Ottawa 1967
Oct. 23-26
Nov. 1

BETWEEN:

NATIONAL CAPITAL COMMISSION ..... PLAINTIFF;

AND

MICHAEL BUDD, personally and as Executor of the Estate of Theresa Budd, and ISABELLE BUDD .... DEFENDANTS.

Expropriation—Value of land to owner—Factors involved—Market value not necessarily highest.

Evidence—Expropriation of land—Expert witness—Competence of—Exchequer Court R. 164B—Contents of affidavit—"Value to owner" insufficient statement of issue.

Plaintiff expropriated 42.4 acres of a 50.1 acre parcel which defendant operated as a market garden, leaving an area too small for economic operation as a market garden. The market value to the owner of the whole parcel as a market garden before the expropriation did not exceed $35,000 and while the evidence was insufficient to determine the amount by which defendant's buildings increased the market value of the bare land the court found that a reasonably prudent man in defendant's position would have paid a further $30,000 rather than give up his land and buildings and move his operation elsewhere. The court also found that as speculative building land, which was the parcel's highest and best use, its market value was $65,000. The value of the unexpropriated area was found to be not more than $10,000 as a market garden and $12,000 as potential building land.

Held, the value to defendant of his land before the expropriation was $65,000 and the value to him of what he had left afterwards was $12,000 and the compensation to be awarded was therefore $53,000.

While the value of land to an owner is not less than its market value for its highest and best use it may have a higher value to him, as e g. where it is used in the owner's business, in which case its value to the

owner will be its market value for use in his business (which may be its highest and best use) plus the amount by which his business buildings and fixtures increase that market value plus what he would have been out of pocket if he had to move his business elsewhere (business disturbance).

For the above reason it is not sufficient for purposes of an expert witness' affidavit under Rule 164B to define the issue as "value to the owner" since this may involve market value simply but may also involve market value for some particular use plus a further amount depending on the facts peculiar to the particular former owner.

An expert witness as to land values is not qualified to express an opinion as to the amount an owner would have been prepared to pay for land over and above its market value in order to be allowed to remain in possession.

INFORMATION for expropriation of land.

Mrs. E. M. Thomas, Q.C. for plaintiff.

Jacie C. Horwitz, Q.C. for defendants.

JACKETT P.:—This is an information (substituted pursuant to an order made on August 15, 1967 for two separate informations that had been filed previously) to determine the compensation payable in respect of a 42.4 acres parcel of land, part of which was expropriated on March 24, 1961, and part of which was expropriated on June 12, 1961.

While it was not so at earlier stages, it was common ground at the time of the trial that, at the time of the expropriation, the defendant Michael Budd (hereinafter referred to as "the defendant") was the sole beneficial owner of the whole 42.4 acre parcel subject to the dower rights of his wife, the defendant Isabelle Budd, and subject to an option in respect of which a release had been given since the expropriation.

It is also common ground that, while the property was expropriated on two separate dates, nothing turns on the difference in the dates and the amount of the compensation may be determined as though the expropriation had taken place on June 12, 1961.

The defendant, with the aid of his wife and children, was, prior to the expropriation, producing vegetables for sale to the public on the expropriated property and an adjoining 7.653 acres parcel of land, which he also owned and on which were situate the family residence and some other buildings. The defendant and his family operated a vegetable stand in season on By Ward Market in Ottawa, and

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also sold vegetables from a stand on the roadside outside their property and to persons who came to their place to buy them.

The combined area used by the defendant for growing vegetables is about 3½ miles from the city limits of Ottawa and about 7½ miles from By Ward Market in downtown Ottawa. The part of that land that was not expropriated (the 7.653 acres parcel) is in the Hamlet of Blackburn which is surrounded by the so-called "Green Belt" that has been established by the National Capital Commission. The expropriated area is outside the Hamlet of Blackburn and inside the Green Belt area, having been expropriated for the purposes of that area.

