flat and at grade with adjoining roads, and by which it was agreed that there was no zoning by-law applicable to such lands although there was a Township by-law restricting disposition of land in the area in parcels under ten acres without the consent of a planning board.

Counsel for the parties have agreed that the expropriation was for the purpose of the "Green Belt" and that reference may be made to the judgments in *National Capital Commission v. Munro*[1] for any necessary information concerning this National Capital project. I shall refer to such judgments only to the extent that that appears to be necessary for the appreciation of what is involved in this case. A passage in the judgment of the Supreme Court of Canada, which was delivered by Cartwright J., as he then was, at page 667, reads as follows:

> It is conceded by counsel for the respondent, and so stated in their factum, that the appellant's lands were taken for the purpose of establishing the Green Belt proposed in the Master Plan for the development of the National Capital Region. . . .
>
> . . . I propose, for the purposes of this appeal, to accept the following conclusions that counsel for the appellant and for the intervenant seek to draw, . . . (ii) that the legislative history of the predecessors of the *National Capital Act* indicates that Parliament,

[1] [1965] 2 Ex. C.R. 579; [1966] S.C.R. 663.

up to the time of the passing of that Act, contemplated that the "zoning" of the lands comprised in the National Capital Region should be effected by co-operation between the Commission established by Parliament and the municipalities which derive their powers from the Provincial Legislatures, and (iii) that it was only after prolonged and unsuccessful efforts to achieve the desired result by such co-operation that Parliament decided to confer upon the National Capital Commission the powers necessary to enable it to carry out the zoning contemplated in the Master Plan.

The "Master Plan" in question is the Greber Plan of the National Capital Commission, which dates from about 1947. Gibson J. reveals something of the problems that this plan met in a passage from his judgment at pages 594-5, reading as follows:

> . . . failure of the representatives of the Townships of Gloucester and Nepean in particular to persuade the persons representing the Government of Ontario and the City of Ottawa (when they met at various times to consider the request of the National Capital Commission that they adopt the latter's Master or General (Greber) Plan as their respective official plans under the Ontario *Planning Act,* and to pass zoning or land use by-laws only in accordance with the same) that compensation should be paid to the owners of land whose rights were liable to be diminished by the passing of zoning or land use by-laws, was one of the main reasons that the National Capital Commission General (Greber) Plan was not so adopted and implemented in the area where the subject property is.

The parties have also agreed to a "Summary of Extracts from Reports in Ottawa Newspapers relating to Greenbelt Development between December 26, 1947, and June 19, 1958" being part of the evidence in this case. This summary shows in "capsule" form what the interested public was given to understand as to what they could expect in matters relating to the much discussed "Green Belt". The next stage in the history of this matter, after the events referred to in the newspaper summary, is the *National Capital Act,* chapter 37 of the Statutes of 1958, which received royal assent on September 6, 1958. By that Act, the National Capital Commission was given powers in connection with the National Capital Region, which includes Nepean Township, that were wide enough to authorize the expropriation of the land in question in this case.

Some of the dates in connection with the Green Belt that may have some significance in this case are

1947: Greber Report

1947: A green belt from two to four miles wide encircling Ottawa was "set down" by the Ottawa Planning Area Board on the recommendation of the National Capital Commission.

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1947 to 1955: Partially effective efforts to restrict development in the Green Belt by action of municipal authorities.

1955: (July 27) Prime Minister St. Laurent announced a Federal Government decision that Central Mortgage and Housing Corporation should refuse to underwrite mortgages on homes in the Green Belt.

1956 (July) Ban on Central Mortgage and Housing Corporation loans was partially lifted.

1956. (August) Joint Parliamentary Committee recommended that the Green Belt be preserved, and, failing provincial legislation to safeguard it, the Federal District Commission be given cash to expropriate land required to maintain it.

1958: (June 18) Prime Minister Diefenbaker told Parliament it would be asked to appropriate money to purchase Green Belt land for the Crown.

1958· (September 6) *National Capital Act* became law.

1961· (June 14) Land that is subject of these proceedings was expropriated.

There were approximately 44,000 acres of the Green Belt in Nepean Township. About 14,000 acres were purchased by the plaintiff before June 12, 1961. About 14,000 acres were expropriated in 1959. The balance of 16,000 acres were expropriated by three expropriations on April 12, 13 and 14, respectively, of which one was the expropriation by which the defendant's land was taken.

The expropriated property was acquired by the defendant on November 9, 1956, from Thomas E. Robertson for $8,000, or an average cost of approximately $593 per acre. In the year of the expropriation it was assessed at $2,700,[2] or $200 per acre.

The defendant put in evidence two opinions of real estate appraisers concerning the value of the expropriated land on June 14, 1961. They were

Mr. Whelan — $67,500 or $5,000 per acre, and

Mr. Young — $54,000 or $4,000 per acre.

One opinion was put before the court by the plaintiff concerning the value of the expropriated land on June 14, 1961. It was

Mr. Crawford — $27,000 or $2,000 per acre.

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[2] That it is not entirely immaterial to refer to a municipal valuation for assessment purposes appears from various decisions, e.g., *The King v. Halin*, [1944] S.C.R. 119 at pages 126 and 134.

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The expropriated property, which has a frontage of 350 feet on Highway 15, has an irregular shape and its measurements and configuration are best appreciated by looking at the following diagram:

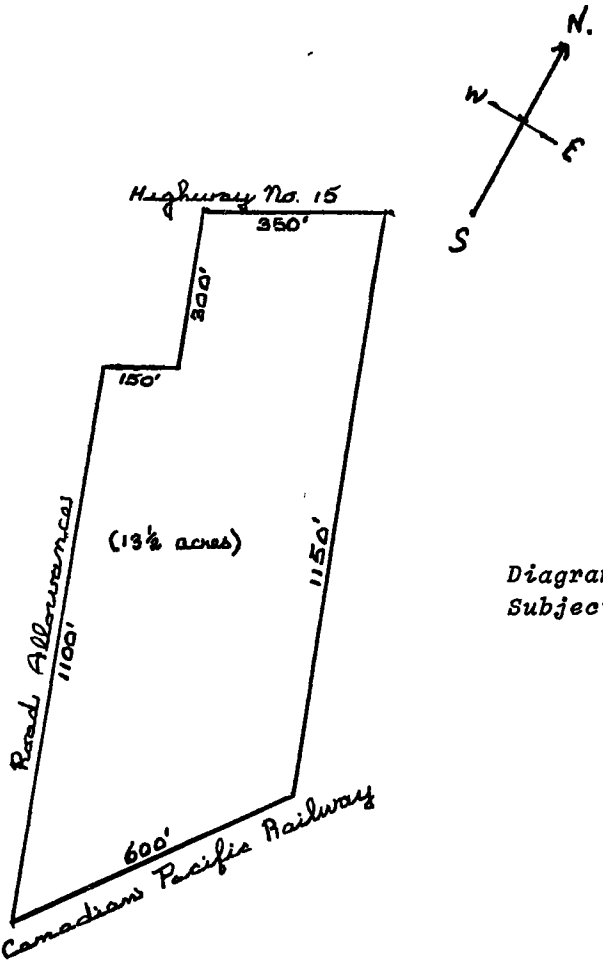

Diagram of Subject Property

Highway 15, which commences at the intersection of Carling Avenue and Richmond Road in the City of Ottawa (not far from the westerly limit of the city) and proceeds towards Carleton Place in a generally southwesterly direction, intersects with the route of the Queensway a short distance after it leaves the city and then enters the Green Belt on that side of the city less than a quarter of a mile from the Queensway. There is a distance of about four and one-half miles on Highway 15 from the point where it enters the Green Belt on the east (city) side to the point where it emerges from the Green Belt on the west side.

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For almost two miles of that distance, however, Highway 15 passes through Bell's Corners, a hamlet that has been excluded from the Green Belt. About two miles of Highway 15 are in the Green Belt west of Bell's Corners and, as already indicated, the subject property has a frontage of 350 feet on the south side of this part of Highway 15 some one-half mile west of Bell's Corners.

At the point where Highway 15 re-enters the Green Belt on the west side of Bell's Corners, it is intersected by the main line of the Canadian Pacific Railway with the result that properties within a certain distance from that point of intersection can have a frontage on the south side of the highway and also have a frontage on the north side of the railway. The subject property is such a property and has a frontage of 600 feet on the railway.[3] (It is to be borne in mind that, similarly, properties within a certain distance to the east of the intersection between the highway and the railway can have a frontage on the north side of the highway and also a frontage on the south side of the railway. This will be a factor to keep in mind in considering the comparability of at least one property that is the subject of a sale that must be considered.)

The subject property also had a frontage of some 1,110 feet on an allowance for a side road.

One reason for the difference in the various measurements of the subject lot is that it does not comprise a lot at the corner created by the intersection of Highway 15 and the side road, which lot has a frontage of 150 feet on Highway 15 and of 300 feet on the side road.

Generally speaking, it would seem that the areas that are of greatest interest in considering the market value of the subject property are the areas fronting on either side of Highway 15 in the part of the Green Belt west of Bell's Corners on the one hand (which I will refer to as the "Green Belt area") and the areas fronting on either side of Highway 15 in Bell's Corners between Richmond Road[4]

[3] There is no direct evidence that the owner of a property fronting on the main line of this railway can arrange for a siding on some practicable basis, but it is an inference that can be drawn from the evidence that several properties on this same line had such a service.

