1959

May 11-14
May 19

June 4

BETWEEN:

AILEEN M. DREW .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

BETWEEN:

HER MAJESTY THE QUEEN, on the information of the Deputy Attorney General of Canada ..... PLAINTIFF;

AND

AILEEN M. DREW .....DEFENDANT.

Expropriation—Crown—Petition of Right—Expropriation Act, R.S.C. 1952, c. 106, ss. 3, 9, 16, 23—Department of Transport Act, R.S.C. 1952, c. 79, ss. 9, 15—Regulations Relative to the Acquisition of Land by Government Departments, Order in Council P.C. 4253, dated October 9, 1952, ss. 6, 7(1)—Financial Administration Act, S. of C. 1951 (2nd sess.), c. 12, now R.S.C. 1952, c. 116, ss. 5(1), 30, 39—Onus on suppliant to prove alleged agreement—Contract involving provision of funds by Parliament requires authorization by Parliament—Minister cannot bind Crown unless authorized by Order in Council or by Statute—No power in Minister to pay amount of valuation claimed by suppliant—Owner not entitled to interest while in possession of property without payment of rent—Additional allowance for compulsory taking an unwarranted bonus—Case not within ambit of rule in The King v. Lavoie.

The petition of right and the information action were tried together. The information proceedings were taken for an adjudication of the amount of compensation to which the defendant was entitled for the expropriation of her property which, together with other properties, was taken for the purpose of the Malton Airport. Subsequently, she brought a petition of right for the recovery of $17,330.50, being the amount of the valuation of her property made by Mr. C, alleging that there was an agreement between Her Majesty the Queen, acting through the Minister of Transport, and herself that Mr. C should appraise her property and that both parties should be bound by his valuation. Mr. C had been appointed by the Department of Transport to appraise the suppliant's property and other properties taken for the Malton Airport. The appointment was made on the recommendation of Mr. P, the Member of Parliament for the constituency in which the expropriated properties were situate, and he obtained agreements by the former owners, including the suppliant, that they would accept the valuations to be made by Mr. C. When the valuations were made they were out of line with other valuations that had been made and with settlements that had been made in a large number of cases in the Malton area and they were unacceptable to the Department. The Deputy Minister of Transport informed the suppliant accordingly and increased the Department's offer for the property from the original offer of $9,200 to $11,200. She declined this increased offer and launched her petition.

1959

DREW
v.
THE QUEEN

It was submitted for her that there was an agreement by the Minister on behalf of Her Majesty with Mr. P on her behalf and that of the other owners that the valuations made by Mr. C should be binding on both parties and, secondly, that Mr. P had been authorized by the Minister to make an agreement with her and the other owners and clothed with ostensible authority to do so and that Mr. P had made such an agreement. There was a conflict of evidence on the issues raised in the petition and a conflict of expert opinion on the value of the expropriated property.

Held: That the Court should not conclude, in the absence of clear evidence, that the Minister agreed to be bound in advance by whatever valuations the appraiser might make.

2. That the burden of proof of the alleged agreement lay on the suppliant and she has not discharged it.
3. That there is no support for the submission that the Minister clothed Mr. P with authority to make an agreement that would be binding on both parties, that he was never an agent of the Government and the Minister never held him out as such.
4. That even if it had been proved that the Minister had agreed to accept the appraiser's valuations as alleged this would not have entitled the suppliant to the relief sought by her.
5. That if a contract which involves the provision of funds by Parliament is to possess legal validity it requires that Parliament should have authorized it, either directly or under the provision of a statute.
6. That a Minister cannot bind the Crown unless authorized by order in council or by statute.
7. That, under sections 6 and 7(1) of the "Regulations Relative to the Acquisition of Land by Government Departments", since Mr. C's appraisal exceeded $15,000, the Minister had no power to pay the amount of compensation claimed by the suppliant without the authority of the Treasury Board.
8. That the Regulations are valid and that the Minister had no power to enter into the alleged agreement.
9. That the Minister was prevented from entering into a valid agreement of the kind alleged by reason of section 30(1) of the *Financial Administration Act*.
10. That the suppliant is not entitled to any of the relief sought by her.
11. That the amount of $11,200 offered to the defendant would cover every factor of the value of the property to her that could reasonably be considered.
12. That since the defendant remained in possession of the property until December 1, 1958, without payment of rent she is not entitled to interest up to that date.

After the date of delivery of judgment herein counsel for the defendant in the information action requested that the amount of the award of $11,200 should be increased by an additional allowance of 10 per cent for compulsory taking.

Held: That the amount of the award in the present case is so ample to cover every factor of the value of the expropriated property to its former owner that could reasonably be considered that any additional allowance for compulsory taking would be an unwarranted bonus. *The Queen v. Sisters of Charity* [1952] Ex. C.R. 113 at 131 and *The Queen v. Supertest Petroleum Corporation Limited* [1954] Ex. C.R. 105 at 143 followed.