Since the expropriation, the defendant has been continuing in the business of producing and selling vegetables but he has been doing so on a precarious basis. He has left only 4½ to 5 acres that are usable for growing vegetables. That amount of land is not sufficient for an economic operation without the use of a greenhouse or hotbeds, which, as he understands it, he cannot use under the governing by-laws because he was not previously using them. He has only found it possible to supplement the 4½ acres by renting other land on a seasonal basis, and that does not enable him to do the necessary work of preparing the land in one year for growing vegetables in the next year.

While the Information filed by the plaintiff in this Court contains an indication that the plaintiff was willing and had offered to pay $56,000 (less certain advance payments that had been made) as compensation for all claims arising out of the expropriation of the defendant's property, this offer was not accepted, and, at the trial before me, the plaintiff's evidence consisted of the opinion of an experienced real estate dealer, Mr. James A. Crawford—

(a) that the market value of the defendant's combined holdings of land (50.1 acres) immediately before the expropriation was $60,000; and

(b) that the market value of the land remaining to the defendant immediately after the expropriation was $14,500.

The plaintiff's position was that the compensation payable is the difference between these amounts, or $45,500.

The defendant's claim was put before the Court in the form of a document prepared by an experienced real estate dealer, Mr. Louis Titley, and was based on the contention that

(a) the defendant's combined holdings had a value to him immediately before the expropriation of $97,104; and

(b) the land remaining to the defendant immediately after the expropriation had a value to him of $18,636;

and the defendant therefore claims the difference, which amounts to $78,468.

In some, if not all, cases where an expropriation takes some of a person's land and leaves contiguous land to the former owner, the former owner's compensation may be determined by deducting the value to the former owner of the land that he has left from the value to the former owner of all the land that he had before the expropriation. It is common ground that this is such a case.

I have, therefore, to determine the value to the defendant of his land before the expropriation, and the value to the defendant of the land that he had left after the expropriation.

While value to the owner and market value are not necessarily the same thing, market value is always an important factor in the determination of value to the owner. Market value of property means "what it would fetch in the market under the state of things for the time being existing". (Stroud's Judicial Dictionary, Second Edition, page 1164) More specifically, it is the price or consideration that would have been arrived at between a willing vendor and a willing purchaser "bargaining on equal terms". (Compare *The King v. Irving Air Chute Inc.*[1])

To understand the problem in this case, it is important to have in mind that one and the same piece of land may notionally have one market value for one possible use and different market values for other possible uses. That is, a parcel of land may have such of the various characteristics required for farming that willing purchasers of land for farming purposes, considering it in relation to other lands suitable for farming purposes that are in the market,

[1] [1949] S.C.R. 613, per Rand J. at page 623.

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would pay $200 per acre for it (and a willing vendor would sell it for such a price if its only possible use was for farming) while, at the same time, the extension of the built-up area of a city to the neighbourhood of the same parcel of land has brought it among the parcels of land regarded as suitable for building development so that willing purchasers, considering it in relation to other lands suitable for building development that are in the market, would pay $500 per acre for it (and a willing vendor would sell it for such a price if it had no higher or better possible use). In other words, such a hypothetical parcel of land would notionally have a market value of $200 per acre for farming use and a market value of $500 per acre for building development use.

It is, I think, common ground that the value to an owner of land as of any time must be *not less than* its market value for its highest and best use. That is, as I have already indicated, the price that would have been arrived at between a willing purchaser and a willing vendor bargaining on equal terms at that time. Obviously, the beneficial owner can sell his land for the best price obtainable in the market and his land has *a value* to *him* equal to that amount. There are, however, cases where land has a value to its owner in excess of its market value for its highest and best use. The typical case is where a person who owns land is using it for carrying on a business, which use is the highest and best use that may be made of the land. To such a person the land has a value equal to

(a) the market value of the land for that highest and best use (because that is, in theory at least, what it would cost him to obtain equally valuable alternative premises for his business), plus

(b) an amount equal to the various amounts that he would be out of pocket if he had to move his business (moving costs, depreciation in fixtures, loss of profits during the move, etc.), sometimes referred to as "business disturbance".

