1958

May 26-29
June 4-7

June 17

Thorson P.

BETWEEN:

CANADA STEAMSHIP LINES LIMITED ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Petition of Right—Claim for damages for injurious affection of property by operation of airport zoning reguations—Aeronautics Act, R.S.C. 1952, c. 2, ss. 4(1)(j), 4(5), 4(6), 4(7), 4(8), 4(9)—Montreal Airport, Dorval, Zoning Regulations, Order in Council P.C. 1955-268, dated February 23, 1955, ss. 2, 4(1), 4(2), 5—Order in Council P.C. 1955-1978, dated October 19, 1955—Amount of compensation for injurious affection of property measured by decrease in value by enactment of Regulations—Value to the owner—Suppliant entitled to have value and decrease in value determined on basis of most advantageous use—No warrant for additional allowance of 10 per cent—Suppliant not entitled to interest.

The suppliant claimed damages for the injurious affection of its property by the operation of the Montreal Airport, Dorval, Zoning Regulations, enacted on February 23, 1955. The Regulations applied to all lands adjacent to or in the vicinity of the Montreal Airport at Dorval in Quebec and included the suppliant's property which had a frontage on the north side of the Côte de Liesse Road. Section 4(1) of the Regulations imposed height restrictions on buildings, structures or objects on the affected lands and section 4(2) empowered the Minister of Transport to order the removal, demolition or modification of any building, structure or object that exceeded the permitted height limits. Section (5) of the Regulations imposed restrictions on any use of the affected lands that caused or might cause a hazard or obstruction to aircraft using the airport. On October 19, 1955, the Regulations were amended by revoking section 4(2) and section 5. The suppliant's property had a frontage of 581.4 feet on the Côte de Liesse Road and a depth of 1,675.5 feet. At the date of the enactment of the Regulations it was vacant land except for an old farm house building but since then the rear portion of the property was occupied by Kingsway Transport Limited, a wholly owned subsidiary of the suppliant, for a truck transport warehouse and terminal, its buildings being set back about 522 feet from Côte de Liesse Road. The front portion of the property was vacant except for the old farm house building. The suppliant based its claim on section 4(8) of the *Aeronautics Act*.

Held: That the suppliant's right to compensation for the injurious affection of its property by the operation of the Regulations is a statutory one.

2. That the measure of the compensation to which the suppliant is entitled is the amount by which its injuriously affected property was decreased in value by the enactment of the Regulations.

3. That, in order to find such decrease in value, the Court must determine the value of the suppliant's property as it was immediately prior to the enactment of the Regulations.

4. That the onus of proof of such value and decrease in value is on the suppliant.

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

5. That the Court must find what increase in the value of the property, if any, occurred after the suppliant became its owner and was attributable to the airport.
6. That there was no such increase in value.
7. That the Court must find the amount, if any, by which the decrease in value suffered by the suppliant by the enactment of the Regulations was reduced by the revocation of sections 4(2) and 5.
8. That the onus of proof of any such reduction rests on the respondent.
9. That the suppliant's right to compensation stems from section 4(8) of the Act and not from the registration of a plan and the measure of the compensation is the decrease in the value of its property by the enactment of the Regulations, not by the registration of a plan.
10. That the value referred to in section 4(8) of the Act is value to the owner and its measure is the amount which a prudent purchaser in a position similar to that of the owner and knowing all the advantages and disadvantages of the property, present and prospective, would, in the ordinary course and without the pressure of urgent need, have been willing to pay for it in order to obtain it. *Pastoral Finance Association, Limited v. The Minister* [1914] A.C. 1083 at 1088 and *The Queen v. Supertest Petroleum Corporation Limited* [1954] Ex. C.R. 105 at 123 applied.
11. That the decrease in value for which the suppliant is entitled to compensation is the difference between the amount which the prudent purchaser referred to would have been willing to pay for the property after the enactment of the regulation and that which he would have been willing to pay for it before its enactment.
12. That the suppliant is entitled to have such value and its decrease determined on the basis of the most advantageous use, whether present or prospective, to which its property could have been put immediately prior to the enactment of the Regulations. *Nichols on Eminent Domain*, 2nd Edition at page 665, applied.
13. That it is only the present value of the prospective advantages of the property that falls to be determined. *The King v. Elgin Realty Company Limited* [1943] S.C.R. 49 applied.
14. That the most advantageous use to which the suppliant could put the rear portion of its property after the enactment of the Regulations was the use to which it actually put it, namely, for the truck transport warehouse and terminal purposes of its wholly owned subsidiary, Kingsway Transports Limited.
15. That the most advantageous use to which the suppliant could put the front portion of its property after the enactment of the Regulations was, and is, a use for a comparatively large light industry and that such use is a better and higher one than that which was possible for the rear portion of the property.
16. That the rear portion of the property had less value than that of the front.
17. That the amount of the compensation to which the suppliant is entitled for the injurious affection of its property by the operation of the Regulations is $25,000.
18. That the suppliant has failed to prove that it suffered any decrease in the value of its property by the inclusion of section 5 in the Regulation.
19. That there is no warrant for the suppliant's claim for an additional allowance of 10 per cent.

