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 BETWEEN:

 THE CORPORATION OF THE
 TOWNSHIP OF PICKERING,.... }

 SUPPLIANT,

 AND

 HIS MAJESTY THE KING,.....RESPONDENT.

Crown—Petition of Right—Expropriation of highway of which soil and freehold vested in suppliant—Highways held in trust for the public—Suppliant not entitled to compensation for their loss.

Suppliant claims compensation for loss of highways included in area of land taken by His Majesty under the Expropriation Act for war purposes.

Held: That the owner of expropriated property is to be compensated for the loss of the value of the property according to its value to him, but in estimating such value regard must be had to the conditions under which he held the property and any restrictions to which it was subject, and the circumstances could be such that the value of the property to the owner in terms of money was nil.

2. That where highways are included in land taken by His Majesty under the Expropriation Act for public purposes and the soil and freehold in them is vested in the municipality in which they are situate, the municipality holds such highways in trust for the public and is not entitled to any compensation to itself for their loss through the expropriation.

PETITION OF RIGHT by suppliant to recover the value of highways included in area of land expropriated by His Majesty for war purposes.

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

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W. J. Beaton, K.C., for suppliant.

J. L. Wilson, K.C., for respondent.

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

THE PRESIDENT now (July 23, 1947) delivered the following judgment:

The suppliant's claim arises out of the expropriation by His Majesty of a large area of land in the Township. The expropriation was effected by the deposit, pursuant to section 9 of the Expropriation Act, R.S.C. 1927, chap. 64, of a plan and description of the land in the office of the registrar of deeds for the registration division of the County of Ontario for the Township of Pickering on October 21, 1940. The land, consisting of 2505 acres, was taken by His Majesty through the Minister of Munitions and Supply for war purposes, namely, the construction and operation of a large shell filling plant. Within the expropriated area there were 10 miles of road allowances, on 7.9 miles of which there were improved highways with culverts and small bridges, the remaining 2.1 miles being unimproved.

The suppliant bases its claim upon the contention that at the date of the expropriation it was the owner of the road allowances and is entitled to compensation for their loss through the expropriation.

The title of the suppliant is clear. Section 454 (1) of The Municipal Act, R.S.O. 1937, chap. 266, reads as follows:

454. (1) Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this or any other Act.

and section 455 provides:

Except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways and bridges within the municipality.

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These provisions had their origin in sections 433 and 434 of The Municipal Act, 1913, Statutes of Ontario, 3-4 Geo. V., chap. 43. Prior to 1913 the soil and freehold of highways and roads were vested in the Crown although jurisdiction over them was exercised by the council of the municipality in which they were situate. The earliest enactment on the subject in the Province of Upper Canada was in 1810, Upper Canada Statutes, 50 Geo. III, chap. 1, section 35 of which provided:

XXXV. And be it further enacted by the authority aforesaid, That when any highway or Road shall be altered, amended, or laid out, under the provisions of this Act, that the soil and freehold of such highway or road, shall be thereby vested in His Majesty, his heirs and successors.

This was repealed in 1858 by section 403 of "An Act respecting the Municipal Institutions of Upper Canada", Statutes of Canada, 22 Vict., chap. 99. Section 301 of that Act provided:

301. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out, according to Law, shall be vested in Her Majesty, Her Heirs and Successors

And section 302 provided:

Subject to the exceptions and provisions hereinafter contained, every Municipal Council shall have jurisdiction over the original allowances for Roads, Highways and Bridges within the Municipality.

These provisions continued in force after the Province of Ontario was created and in 1873 were carried into "An Act respecting Municipal Institutions in the Province of Ontario", Ontario Statutes, 36 Vict., chap. 48 by sections 405 and 406, and remained in effect until altered in 1913 as indicated.

It may be assumed that the road allowances were the same as those laid out in the original survey by the Crown according to a plan dated November 18, 1854. They were never acquired by dedication, purchase or otherwise from private individuals but were always public highways and held as such either by the Crown or, since 1913, by the suppliant municipality.

There are some other observations. There is no debenture or other debt against the expropriated highways for which the suppliant is liable. It is also clear that the suppliant need not provide any new highways to replace those taken away; indeed, the facilities for public access

from No. 2 Provincial Highway to Pickering Beach Park have been improved by the respondent through improvement in the road between lots 8 and 9, to which the suppliant contributed, the erection of a new bridge over the C.N.R. right of way and the construction of a new bypass road south of it connecting with the Pickering Beach Road. And, in one sense, the suppliant has benefited by the expropriation in that it has been relieved of the obligation of paying its share of the cost of annual maintenance of the roads.