[4] Richmond Road and Highway 15 form a corner in Bell's Corners that is about 11.5 miles from Parliament Hill. The Richmond Road referred to here starts at Bell's Corners and runs in a southwesterly direction. It is not to be confused with Richmond Road in Ottawa to which reference has already been made.

and the western limit of the Hamlet, on the other hand (which I will refer to as the "Westerly Bell's Corners area"). East of Richmond Road there is a subdivision called "Lynwood Village" which started to develop in 1958 on the south side of the highway and my impression is that the character of the neighbourhood on either side of Highway 15 east of Richmond Road in 1961 was well urbanized and quite different from that of the Green Belt area or the westerly Bell's Corners area.

There were at least three differences between the westerly Bell's Corners area and the Green Belt area in 1961 that have been put forward expressly or implicitly as factors that tended to create differences in the prices for which land could be bought and sold in the two areas, *viz:*

(a) lands in the Green Belt area were, so it is said, less saleable for certain purposes because potential purchasers for such purpose would not acquire lands for a permanent purpose when they had reason to believe that they would not be allowed to use them for such purposes permanently;

(b) there was a bad "S" curve going through a subway under the railway between the two areas, and this may have been a deterrent to development in the Green Belt area that did not apply to the westerly Bell's Corners area; and

(c) the Green Belt area was further from Ottawa than the westerly Bell's Corners area and it may be that, on that account, the commercial and industrial development of properties adjoining the highway was further advanced in the westerly Bell's Corners area than in the Green Belt area.

I turn now to the evidence of the various witnessess put forward by the parties as experts to give opinion evidence as to market value of the subject property at the time of the expropriation.

The first such witness was James H. Whelan of Ottawa whose evidence-in-chief on behalf of the former owner is contained in an affidavit filed under Rule 164B, the portion of which containing his opinions reads as follows:

> 5. At the request of the defendant, I personally examined the property described in paragraph 2 of the information filed herein and

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carried out a complete investigation into all matters that in my opinion related to value of the said property for the purpose of providing an opinion as to its market value as of the 14th day of June 1961, the date of expropriation referred to in the said information.

6. In my opinion the market value of the said property, as of the 14th day of June, 1961, was in the total amount of $67,500, or $5,000 an acre

7. In my opinion, as of that date, the highest and best use of the said property would have been utilization for commercial purposes, taking advantage of its road and rail facilities.

8. The following facts concerning the said property were disclosed by my investigation and were considered by me in arriving at my opinion as to market value:

(a) The said property, which comprises an area of approximately 13.5 acres, as scaled from the expropriation plan, has a frontage of approximately 350 feet along the south side of Provincial Highway No. 15, and measures approximately 1100 feet along its westerly boundary, 600 feet along the northerly boundary of the Canadian Pacific Railway lands adjoining to the south, and 1150 feet along its easterly boundary.

(b) The westerly boundary of the said property fronts on the concession road running between Concessions 5 and 6, Rideau Front, Township of Nepean.

(c) The said land was vacant and fairly level with some scrub growth on it.

(d) At the date of expropriation, there was no by-law governing land use of the said property but it was subject to a subdivision control by-law passed by the Township of Nepean on March 18th, 1955, known as By-law No. 11-55.

(e) I have been informed by officials of the Township of Nepean and verily believe that, as of the date of expropriation, the nearest services were located at Lynwood Village, approximately 1 and ½ miles east of the said property on the south side of Provincial Highway No. 15.

(f) The said property could be reached by Provincial Highway No. 15, which is a paved, two-lane highway extending from the westerly limits of the City of Ottawa to the Town of Carleton Place and intersecting with the following main access routes to the centre of the City of Ottawa:

(i) Richmond Road, which is a paved, two-lane street running through the City of Ottawa to its intersection with Provincial Highway No. 15 at Britannia;

(ii) Carling Avenue, which is a paved, divided highway running west from Bronson Avenue to its intersection with Provincial Highway No. 15 at Britannia; and

(iii) The Queensway, which is a high-speed, controlled-access, divided highway which traverses the City of Ottawa from its easterly boundary to beyond its westerly boundary, where it intersects Provincial Highway No. 15 approximately 2 and ½ miles east of the said property.[5]

[5] There is some doubt in the evidence whether this highway was in full operation at the time of the expropriation, but there is no doubt that it was only a matter of months until it would be open all the way if it was not open at that time.

(*g*) The said property was also served by the main line of the Canadian Pacific Railway which forms its southern boundary.

9. The following neighbourhood data were considered by me in arriving at my opinion as to market value:

(*a*) The Bell's Corners area east of the subway where the Canadian Pacific Railway tracks crossed over Provincial Highway No. 15 had been developing for some years prior to the date of expropriation and this development speeded up with the beginning of the Lynwood Village subdivision in 1958.

(*b*) Computing Devices had established on the north side of Provincial Highway No. 15 across from Lynwood Village as well as McGlashan Silverware and the Motorways Express Terminal.

(*c*) On the south side of Provincial Highway No. 15 a shopping centre was developed in connection with Lynwood Village.

(*d*) There were also several retail gasoline service stations as well as Steenbakkers Lumber, Blackwood Hodge Limited, and Shawnee Pre-Cast Products Limited.

(*e*) The area lying to the west of the Canadian Pacific Railway right of way was in the early stages of urbanization since a motel had been built, several sites had been sold to gasoline companies, an equipment company had located on the north side of Provincial Highway No. 15, and land had been assembled and shaped for a golf club west of the said property.

10. In my opinion, in the absence of public knowledge of Greenbelt proposals by the Federal District Commission and later the National Capital Commission, the areas on both sides of Provincial Highway No. 15 lying to the west of the Canadian Pacific Railway right of way would have been developed to the same extent as the areas lying east of the said right of way.

11. My opinion as to market value is based on a study of the sales of comparable properties lying both east and west of the Canadian Pacific Railway right of way since all of these sales have the same road influence and some have the added influence of access to the Canadian Pacific Railway tracks.

12. Attached as Exhibit A to this Affidavit is a summary of the sales of comparable properties considered by me in reaching my opinion as to market value.

13. Those sales referred to in Exhibit A considered to be the most reliable guide to the value of the said property were analyzed and interpreted and adjustments were made for various factors influencing value, following which all of the available information was correlated into my final estimate of the market value of the said property as of the date of expropriation.

While Mr. Whelan says in his affidavit that he has considered, in reaching his opinion as to market value, the "sales of comparable properties" summarized in Exhibit A to his affidavit and that those sales in Exhibit A considered by him to be "the most reliable guide to the value of the property" were "analyzed and interpreted", and that adjust-

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ments were made "for various factors influencing value" following which "all of the available information was correlated" into his "final estimate of the market value of the said property", he was not, when he was giving his evidence orally, able to make me understand how he had accomplished this task.

In the first place, it should be noted that he did not, as his affidavit indicates, consider all the sales that he mentioned in his affidavit. The sales that he considered in the Green Belt, according to his verbal testimony, may be enumerated as follows:[6]

Year	Parties	Acreage	Average price per acre	Average per front foot	Depth
1955	Berlin to Imperial Oil....	1·66	$4,819	$16	150′
1957	Robertson to Westwell. ..	1·03	$1,456	$10	300′
1958	Robertson to MacDonald .	10	$1,500	$15	435·6′
1961	Berlin to Texaco	1·06	$9,433	$33⅓	150′
1961	Berlin to McFarland.....	1	$5,000	(No frontage on Highway 15)	
1961	Berlin to N.C.C.	80·46	$1,053	(Partial frontage on Highway 15)	

The two sales mentioned by him in the Green Belt which he says that he disregarded are

1956	Berlin to Leduc	14·09	$1,774	(No frontage on Highway 15)	
1956	Droeske to B.A. Oil. ..	·993	$9,566	$45	208′

His position as to what effect should be given to Green Belt sales and as to the relationship of sales outside the Green Belt to values in the Green Belt is not clear to me. He says in his affidavit that, in the absence of public knowledge of the Green Belt proposals by the Federal District Commission and later the National Capital Commission, the areas on Highway 15 in the Green Belt would have been developed to the same extent as areas lying east of

[6] N B. All averages per front foot in these reasons have been computed by the court. None of the witnesses gave any such information. Other information about a particular sale may come from the evidence of any witness and not necessarily from the witness whose evidence is being summarized.

the railway. He also says in his affidavit that, in his opinion, at the time of the expropriation "the highest and best use of the said property" would have been "utilization for commercial purposes, taking advantage of its road and rail facilities", but, in his verbal evidence, he said that, by 1960, the Green Belt was well known and real estate brokers advised people not to buy there. Nevertheless, in the course of his verbal testimony, Mr. Whelan said that he did consider the six sales in the Green Belt indicated above in arriving at his "estimate of value".