20. That the suppliant is not entitled to interest since there cannot be a valid claim for interest against the Crown unless interest is payable under a contract providing for it or is authorized by statute and neither of these conditions is present.

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

PETITION OF RIGHT.

The petition was heard by the President of the Court at Montreal.

T. H. Montgomery and *Paul Renault* for suppliant.

Norman Genser, Q.C., and *Paul Ollivier* for respondent.

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

THE PRESIDENT now (June 17, 1958) delivered the following judgment:

In its original petition of right, filed on April 8, 1957, the suppliant claimed damages in the amount of $160,000.50 for the injurious affection of its property, described in paragraph 1 of the petition, by the operation of the Montreal Airport, Dorval, Zoning Regulations, hereinafter simply called the Regulations, but in its amended petition, filed on May 9, 1958, it increased its claim to $266,667.50.

In a sense, this is a test case in that there are about sixty other claims for damages for injurious affection of property by the operation of the Regulations.

The Regulations were enacted by Order in Council, P.C. 1955-268, dated February 23, 1955, under the authority of section 4(1)(*j*) of the *Aeronautics Act,* R.S.C. 1952, Chapter 2, as amended by Chapter 302, which provides as follows:

4. (1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to

(*j*) the height, use and location of buildings, structures and objects, including objects of natural growth, situated on lands adjacent to or in the vicinity of airports, for purposes relating to navigation of aircraft and use and operation of airports, and including, for such purposes, regulations restricting, regulating or prohibiting the doing of anything or the suffering of anything to be done on any such lands, or the construction or use of any such building, structure or object.

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

The Regulations applied to all lands adjacent to or in the vicinity of the Montreal Airport at Dorval in Quebec, including public road allowances, as particularly described in the Schedule to them, which Schedule included the suppliant's property.

Section 4 of the Regulations imposed height restrictions on the affected lands in the following terms:

> 4. (1) No person shall erect or construct, on any land to which these regulations apply, any building, structure or object or any addition to any existing building, structure or object the highest point of which exceeds in elevation the elevation at that point of such of the surfaces hereinafter described as projects immediately over and above the surface of the land upon which such building, structure or object is located, namely:
>
> (*a*) A horizontal surface, the outer limit of which may be described as follows: [here there is a lengthy description with which we are not in this case concerned];
>
> (*b*) The approach surfaces abutting each end of the strip designated as 6L-24R, the strip designated as 10-28, the proposed strip designated as 6R-24L and the proposed strip designated as 15-33 and extending outward therefrom, the dimensions of which approach surfaces are 600 feet on each side of the centre line of the strip at the strip ends and 2,000 feet on each side of the projected centre line of the strip at the outer ends, the said outer ends being 200 feet above the elevations at the strip ends and measured horizontally, 10,000 feet from the strip ends; and
>
> (*c*) The several transitional surfaces, each rising at an angle determined on the basis of a ratio of one foot vertically for every seven feet measured horizontally from the outer lateral limits of the strips and their abutting surfaces;
>
> as shown on plan No. M.0655 A-B-C dated November 19, 1954 of record in the Department of Transport at Ottawa.
>
> (2) Where any building, structure or object on any land to which these regulations apply exceeds the limits in elevation specified in subsection (1) the Minister may order the owner or occupier of the land to remove, demolish or modify such building, structure or object or do any act or thing necessary to ensure that such building, structure or object complies with the limits in elevation so specified and may, in any such order, specify the time within which such removal, demolition, modification, act or thing shall be done.

Section 5 of the Regulations imposed what may be called use restrictions on the lands affected, in the following terms:

> 5. No person shall operate or cause to be operated on any lands to which these regulations apply any machine, device, contrivance or thing after being notified by the Minister that, in the opinion of the Minister, the machine, device, contrivance or thing causes or is likely to cause, by the emission of light, smoke, noise or fumes, a hazard or obstruction to aircraft using the airport.

The Minister referred to in the Regulations is the Minister of Transport.

Section 2 of the Regulations defined certain of the terms used in them as follows:

(*d*) "horizontal surface" means an imaginary horizontal plane centering on and located 150 feet above the assigned elevation of the airport reference point;

(*b*) "airport reference point" means the point fixed by these regulations as the centre of the airport, the assigned elevation of which is deemed, for the purposes of these regulations, to be 104 feet above sea level (m. s. l.);

(*c*) "approach surface" means an imaginary inclined plane the lower end of which is a horizontal line at right angles to the centre of the strip and passing through a point at the strip end on the centre line of the strip;

(*f*) "strip" means a rectangular portion of the landing area of the airport, 1,200 feet in width, including the runway, especially prepared for the take-off and landing of aircraft in a particular direction;

(*g*) "transitional surface" means an imaginary inclined plane extending upward and outward from the outer lateral limits of the strip and its approach surfaces to an intersection with the horizontal surface or other transitional surfaces.