2. That the case does not fall within the ambit of the rule laid down by the unanimous judgment of the Supreme Court of Canada in *The King v. Lavoie* (December 18, 1950, unreported).
3. That it is reasonable to assume that the increased offer of $11,200 included an additional amount of 10 per cent and that it would be highly improper to add another additional allowance of 10 per cent to an amount that already includes it.
4. That even if there were jurisdiction to alter the amount of the judgment it would not be altered and that the request of counsel for the defendant that the amount of the award be increased by an additional allowance of 10 per cent for compulsory taking is refused.

PETITION OF RIGHT and INFORMATION for adjudication of amount of compensation for expropriated property.

The petition of right and the information were tried together before the President of the Court at Toronto.

F. A. Brewin, Q.C., and *J. C. Skells* for suppliant and defendant.

P. B. C. Pepper and *P. M. Troop* for respondent and plaintiff.

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

THE PRESIDENT now (May 19, 1959) delivered the following judgment: and, subsequently (June 4, 1959), dealt with the request of counsel for the defendant in the following addition:

The petition of right and the information were tried together.

Both actions stem from the expropriation of the suppliant's property, described in paragraph 1 of the petition and paragraph 2 of the information. Together with many other properties it was taken under the *Expropriation Act*, R.S.C. 1952, Chapter 106, for the purpose of the Malton Airport and the expropriation was completed on February 12, 1954. The compensation for it has not been agreed upon.

In her petition the suppliant seeks to recover the sum of $17,330.50, being the amount of the valuation made by Mr. J. E. S. Clare, on the ground that there was an agreement between Her Majestry acting through the Minister of Transport and herself that Mr. Clare should appraise the

1959

DREW
v.
THE QUEEN

Thorson P.

property and both parties should be bound by the amount of his valuation. The other action was brought for an adjudication of the amount of compensation to which the defendant is entitled. By the information the plaintiff offered the sum of $9,200 but the defendant by her statement of defence claimed $20,597.10. Since the launching of the action the plaintiff has paid the defendant $10,080 on account, $6,000 on May 5, 1958, and $4,080 on December 1, 1958.

In a sense this is a test case, there being ten other cases in which the circumstances are similar.

Although the petition of right was later in point of time than the information I shall deal with it first.

It is desirable to set out in chronological order the facts on which the suppliant relies. They involve, in addition to the suppliant herself and the other former owners, Mr. John C. Pallett, the Member of Parliament for the Constituency of Peel in which the properties are situate, the Honourable George Hees, the Minister of Transport, hereinafter referred to as the Minister, Mr. Stephen C. Booth, the Assistant Deputy Minister of Transport, and Mr. J. E. S. Clare, a real estate appraiser of Port Credit recommended by Mr. Pallett and appointed by the Minister to appraise the properties under the circumstances set out later.

Mr. Pallett is a barrister and solicitor practising at Port Credit as a member of the firm of Pallett, Pallett and Lane. Prior to the general election of 1957 he was the suppliant's solicitor and in that capacity prepared her statement of defence in the action commenced by the information. After the general election in June, 1957, which resulted in a change of the administration at Ottawa, he dissociated himself from that capacity. Thereafter his interest was political. There was general dissatisfaction in the Malton area with the manner in which the settlement of claims for compensation was being conducted and he was anxious to find a solution of the difficulties, particularly in the case of the veterans whose claims had not been settled. There were at the time fourteen or fifteen such claims, including the suppliant's. Soon after the election, indeed, prior to July 19, 1957, as appears from a letter of that date, filed as Exhibit 21, he saw the Minister at Ottawa and suggested to him that in the interests of public goodwill the matters in dispute could be settled very quickly by the appointment of an

independent person acceptable to the Government and his constituents to determine the value of the expropriated properties. Following this suggestion he saw Mr. Booth who had been instructed that Mr. Pallett would get in touch with him. This was Mr. Pallett's first meeting with Mr. Booth. It took place in Mr. Booth's office in the Hunter Building at Ottawa. Mr. Pallett was concerned over the situation of the home owners at Malton, about twelve or thirteen in number, and Mr. Booth had been instructed to do whatever was practicable to bring about a solution of the problem. Mr. Pallett took the stand that the amounts of the owners' claims were not unreasonable and suggested that the Department of Transport should settle them on the basis of the amounts claimed. There was a general discussion of possible means of settlement of the outstanding disputes.

Following this meeting the Minister wrote to Mr. Pallett on July 19, 1957, to the effect that, subject to certain conditions, the Department would be glad to arrange a further meeting to discuss the matter with all concerned, including officials of the Veterans Land Act, and saying:

> I would not like to commit myself at this stage to arbitration in the sense of appointing an independent appraiser acecptable to both the veterans and ourselves until after this meeting takes place. However, I would certainly be prepared to consider this possibility further if the veterans were prepared to agree by contract in advance the report of such an independent appraiser was final and binding on them.