Clearly, ownership of the land has a "value to the owner" in such a case equal to what he would have to pay for alternative premises for his business plus what he would be out of pocket if he had to move his business, because such ownership saves him from the necessity of acquiring alternative premises for his business and moving it.

Put another way, where use of a parcel of land by the owner for his business constitutes the highest and best use of land, the land has *a value to the owner* equal to

(a) the market value of the bare land for its highest and best use,

(b) the amount by which his business buildings and fixtures increase that market value, and

(c) an amount equal to all the amounts by which he would be out of pocket if he had to move his business to alternative premises (i.e., business disturbance).

Where, however, use of land by the owner for his business does not constitute the highest and best use of the land, a further problem arises.[2] It seems obvious, and I think that it is common ground in this case, that *value to the owner* in such a case is the larger of

(a) market value of the bare land for the highest and best use, or

(b) market value of the bare land for the use for which it is being used, plus the amount that that value is improved by the business buildings and fixtures plus the "business disturbance" amounts to which I have referred.

I can now discuss the problem in this case as it appears to me.

The plaintiff says that the defendant's land before the expropriation, and what was left to him after the expropriation, had, at that time, a market value to a speculator acquiring land to hold for future building development that was higher than its market value for any other use. The defendant says that the highest and best use of his land before expropriation was for the vegetable production (market gardening) business for which he was using it, and that the property left to him after the expropriation had value only as Hamlet property with no special use.

The evidence that has been adduced is hardly sufficient to make any finding as to the value of the defendant's land

[2] This problem is that one must avoid the "duplication trap". See "Federal Expropriation Problems" by Mr. Keith E. Eaton in The Canadian Bar Journal, Vol. 1 (1958) 33, at page 40; also, *Horn v. Sunderland*, [1941] 2 K.B. 26, and *The King v. Edwards*, [1946] Ex. C.R. 311, the cases referred to by him in that connection.

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before the expropriation for use in his kind of market gardening. If I were to conclude that it is not possible to make such a finding on the evidence, I should have to reject the claim in so far as it is based on value to the owner for use in his business as the defendant would have failed to discharge the onus[3] of establishing the amount to which he was entitled on that basis. It would be most unfortunate if I found it necessary to make such a disposition of the claim. I propose therefore to make a finding in connection with that question as best I can on the evidence available.

To begin with, I should say that it seems reasonably clear on the evidence that, prior to the inauguration of the Green Belt scheme, land suitable for farming in the general area with which we are concerned was not too expensive for farm use. One of the experts mentioned prices for ordinary, good farm land in the general area of $200 to $250 per acre. However, the result of the inauguration of the Green Belt scheme was to send land prices in the area so high that, by the time of the expropriation, no reasonably prudent person would have bought such land for the purpose of carrying on an ordinary farming operation. I am inclined to the view that the same thing might be said about the acquisition of land in the area for the purpose of dedicating it to a market garden enterprise such as the defendant's.[4]

In that connection, it is significant that, while the experts refer to some sales where farmers as market gardeners have sold within the relevant time for some other use, there is only one sale of which any knowledge was communicated to the Court where the acquisition was for farming or market gardening purposes, and that was the acquisition by the witness Renaud for his business of market gardening which involved the use of a green house and hot beds and the much more intensive cultivation of a much smaller area than that involved in the defendant's operation. In many ways the site so acquired by Renaud appears to differ radically from the defendant's property, and I have not had the benefit of any helpful comparison by the experts so far as market value is concerned.

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[3] The onus of proof of value is on the former owner. See *The King v. W. D. Morris Realty Ltd.*, [1943] Ex. C.R. 140, per Thorson P. at page 155.

[4] The real estate expert who was called to give evidence for the defendant testified that he would advise a person looking for land to use in a farming operation like the defendant's "to get out of the Ottawa Valley".