Thus it is clear that the imaginary plane of a transitional surface is inclined upward much more steeply than that of an approach surface, for the permissible heights under the former rise from the side of the strip at the rate of one foot for every seven feet measured horizontally whereas those under the latter rise from the end of the strip at the rate of one foot for every 50 feet measured horizontally.

A plan and description of the lands affected by the Regulations, including the suppliant's property, was signed and deposited in the Registry Office for the Registration Division of Montreal on April 13, 1955, as required by section 4(6) of the Act and a copy of the Regulations was deposited with the said plan and description. Moreover, a copy of the Regulations was published, as required by section 4(5) of the Act, in the *Montreal Star* and *La Presse* in the respective issues of these papers of May 17, 1955, and May 18, 1955.

Subsequently, by Order in Council P.C. 1955-1978, dated October 19, 1955, the Regulations were amended by revoking subsection (2) of section 4 and section 5 thereof and a copy of the said amendment was deposited in the Registry Office for the Registration Division of Montreal on May 13, 1957, pursuant to section 4(7) of the Act. And a copy of the amendment was published in the March 12, 1956, and March 13, 1956, issues of the *Montreal Star* and the *Montreal Gazette* respectively.

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

The suppliant bases its claim on section 4(8) of the Act which provides:

> 4. (8) Every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty, as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, minus an amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport.

The suppliant's right to compensation is a statutory one under section 4(8) of the Act. It is for the injurious affection of its property by the operation of the Regulations and the measure of the compensation to which it is entitled is the amount by which its injuriously affected property was decreased in value by the enactment of the Regulations. Thus the essential finding that the Court must make is the amount of such decrease in value. In order to do so the Court must determine the value of the suppliant's property as it was immediately prior to the enactment of the Regulations, that is to say, immediately prior to February 23, 1955. The onus of proof of such value and decrease in value is on the suppliant. The Court must also find what increase in the value of the property, if any, occurred after the suppliant became its owner and was attributable to the airport. It is not necessary in this case to express any opinion on whether the onus of proof of this fact rests on the suppliant or on the respondent for the evidence is overwhelming that there was no increase in the value of the property that was attributable to the airport. Indeed, the reverse is true. It is also incumbent on the Court to find the amount, if any, by which the decrease in value suffered by the suppliant by the enactment of the Regulations was reduced by the revocation of section 4(2) and 5. The onus of proof of any such reduction rests, I think, on the respondent.

On the opening of the trial, after the filing of certain documents, counsel for the suppliant brought to the attention of the Court that the plan, described in the Regulations as No. M-0655 A-B-C, dated November 19, 1954, which had been deposited in the Registry Office for the Registration Division of Montreal on April 13, 1955, was in error in that it did not show the full extent to which the suppliant's property was affected by the transitional surface height restrictions due to the proposed runway 6R-24L, immediately to the north of its property, and that it was not until

sometime in November, 1957, that the error was brought to his attention by the Department of Transport. Counsel then received photostatic copies of two sketches, dated November 5, 1957, one showing the error and the other the correction. The correction showed that the area of the suppliant's property that was affected by the transitional surface height restrictions was substantially larger than that shown on the deposited plan. On the strength of this the suppliant obtained leave to amend its petition of right and pursuant thereto increased its claim as already stated. Counsel stated that he had obtained an undertaking from the Department of Transport that a corrected plan would be registered but up to the date of the trial it had not been. Counsel for the respondent did, however, file a plan as Exhibit D4, correctly showing the area affected by the said transitional surface height restrictions.

On the strength of these facts counsel for the suppliant contended that the deposit of a correct plan was an essential pre-requisite condition of the applicability of the Regulation and submitted that since the plan that was filed on April 13, 1955, was not correct the suppliant's right to compensation should not be confined to the decrease in the value of its property as at that date but should be determined as at the date of the filing of a correct plan. In my opinion, there is no substance in the submission thus put forward and I dismissed it. If counsel's contention is correct it must follow that the suppliant's right to compensation has not yet accrued to it since a correct plan has not yet been registered. It would also follow that the Department of Transport could indefinitely delay the accrual of the suppliant's right by not depositing the plan. It is obvious that such an absurd result could not have been intended by the legislation by which the right to compensation was conferred. The suppliant's right stems, as I have already stated, from section 4(8) of the Act, under which it has a right to compensation if its property was injuriously affected by the operation of the Regulations, not by the registration of a plan, and the measure of the compensation is the decrease in the value of its property by the enactment of the Regulations, not by the registration of a plan. The purpose of requiring the deposit of the plan and description of the lands affected by the zoning regulation and a copy of the regulation, pursuant to sections 4(6) and 4(7) of the Act,

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

apart from that of giving notice of the Regulations to the public, is to fix the commencement of the two-year period of prescription enacted by section 4(9). It followed from my dismissal of counsel's contention that evidence of the value of the suppliant's property as at a date subsequent to that of the enactment of the Regulations, such as at November, 1957, or later, should be excluded and I so ruled.