It was Mr. Booth's understanding that Mr. Pallett would get the dissatisfied owners together and that he, Mr. Booth, should attend such meeting.

But Mr. Pallett had a different idea. He called a meeting of the dissatisfied former owners at the home of Mrs. Murray. There were, according to the evidence, from fifteen to twenty persons at this meeting. The date was prior to August 27, 1957. At this meeting Mr. Pallett suggested a plan to clear up the disputed situation. He said that he had been talking to the Minister and had put a plan before him that would finish the business, namely, to get an independent valuator approved by the Department and the Minister, and he assured the meeting that the appraiser would be a reputable and reliable real estate man. He said that if the

1959

DREW
v.
THE QUEEN

Thorson P.

owners would agree that they would accept a valuation submitted by such a valuator he thought he could get the matter settled. He put it to the meeting that it was his proposal that both the owners and the Department should be bound.

The owners, including the suppliant, were interested in Mr. Pallett's proposal even although they did not know the name of the appraiser and, while there was no great enthusiasm for it, they agreed to accept his plan. They were willing to place their faith in Mr. Pallett that matters would be cleared up.

Then Mr. Pallett wrote to Mr. Booth on August 27, 1957, which letter was filed as Exhibit 19, confirming a telephone conversation with him and enclosing a list of the names of the persons interested and agreeable to having an arbitrator or a new valuator whose finding should be binding upon both parties.

On August 29, 1957, Mr. Booth wrote to Mr. Pallett informing him that he had discussed his proposal for the disposition of the matter by arbitration with Mr. R. G. MacNeill of the Treasury Board staff and that he felt that the proposed course would be impracticable for a number of reasons and also telling him that he had discussed the question with the Deputy Minister of Justice who saw many practical difficulties. The letter, filed as Exhibit 20, was plainly a rejection of Mr. Pallett's proposal and Mr. Pallett so regarded it. Mr. Booth had discussed the matter with the Minister and it was on his instruction that he had consulted Mr. MacNeill and the Deputy Minister of Justice and the letter of August 29, 1957, was sent with the Minister's knowledge and concurrence.

The next event is an important one. Mr. Pallett met the Minister in his office at the Hunter Building on September 19, 1957. At first the Deputy Minister of Transport was also present but he left the meeting after instructing Mr. Booth to attend. The Minister was insistent on getting on with the Malton business and said that it had to be settled. Mr. Pallett suggested that an independnt appraiser should be appointed and that both the Crown and the owners should be bound by his valuations. Mr. Booth reminded the Minister of the advice that he had secured from Mr. MacNeill and the Deputy Minister of Justice and that any recommendations were subject to the approval of the

Treasury Board and, consequently, the Department could not be bound in advance. He also said that he had to advise the Minister that the Minister could not agree that the Crown should be bound by the valuations suggested. Then, with that limitation, the question of the desirability of a new valuation in any event was discussed. Mr. Booth pointed out that the Department was satisfied with the valuations that had been made and that they were valid but since they had all been made under a previous administration the Department would welcome a further valuation if the Minister so decided. He then expressed the view that as such a valuation would involve expense the Department should have some assurance that the owners would accept it. Mr. Pallett was not satisfied with the limitation suggested by Mr. Booth and the Minister said that he would direct a new appraisal valuation. At this stage Mr. Booth interjected that he assumed that the Department would not be bound in advance by such a valuation and Mr. Booth said that the Minister "indicated assent". The question of who should be the appraiser was then discussed. Mr. Pallett said that he would accept any reputable appraiser so long as he was not one of those who had made appraisals for the Department in the area and he suggested the name of Mr. Clare. The Minister then asked Mr. Booth whether that was alright with him and Mr. Booth replied that he would like to check his qualifications and suitability. The Minister then instructed Mr. Booth to get on with the matter as quickly as possible and Mr. Booth then left the meeting. The understanding was that Mr. Clare's qualifications should be checked and if found satisfactory he was to be employed. Mr. Booth could not remember whether Mr. Pallett left then or not.

After Mr. Booth left the meeting in the Minister's office on September 19, 1957, he told Mr. A. Ledoux, the general manager of the Department's real estate branch, to check Mr. Clare's qualifications and report to him.

On October 1, 1957, the Minister wrote to Mr. Pallett. This letter was prepared for the Minister's signature by Mr. Booth. In it the Minister stated that his understanding of Mr. Pallett's proposal was that if new appraisals were made by a valuator acceptable to him the owners would agree to be bound by his valuation and he informed Mr.

1959

DREW
v.
THE QUEEN

Thorson P.