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The Court has jurisdiction to deal with the claim under section 19 (a) of the Exchequer Court Act, R.S.C. 1927, chap. 34:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(a) Every claim against the Crown for property taken for any public purpose;

And section 47 of the same Act prescribes the standard by which the amount of the claim must be measured.

47. 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.

The value referred to means money value so that the sole question before the Court is what, if any, was the money value to the suppliant of the highways included in the land taken by His Majesty. It is well established that the owner of expropriated property is to be compensated for the loss of the value of the property according to its value to him and not its value to the expropriating party. But in estimating such value to the owner regard must be had to the conditions under which he held the property and any restrictions to which it was subject. It could happen that the circumstances were such that the value of the property to the owner in terms of money was nil. These statements are, in my opinion, fully supported by *Stebbing v. Metropolitan Board of Works* (1), particularly as explained in the House of Lords by Lord Dunedin in *Corrie v. MacDermott* (2). The value to be estimated is, as Lord Dunedin put it, the "value to the owner as he holds."

(1) (1870) 6 Q.B. 37

(2) (1914) A.C. 1056.

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The respondent contends that the suppliant has suffered no loss of money value through the expropriation and is consequently not entitled to any compensation. I have come to the same conclusion.

There is a great difference between the proprietary interest of a municipality in the highways within its limits, even although the soil and freehold in them are vested in it, and that of an individual in his own land. The latter is private and exclusive of the public, whereas the former is held for the public and open to it. The difference was well expressed by Rinfret J., as he then was, speaking for the majority of the Supreme Court of Canada in *City of Vancouver v. Burchill* (1), when he said:

Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to "pass and repass"; and that character, of course, is of the very essence of a street. So that the municipality, in respect of its streets does not stand in the same position as a land owner with regard to his property.

There is also a fundamental difference between the ownership of highways by a municipality over which the public has the free right to "pass and repass" and the ownership of a railway by a company where the operation of the railway is for commercial purposes of gain, so that the decision of the Judicial Committee of the Privy Council in *International Railway Company v. The Niagara Parks Commission* (2), on which counsel for the suppliant relied, has no applicability to the present case.

The fact that the suppliant held the highways as trustee for the public makes it impossible, in my view, for the suppliant to succeed in its claim for compensation to itself for their loss through their being taken by His Majesty for public purposes under the Expropriation Act. It has been lawfully released from any obligation to the public in respect of them and it cannot show any loss of money value to itself through their having been taken. Its title to the highways as trustee for the public is not, in my judgment, the kind of ownership of property for which

(1) (1932) S.C.R. 620 at 625.

(2) (1937) O.R. 607.

compensation for its loss through expropriation for public purposes is contemplated by law. This view has been recognized by the authorities. In *Lewis on Eminent Domain*, Third Edition, page 321, the author says:

As we have already had occasion to observe a municipal corporation, though holding the fee of its streets, holds them simply as a trustee for the public. It has no such private right or interest therein, as entitles it to compensation when a railroad is laid thereon by legislative authority, though without its consent.

And a similar opinion is expressed in *Nichols on Eminent Domain*, Second Edition, where the author says, at page 394:

Whatever doubts may arise regarding other property, it is well settled that streets and highways are held in trust for the public, and whatever estate or interest in them belongs to the city or town in which they lie is owned by the municipality in its governmental capacity and as an agency of the state.

The views expressed by these authors have been adopted by this Court in *Corporation of Town of Dartmouth v. The King* (1). In that case Angers J. said, at page 200:

The question arises as to whether the suppliant is entitled to compensation for the parcels of streets expropriated. The doctrine and jurisprudence are unanimous in disallowing compensation for streets expropriated on the ground that the municipality holds them in trust for the public.

In addition to the authors referred to Angers J. cited a large number of cases in support of his conclusion that the suppliant in that case was not entitled to compensation for the loss of its streets included in the expropriated area. In my opinion, a similar attitude should be taken with regard to the claim of the suppliant in the present case. It is consequently unnecessary to estimate the value of the expropriated road allowances either from the point of view of their value as farm land or from that of the cost of construction of the highways less depreciation.

The result will be that there will be judgment declaring that the suppliant is not entitled to any of the relief sought by it in its petition of right and that the respondent is entitled to costs.

Judgment accordingly.

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