The value referred to in section 4(8) of the Act is, I think, value to the owner. Its measure is the amount which a prudent purchaser in a position similar to that of the owner and knowing all the advantages and disadvantages of the property, present and prospective, would, in the ordinary course and without the pressure of urgent need, have been willing to pay for it in order to obtain it. This is essentially the test laid down by Lord Moulton in *Pastoral Finance Association, Limited v. The Minister*[1] as I sought to show in *The Queen v. Supertest Petroleum Corporation Limited*[2]. Later in that case I expressed my view of what was essentially implied in the sentence in Lord Moulton's judgment that is so often cited by itself. At page 131, I said:

> As I read Lord Moulton's judgment it envisages negotiations between the owner of the property and the prudent man referred to, who is a purchaser, each knowing the advantages of the property and the possibilities of savings and profits from its use, culminating in a sale of it to the prudent purchaser at the price beyond which, in the ordinary course and without the pressure of urgent need, he would not be willing to go.

It is for the decrease of such value by the enactment of a zoning regulation that the owner of property injuriously affected by its operation is entitled to compensation under section 4(8) of the Act. Put in other terms, the decrease in value for which he is entitled to compensation is the difference between the amount which the prudent purchaser referred to would have been willing to pay for the property after the enactment of the regulation and that which he would have been willing to pay for it before its enactment.

And it is axiomatic that the suppliant is entitled to have such value and its decrease determined on the basis of the most advantageous use, whether present or prospective, to which its property could have been put immediately prior to the enactment of the Regulations. It is also clear that in determining such most advantageous use the Court must not limit itself to the actual use to which the owner has put his property. It is the most advantageous use to which it could

[1] [1914] A.C. 1083 at 1088. [2] [1954] Ex. C.R. 105 at 123.

have been put that is to be considered. In my opinion, the best statement of the applicable principle was made in *Nichols on Eminent Domain,* 2nd Edition at page 665, where the author said:

> In determining the market value of a piece of real estate for the purpose of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

While this statement was expressly applicable to the determination of market value for the purpose of a taking by eminent domain I consider it equally applicable to the determination of the value and decrease of value referred to in section 4(8) of the Act and I so find. But it must always be remembered, as the Supreme Court of Canada pointed out in *The King v. Elgin Realty Company Limited*[1], that it is only the present value of the prospective advantages to the property that falls to be determined. Thus, in the present case it is only the present value of the prospective advantages of the suppliant's property as at immediately prior to February 23, 1955, that is to be determined. It is sufficient for the time being to state the applicable principle generally. I shall discuss its application to the present case when I come to consideration of the decrease in the value of the suppliant's property by the enactment of the Regulations.

The suppliant's property is part of Lot 522 on the Official Plan and in the Book of Reference of the Parish of St. Laurent, now part of the City of Dorval. It has a frontage of 581.4 feet on Côte de Liesse Road, a width at the rear along the boundary of the Dorval Airport of 579.4 feet and a depth of 1,675.5 feet on its west side and 1,690.4 feet on its east side. Its total area is 976,717 square feet or 26.54 arpents. At the date of the enactment of the Regulations the property was vacant land except for an old farm-house building facing Côte de Liesse Road, which building is admittedly valueless. Since then the rear portion of the property has been occupied by Kingsway Transports Limited, a wholly owned subsidiary of the suppliant, for a truck

[1] [1943] S.C.R. 49.

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

transport warehouse and terminal and the necessary buildings for such use were constructed in 1957. The buildings nearest Côte de Liesse Road were set back at a distance of approximately 522 feet from it. There is also a driveway of 50 feet in width from Côte de Liesse Road to the rear portion for the use of Kingsway Transports Limited. The front portion of the property is still vacant land except for the old farm-house building referred to.

Opinion evidence of the value of the suppliant's property as at immediately prior to February 23, 1955, was given by Mr. R. A. Patterson for the suppliant and by Mr. R. Davis, Mr. J. A. Lowden and Mr. Jean Beique for the respondent but before I deal with their appraisals I should set out a description of the area in which the property is located and outline the course of its development. The area may be called the Côte de Liesse Road Industrial District. This road is a well-paved four-lane highway running from the Dorval Circle of the Metropolitan Boulevard to the west to the Decarie Boulevard Circle to the east. The suppliant's property is slightly less than four miles from the Decarie Boulevard Circle and slightly less than two miles from the entrance to Dorval Airport which is just a short distance east of the Dorval Circle.