Pallett that the Department had arranged that Mr. Clare should undertake the work. The letter closed with the following paragraph:

> I would appreciate receiving from you, as soon as conveniently possible, the written undertakings of the owners to be bound by Mr. Clare's valuations. When these valuations are received I will proceed along the lines indicated to you in our discussion.

The last sentence in this paragraph was the subject of sharply conflicting evidence. When Mr. Pallett was asked what lines had been indicated to him in the discussion his answer was "whatever valuations were made by the independent valuator would be accepted by the Department of Transport".

Mr. Booth was asked specifically whether the Minister had made such a statement and replied positively "the Minister did not say that". There was thus a sharp difference between Mr. Pallett and Mr. Booth. Mr. Pallett said that he had convinced the Minister and that he left the meeting with the understanding that the valuation to be made by Mr. Clare, if he was found to be qualified, would bind both the Department and the owners and that it was his responsibility to get the owner's signature on documents agreeing to his valuation. But Mr. Booth was clear that the Minister was most anxious to settle the matter and do everything possible short of binding the Crown in advance by the proposed valuation.

On October 3, 1957, Mr. Pallett wrote to the Minister acknowledging receipt of his letter of October 1, 1957, and informing him that the forms were being delivered that evening to the owners to obtain their signatures.

Mr. Pallett then secured the signatures of the owners to a document similar to that which was executed by the suppliant and her husband and filed as Exhibit 5. This purported to be an agreement between the suppliant and her husband as vendors and Her Majesty the Queen in the Right of Canada but it was signed only by the suppliant and her husband. There were several recitals—the last one reading as follows:

> Whereas the Vendors to assist Her Majesty the Queen in the Right of Canada to settle their claims, the Vendors agree to accept and be bound by the valuation placed on the lands and appurtenances above described by one James Earl Scott Clare, of the Village of Port Credit, in the County of Peel, Real Estate Agent.

Then the operative part was as follows:

> The Vendors agree to be bound by this Agrement of Settlement only if the amount as determined by James Earl Scott Clare having submitted his figures to the Minister of Transport, Ottawa, is paid within two months after the valuation is submitted.

Three copies of this document were executed by the suppliant and her husband and similar documents were executed by the other owners.

The suppliant had no knowledge that Mr. Clare was to be the valuator prior to the execution of the document, Exhibit 5. And it should be noted that while the document purported to be an agreement between the Vendors and Her Majesty the Queen there was no provision for execution of it on behalf of Her Majesty.

On October 7, 1957, the Minister wrote to Mr. Pallett acknowledging receipt of his letter of October 3, 1957, and referring to Mr. Booth's telephone conversation with Mr. Pallett commenting on the shortness of the two months limit and concluding as follows:

> I have been advised that barring unforseen difficulties we shall be able to complete the formalities within this time limit, and under the circumstances I agree to proceeding in the manner you have arranged.

There was controversy over the meaning of the last portion of this letter: "I agree to proceeding in the manner you have arranged". It was Mr. Pallett's opinion that what was meant was that Mr. Clare would do the valuation and that it would be acceptable to both parties. But Mr. Booth, who had prepared the letter for the Minister's signature, said that the phrase "formalities" meant simply the formalities in the case of agreed settlements including submissions to the Treasury Board.

It is clear, of course, that Mr. Pallett knew the need for approval of the Treasury Board but he stated that the Minister said that he would take the responsibility.

There is no evidence of the date when Mr. Pallett sent the so-called agreements to Ottawa and he could not recall any acknowledgement of their receipt or any discussion with the Department relating to them.

After Mr. Clare received his appointment he made his appraisal of the suppliant's property. His report, which was filed as Exhibit 7, was dated December 6, 1957, and showed a valuation of $17,330.50. When his reports were completed he showed them to the owners.

1959

DREW
v.
THE QUEEN

Thorson P.

On December 9, 1957, Mr. Pallett sent Mr. Clare's valuation reports to the Minister's executive assistant and they were then placed before the Minister.

The valuations were so out of line with other valuations that had been made and with settlements that had been made in about 180 cases in the Malton area that the Minister did not recommend them to the Treasury Board. After reporting to the Minister Mr. Booth, on the instructions of the Minister, discussed the valuations with Mr. MacNeill and one or two of his officials with a view to having them examined to consider whether there was any basis for approving settlement. They found the valuations unacceptable. On February 11, 1958, Mr. J. R. Baldwin, the Deputy Minister of Transport, wrote to the suppliant advising her to that effect and informing her that Mr. Clare's valuation could not be used as a basis for settlement of her claim. At the same time he told the suppliant that the Department's offer was increased to $11,200 and that he was prepared to recommend this amount for approval by the Treasury Board. The suppliant declined this increased offer and on December 23, 1958, launched her petition of Right. At the trial Mr. Booth stated that this offer of $11,200 was still open for acceptance.