Of the twenty-one sales mentioned in Mr. Whelan's affidavit as "sales of comparable property" outside the Green Belt, Mr. Whelan informed the court during his verbal testimony that he had disregarded eleven[7] in arriving at his valuation of the property. Those that he says that he did rely on may be enumerated as follows:

Year	Parties	Acreage	Average price per acre	Average per front foot	Depth
1958	Robertson to Ballentine	8	$ 1,500	$22	632·6′
1958	Robertson to Braun	21	$ 1,500	(Partial frontage)	
1958	Robertson to Lobel	10	$ 1,500	$26	759′
1959	Braun to Mount Royal Paving	11·158	$ 2,628	(Rear land)	
1960	Braun to Carleton Culvert	5·65	$ 1,414	$18	450′
1960	Moore to Steenbakkers	24·78	$ 1,908	(Rear land)	
1961	Braun to Gervais	3·7	$ 2,700	(Rear land)	
1961	Lobel to Hodgins	10	$ 5,000	$87	759′
1961	N.C.C. to Kassirer	2·67	$ 2,921	(Rear land)	
1962	Steenbakkers to Horwitz	8·734	$ 3,435	(Rear land)	

While Mr. Whelan gave very useful evidence about the general development of properties along Highway 15 as it

[7] He did indicate under cross-examination that he relied on one of these "re size". Among those that he said that he disregarded is a sale in 1960 by Robertson to Nepean Hamlet Realty of 72.98 acres across the road from the Hodgins property for an average price of $2,371 per acre. This parcel had a partial frontage on the highway. I was quite unable to understand the reason why Mr. Whelan disregarded this sale but nevertheless based his opinion on another sale or sales in Bell's Corners Hamlet.

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passes through Bell's Corners and the Green Belt and for some distance the other side of the Green Belt, and gave very persuasive evidence of a gradual conversion from farm lands to commercial and industrial lands as the influence of the growing city made itself felt, I was not able to form any idea from his testimony as to how, after considering all the sales he considered, he reached the conclusion that the subject property had an average market value of $5,000 per acre.[8]

Indeed, and this comment applies to all witnesses put forward as experts on value, his evidence left me almost completely in the dark as to how "Those sales... were analyzed and interpreted" and as to how "adjustments were made for various factors influencing value". I cannot accept a valuation that appears to be based on one sale only if I do not understand the reasoning by which a conclusion has been reached to base the market value on that sale alone (to the exclusion of all the other sales), and I cannot accept a valuation based on many sales if I cannot appreciate how it was derived from those sales so that I may form my own conclusion as to the weight of the reasoning on which the valuation was based. Whether, therefore, Mr. Whelan's final result was based solely on the Hodgins Lumber sale, or was based on all the sales that he says that he took into account, I cannot adopt his opinion that the subject property had an average market value of $5,000 per acre.[9] It follows also from my inability to appreciate how the opinion was reached that I cannot adopt it subject to some adjustment.

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[8] His evidence as to the sale by Lobel to Hodgins just before the expropriation would explain to me how he reached the result that he did if that were the only sale that he says that he considered, and it has been very useful to me in arriving at the result that I reach on my own analysis of the market information.

[9] If Mr Whelan had qualified as a person who had a personal knowledge of the real estate market in the area in question by reason of participation in it as broker or principal over a long period of time, and had expressed an opinion, simply based on such experience, that the subject property would have fetched $5,000 per acre in June, 1961, I should have felt bound to pay some heed to that opinion even though he could not explain by some logical process how he reached it. I think it is fair to say, however, that, while Mr. Whelan and Mr. Crawford each had considerable actual experience in buying and selling land, *in this case,* all three of the "expert" witnesses made it clear that they were basing their opinions on their training and experience as "appraisers" rather than upon practical experience in the particular market.

The second witness put forward to give opinion evidence on market value was Gerald I. M. Young of Toronto, whose evidence-in-chief on behalf of the former owner is contained in an affidavit filed under Rule 164B, the portion of which containing his opinion reads as follows:

8 At the request of the defendant, I personally examined the property described in paragraph 2 of the information filed herein and carried out an investigation into matters affecting the value of the said property for the purpose of providing an opinion as to its market value as of the 14th day of June, 1961, the date of expropriation referred to in the said Information.

9. In my opinion the market value of the said property, as of the 14th day of June, 1961, was in the total amount of $54,000 00

10 In my opinion, as of that date, the highest and best use of the said property would have been its utilization for commercial purposes, possibly in conjunction with utilization for industrial purposes of the rear portion of the said property.

11. The following facts concerning the said property were disclosed by my investigation and were considered by me in arriving at my opinion as to market value:

(*a*) The said property is located on Provincial Highway No. 15 which is a busy two-lane paved highway connecting Ottawa with Kingston via Provincial Highway No. 29 and with Toronto via Provincial Highway No 7. The said property also adjoins a gravel side road running between Concessions 5 and 6, Rideau Front, in the Township of Nepean. The intersection of that road with Provincial Highway No. 15 lies approximately 3 and ½ miles west of the limits of the City of Ottawa and ½ mile west of the Hamlet of Bell's Corners

(*b*) The said property consists of an area of approximately 13.5 acres and has the following approximate dimensions.

Frontage on Provincial Highway No 15	350 feet
Northern boundary not fronting on that Highway	150 feet
Easterly boundary	1,140 feet
Southern boundary along Canadian Pacific Railway property	600 feet
Westerly boundary adjoining side road between Concessions 5 and 6	1,110 feet
Remaining westerly boundary not adjoining that road	300 feet

(*c*) The said property is, and was at the date of expropriation, vacant, unimproved land which is practically flat and at grade with adjoining roads although the rear of the property is a few feet higher than the front portion adjoining Provincial Highway No. 15.

(*d*) Canadian Pacific Railway tracks running along the land adjoining the southern limit of the said property cross Provincial Highway No. 15 diagonally from northeast to southwest approximately 2,400 feet east of the said property As of the date of expropriation, that highway entered an S-bend and passed through a narrow bridge at the point where it was crossed by the Canadian Pacific Railway tracks. Subsequent to the date of expropriation, that highway was straightened

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and widened at that point. Pyrofax Gas, Hodgins Lumber and other industries to the east of the said property are served by railway sidings from these Canadian Pacific Railway tracks.

(e) Although, at the date of expropriation, no municipal services were available to the said property, all subdivisions in the hamlet of Bell's Corners to the east were supplied with water by means of a private central well system and it is understood that well water was in abundant supply A sewage treatment plant at Shirley's Bay, which opened in 1962, is now connected to local sewerage services in newly developed subdivisions at Bell's Corners. By-law No. 21-59, authorizing stage 1 of the treatment plant project, was passed on December 10, 1959, and Ontario Municipal Board Order dated August 25, 1960 approved agreements for the construction of the treatment plant. Schedule "A" to one of the authorizing by-laws shows the said property as included in the sanitary sewer drainage area to be served by the treatment plant

(f) No applicable zoning by-law was in force at the date of expropriation but the said property was subject to subdivision control under Township of Nepean By-law No 11-55 passed on March 18, 1955 under section 24 of *The Planning Act*.

12. The following facts concerning development at the time of expropriation of nearby properties lying to the west of the Canadian Pacific Railway tracks were also disclosed by my investigation and were considered by me in arriving at my opinion as to market value·

(a) A Pyrofax Gas Depot was located on the south side of Provincial Highway No. 15 approximately 1,300 feet east of the said property.

(b) A G. and G. Auto Service body shop with a British Petroleum franchise was located immediately to the east of the said property.

(c) Imperial Oil Limited had purchased land on the south side of Provincial Highway No. 15 at the southwest corner of its intersection with the gravel road adjoining the said property, but that land had not been developed.

(d) A retail furniture store known as the "Little Blue Barn" was located on the north side of Provincial Highway No 15 approximately 700 feet west of the said property.

(e) The property adjoining the "Little Blue Barn" to the west was used by B.A. Oil Company Limited.

(f) The Cedarview Motel was located on the south side of Provincial Highway No. 15 approximately ½ mile west of the said property.

(g) A Texaco service station was located to the west of the Cedarview Motel on the south side of Provincial Highway No. 15.

(h) Another motel, "Charlie's Motel" (now the Kanata Motel) was located on the south side of the highway and approximately 1 mile west of the subject property.

(i) North of this was a construction equipment depot.

(j) There were also approximately 15 or 20 houses located along Provincial Highway No. 15 between the said property and the westerly limit of the Township.

13. The following facts relating to development at the time of expropriation of nearby properties lying to the east of the Canadian Pacific Railway tracks were also disclosed by my investigation and were considered by me in arriving at my opinion as to market value.

(a) The hamlet of Bell's Corners was under development immediately east of the said tracks on both sides of Provincial Highway No. 15.

(b) A garden nursery business was located approximately 1,500 feet east of the said tracks.

(c) A heavy equipment warehouse was under construction for the W. L. Ballentine Company Limited on a 8 acre site located approximately 1,000 feet east of the garden nursery

(d) Close to the intersection of Provincial Highway No. 15 with the Richmond Road at Bell's Corners, Steenbakkers operated a retail and wholesale lumber and builders' supply business.

(e) The Bruce MacDonald Motor Lodge and an Imperial Oil service station were located approximately 1,500 feet to the east of Steenbakkers.

(f) Unit Pre-Cast Specialties Limited operated on a 10 acre site close to the Canadian Pacific Railway tracks on the north side of Provincial Highway No 15.

(g) Hodgins Lumber Limited had commenced building on a 10 acre site to the east of Unit Pre-cast Specialties Limited for the purpose of carrying on a lumber and building supply business.