The Côte de Liesse Road Industrial District is really in two sections. The older one is near Decarie Boulevard in the Ville St. Laurent district. This had transportation, water and sewer services but during the war years its development proceeded slowly. After 1947 it went rapidly and spread westward along Côte de Liesse Road to what became the newer section of the industrial district. One of the outstanding figures in this development was Alexis Nihon who envisaged the possibilities of the western section of the Côte de Liesse Road area as early as 1946. The Road was in the very centre of the Island of Montreal and he considered that the area was a natural one for industrial expansion. His exploits are a dramatic exemplification of foresight of the tremendous boom in real estate values of properties fronting on Côte de Liesse Road that has occurred. About 1950 the speculation in real estate, the value of which Mr. Nihon had foreseen as early as 1946, spread to others who began to buy farm properties with frontages on Côte de Liesse Road at prices that must have seemed fabulous to the farmers that sold them. The increases in value that

have since taken place are almost beyond belief. The western section of the district became, in effect, a newer industrial district for light industries seeking large areas of land that was less expensive than that of land in the Ville St. Laurent district near Decarie Boulevard. The south side of Côte de Liesse Road has developed more rapidly than the north because of the availability there of C.N.R. and C.P.R. siding facilities but many industries have located on the north side. This newer industrial district is still in its initial stage of development for most of the land is still in agricultural use. There are no transportation, water or sewer services so that the development has been limited to industries that could function with well water and septic tanks. Such industries have not allowed the lack of services or the nearness of the Airport to deter them. They have met the lack of transportation services by operating their own bus services for their employees. They have overcome the lack of water services by sinking their own artesian wells, the supply of water in the area being excellent, and have filled the deficiencies of lack of sewers by the use of septic tanks and their drainage accessories. Progress in the development of the newer district has not been allowed to be held back by the slowness of provision of municipal services. There has been a realization that these will come and, in the opinion of one of the experts, they may be expected in five or ten years. One of the outstanding illustrations of the development of the district, that has not waited for municipal services, is that afforded by Industrial Glass Company Limited, of which Alexis Nihon is the real owner. It bought lands in the district from farmers, constructed buildings on them, either on specifications supplied by a prospective tenant or speculatively, and rented them but did not sell the land on which they had been built. Some of its properties are on the north side of Côte de Liesse Road but others are on the south side and relatively far removed from the effect of the height restrictions of the Regulations. The length of the newer industrial district thus described extends from the entrance to Dorval Airport on the west to a short distance east of Montée de Liesse Road on the east.

Mr. Patterson considered this newer industrial district eminently suited to the location of light industries requiring a comparatively large area of land. Use for such an industry was, in his opinion, the most advantageous use to

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

which the suppliant's property could have been put at the date of the enactment of the Regulations. Mr. Davis also agreed that the highest and best use of property in the newer district fronting on Côte de Liesse Road was a use for industrial purposes. And Mr. Lowden and Mr. Beique had similar opinions.

Before I refer to the specific appraisals of the experts I should set out briefly the suppliant's dealings with the property. It purchased the whole of Lot 522 less the portion thereof that had been sold for the widening of Côte de Liesse Road from Hector Groulx on March 4, 1952, for $130,000 cash. The total area of the farm thus purchased was 75.75 arpents, the price working out at $1,733 per arpent, an arpent being 36,801 square feet. Subsequently, on January 7, 1954, the northern portion of the property, amounting to 49.21 arpents, was expropriated for the purposes of Dorval Airport and the Crown paid compensation to the suppliant for the portion so taken in the amount of $271,686, which worked out at $5,520 per arpent. This left the suppliant with the remainder of the lot as already described, with its area of 976,717 square feet, or 26.54 arpents.

I now come to the appraisals of the experts. [Here the President reviewed the appraisals of the experts of the value of the property immediately prior to the enactment of the Regulations and continued.] I was impressed with the careful studies made by Mr. Patterson and Mr. Davis. I take the higher valuation of the two and find as a fact that immediately prior to the enactment of the Regulations the value of the suppliant's property was $346,640.

But, of course, this finding of value is not the basically important one. What the Court must determine is the amount of the decrease in such value by the enactment of the Regulations. Its determination of that issue involves consideration of whether there has been any change in or lessening of the most advantageous use to which the property could have been put after the enactment of the Regulations, that could properly be said to be due to them. But, while the Court in dealing with this problem, which is not free from difficulty, must not confine its consideration to the use to which the property was actually put, it may properly consider such use, for it may well be that the use to which it was actually put was in fact its most advantageous use.

Thus, in the present case, the Court must not close its eyes to the purpose for which the suppliant acquired the property and the use to which it was put after the enatcment of the Regulations. It would be unrealistic to assume that a large corporation, such as the suppliant, purchased the property, and used it, after the Regulations came into effect, for a purpose less advantageous than that to which it could have been put. It is essential to look at the facts in the clear light of reality.

At this stage, it would be appropriate to review the evidence of Mr. J. G. Wyllie, the suppliant's vice-president, and Mr. B. Perry, a prominent and capable civil engineer, both called as witnesses for the suppliant.