Another aspect of the matter that makes it very difficult to appraise the value of the defendant's land for his market gardening operation is the fact that he was able to make available to the Court only the most inadequate information concerning the financial results of his operations. He filed two documents entitled, respectively, "Financial Statement for 1960" and "Financial Report for 1961" in which he adds together his "Income Tax Recorded Net Profit", his "cash increase" for the year, and the total of certain itemized payments largely of a non-business nature to get a "total" which was put forward as being his earnings for the year from his market gardening business and his snow ploughing and similar operations in the winter season. For 1960, this was

Cash increase	$ 563.89
Expenditures	3,499.48
Income tax recorded net profit	2,978.15
Total	$7,041.52

For 1961, it was

Balance	$1,750.45
Payments	1,783.96
Net profit on recorded income tax report	2,108.11
Total	$5,642.52

Other figures are contained in these statements but they are even less meaningful to me than those that I have set out. Taken all together, these statements raise considerable doubt in my mind that a reasonably prudent man would invest any substantial amount in land for the sort of business operation reflected by them, much less the very large sum of money that I am asked to accept as having been the market value of the defendant's land for market gardening before the expropriation.

The figures put forward by the defendant as being the market value of his land before the expropriation for his market gardening operation are

42.4 acres of expropriated area	$55,050
6.636 acres of part remaining	9,954
	$65,004

(This did not take into account 1.017 acres on which his house and fruit trees are located.)

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On the evidence, in my judgment, the balance of probability is that a reasonably prudent man would not have willingly paid $65,000 for this land for use in a business such as the defendant's, and I so find.

It is much more difficult to make any finding as to what a reasonably prudent man would have paid for the defendant's land as it was before the expropriation for use in a business such as the defendant's. I have in mind that there is some evidence that ordinary farm land could have been purchased in the pre-Green Belt times, when this area was a place to buy a farm, for about $250 per acre. I have heard much evidence about the cost of upgrading raw land to a state where it could be used in an operation such as the witness Renaud's. Remembering the differences between the defendant's land and Renaud's and the much larger area involved here, the balance of probability in my opinion is that no reasonably prudent person would have paid more than $700 per acre for all 50.1 acres of the defendant's land as it was immediately before the expropriation to use it in a business such as that that was being carried on by the defendant. That is, I find that the market value of the bare land for such a purpose did not exceed $35,000 in 1961.

I do not propose to make any specific finding with reference to the various amounts that the defendant contends should be added to market value of the land for the purpose for which the land was being used as elements of damage or value to the owner, and in respect of the buildings that were on the land. The amounts so claimed are:

Residence	$12,000[5]
Farm buildings	4,700
Value of custom work	7,000
Location value	8,400
	$32,100

I regard the location value as being included in the amount that I have already fixed as the market value of the bare land for the purpose of the defendant's business. I cannot accept the present value of net winter earnings for snow ploughing, etc. (Value of custom work) as being an amount that can, as such, be added to market value to obtain value

[5] This amount included 1.017 acres of land.

to the owner. Compare *Pastoral Finance Association v. The Minister*.[6] I am not satisfied that I have sufficient evidence to fix any amount as being the amount by which the buildings increase the market value of the bare land. However, I do not think that the matter must necessarily be approached, in a case such as this, by a process of specific findings and the addition of the amounts so found. Having regard to the evidence that I heard as to the way of life that the defendant had developed for his family and himself in connection with this property and the business that he carried on there, having regard to the ordinary elements of expense and loss involved in moving a business and residence, and having regard to the position in the community that the defendant had, according to the evidence, carved out for himself in Blackburn Hamlet, I am satisfied that the balance of probability is that a reasonably prudent man in the defendant's position would have paid an amount of $30,000 over and above market value of the bare land for his type of business sooner than have had to give up his land with the buildings on it and to move his place of residence and business to some other place where an alternative site was available.

Putting the two amounts together, I get a total value to the owner on this basis of not more than $65,000.