(h) Immediately east of the Hodgins Lumber Limited development, Carleton Culvert Co. Ltd. occupied a site of 5 6 acres, and to the rear of that site the operations of Mount Royal Paving and Supplies Limited were located on an 11 7 acre parcel adjoining the railway tracks.

(i) A trailer park was located east of Moodie Drive in the hamlet of Bell's Corners.

(j) Computing Devices of Canada Limited occupied a large establishment opposite the Bruce MacDonald Motor Lodge.

(k) Approximately 20 houses were scattered along the section of Provincial Highway No 15 lying between the Canadian Pacific Railway tracks and the Bruce MacDonald Motor Lodge.

(l) Two parallel and adjacent transmission line easements of the Hydro Electric Power Commission for Ontario with a total right of way width of 250 feet, diagonally crossing Provincial Highway No. 15 about 2,500 feet east of the Canadian Pacific Railway tracks, crossed the properties occupied by Hodgins Lumber Limited, Carleton Culvert Co. Ltd and W L. Ballentine Company Limited.

(m) To the south of Provincial Highway No. 15 approximately 590 subdivision lots were improved with houses in a residential subdivision development known as Lynwood Village, for which the assessment roll prepared in 1961 for 1962 taxes showed a total population of 1,849. As part of that development a shopping plaza was under construction to the south of Provincial Highway No. 15 and east of the Bruce MacDonald Motor Lodge.

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14. In arriving at my opinion as to market value of the said property, I have had regard to 9 sales of lands lying on both sides of Provincial Highway No. 15 to the west of the said Canadian Pacific Railway tracks and within 3,300 feet of the said property. Particulars of the said sales are set forth in a schedule attached as Exhibit A to this affidavit.

15. In arriving at my opinion as to market value of the said property I have also had regard to 12 sales of lands lying on both sides of Provincial Highway No. 15 to the east of the said Canadian Pacific Railway tracks in the hamlet of Bell's Corners. Particulars of the said sales are set forth in a schedule attached as Exhibit B to this affidavit.

16. Items 3, 4 and 5 of Exhibit B are resales of the land referred to in Item 2 thereof.

17. The Hydro easements affecting the lands referred to in Items 1, 2, 4, 6 and 7 of Exhibit B prohibit the erection of buildings or the use of land within the easement areas for open storage so that the effective areas purchased in each case and effective prices paid therefor have been calculated as follows:

Item	Actual Area (acreage)	Actual Price (per acre)	Effective Area	Effective Price (per acre)
1	8	$1,500	5·7	$2,100
2	21	$1,500	18·6	$1,695
4	5·656	$1,414	3·256	$2,450
6	10	$1,500	7	$2,140
7	10	$5,000	7	$7.140

* * *

19. All of the sales referred to in Exhibits A and B were of unserviced land, (only item 8 of Exhibit "B" was subsequently serviced, in 1965 or 1966), and it is my understanding that all of the said sales were made at arm's length.

Mr. Young's oral evidence shows that he placed "greatest reliance", in reaching his valuation of $54,000 ($4,000 per acre) for the subject property, on the purchase in April 1961 (his Item 7) made by Hodgins Lumber from Lobel of a 10 acre parcel in the westerly Bell's Corners area, running from Highway 15 to the railway, for $50,000. Having regard to the factors taken into account by Mr. Young (the Hydro easement over the Hodgins Lumber property when there was none on the subject property, the greater highway frontage of the Hodgins Lumber property in relation to the subject property, the public road allowance along one side of the subject property when there was none along

either side of the Hodgins Lumber property, and the greater distance of the subject property from the city, for example), as already indicated, I find that transaction to be of great assistance. My difficulty is that there were other transactions to some of which Mr. Young assigns a supporting role without my being able to appreciate how they lead to the result that he assigns to them,[10] and some of which he says should be ignored for reasons that do not appear to me to be valid. He says, for example, that he ignores all purchases by the National Capital Commission completely because the Commission had expropriation powers;[11] he suggests that sales in the Green Belt after the Government announced that it was seeking authority to

[10] For example, in supporting his valuation by putting a value of $9,000 per acre, or $21,700, on the front 300 feet of the subject property, which has a frontage of 350 feet, and a value of $2,750 per acre on the balance, he arrived at the figure of $9,000 per acre for the first 300 feet by considering (*a*) a sale for $8,000 by Berlin of 1.66 acres (500 feet frontage by a depth of 150 feet) some distance west of the subject property to an oil company in 1955, (*b*) a sale in 1960 (Torontow) of .48 acres (100 feet frontage by a depth of 208 feet) for $2,500, and (*c*) a sale in 1961 (price fixed in 1959) to an oil company (Texaco) of 1.06 acres (299.68 feet frontage on the highway and a depth of 150 feet) for $10,000. As I interpret these sales they may be summarized as follows:

Year	Acreage	Frontage	Depth	Average price per acre	Average price per front foot
1955	1·66	500′	150′	$4,819	$16
1959	1·06	299·68′	150′	$9,433	$33·5
1960	·48	100′	208′	$5,208	$25

Having regard to the fact that the less the depth, the greater should be the average value per acre, it is not evident how these sales lead to an average value of $9,000 per acre for the front 300 feet of the subject property, even if one assumes an immediate demand for parcels of this kind in June, 1961. It is even more difficult to see how they lead to a per front value of over $60 per foot for the front 300 feet of the subject property, which is the effect of putting a value of $21,700 on a parcel with a frontage of 350 feet.

[11] While there may have been reason to examine a purchase by such an authority with care or even scepticism because it had expropriating powers, or was otherwise in a position of strength, in my view, it was wrong in principle to ignore them entirely for that reason. See *Gagetown Lumber v. The Queen*, [1957] S.C.R. 44, per Rand J. at pages 55-6, where he quotes *inter alia*, *O'Malley v. Commonwealth*, per Holmes C.J.: "We cannot say merely because of the name of the purchaser that the sale was not a fair transaction in the market ...

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acquire the area should be ignored;[12] and he says that certain sales should be ignored because the area bought was too large although he gives, apparently, considerable weight to other sales of properties that were correspondingly smaller than the subject property. None of these reasons (except possibly the one as to size, which cuts both ways) is, in my view, a reason for refusing to give any consideration to the sales in question in determining what a reasonably prudent purchaser would have paid to a reasonably prudent vendor for the subject property, at the time of the expropriation (leaving aside for the moment the legal argument of counsel for the defendant as to the effect of the Green Belt proposal). Again, Mr. Young also says that he did not take the price paid by the defendant for the subject property in 1956 into consideration although he does take into consideration a sale made in 1955 by Berlin to Imperial Oil of a parcel of 1.66 acres. I can find very little support, in the principles that have been laid down by the courts for determining market value, for Mr. Young's various decisions to disregard completely the respective classes of transactions that he decided to disregard.

The sole witness put forward by the plaintiff to express an opinion as to the market value of the subject property at the time that it was expropriated was James Austen Crawford of Ottawa. The portion of his affidavit as filed under Rule 164B dealing with his opinion, reads as follows:

> 4. That at the request of the National Capital Commission I examined the property located in Lot 35, Concession 5, Rideau Front, Township of Nepean, comprising approximately 13.5 acres, (which property is the subject of this action) in order to advise the Commission of my estimate of market value as of the day of expropriation.

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[12] For example, one short extract from his evidence reads:

"THE WITNESS: Well, I am making the distinction because the lands east of the track were not in the Greenbelt; it was land that was in a free market and not in the Greenbelt.

HIS LORDSHIP: What do you mean by a free market?

THE WITNESS: Well, where purchasers are able to buy the land without any question of it perhaps being required by the public authority in the near future."

He also indicated that he valued the subject property "as though free from the adverse effect which the Green Belt might have had."

5. That in my opinion the market value of the said property on the day of expropriation, namely, June 14th, 1961, was the sum of $27,000.00.

6 That annexed hereto and marked Exhibit "A" to this my affidavit is the outline of the information and material on which I have based my opinion.

Exhibit "A" to Mr. Crawford's report is a document called an "Appraisal" of the subject property. The substantive portion of the appraisal reads as follows:

The purpose of the appraisal is to estimate the market value of the subject property as of June 14, 1961.

Market value may be defined as that amount of money that a willing owner will accept and a willing purchaser will pay for the exchange of ownership of a parcel of real estate where both are fully informed of the present use and potential uses of the property.

AREA DATA

The City of Ottawa in 1961 reported a population of about 277,000. Being the Capital of Canada, the Federal Government was the major employer but some industry was attracted to the greater Ottawa area, for the most part in the Township of Nepean

The Township of Nepean, in which the subject property is located, lies to the west and south west of the city. The Township contained about 69,000 acres of which approximately 17,000 acres was included in the Green Belt.

For many years prior to the Second World War studies were undertaken with a view to servicing and containing a sprawling city. By 1954 rumours of a Green Belt became most persistent. It was not known whether it would be by zoning or ownership.

Some two years later, in 1956 the Central Mortgage and Housing Corporation declined to loan funds on subdivisions serviced by wells and septic tanks. On appeal to the Ontario Municipal Board one or two subdivisions were approved.

The National Capital Commission began to acquire property by purchasing from owners prepared to sell Thus land in the Green Belt area slowly began to come under ownership of the Commission.

The boundaries of the Green Belt which embraced about 40,000 acres of land in total, were defined in 1958. Few changes in boundaries have taken place.