On these facts counsel for the suppliant contended that there was an agreement between the suppliant and Her Majesty the Queen that the valuation made by Mr. Clare of the suppliant's former property should be binding on both parties. It was submitted that this agreement was spelled out in two ways: firstly, that there was an agreement by the Minister on behalf of Her Majesty with Mr. Pallett on behalf of the suppliant and the other owners, consisting of an offer by word of mouth made by the Minister to the suppliant and other owners through Mr. Pallett to be accepted in writing by them and an acceptance in writing by the suppliant and the other owners by their signatures of undertakings such as that executed by the suppliant and her husband and filed as Exhibit 5; secondly, that Mr. Pallett was authorized by the Minister to make an agreement with the suppliant and the other owners and clothed with ostensible authority to do so and that Mr. Pallett made such an agreement. Counsel referred to the evidence. There was, of course, the conflicting evidence of what took place in the Minister's office on September 19,

1957, Mr. Pallett asserting that the Minister had accepted his proposal that there should be a valuation by an appraiser approved by the Department and acceptable to the owners and that both the owners and the Minister acting for Her Majesty should be bound by such valuations and Mr. Booth stating that the Minister had not agreed to be bound in advance by such a valuation. Counsel for the suppliant contended strongly that the letters of October 1, 1957, and October 7, 1957, filed as Exhibits 22 and 24, and the conduct of the parties supported Mr. Pallett's statement, that the document filed as Exhibit 5 was an agreement of settlement contemplating a bilateral, and not a unilateral, obligation, and that the Department's concern over Mr. Clare indicated that it was to be bound by his valuation. And it was contended that the Minister had selected Mr. Pallett to make an agreement on his behalf with the owners and clothed him with authority to do so and that the arrangement set out in Exhibit 5 was such an agreement and had never been repudiated.

Counsel for the Crown contended equally strongly that the evidence as a whole was consistent with Mr. Booth's statement that the Minister did not say that the Department would accept whatever valuation the appraiser might make and inconsistent with Mr. Pallett's statement. It was significant that Exhibit 5, which Mr. Pallett prepared without submitting a draft of it to the Department, provided for only the signature of the owner. And the fact that the owners agreed to be bound only if the amount of Mr. Clare's valuation was paid within two months after the valuation was submitted is inconsistent with an agreement that the valuation should be binding on both parties. Counsel for the Crown also relied on the correspondence as inconsistent with the agreement asserted on behalf of the suppliant. For example, if there had been an agreement to accept the appraiser's valuations the words in Exhibit 22 "I will proceed along the lines indicated to you in our discussion" would be quite unnecessary. Moreover, the Minister's reference to Mr. Pallett's proposal would not have been made if there had been a concluded agreement.

It is clear that both Mr. Pallett and the Minister knew of the need for Treasury Board approval before the amounts of the valuations made by the appraiser could be paid. Under the circumstances, I am of the opinion that the

1959

DREW
v.
THE QUEEN

Thorson P.

Court should not conclude, in the absence of clear evidence, that the Minister, having been advised as he had been, agreed to be bound in advance by whatever valuations the appraiser might make.

Moreover, the agreement urged by counsel for the suppliant, being partly by word of mouth on the part of the Minister and partly in writing on the part of the suppliant, is of an unusual nature and not the kind of agreement that might ordinarily be expected in a case involving Her Majesty.

Finally, it must be kept in mind that the burden of proof of the alleged agreement lies on the suppliant. In my view of the evidence she has not discharged this burden and I so find.

And I am unable to find any support for the submission that the Minister clothed Mr. Pallett with authority to make an agreement that would be binding on both parties. He was never an agent of the Government and the Minister never held him out as such.

These findings are sufficient to dispose of the suppliant's petition of right, but even if it had been proved that the Minister had agreed to accept the appraiser's valuations as alleged this would not have entitled the suppliant to the relief sought by her.

It is an established rule that a contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly or under the provisions of a statute: *vide MacKay v. Attorney General for British Columbia*[1]. And it is an elementary principle that a Minister cannot bind the Crown unless authorized by order in council or by statute: *vide The Quebec Skating Club v. The Queen*[2]; *The King v. McCarthy*[3]; and *The King v. Vancouver Lumber Co.*[4]

Counsel for the suppliant submitted that there was statutory authority for the Minister's action. He relied on sections 7 and 15 of the *Department of Transport Act,* R.S.C. 1952, Chapter 79, and several sections of the *Expropriation Act,* R.S.C. 1952, Chapter 106, including sections 3, 9, 16 and 23, and urged that the Act contemplated that the Minister could enter into agreements for the payment of compensation.

[1] [1922] 1 A.C. 457 at 461.
[2] (1893) 3 Ex. C.R. 387.
[3] (1919) 18 Ex. C.R. 410 at 414.
[4] (1920) 50 D.L.R. 6.