Coming to market value for the highest and best use of the whole of the defendant's land before the expropriation, I accept the opinion given by Mr. Crawford for the plaintiff that the highest and best use of the land was as a speculative holding for building development. I have considered as well as I can the various sales that have been brought to my attention and, as nearly as I can tell, he endeavoured to give full weight to all the relevant factors. This again, however, is not a matter that can be determined mathematically, and, giving the matter the best consideration that I can, and allowing a little more weight than Mr. Crawford has to the indication of market movement to be found in subsequent sales, I find that the balance of probability is that the market value of the defendant's land before the expropriation for its highest and best use was $65,000, being an average value per acre of $1,300.

[6] [1914] A.C. 1083 at p. 1088.

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In coming to this conclusion, I have not overlooked the defendant's contention that a person in his position could have stripped the top soil off his land and sold it for an amount that would have realized $500 per acre before selling his land for subdivision purposes. This possibility, in my view, has exactly the same weight in the case of the defendant's lands as it had in the case of the comparable lands that were sold with their top soil. Those are the sales on which I am relying. I have also given careful consideration to the alternative opinion expressed by Mr. Titley, the defendant's expert, at trial, based upon a calculation of the amounts for which the defendant's land could have been sold on a per lot basis, if he had subdivided it, and the costs that he would have incurred in so doing. I do not think that that is an acceptable basis for determining the speculative value of raw land for future building purposes. Even if the land were already subdivided, it would not be a proper approach. Compare *The King v. Halin*[7] per Kerwin J. (as he then was) at page 134: "In any event, the trial judge did not take into consideration the fact that the prices obtained on the sale of individual lots should not be applied to the disposal by the respondent of a great number of lots at one time."

I find, therefore, that the *value to the defendant* of his lands before the expropriation was $65,000.

I come now to the value to the defendant of what he had left after the expropriation.

Looking at it from the point of view of the defendant with a market gardening business from which the major part of his producing land had been cut off, I should not have thought that a reasonably prudent person in his position would have regarded the land as having much value for that purpose. I have, moreover, no evidence before me upon which I can make any finding as to the value of the residence. I discount greatly the evidence given on behalf of the defendant of its being worth $12,000 because that was put forward on the assumption that it would be considered both "before" and "after", so that the actual amount was unimportant. I am unable to conclude that the property

[7] [1944] S.C.R. 119.

left to the defendant after the expropriation was worth more than $10,000 as the remnant of a market gardening operation.

I think, however, that the soundest approach is to regard the remaining land, as Mr. Crawford did, as land in the market for speculators having in mind potential building development. I find, however, that the amount of $1,900 per acre put by Mr. Crawford on this parcel as of 1961 is too high.[8] Having regard to the evidence that I have heard as to the market, I am of the opinion that the market value as of that time was not much more than $1,500 per acre, and I find that the 7.653 acres parcel left to the defendant after the expropriation had a value to the defendant at that time of $12,000.

My conclusion is, therefore, that the value of the defendant's land to him before the expropriation was $65,000, and the value to him of what was left after the expropriation was $12,000 so that the difference, to which he is entitled as compensation for releases of all claims arising out of the expropriation, is $53,000.[9] As the defendant has been paid amounts by way of advances on the compensation that total $36,000, there will be judgment for the balance, subject to the usual conditions, in the sum of $17,000.

It is common ground that the defendant is also entitled to interest on unpaid amounts of compensation at 5 per cent. per annum from November 1, 1961 until the date of the judgment.

As an advance of $14,000 was paid in April, 1961, the amount unpaid on November 1, 1961 was $39,000. There will be interest, therefore, on that amount from November 1, 1961 until November 17, 1961, when the second advance of $10,000 was paid. There will be interest at 5 per cent. on $29,000 from November 17, 1961 until April 25, 1962,

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[8] There is no necessary inconsistency between Mr. Crawford's opinion that the 50.1 acres had a value of $1,200 per acre and that the 7.653 acres at almost the same time had a value of $1,900 per acre. These amounts are average rates for the 50.1 acres and 7.653 acres respectively. The 7.653 acres are on the highway and are the most valuable part of the whole area. When they are added to the 42.4 acres, to which he has given a value of $1,073 per acre, they raise the *average* value per acre accordingly.