Taking an area of land out of potential subdivision use placed a greater demand on vacant land between the City of Ottawa and the inner limits of the Green Belt.

In examining population trends, the Township of Nepean has in 1961 become more popular than for the Township of Gloucester. This was primarily due to an indifferent water supply in Gloucester and lack of sewage collectors Whereas, at that time, the Township of Nepean was in the process of developing the Nepean Trunk Collector Sewer. Some years later the Queensway Collector Sewer was installed connecting into the main collector.

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The following table compares the rate of growth for the two Townships and records the building permits issued for the Township of Nepean for 1955 to 1961—

Year	Population	Single Family Permits	Apt. Permits	No. of Units or Apts.	Value of Residential Permits	Industrial and Commercial Permits
1955	8,167	331			$ 4,538,011	18
1956	10,695	280			$ 4,820,639	23
1957	10,963	279			$ 4,382,242	36
1958	11,756	470			$ 6,427,273	30
1959	13,724	556			$ 8,960,545	50
1960	16,566	937			$ 16,712,936	46
1961	21,055	1,205	3	298	$ 17,559,840	38

A neighbourhood is a segment or section of an area that is defined due to homogeneity of peoples and enterprise or through natural or man made division of boundaries.

The subject neighbourhood may be considered as being bounded on the east by the Canadian Pacific Railway and on the west by the town line which is the easterly boundary of the Glen Cairn Subdivision.

The aforementioned railway line is the westerly limit of Bells Corners Hamlet which includes the residential subdivision of Lynwood Village and the N.C C industrial area

The (subject) neighbourhood was sparsely developed and mainly used for farming with some residential and commercial holdings.

The old S turn underpass which was the scene of many accidents and which considerably reduced development to the west, has now been replaced with a modern structure.

Highway 15 links the City of Ottawa, approximately 2 miles east of Bell's Corners to a network of highways that leads to the Rideau Lakes Tourist Area and the highway itself leads to Toronto. It is the shortest route and carries a heavy flow of intercity traffic as well as commuter traffic to and from the employment center of Bells Corners and Ottawa.

(At this point the Appraisal contained the legal description of the subject property)

* * *

ASSESSMENT

The subject property was assessed in 1961 as follows:—

Land—$2,700.00

ZONING

There was no land use zoning by-law applicable to the subject lands at the date of expropriation There was, however, a subdivision control by-law in force.

DATE OF APPRAISAL

The subject property is appraised as of June 14, 1961.

HIGHEST AND BEST USE

This is the legal use most likely to produce the greatest net return over a given period of time in money and amenities.

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The subject enjoys access to a railway right-of-way and highway frontage. The subway east of the property has a detrimental effect.

In the circumstances and having regard for the market it is considered that as of the date of the appraisal the highest and best use is speculative

DESCRIPTION OF THE SUBJECT SITE

Containing approximately 13 5 acres it lies on the south side of Highway 15 (now Highway 7) and runs back to the north limit of the Canadian Pacific Railway right-of-way.

The west boundary is the road allowance between concessions 5 and 6 The easterly boundary is unfenced. Out of the northwest corner a block with 150 feet frontage on the highway and 300 feet frontage on the road allowance has been sold

The parcel has frontage of 350 feet on the highway, 1,090 feet approximately on the road allowance, 600 feet on the railway and an easterly boundary of approximately 1,140 feet.

According to the soil map for the County of Carleton the subject is Farmington said to be shallow soil over limestone bedrock.

The topography generally is gradually sloping downward from west to east. The surface is uneven with many areas throughout where either rocks protrude above the surface and in others where there is no soil over the flat rock.

Other than a mature tree inside the highway boundary the front 500 to 600 feet is clear of trees and underbrush. There are a couple of low knolls.

From that point there is a ribbon of trees and underbrush to the rear of which is a cleared area lying in the center and toward the south west corner. The easterly portion of the rear half drops less gently into a more heavily wooded area.

A rather heavy copse of underbrush lies along the road allowance approximately 200 feet from the railway

The highway boundary is marked by a wire fence on steel posts. Along the road allowance is a shallow ditch and hydro line on wood posts. A wire fence on wood posts marks the railway right-of-way.

Inside the northerly boundary the area excepted out is partly fenced with wire on wood posts Parallel to the railway right-of-way is a row of posts about half the width running to the east boundary.

The site has not been used agriculturally. It is growing to grass and weeds with approximately one-third clear of trees and underbrush Mature trees are few and of no merchantable value.

The only services available to the subject land are electricity and telephone.

(At this point the Appraisal contained particulars of some 27 "Comparable Sales".)

* * *

As a result of the foregoing comparables after giving consideration to the various points of difference including road frontage and depth, the market value of the subject property as of the date of the appraisal is estimated to be $2,000 00 per acre. Which for 13.5 acres indicates a total value of $27,000 00

Final estimate of value—

TWENTY-SEVEN THOUSAND DOLLARS

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Like the other two witnesses who expressed an opinion as to the market value of the subject property at the time of the expropriation, Mr. Crawford, in his oral evidence, said that he viewed the subject property, he searched for sales in the entire area, he considered the comparable sales, and he then arrived at his value, which, in his case, was $27,000, or $2,000 per acre. He failed, however, to make me understand how he reached that decision.

Mr. Crawford did say that he relied on the sale of three properties (four sales) more than the others. These may be summarized as follows:

Year	Parties	Acreage	Average price per acre	Average per front foot	Depth
1958	Roberts to MacDonald...	10	$1,500	$15	435'
1958	Storey to Kassirer.....	10·22	$1,000	$ 8	333'
1961	Kassirer to N.C.C.....	10·22	$2,000	$16	333'
1961	Berlin to N.C.C..... ..	84·7	$1,000	(Partial frontage on highway)	

He also gave evidence regarding the Hodgins Lumber Company purchase, on which the other two witnesses relied so strongly. He said that the Hydro Company, some years after Hodgins bought the land in question subject to the Hydro easement for $50,000, paid Hodgins $17,064 for the land over which the easement ran so that the net cost of the land to Hodgins was only about $33,000. There was, however, no evidence that Hodgins had any reason to anticipate any such windfall when it bought the property in 1961, and I am of opinion therefore that this approach must be rejected because, in considering the effect of a transaction as evidence of the market existing at the time it was entered into, it is the terms and circumstances of that transaction that must be considered and not the net cost of the land to the purchaser as a result of that transaction coupled with some subsequent transaction not foreseeable at the time.

Mr. Crawford also gave evidence that the publicity about the Green Belt caused prospective purchasers to lose interest

in properties in the Green Belt and that there was a resulting flow of values into areas between the Green Belt and Ottawa and such areas as Bell's Corners Hamlet, which he described as a "protected" area in the middle of the Green Belt. The general effect of his evidence was that, in his opinion, the Green Belt publicity and the acquisition of lands prior to 1961 for the Green Belt caused values in the Green Belt to fall and those in Bell's Corners to rise, but it is not too clear to me just when, in his opinion, these movements in values occurred.

It is clear from Mr. Crawford's evidence that he regarded the bad "S" underpass where Highway 15 went under the railway as being a factor that depreciated values of properties in the Green Belt area as compared with properties in the westerly Bell's Corners area.

When I attempt to make use of Mr. Crawford's opinion as an aid to determining market value of the subject property at the time of the expropriation, I find myself in the same position as when I attempt to make such a use of Mr. Whelan's opinion or Mr. Young's opinion.

In the case of each of these witnesses, after saying that he has considered certain matters (which are, generally speaking, proper matters to consider), the witness says that he has reached a certain conclusion as to market value of the subject property at the time of the expropriation. But when, for the purpose of assessing what weight, if any, to give to one of these opinions, one attempts to ascertain how the witness has allowed various factors mentioned by him to enter into the production of his ultimate conclusion, or why he had discarded certain of them as being of no importance in reaching a valid conclusion, one is faced with a lack of any such information in respect of many factors and, in respect of others, reasons for disregarding them that seem to lack validity. It follows that I must reach my own conclusion making the best use I can of the information and ideas that the witnesses and counsel have made available to me.

What I must do, as I understand it, is put myself in the position of a person owning the subject property just before the expropriation willing to sell, but under no compulsion to sell, and capable of appreciating all the factors bearing

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on what a reasonably prudent and competent person would take into account in the circumstances, and consider what amount he would insist on having before he would sell; and I must put myself in the position of a person desiring to buy a property such as the subject property just before the expropriation but under no necessity of obtaining that particular property, and capable of appreciating all the factors bearing on what a reasonably prudent and competent person would take into account in the circumstances, and consider what is the highest amount that he would be prepared to pay to acquire the property.

The first important fact, as it seems to me after a long and careful examination of the evidence, that such a person would have in his mind is that urbanization was, in 1961, gradually creeping out along Highway 15 from the City of Ottawa. Eastern Bell's Corners was, by that time, quite well developed with a housing area and a motel and other commercial establishments to the south of Highway 15, and various business operations established to the north of the highway. Commercial and industrial development was already making itself felt in western Bell's Corners and isolated properties were being acquired and developed in the Green Belt area for commercial and residential purposes. Housing developments were in an embryo stage immediately to the west of the Green Belt area.