On the other hand, it was submitted on behalf of the Crown that the Minister could not validly bind the Crown as alleged. In support of this submission reliance was placed on sections 6 and 7(1) of the "Regulations Relative to the Acquisition of Land by Government Departments" made by Order in Council P.C. 4253, dated October 9, 1952. These sections read as follows:

6. The Treasury Board may authorize the payment of compensation in respect of claims arising out of the expropriation of land and, except as provided herein, no compensation may be paid without the authority of the Treasury Board.

7. (1) The Minister may, without the authority of the Treasury Board, pay compensation in respect of all claims arising out of the expropriation of a parcel of land, where the amount of such compensation does not exceed $15,000.

And it was submitted that since Mr. Clare's appraisal of $17,330.50 exceeded $15,000 the Minister had no power to pay that amount of compensation. I agree with this submission. The compensation money stands in the place and stead of the expropriated property and is indivisible.

Counsel for the suppliant contended that any limitation of the Minister's powers must be authorized by statute and that there was no statutory authority for the Regulations made by Order in Council P.C. 4253, dated October 1952.

I cannot accept this contention. Counsel on behalf of the Crown put forward two submissions in support of the validity of the Regulations. The first was that they were made under the authority of sections 39 and 5(1) of the *Financial Administration Act, Statutes of Canada,* 1951 (Second Session), Chapter 12, now R.S.C. 1952, Chapter 116. Section 39(1) of this Act reads as follows:

39. The Governor in Council may make regulations with respect to the conditions under which contracts may be entered into and notwithstanding any other act,

(*a*) may direct that no contract by the terms of which payments are required in excess of such amount or amounts as the Governor in Council may prescribe shall be entered into or have any force or effect unless entry into the contract has been approved by the Governor in Council or The Treasury Board, . . .

And section 5(1) provides:

5. (1) The Treasury Board shall act as a committee of The Queen's Privy Council for Canada on all matters relating to finance, revenues, estimates, expenditures and financial commitments, the terms and conditions of employment of persons in the public service, and general administrative policy in the public service referred to the Board by the Governor

1959

DREW
v.
THE QUEEN

Thorson P.

in Council or on which the Board considers it desirable to report to the Governor in Council, or on which the Board considers it necessary to act under powers conferred by this or any other Act.

The second submission was that the Regulations constituted an executive direction of the Governor in Council designating the Treasury Board as the authority for the payment of compensation for expropriated land.

Prior to the Regulations every expropriation settlement and every purchase of land was authorized by an order in council. Under the Regulations the Governor in Council has designated the Treasury Board to act on his behalf in the payment of compensation for the expropriation of land and it now exercises the authority that was previously exercised by the Governor in Council.

In the absence of compelling argument to the contrary I am of the opinion that the Regulations are valid and that, consequently, the Minister had no power to enter into the alleged agreement.

It was submitted further on behalf of the Crown that the Minister was prevented from entering into a valid agreement of the kind alleged by reason of Section 30(1) of the *Financial Administration Act*, which provides:

> 30(1) No contract providing for the payment of any money by Her Majesty shall be entered into or have any force or effect unless the Comptroller certifies that there is a sufficient unencumbered balance available out of an appropriation or out of an item included in estimates before the House of Commons to discharge any commitments under such contract that would, under the provisions thereof, come in course of payment during the fiscal year in which the contract was entered into.

Since under the alleged agreement there was a commitment for payment within the fiscal year, a certificate from the Comptroller that there was a sufficient unencumbered balance available out of an appropriation to discharge it was necessary and the affidavits of Mr. D. M. Watters, the Secretary of the Treasury Board, and Mr. H. R. Balls, an officer of the Department of Finance and the Comptroller of the Treasury, indicated that, apart from documents authorizing certain advances to the suppliant, there was no document authorizing payment of the amount of Mr. Clare's valuation and that the necessary certificate had not been issued.

Consequently, I must find that there is no support for the suppliant's petition of right. There will, therefore, be judgment that she is not entitled to any of the relief sought

1959

DREW
v.
THE QUEEN

Thorson P.

by her in the petition. And since I find that there was no support for the petition I see no reason why the respondent should be deprived of its costs. The respondent will, therefore, be entitled to costs of the petition to be taxed in the usual way.

This leaves for consideration the information exhibited herein and the statement of defence to it.

The expropriated property is part of Lot 5 in Concession 7 in the Township of Toronto Gore and is on Line Six south of the Malton Airport. It has a frontage on Line Six of 124 feet running back 640 feet and back of that there is a width of 174 feet running back a further 643 feet. The area of the land is 4.36 acres. At the date of the expropriation there was a five-room bungalow, of frame construction, built by the defendant and her husband, the dwelling being described in detail in the various appraisal reports. In addition, there were various improvements on the property, also set out in the reports of the appraisers.

It was admitted that the best use that could have been made of the property was that to which it was actually being put.