Mr. Wyllie's evidence was clear cut and conclusive. He stated that the suppliant had purchased the property in order to provide space for a truck transport terminal and warehouse for Kingsway Transports Limited, its wholly owned subsidiary. It did not think that all the property would be required for its intended purpose, but it was one farm property and the suppliant purchased it as such, notwithstanding the fact that it was much too large for use for a truck transport warehouse and terminal. The suppliant had only shortly previously bought 17 acres in Toronto for a similar purpose, of which it occupied only six acres, so that it knew that some of the property purchased by it would be available for future disposition after adequate provision had been made for the needs of its transport subsidiary. According to Mr. Wyllie, the property was eminently suitable for the needs of the subsidiary, the greater portion of its business being west of Montreal as far as Sarnia with a border crossing at Windsor. It also operates southward to New York and eastward to Sherbrooke and Quebec. It is significant that the enactment of the Regulations did not affect the suppliant's execution of its intended purpose. Knowing that it had plenty of land available after making provision for the needs of its subsidiary, the suppliant gave instructions to place the buildings and installations required for the use of its subsidiary as far to the rear of the property as possible in order to leave the area fronting on Côte de Liesse Road available for subsequent sale. This part of the property has never been listed for sale but has been kept for investment purposes for sale at an

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

appropriate time. The Montreal plant of Kingsway Transports Limited is larger than its Toronto one, there being 24 bays in the former as against 20 in the latter. Even so, there is plenty of room for expansion in the rear portion of the property that has been assigned to its use.

Evidence of the actual use to which the suppliant put the rear portion of its property, pursuant to its intention for such use, was given by Mr. B. Perry, a consulting civil engineer, who was responsible for the construction of the buildings and installations of Kingsway Transports Limited. He did their planning and designing and supervised their construction. The plans were completed in 1956 and the buildings constructed in 1957. At the time of their planning and construction Mr. Perry knew of the height restrictions under the approach surface affecting the property but had no knowledge of the transitional surface height restrictions. His instructions, with which he agreed, were that the buildings and installations should be placed as far to the rear of the property as possible after due allowance for the future expansion of the subsidiary's activities. Thus, the buildings now on the property were put at their present locations in accordance with the suppliant's specific instructions. Mr. Perry put the suppliant's purpose in connection with the property graphically, and realistically, when he said that it had used the least desirable portion of its property, namely, the rear portion, for the truck transport warehouse and terminal purposes of its subsidiary, and had reserved the much more desirable front portion facing on Côte de Liesse Road for a better and higher use. The buildings of the subsidiary nearest Côte de Liesse Road are, as I have already stated, 522 feet back from it, thus leaving a substantial area in the front portion of the property.

It is thus manifestly clear that the suppliant had two separate and distinct purposes in mind for the use of its property, one being the use of the rear portion for the purposes of its subsidiary and the other the use of the front portion for a more advantageous use in the future, albeit a speculative one that has not yet been put into effect.

In the light of these undisputed facts it would be proper to conclude, either that the use to which the suppliant has thus far put its property is illustrative of the most advantageous use to which it could be put after the enactment of

the Regulations, or that in determining its most advantageous use the property should be regarded as consisting of two portions, notwithstanding the fact that there has not been any actual division of it, namely, the rear portion on which the suppliant's subsidiary has located its buildings and installations for its truck transport warehouse and terminal, and the front portion facing on Côte de Liesse Road which it has kept as an investment for disposition in the future for a better and more advantageous use than that for which it has used the rear portion. I have no hesitation in saying that the second alternative conclusion is the one that should be made and I make it. Indeed, I find it difficult to think of a more advantageous use of the rear portion of the suppliant's property than that to which the suppliant actually put it, with full knowledge, actual or imputed by law, of the Regulations. It was amply adequate for the needs of its subsidiary, there was access to it from Côte de Liesse Road by a road specifically constructed for the purpose, and it was conveniently located for the activities of the subsidiary, westward, southward and eastward. I, therefore, find as a fact that the most advantageous use to which the suppliant could put the rear portion of its property after the enactment of the Regulations was the use to which it actually put it, namely, for the truck transport warehouse and terminal purposes of its wholly owned subsidiary, Kingsway Transports Limited. And I find also that the most advantageous use to which the suppliant could put the front portion of its property after the enactment of the Regulations was, and is, a use for a comparatively large light industry and that such use is a better and higher one than that which was possible for the rear portion of the property. The suppliant has, therefore, been wise in reserving the front portion for investment and sale in the future, and there is every likelihood that its decision will result in a substantial profit to it consonant with that which it has already made from its original purchase in 1952.

It must follow from what I have found that the rear portion of the property had less value than that of the front. This fact was recognized by Mr. Davis in his appraisal, when he found the value of the front portion of the property to a depth of 1,000 feet to be 46 cents per square foot and that of the rear portion 20 cents. Mr. Lowden and Mr.