A second fact of great importance to any such potential vendor or purchaser was that, ever since 1947, a "Green Belt" was mooted which would encompass this very area and that, while its accomplishment had not been worked out in a very clear-cut way by the various levels of government, nevertheless, steps had already been taken to stop building subdivisions and, by 1958, the Government of Canada had made it clear that it was going to purchase the land to ensure that the Green Belt area maintained the character deemed necessary for an appropriate National Capital District.

What this would have meant to a businessman of perspicacity, as I see it, is that a new and financially powerful purchaser had come into the market for the Green Belt area properties, which included the subject property. He would realize, of course, that the steps taken by the Government in connection with the Green Belt would have the effect, which according to the evidence they did have, of

discouraging developers of property for housing subdivisions from coming into this area, and of discouraging individuals and companies seeking properties for specific commercial or industrial developments from coming into this area. On the other hand, he would, I should have thought, with some reason, have guided himself by the view that, the Government having decided that these properties were to be acquired and used for public purposes and other purposes acceptable from the point of view of the Green Belt concept, those purposes must be regarded as being at least as important as, and at least the equivalent of, the "highest and best use" to which the lands in the Green Belt would have been put if the Green Belt policy had not been adopted and put into execution by the Government. In other words, a potential vendor of a property such as the subject property, while he would not have the possibility of a sale to a company wishing to establish a business such as that of Hodgins Lumber, would have substituted therefor the possibility of sale to a government for a public institution or to some other person having "Green Belt" approval for some other establishment (which type of user would, I should have thought, make just as good use of the physical characteristics of the subject property) and would expect to be paid as much by such a purchaser as he would have been paid by a purchaser for commercial or industrial purposes; and a government or other purchaser for a "Green Belt" type of institution or establishment could not properly have expected to get such a property for less than would have had to be paid by a purchaser who would have bought it if the Green Belt had not been set up.

In my view, therefore, a potential vendor or purchaser of the subject property just before the expropriation in 1961 would have taken the market as it was with all the effect that the entry of the Government as a purchaser some years previously had had on the values of land along Highway 15 both in the westerly Bell's Corners area and in the Green Belt area.

I am further of the view that such a vendor or purchaser would not have been intimidated by the fact that the National Capital Commission had been given powers to expropriate for Green Belt purposes. I fully recognize that persons not aware of their rights after an expropriation, or not equipped or prepared to enforce such rights, might not

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have been capable of dealing on equal terms with such a potential purchaser, but, in my view, the market price must be determined on the basis that the reasonably competent vendor or purchaser (whose conclusion on the matter is our theoretical test) is a person both competent and prepared to exercise his legal remedies, if necessary, to obtain his legal rights. (It will, of course, be a relevant consideration in considering the comparability of a sale to consider whether it was a sale to the National Capital Commission by some person who, through ignorance or lack of means or otherwise, may have failed to bargain from as strong a position as should have been available to him.)

One other matter of a general character on which I should express my conclusion as a preliminary matter is that, as we are considering what price would be negotiated by a person who is not under pressure and who has in mind the creeping urbanization of Highway 15, the potential vendor or purchaser would not be unduly affected by the difficult "S" underpass where the highway intersected the railway. He would have had in mind that such obstacles to the free flow of traffic would be eliminated in the normal course of adjustment to spreading urbanization.

In considering what importance a potential purchaser or vendor would have attributed to sales of other properties, one factor of importance, as it seems to me, is that consideration of the average price per acre for which some other property was sold can be a very misleading means of comparison unless due weight is given to the proportion of the land in question that was close enough to a highway, side road or railway to have special value as frontage land as compared with the proportion of "rear" land that was remote from any such frontage. For example, if highway frontage has a value for commercial or industrial reasons, while two lots may have the same acreage, if one has 300 feet frontage for a depth of 150 feet, it will be more valuable than the other that has 150 feet frontage for a depth of 300 feet, all other things being equal.

Similarly, in considering "comparable sales", it would seem, from an examination of sales information and as a matter of general and common experience, that substantially more is, generally speaking, paid for a property by a purchaser who has an immediate requirement for that

property himself than would be paid for the same property by a purchaser (a dealer or speculator) who buys for re-sale to a person with such a requirement if and when he materializes. (The difference is analogous to the difference between a sale of goods at retail and a sale of the same goods to a jobber or wholesaler.)[13]

It would also seem obvious that purchasess of areas of such a size that they would require subdivision before being used for normal industrial, commercial or residential use, whether or not there is an immediate demand for the property when subdivided, are at prices considerably less on the average per acre than prices at which parcels of a size convenient for such development are sold[14].

For an example of how both these considerations may have been operating in the market under consideration, compare the sale by Robertson to Nepean Hamlet Realty of 72.98 acres at an average price per acre of $2,371 per acre with the sale a few months later by Lobel to Hodgins Lumber of property right across Highway 15 of 10 acres at $5,000 per acre, and this notwithstanding that the 72.98 acre parcel had, apparently, very good although broken Highway 15 frontage, very good railway frontage, very good side road frontage, and relatively less Hydro easement diasability than the Lobel property. Normally, a larger property would be bought by a dealer or speculator for resale in parcels and such a purchaser is not going to pay the aggregate of what the various persons with immediate requirements for parts of the property would probably pay as that would leave him no reasonable possibility of profit on re-sale.

As I appreciate the expropriated property, its highest and best use was to hold it until a requirement arose for

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[13] This is an example of contingent value arising from adaptability for a possible use as compared with realized possibility arising from a purchaser appearing with an immediate requirement for such a use. Compare *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16.

[14] This would seem to have been the principle on which Mr. Whelan based his reason for including in his list of sales a reference to the sale by O'Neill to Assaly (his #12). He also testified in a general way that ". . . they usually pay more per acre for a smaller parcel than they do for a larger parcel . . ." Mr. Young was also of the opinion that ". . . generally smaller lots will sell for more".

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its development as a single property for a public institution or other "Green Belt" establishment that could utilize to advantage its highway, railway and side road frontages just as Hodgins Lumber utilized the highway and railway frontages of the property that it acquired. The real difference between the Hodgins Lumber property at the time it was acquired and the expropriated property is that in the case of the Hodgins Lumber property there was a present requirement for it for that use while in the case of the expropriated property some months later, there was merely a possibility of its being so required, albeit a very good possibility.

No witness put before the court a factual picture of the supply of, and demand for, sites of the general character of the subject property in the Ottawa area immediately before the expropriation. There was some evidence to suggest that industrial sites that were available in 1961 on railway sidings in the City of Ottawa were very expensive, and there was evidence by one witness that, while he did not know of such site on Highway 15 in Nepean Township, he did know of sites with highway and railway frontage of approximately the size of the subject property that were available elsewhere in Nepean Township. That was evidence that came out incidentally in the course of cross-examination.

There is some slight evidence, as I have indicated, that there were other sites like the subject property in Nepean Township. I should have thought that others in the general Ottawa area would have competed with those in Nepean Township on or off of Highway 15, some being more sought after for one type of demand and others being more sought after for other types of demand. I have no evidence, however, as to whether there was any scarcity of such sites to meet any demand for them.

I am struck, moreover, with the fact that there was no evidence at all of any immediate demand for sites such as the subject property either for industrial or commercial purposes, for government undertakings, or for any other purpose. In the absence of any evidence that there was,

just before the expropriation, any such demand in the market, I must conclude, as I have already indicated, that the probable willing purchaser for a site such as the subject property at that time was a dealer or speculator buying to hold for re-sale when such a demand did arise.

In the light of what I know from the evidence of the history of the real estate market in the area in question, I think that sales prior to 1959 must be disregarded as being too remote from the time of the expropriation to be of any assistance, in the absence of some indication as to trends in value, and I have been unable to detect any. I am also of the view that transactions involving one or two acre parcels or less for such purposes as filling stations, small individual residences, etc., must be disregarded inasmuch as they not only suggest an acquisition to meet an immediate need for a special purpose, but they will generally reflect some amount in respect of depreciation in the value of other land as a result of severance. (In the case of Berlin to McFarland, an additional reason for regarding it as not being any aid in valuing the subject property is that it was apparently acquired to give the purchaser access from other property that he already owned to a public road and thus the vendor was in a particularly good bargaining position that would not apply to ordinary sales. In addition, the vendor was parting with the only access that he had to the railway for a very large parcel of land.)

For various reasons, specific sales mentioned in the evidence can be excluded from consideration, or only used with substantial adjustment, in valuing the subject property. Although the property sold by Berlin to the National Capital Commission just before the expropriation on June 14, 1961, is very close to the subject property, the average price per acre at which that property was sold, namely, $1,000, must be regarded as very substantially below the market value at the same time of the subject property inasmuch as it was a sale of an area sufficient for several different institutions or other foreseeable developments. Other factors that may have brought that price even lower in relation to the ideal market is the fact, as has been reported,

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that Berlin desired to turn the land into money to be used for other purposes and the fact, which is admittedly merely a supposition, that he may have been prepared to take a somewhat lower price than he could otherwise have got in order to avoid long-drawn-out negotiations with a government agency. The Craig to the Federal District Commission transaction is another transaction where, apparently, the same factors may have come into play. Again, I cannot overlook the possibility that the sale by Kassirer to the National Capital Commission in 1961 may have been at an average price per acre somewhat below the ideal market for the subject land, notwithstanding its closeness in time and locality, because it was probably part of larger negotiations between Kassirer and the National Capital Commission involving another transaction, because it was low and subject to being under water at times, and because it did not have the railway and side road frontages that the subject property did. At the same time it must not be overlooked that it had, comparatively, much better Highway 15 frontage. Finally, as pointed out by Mr. Crawford, the establishment of Mount Royal Paving on the adjoining land probably created a dust and noise situation that affected the value of the property sold to Carleton Culvert in 1960 so that that sale is practically speaking of no help.