[9] I am not overlooking the reference to $56,000 in the Information, but I am bound to restrict the judgment to the amount established by the evidence. *The King v. Hooper,* [1942] Ex. C.R. 193.

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when the third advance of $6,000 was paid. There will be interest on $23,000 at 5 per cent. from April 25, 1962 until July 26, 1963, when the fourth advance of $6,000 was paid. There will finally be interest at 5 per cent. on $17,000 from July 26, 1963, until the date of judgment.

The defendant will also have his costs of the action.

There is a procedural matter on which I should comment. It is not uncommon, in expropriation matters instituted under section 27 of the *Exchequer Court Act*, R.S.C. 1952, chapter 106, as this matter was, that the pleadings are not very informative as to the issues of fact on which the Court will have to adjudicate. This is probably due in part at least to the peculiar nature of the proceeding under which the defendant is really a claimant who would ordinarily be a plaintiff.

In accordance with a practice of long standing, the Information in this case alleges no facts material to the amount of compensation payable. This is probably as it should be inasmuch as it is clear that the onus of establishing the compensation payable rests on the former owner. The only allegations in the Statement of Defence that in any way bear on the compensation payable read as follows:

> 2. The defendant Michael Budd was the owner of 52 acres of land of which the plaintiff expropriated 42.4 acres.
>
> 3. The defendants claim the sum of $95,000.00 as compensation for all the expropriated land which sum includes severance damage to the remainder of their lands and premises.

A reply was filed joining issue on the Statement of Defence and saying that the defendant was, at the time of the expropriation, the owner of 53.9 acres.

It would appear that there has not been any pretence of complying with provisions in the Rules of Court, such as:

> *Rule 88:* Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence;
>
> . . .
>
> *Rule 93:* Each party in any pleading, not being an information, petition of right or statement of claim, must allege all such facts not appearing in the previous pleadings as he means to rely on . . .
>
> *Rule 96A:* . . . every pleading shall contain the necessary particulars of any claim . . . pleaded . . .

In this case, if I am right in my analysis of it, the plaintiff's claim was based on allegations

(a) as to the various features of the expropriated lands, including improvements, that affect their market value and their value for any use to which he might be putting them,

(b) that the market value of the defendant's lands for their highest and best use before the expropriation was not less than $X, while the market value of the lands left to the defendant after the expropriation for their highest and best use was not more than $Y,

(c) that the defendant was, before the expropriation, using his lands for a particular purpose, and that they had a market value of not less than $A for the use to which he had been putting them, and that, by reason of certain additional facts, they had a value to him over and above such market value; but the value to him of what was left, on the same or any other basis, after the expropriation was not more than $B,

or on some of such allegations.

I do not pretend to be giving an exhaustive or precise indication of the material facts. I am merely endeavouring to indicate that there were material facts that should have been pleaded and to which the plaintiff should have responded.

My suggestion is that, if the material facts were pleaded in cases under section 27 of the *Expropriation Act*, there would be a basis for discovery and the issues would be defined and narrowed so that, when the matter comes to trial, the witnesses, counsel and the Court would be able to concentrate attention on the matters that are actually in dispute. I invite counsel for both the Crown and the owner in similar cases in the future to consider this suggestion.

I also consider it appropriate that I should comment briefly on the application of Rule 164B concerning the evidence of expert witnesses in the light of this case.

Rule 164B provides, as far as relevant for purposes of this comment, that no evidence in chief of an expert witness shall be received at trial unless the Court otherwise orders "in respect of any issue", unless

(a) that issue has been defined to the satisfaction of the Court, and

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(b) the proposed evidence has been set out in written form and filed and served on the opposing party 10 days before trial.