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

Beique found the respective values to be 42 cents and 23 cents. And on his cross-examination, Mr. Patterson admitted that if the property was to be regarded as being in two portions, as I have found proper, the value of the front portion was higher than that of the rear. That is obvious. When pressed for a specific figure he put the value of the front half of the property at 50 cents per square foot from which it would follow that the value of the rear half would be not more than 20 cents per square foot, since the whole property was valued at 35 cents per square foot and it is a principle well recognized by real estate appraisers, and admitted by Mr. Patterson, that the value of such a property as the one in question as a whole is greater than the total of the values of its separate halves. On Mr. Patterson's re-examination, counsel for the suppliant sought strenuously, but unsuccessfully, to rescue him from his valuation of the front half of the property at 50 cents per square foot. In my opinion, it is an eminently proper one. It is consistent with the realistic opinion of Mr. Perry and that implied by Mr. Wyllie. But it would not be proper to extend it to too great a depth. While Mr. Patterson put it for the front half of the property it is plain that he had in mind that portion of it that had not been used for the purposes of Kingsway Transports Limited but had been reserved for investment purposes and subsequent sale. Thus, I think that it would be fair to assign his 50 cents per square foot value to the front portion of the property to a depth of 500 feet, being approximately the depth of the property not used by Kingsway Transports Limited. And Mr. Davis' valuation of the front portion to a depth of 1,000 feet at 46 cents per square foot must be adjusted upward accordingly for the front portion to a depth of 500 feet. This appraisal of the front portion of the property to a depth of 500 feet results in a valuation of it for a total area of 289,700 square feet at 50 cents per square foot, or $144,850. If this amount is deducted from the value of $346,640, which I have found to be the value of the property as a whole as at immediately prior to February 23, 1955, there remains a valuation of $201,790 for the rear portion of the property, which for the area of 687,017 square feet works out at a little more than 29 cents per square foot as the value of the rear portion actually assigned to and used by

the suppliant's subsidiary. I find as facts these valuations of 50 cents per square foot for the front portion of the property to a depth of 500 feet and 29 cents per square foot for the remaining rear portion. These valuations are, of course, only approximations and are not controlling, for what the Court must determine is the decrease in value and the determination of such decrease must depend, in some measure at least, on the extent to which the respective portions of the suppliant's property have been injuriously affected by the operation of the Regulations.

If there was any injurious affection of the suppliant's property by the operation of the Regulations it could only be by reason of the height restrictions imposed on it under the approach surface plane from the end of the runway designated as 10-28, or the height restrictions imposed under the transitional surface plane from the side of the projected runway 6R-24L running parallel with, and immediately adjacent to, the north boundary of the property, which is the south boundary of the airport, or the prohibitions of use set out in section 5 of the Regulations.

The approach surface height restrictions and the transitional surface height restrictions are shown on a plan filed as Exhibit P33, and also on plans filed as Exhibits P32, P34 and D5, which latter three exhibits show the location of the buildings erected by Kingsway Transports Limited. From these exhibits it can be computed that the end of runway 10-28 is approximately half a mile distant from the point where the approach surface height restrictions first affect the suppliant's property and the exhibits show that the heights under such surface permitted by the Regulations run from a little less than 57 feet to a little more than 77 feet at the Côte de Liesse Road frontage, the permissible heights rising, as already stated, one foot for each fifty feet of horizontal distance. But the transitional surface height restrictions affect the rear portion of the property much more sharply, but for a more limited area, the permissible heights running from zero at the north boundary of the property and rising one foot for each seven feet measured horizontally.

And it is plain from what I have held that the effect of the height restrictions must be considered in respect of the

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

front and rear portions of the property and the extent to which such portions are respectively affected by them.

I now come to the appraisal by the experts of the decrease in the value of the suppliant's property by the enactment of the Regulations. Here they found themselves in a field of considerable uncertainty, without the assistance that had guided them in estimating the value of the property as at immediately prior to the date of the Regulations.

[Here the President reviewed the appraisals of the experts of the decrease in the value of the suppliant's property by the enactment of the Regulations and continued.]

It seems to me that the evidence in this case clearly points to the conclusion that the front portion of the suppliant's property which it has reserved for disposition has not been injuriously affected to any substantial extent by the operation of the Regulations. The only extent to be considered is the possible effect which the approach surface height restrictions in preventing the erection of certain high structures might have on the value of the front portion of the property.

The evidence also establishes that the only part of the suppliant's property that could really be said to have been injuriously affected by the operation of the Regulations, within the meaning of section 4(8) of the Act, was the rear portion which was used for the purposes of the suppliant's subsidiary. And it is only the property at the very north end of this portion that was affected. It consists of the area subject to the transitional surface height restrictions running from zero to 17 feet. It amounts to 72,629 square feet. Mr. Davis took the position that since this area was rendered valueless for the purposes of the suppliant's subsidiary an equivalent area would have to be found out of the front portion and he valued such equivalent area at 46 cents per square foot. I am unable to accept this estimate. I do not believe that the suppliant would be likely to take such an area out of the front portion of its property, which it has reserved for investment purposes and sale, and add it to the rear portion which it has assigned for the use of its subsidiary, a portion that is already very large and affords plenty of space for the expansion of the subsidiary's activities in the future. The Regulations had been in effect for a long time before the suppliant completed its

plans for the location of the subsidiary's buildings and installations and I doubt whether it would have made any change in them even if Mr. Perry had known of the transitional surface height restrictions and their effect.