The onus of proof of value of the property is on its former owner.

Evidence of value was given for the defendant by Mr. Clare and for the plaintiff by Mr. R. A. Davis, Mr. S. E. Janossy and Mr. W. L. Mason.

The total valuations made by the appraisers ranged from $17,330.50 by Mr. Clare, $9,080 by Mr. Davis to $7,500 by Mr. Janossy.

There was less variation in the valuations of the dwelling and improvements than in the case of the land.

Mr. Clare put a valuation on the cottage of $7 per square foot for 815 square feet, which should be 765 square feet, or $5,705, and $1,250 for the improvements, making a total of $6,955. Mr. Davis valued the building at $4,300 and the land improvements at $680, or a total of $4,980. And Mr. Janossy put the value of the house and improvements at $4,435.

But in respect of the land value there was a sharp difference of opinion. Mr. Clare valued the frontage of 124 feet to a depth of 200 feet at $25 per foot, or $3,100, and put a valuation on the land at the rear at $1,500 per acre for 3.8 acres, of $5,700, making a land valuation of $8,800,

1959

DREW
v.
THE QUEEN

Thorson P.

which worked out at over $2,000 per acre. Mr. Davis valued the frontage at the rate of $15.85 per foot for a depth of 400 feet and, subject to some adjustments, put the valuation of the front portion of the property, consisting of 1.13 acres, at $2,150. In his opinion, the agricultural land at the rear had a value of $600 per acre for 3.23 acres, or $1,938, making a total land valuation of $4,088, which worked out at about $940 per acre. Mr. Janossy valued the acreage as a whole at $750 per acre or total of $3,225.

Mr. Mason was called for the purpose of proving the value of the frontage. Basing his opinion on sales of lots on the other side of the Sixth Line he estimated the value of the frontage of the suppliant's property at $13 per foot for a depth of 200 feet, or $1,612, and the balance of 3.79 acres at $600 per acre, or $2,300, making a land valuation of $3,900.

Here I add the fact that the defendant bought the land in 1948 at $350 per acre.

I have no hesitation in rejecting Mr. Clare's valuation. I do not believe that he was a free and independent appraiser. He admitted that Mr. Pallett, who had recommended his appointment, said that he wanted a good price and on his cross-examination, after long hesitation, he admitted that Mr. Pallett had instructed him to put as generous a valuation as possible on the properties and he told Mr. A. A. Speer, the Department of Transport's District Land Agent, that it was difficult for him to carry out his instructions.

But quite apart from these reasons his valuation is subject to serious objections. I am not concerned with his admitted error in the square footage of the house but his land valuations are quite erroneous. There was no justification for his valuation of the frontage at $25 per foot for a depth of only 200 feet and there was no warrant for his valuation of the acreage at the rear at $1,500 per acre. I have pointed out that his land valuation works out at over $2,000 per acre. This was excessive and there is no wonder, in my opinion, that the Department of Transport found it out of line and informed the defendant that it could not be used as a basis for settlement of her claim.

I also reject Mr. Janossy's valuation as being very considerably too low.

This leaves the valuation made by Mr. Davis. His report demonstrates that his valuation was very carefully done.

He made a thorough study of the district, and of the relevant sales. As for the dwelling he took off the quantities of material and applied the current prices of material and labor. This is the best manner of appraising the value of a building, particularly when it is not of a standard type. I would, however, add to his valuation of the improvements. Counsel for the defendant found some fault with Mr. Davis' appraisal but such criticism as is valid would be amply met by raising his total valuation of $9,080 to $10,000 in round figures. That would result from an increase in valuation of the improvements and an increase in the valuation of the land.

But I am, in a sense, freed from difficulty in this case by reason of the offers that have been made. The evidence shows that on June 20, 1955, Mr. A. A. Speer offered the defendant $9,825 and that this offer was increased on September 30, 1955, to $10,350. The details of the breakdown of this amount appear in Exhibits 13 and 16 and it would appear that the amount offered in respect of the house and improvement seemed to the defendant to be fair. Her concern was with the valuation of the land. Subsequently, the Department's offer was, on February 11, 1958, increased to $11,200 and this is still open. Under the circumstances, I have come to the conclusion that if I were to estimate the value of the expropriated property as at February 12, 1954, at this amount it would amply cover every factor of its value to the defendant that could reasonably be considered and I award this amount accordingly.

The defendant remained in possession of the property until December 1, 1958, without payment of rent. Consequently, in accordance with the well established rule in this Court she is not entitled to any interest up to that date. Since the defendant has received $10,080 on account there still remains to be paid the sum of $1,120 and the defendant is entitled to interest on this amount at 5 per cent per annum from December 1, 1958, to this date.

The defendant will also be entitled to her costs of the information action to be set off against the costs of the petition and if the costs on taxation show a balance against the defendant it will be deducted from the amount of the compensation money.