In this case, counsel for the defendant submitted to the Court for approval before trial a statement of the issues in respect of which he proposed to adduce the evidence of "expert witnesses", reading as follows:

> 1. The defendants say that the value to them, the owners of the lands taken, namely, 42.4 acres as of March 23rd, 1961 was $97,104.00.
>
> 2. The defendants further say that the value to them, the owners of the land left after expropriation, namely, 7.6 acres was $18,636.00.
>
> 3. The defendants further say that the difference between these figures, namely, $78,468.00 is the value of the expropriated lands to the owners and reflects the value of the severance damage or injurious affection to the remainder of the property.

This document was not accepted by the Court as a satisfactory statement of the issues in respect of which the experts might give opinion evidence.

The reason that such document was not regarded as satisfactory is that it stated the issues in terms of *value to the owner* which, as I have endeavoured to explain earlier in these reasons, may involve simply market value, but very often involves in addition (a) market value for some particular use, plus (b) a further amount depending on facts peculiar to the particular former owner. The document that I have quoted is not in my opinion a satisfactory statement of an issue in respect of which the testimony of an expert witness would be admissible.

The only basis upon which, in my experience, the testimony of expert witnesses has been tendered in relation to the *quantum* of compensation for expropriated property is that persons who have had sufficient experience in the buying and selling of land can assist the Court by opinion evidence as to what the "willing" vendor would have paid for the land in question at the time in question and what the "willing" purchaser would have accepted for it. They may also, by reason of their experience, be able to give evidence of the factual background of the particular market or of other relevant facts of which they have knowledge.

I know of no special learning or experience that enables a real estate broker, or any other "expert", to give the Court assistance by way of opinion evidence as to the amount that a particular former owner in possession would have

been prepared to pay for the land over and above its market value in order to be allowed to continue in possession. This, as it seems to me, is a matter that must be decided by the Court on the facts of the particular case with such assistance as counsel may be able to supply. I have no doubt that many real estate men who assist counsel in such cases are very useful in making suggestions to counsel as to the manner in which he should frame his submissions. The fact remains that, as I see it, it is a matter for submissions by counsel having regard to the proven facts and not for "expert" opinion given under oath.

For the above reasons, as I have indicated, I did not approve the form in which counsel for the defendant stated the issues in respect of which he proposed to adduce the testimony of his expert witness. Nevertheless, a report prepared by an experienced real estate broker was filed and served on the plaintiff as contemplated by Rule 164B, and the defendant was permitted to put it in evidence at trial to be used to the extent that it was proper evidence; and I think I can say that I have not ignored anything in that report in reaching the conclusions that I have expressed earlier in these reasons.

However, it might not be possible in another case to follow that course and, for that reason, it seems expedient for me to state my personal view as to the contents of this particular document.

The contents of that particular document might be classified as follows:

(a) statements of fact within the personal knowledge of the expert and more or less closely related to his knowledge or experience as a real estate man (these are obviously admissible and require no further comment);

(b) statements of fact based upon information obtained by questioning the former owner or some other person;

(c) opinions as to market value (these are clearly admissible and require no further comment); and

(d) opinions as to what amounts should be paid to the former owner over and above market value.

So far as such a report contains information obtained from third persons, I suggest that, while such statements are

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frequently necessary as a means of indicating what is the subject matter of the opinion and of supporting the opinion, many of them are of such a character that they must be proven as part of the defendant's case and any such statements should, in addition to being in the expert's report, either be the subject of admissions from the other side or of admissible testimony. Others may, of course, be the sort of hearsay that an expert may properly take into account in forming an opinion.[10] With reference to opinions as to amounts in addition to market value that should be awarded to the former owner, I have already indicated that I know of no basis for receiving such opinions by way of expert testimony.

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[10] Compare *The City of Saint John v. Irving Oil Company Limited*, [1966] S.C.R. 581, per Ritchie J. at pages 591-2.