There would appear to be no doubt, on any appreciation that I can make of the matter on the material before me, that the sale that is of greatest assistance is the sale from Lobel to Hodgins Lumber just before the expropriation. The general characteristics of the two properties are comparable. Both properties have frontage on Highway 15 and on the Canadian Pacific Railway line. The expropriated property is only a few minutes further from Ottawa than the Hodgins Lumber property. While the expropriated property was 13½ acres, the Hodgins Lumber property was only 10 acres. The Hodgins Lumber parcel had more Highway 15 frontage than the subject property, about the same railway frontage as the subject property, no side road allowance frontage, and was subject to an easement that was a serious disability. The subject property had over 1,100 feet of side road allowance frontage, had 3½ acres

more area, and was not subject to any Hydro or other easement. I am of the view that, in 1961, if it were not for the Green Belt, a person wanting a property for the sort of development that Hodgins Lumber had in mind would have paid $50,000 for the subject property just as willingly as Hodgins Lumber paid that amount for the property that it acquired at that time. That being so, on the basis that I have already laid down, that the subject property was equally valuable for government institutions or other Green Belt purposes, as it would have been for commercial or industrial purposes if it were not for the Green Belt, I am of the opinion that if such a property had been required at that time for such a purpose, the parties would have reached agreement on a price of about $50,000. As, however, there is no evidence of any such realized requirement at that time and it is a matter of valuing it on its potentiality for such a purpose, I am of opinion that, looking only at the Hodgins Lumber purchase, the proper price to put on it is $30,000, being the highest price that, I should have thought, a dealer or speculator would have paid to acquire it for re-sale to such a purchaser, if and when one appeared, and the price for which an owner of the property willing to sell it at that time, but under no pressure, would have sold it.

When I take into account the various considerations that I have enumerated in connection with other transactions, they do not cause me to change the conclusion that I have reached, based on the Hodgins Lumber transaction.

Having regard to the extreme difficulty I have encountered in trying to reach a conclusion on the question of market value in this case, it might not be superfluous for me to attempt to explain my thinking in a more general way. In *Cedars Rapids Manufacturing and Power Co. v. Lacoste*[15] per Lord Dunedin (quoted by Ritchie J. in *Fraser v. The Queen*[16]), Lord Dunedin said at page 576:

> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though

[15] [1914] A C. 569.

[16] [1963] S.C.R. 455, at pages 472-3.

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> adaptability . . . is really rather an unfortunate expression) the value . . . is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Adapting that reasoning to the facts of this case, in my opinion the market value of the expropriated property is the amount to be arrived at by "the imaginary market" that would have ruled if the expropriated property had been exposed for sale immediately before the expropriation. As far as the evidence goes, there was not at that time any project on foot that created an immediate demand for a property having the characteristics of the expropriated property, but Ottawa was growing and it was obvious to any one who studied the evidence in this case that there was a large potential demand for properties such as the expropriated property in areas such as that where that property was located, not only for commercial and industrial purposes, but also for governmental developments (public buildings, laboratories, etc.) and other developments of a similar character that are attracted to the National Capital area. If, therefore, that property had been exposed for sale just before the expropriation, I have no doubt that some trader or speculator would have been prepared to buy with a view to holding it until this potential demand became realized and the property could be re-sold at a profit to a purchaser who needed it for a project ready to go ahead. Such a dealer or speculator would obviously not pay the amount for which he hoped to be able to re-sell because his object would be to make a profit. The best estimate that I can make of the amount for which such a trader or speculator would hope to be able to re-sell at some time in the not too distant future is $50,000 (based on my comparison with the property bought by Hodgins Lumber at that time). The highest price that I can conceive of a trader or speculator paying for a property yielding no income in the hope of re-sale at $50,000 is $30,000. Having regard to the risks involved, $30,000 would be a large amount to hazard in the hope of realizing a profit of $20,000 at some indefinite time in the future, but, having regard to the public knowledge

that the Government had already decided to acquire all the land in the area, I am inclined to think that it would have been regarded by such a trader or speculator as a fair risk.

There remains for consideration the argument of counsel for the defendant based on the following decisions:

1. *Kramer v. Wascana Centre Authority*, [1967] S.C.R. 237.
2. *Re Gibson and City of Toronto*, (1913) 28 O.L.R. 20
3. *Pawson v. The City of Sudbury*, [1953] O.R. 988
4. *Cunard v. The King*, (1910) 43 S.C.R. 88.

The argument was that the announcement by the Prime Minister in 1958 of the Government's intention to seek funds from Parliament for the purchase of Green Belt lands must be regarded as the commencement of the scheme resulting in the expropriation and that any diminution in value by reason of that Green Belt scheme must be disregarded in determining the compensation payable. In view of my conclusion that the entry of the Government into the market for Green Belt lands not only did not reduce the market value of such lands but probably resulted in higher prices having been paid for properties purchased in the general area between the Prime Minister's announcement and the expropriation, it becomes unnecessary for me to consider this submission on behalf of the defendant. The question nevertheless arises as to whether application of the same general principle results in the necessity of disregarding any increase in value by reason of the Green Belt scheme. If that were so, I have been unable to see on what basis I can regard the scheme as commencing in 1958. As it seems to me, the possibility of acquisition for a Green Belt became a factor in the market value of the subject lands at least as early as 1947; but I have no evidence to show that it became a "realized possibility" prior to the filing of the expropriation documents. The decision in 1958 was a decision to seek authority to purchase Green Belt lands. In the circumstances, I cannot distinguish the facts, from this point of view, from those in *Fraser v. The Queen.*[17]

[17] [1963] S.C.R. 455, per Ritchie J at pages 472 to 477.

I regard the reasoning in that case as being so analogous that I have set out the relevant portion of Mr. Justice Ritchie's reasons in an appendix to these reasons.

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Before concluding these reasons for judgment, I must deal with a problem that now presents itself to me in a light in which I did not see it during the course of argument.

Practically all, if not all, the evidence concerning the "market" that was put before the Court in this case consisted of facts stated by the three "experts" in explaining the basis for their respective opinions. Some of that evidence was evidence as to facts within the personal knowledge of the expert. Most of it, however, was hearsay. Indeed, I think it is probably true that all evidence concerning "comparable sales" was hearsay.

No objection to any of such evidence on the ground that it was hearsay could have been sustained having regard to *City of Saint John v. Irving Oil Co. Ltd.*[18] per Ritchie J., delivering the judgment of the Supreme Court of Canada, where he said, at pages 591-2:

> It would be unnecessary to say more than this were it not for the fact that it was strenuously contended in the course of argument before us that the opinion of the expert appraiser called by the City to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with forty-seven persons who had been parties to sales of land in the area. In this regard, Ritchie J.A. made the following findings:
>
> > "Based on the study he had made of market conditions in the area as represented by forty-six unidentified and one identified transactions, Mr. de Stecher applied a unit value of $40 per front foot . . . Opinion evidence as to the value of land based on such a foundation was inadmissible It was admitted by the Board despite strong objections of counsel for the Company. The validity of an opinion such as expressed is only as good as the validity of the information on which it is based. The precise information obtained in respect of all forty-seven transactions, including price and the dimensions and physical characteristics of each property should have been submitted to the Board."
>
> This opinion was in accordance with a decision rendered by the same judge on behalf of the same bench of judges in respect of evidence of the same witness in *McCain v. City of Saint John, (1965) 50 M.P.R. 363,* where he said:
>
> > "Much of his (Mr. de Stecher's) opinion evidence was founded on hearsay information obtained from sources not always disclosed.

[18] [1966] S.C.R. 581.

> In the course of making his appraisal, Mr. de Stecher compiled a market survey covering sales of as many properties in the area during the preceding four years as he could obtain information on . . . The report indicates the market survey rests on a foundation of hearsay and is restricted mainly to sales by trustees of estates to public bodies. When an appraiser elects to rest his valuation of real estate on sales of comparable properties, he should testify he has examined each of them.
>
> The greater part of the de Stecher evidence, including the appraisal report, was inadmissible."

Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called. To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.

The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision.

It seems clear, therefore, that an expert may express his opinion as to value and, in so doing, may inform the court as to the "information upon which the opinion was founded" even though such "information" has been "acquired from others who have not been called to testify" and that it will then be for the arbitrator or the court, as the case may be, to determine the "weight to be attached to that opinion" after assessing it in the context of the information on which it was based. That is the way in which I appreciated the situation during the trial and I assumed that it was because counsel similarly understood the law that I did not hear objections to much of the evidence given in this case on the ground that it was hearsay, though it sometimes constituted a somewhat extreme type of hearsay even for an expropriation case.

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My problem is whether hearsay information so received from an expert concerning comparable sales or other market information for the purpose of testing the value of his opinion as to value can be used for any other purpose.