There will, therefore, be judgment in the information action declaring that the land described in paragraph 2

1959

DREW
v.
THE QUEEN

Thorson P.

thereof is vested in Her Majesty as at February 12, 1954; and that the amount of compensation to which the defendant is entitled, subject to the usual discharges and releases of all liens and claims is the sum of $11,200, less $10,080 paid on account, together with interest as stated and costs, subject to the costs of the plaintiff in the petition.

Judgment accordingly.

ADDITION

The day after I had delivered the above judgment counsel for the defendant in the information action requested by letter and in person that I increase the amount of my award by an additional allowance of 10 per cent for compulsory taking. Subsequently, he put forward a written submission in support of this request. I have also heard in writing from counsel for the plaintiff.

I have no hesitation in denying the request. I have dealt at length with the vexatious question of the additional allowance for compulsory taking in *The Queen v. Sisters of Charity*[1] and *The Queen v. Supertest Petroleum Corporation Limited*[2] and need not repeat what I said in my reasons for judgment in these cases. In my opinion, the amount of the award in the present case is so ample to cover every factor of the value of the expropriated property to its former owner that could reasonably be considered that any additional allowance for compulsory taking would be an unwarranted bonus.

Moreover, the case does not fall within the ambit of the rule for the granting of an additional allowance laid down by the unanimous judgment of the Supreme Court of Canada in *The King v. Lavoie*[3]. In that case Taschereau J., in delivering the judgment of the Court, in which Rinfret C.J. and Rand, Cartwright and Fauteux JJ. concurred, laid down the following rule:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10% de la compensation accordée, pour dépossession forcée. Ce montant additionnel de 10% n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes ou il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation qu'il y a lieu de l'ajouter à l'indemnité (*Irving Oil Co. v. The King* 1946, S.C.R. 551; *Diggon-Hibben Ltd. v. The King* 1949, S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes

[1] [1952] Ex. C.R. 113 at 131. [2] [1954] Ex. C.R. 105 at 143.
[3] (December 18, 1950 unreported).

que je viens de citer, et qui alors ont justifié l'application de la règle. Il n'a pas été démontré qu'il existait des éventualités inappréciables et incertaines, impossible à évaluer au moment du procès.

While the meaning of the term "certaines incertitudes" is not clear, it is manifest, I think, that the Supreme Court of Canada, in the passage cited, decided that the additional allowance of ten per cent for compulsory taking is not allowed in all cases of compensation, and that it is *only* in cases of "certaines incertitudes" such as those that existed in *Irving Oil Co. v. The King* and *Diggon-Hibben Ltd. v. The King* that there is ground for adding it to the amount of the award. In my view, the *Lavoie* case is authority for saying that the additional allowance for compulsory taking should be granted *only* in cases of "incertitudes" such as those that existed in the cases cited by Taschereau J.

In my opinion, it is plain that the present case does not fall within the ambit of the rule laid down in the *Lavoie* case. Strictly speaking, I should, on the evidence before me, have limited my award to $10,000, the amount to which I consider that Mr. Davis' valuation should be increased, but I was led to the award of $11,200 by the fact that the offer of this amount was still open. To the extent of the difference my award was thus more than the amount warranted by the credible evidence before me.

There is a further reason for refusing counsel's request. It is clear from the valuations appearing on Exhibits 13 and 16, showing totals of $10,268.40 and $10,297.98, on which Mr. Speer's offer of $10,350 on September 30, 1955, was made, that an allowance of 10 per cent was included in the amount offered. Consequently, I think it is reasonable to assume that the increased offer of $11,200, referred to in Mr. Baldwin's letter of February 11, 1958, filed as Exhibit 8, also included such an additional allowance. That being so, it would be highly improper to add another additional allowance of 10 per cent to an amount that already includes it.

Consequently, even if I had jurisdiction to alter the amount of my judgment after its delivery by me, which question I need not here consider, I would not alter it.

The request of counsel for the defendant that I increase the amount of my award by an additional allowance of 10 per cent for compulsory taking is, therefore, refused.

Judgment accordingly.

1959

DREW
v.
THE QUEEN

Thorson P.

N.B.—The judgments herein were both affirmed by the Supreme Court of Canada [1961] S.C.R. 614. It was finally settled by the Supreme Court of Canada that in fixing the amount of an award of compensation for expropriated property there are factors other than the market value of the expropriated property which must be taken into account but which are not easily calculated, that in such cases the trial court may decide that compensation for such factors can best be appraised in the form of a percentage of the market value, but that when the value of the property has been assessed it represents full compensation and the former owner is not entitled to an additional amount for compulsory taking. The decision thus put an end, in cases under the Expropriation Act, to the "additional" allowance of 10 per cent for compulsory taking. There was no statutory basis for the allowance and no rule of law requiring it.