It is not easy to determine what decrease in the value of the area has resulted from the Regulations. Up to the moment the suppliant has not suffered any actual loss. The area in question is part of a larger area that is behind a fence constructed by the subsidiary to enclose its buildings and installations so that it is not now being used for any purpose. The only loss to the suppliant is the loss of the usability of the area for the expansion of its subsidiary's activities if and when the time for expansion comes. This is a matter for the future. Under the circumstances, it would, I think, be ample compensation to the suppliant for the decrease in the value of this area to determine its compensation at the rate per square foot which I have found as the value of the rear portion of the property. Consequently, I fix the amount of the compensation at 29 cents per square foot for 72,629 square feet, or a total of $21,062.41.

As for the remainder of the property I am unable to see anything in the Regulations that would impede its development for any purpose for which it would be likely to be used or result in a decrease in its value except the possible effect of the approach surface height restrictions in preventing the erection of high chimneys and other high structures. For this it would be ample to award a small amount. If it were computed at, say, two per cent of the value of the front portion of the property at the rate of 50 cents per square foot, putting its depth at 500 feet and its width at 530 feet, after allowing 50 feet for the road to the subsidiary's location, making an area of 265,000 square feet, the amount would be $2,650.

The two amounts thus fixed come to $23,672, but I put the total in round figures at $25,000 and fix this as the amount of the compensation to which the suppliant is entitled under section 4(8) of the Act for the injurious affection of its property by the operation of the Regulations. In my judgment, there is no warrant in the evidence, including the opinions of the experts, for any larger amount.

I have not added any amount specifically in respect of section 5 of the Regulations. It is one section of the zoning

1958

CANADA STEAMSHIP LINES LIMITED v. THE QUEEN

Thorson P.

regulation applicable in this case and I see no reason for attempting to assess any separate effect from its inclusion. And, whether that is a correct view or not, I have no hesitation in finding that in the present case the suppliant has wholly failed to prove that it suffered any decrease in the value of its property by the inclusion of section 5 in the Regulations. Mr. Patterson estimated a reduction in value of 2½ per cent per year on the assumption that the section was in effect from April 13, 1955, to May 13, 1957, the respective dates of the registrations of the original Regulations and the amendment by which section 5 was rescinded, whereas the fact is that it was in effect only from February 23, 1955 to October 19, 1955. This would substantially reduce Mr. Patterson's estimate of $15,320. But there was no warrant in the evidence for any amount. Moreover, it is difficult to see how section 5 could have reduced the value of the suppliant's property in view of Mr. Patterson's admission that the Regulations were not well known. Moreover, it could not in any way affect the value of the rear portion. It is interesting to note also that Mr. Fitzsimmons did not even mention section 5 in his appraisal report. In his evidence he put a reduction of 10 per cent in value for the effect of the section, without any evidence to support it, and then said that this reduction was eliminated when the section was rescinded. There was thus, in my opinion, no evidence adduced for the suppliant to warrant any finding of a decrease in the value of the suppliant's property by the inclusion of section 5 in the Regulations.

And the opinions of the experts called for the respondent were to the same effect. Mr. Davis said that there was no evidence in any sales that would indicate any decrease in the value of the property by the inclusion of section 5 and there was no indication that its presence had any deterring effect on prospective purchasers. He did not think that there had been any decrease in the value of the suppliant's property by the section.

And Mr. Lowden, in his appraisal filed as Exhibit D21, concluded that there was no justification for ascribing any decrease in the value of the suppliant's property by the enactment of section 5 of the Regulations.

Consequently, I am unable to discover any basis on which to make any award of compensation because of section 5 of the Regulations and I do not make any.

There are only a few other comments. One is that it was conclusively proved that there was no increase in the value of the suppliant's property that occurred after the suppliant became the owner of it that was attributable to the airport. Indeed, the contrary was established. The nearness of the airport was a definite disadvantage.

The suppliant claimed an additional allowance of 10 per cent but there is no warrant for any such allowance in a case of this kind.

Nor is the suppliant entitled to interest, for it is an established rule that there cannot be a valid claim for interest against the Crown unless interest is payable under a contract providing for it or is authorized by statute. Neither of these conditions is present here.

The suppliant is, of course, entitled to its costs.

There will, therefore, be judgment in favor of the suppliant declaring that the amount of compensation to which it is entitled is the sum of $25,000 and that it is entitled to costs to be taxed in the usual way.

Judgment accordingly.

N.B. The judgment herein was affirmed by the Supreme Court of Canada, (June 6, 1963, unreported).