In this case, I have concluded that I cannot base a conclusion as to the market value of the expropriated property on any of the opinions as to value expressed by the experts either by adopting the opinion as such or by adopting it subject to making certain adjustments for factors to which, in my view, the expert gave too much or too little weight. If the situation is that, because I cannot use his opinion as to value, I must disregard all the hearsay evidence that he put before the Court, I am left in the position that I have no evidence as to "comparable sales" and have, indeed, no material upon which I can make a finding as to market value.

The absurdity of the result that I would reach by applying the rules of evidence to the testimony put before the court by the parties in this case in such an inflexible manner constrains me to seek some more sensible approach.

Pursuant to the rules of this court, each of the parties in this case filed affidavits setting out the evidence-in-chief of their experts,[19] and copies of such affidavits were served upon the opposite parties. All comparable sales upon which the respective experts relied as evidence of the market were thus brought to the attention of the opposite party before trial. Having that opportunity to consider the other party's expert's evidence in advance of trial, I think it is fair to conclude that each party made such attack as it thought was open to it on the market information being relied on by the other party. On that assumption, I feel warranted

[19] I do not want to be taken as expressing an opinion that there was full compliance in this case with Rule 164B. In my view, each of the experts gave much hearsay evidence that he should not have been allowed to give because it was not in his affidavit. The same comment applies to his explanation of his conclusion from his market information. In my view, an expert should not, in his affidavit, say he relied on twenty sales and then, in his verbal testimony, say that he really relied only on some of them.

in concluding from the manner in which the trial actually proceeded that, subject to isolated transactions that were attacked and to which I have paid no attention, there was an implied agreement by the parties as to the basic facts of the transactions to which the various experts referred and that the court is entitled, therefore, to rely on such transactions in reaching a conclusion as to market value, even though it is not based in whole or in part on the actual conclusions of any of the experts.

This is the basis on which I have reached the conclusion in this case that I have already expressed.

There will be judgment in the usual form based on my finding that the market value of the expropriated property at the time of the expropriation was $30,000. Before judgment is pronounced, I must be satisfied that the pleadings have been revised to make the description of the expropriated property accord with the understanding upon which the trial took place. When that has been done, if the parties can jointly submit a proposed pronouncement, I will proceed to pronounce judgment accordingly. Otherwise, either party may move for judgment.

APPENDIX

Fraser v. The Queen, [1963] S.C.R. 455, per Ritchie J. at pages 472 to 477:

> The respondent's counsel contends that the only potential value of the expropriated lands over and above their "bare ground" value was "solely and exclusively related to the scheme of constructing the causeway" and should accordingly have been excluded in fixing the value for the purposes of compensation. The leading authorities cited in support of this contention are: *Cedars Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569; *Fraser v. City of Fraserville*, [1917] A.C. 187, and *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565. None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.

In the *Cedars Rapids* case, *supra,* Lord Dunedin stated the matter thus, at p. 576:

> "Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability . . . is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility."

It seems plain that the element of value which Lord Dunedin excluded in fixing compensation was the value as "a proportional part of the assumed value of the whole undertaking . . ." If there were any doubt about this, it is made plain at p. 577, where it is said:

> "Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony."

In *Fraser v. City of Fraserville, supra,* the original arbitrator had taken into consideration the value which the lands would have after expropriation as a part of the hydro-electric system to be operated by the City of Fraserville, and Lord Buckmaster observed, at p. 193:

> ". . . in truth the value which Mr St. Laurent (the arbitrator) fixed was the value of the property to the person who was buying and not to the person who was selling and it was not this value that he was appointed to determine."

In the *Pointe Gourde* case, *supra,* which is particularly relied upon by the respondent, the British Crown authorities expropriated the appellant's lands in Trinidad which were required by the United States of America in connection with the establishment of a naval base. The situation was that the appellants owned and operated a stone quarry situate on the expropriated lands which had a special suitability and adaptability for the purpose of producing and marketing quarry products and as such had a market value as quarry land prior to the acquisition. The original award of compensation made due allowance for the value of the quarry as a going concern and for the special adaptability of the land as a quarry but the item in dispute was a special award of $15,000 which related

> "not to the special suitability or adaptability of the land for the purpose of quarrying which existed before the acquisition, but to the special adaptability (to follow the language of the tribunal) which the quarry land possessed after acquisition in that its proximity to the naval base under construction made it specially suited to the needs of the United States."

It is to be noted that the "special suitability" for which the additional $15,000 award was made could not arise until after the acquisition of the land by the British Crown and after the lands had been leased to the United States Government for the purpose of building the base and that it only came into being because of the "special needs of the United States".

In giving his reasons for disallowing this item, Lord Macdermott further indicated what he meant by "an increase in value which is entirely due to the scheme . . ." when he said, at p. 572:

> "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *Southeastern Railway Co. v. London County Council* [1915] 2 Ch. 252 at 258: 'increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded'."

Earlier in his judgment, Lord Macdermott had characterized "the use of the quarry stone in the construction of the naval base" which is the subject of the disputed item as being 'at most . . . but a circumstance which added to the value to the United States of the use of the land as a quarry'.

The exclusion from the Court's consideration of 'increase in value consequent on the execution of the undertaking' to build a causeway and of any value based on the Crown acting under compulsion as a necessitous purchaser, does not mean that the value of the special adaptability to the owner at the date of expropriation is to be disregarded.

In this regard, like the learned trial judge, I adopt the reasoning of Lord Romer in the case of *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam* [*1939*] *A.C. 302* (hereinafter referred to as the *Indian* case) where he makes the following comment on the judgment of Rowlatt J. in *Sidney v. North Eastern Ry. Co.*, [*1914*] *3 K.B. 629*. Lord Romer there said, at pp. 322-323:

> "If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a "driven" purchaser, to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser, being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned judge.
>
> "For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in the case where there are several possible purchasers and that he is no more confined to awarding the land's 'poramboke' value in the former case than he is in the latter."

Although recognizing that an allowance must be made for the value of the special adaptability of the property in question as a source of rock for the causeway, the learned trial judge felt himself bound to assess the value in relation to the market which would have ruled if the lands had been put up for sale immediately before October 17, 1951, when Cabinet approval was given to the scheme, and in so doing he was governed by his interpretation of the following quotation from Cripps on Compulsory Acquisition of Land, 10th ed., at p. 4040, where it is said:

> "The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the purchaser had secured any powers or acquired the other subject which made the undertaking a realized possibility.

"This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded."

In apparent reliance on this authority, the learned trial judge went on to hold:

"In Canada, of course, the powers of the Crown to expropriate property for public works are statutory and ordinarily no special Act is required. It seems to me, however, that when Cabinet approval was given to the construction of the causeway on October 17, 1951, the undertaking of the construction thereof became a realized possibility and ceased to be a mere potentiality. The value of the lands expropriated, together with the special adaptability 'must be tested in relation to the market value which would have ruled had the land been exposed to sale prior to that date'. The subsequent preparation of the plan, the call for tenders, and the letting of the contract were merely steps in carrying out the scheme to which the Crown was already committed, and of themselves could not, in the circumstances, be considered as adding to the potential value to the special adaptability."

With the greatest respect, I am unable to treat the giving of Cabinet approval to the construction of the causeway as being equivalent to the exercise of powers of expropriation over the appellant's lands. In the case of an expropriation by the Crown in the right of Canada no question arises of securing special powers and in the present case there was no occasion to acquire the other land upon which the public work was to be constructed as the Strait of Canso was the property of the federal government. For these reasons in applying the language used by Cripps on Compulsory Acquisition of Land to the present circumstances it should, in my opinion, be read as meaning that:

"The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the powers of expropriation had been exercised."

This same view was expressed by Roach J.A. in *Agnew v. Minister of Highways*, [*1961*] *O.R. 234 at 239, 27 D.L.R. (2d) 82*, with reference to the statutory power of expropriation conferred upon the Minister of Highways of Ontario.

By giving Cabinet approval to the plan to construct a causeway the Crown made it known that there was a probable rather than a possible market for the appellant's rock at the price which a willing purchaser would pay to a willing vendor, but taking this factor into consideration in fixing the value of the land is by no means the same thing as determining the value on the basis that the use of the appellant's rock as a part of the undertaking for the construction of the causeway had become a realized possibility.

The significance of the phrase "realized possibility" as employed in the authorities is illustrated by the following excerpt from the reasons for judgment of Lord Romer in the *Indian* case, *supra*, at p. 313:

"No one can suppose in the case of land which is *certain*, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes will have to be taken into account. It is equally plain, however,

that the land must not be valued as though it had already been built upon, a proposition that . . . is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration."

When the property in question was taken from the appellant by the Province of Nova Scotia in 1950, the potential market for the rock which it contained was still a matter of speculation as no decision had been finally made about the causeway but when the lands were reacquired by the appellant on July 9, 1952, the years of speculation, study and planning concerning the building of this causeway had already culminated in the letting of a contract for its construction which contemplated the use of an estimated 9,000,000 tons of rock from these lands, and the potential market for this commodity had thus become a reality before the lands were reacquired by the appellant. It was these lands, with this potentiality, which were expropriated by the Dominion Government, and it is their value at the time of that expropriation which is required to be assessed for the purposes of compensation. In this regard, s. 46 of the *Exchequer Court Act*, R S C. 1952, c. 98, provides that:

"46. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess *the value or amount thereof at the time when the land or property was taken,* or the injury complained of was occasioned."