Expropriation and Indemnity for Forcible Dispossession

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I

In addition to the usual indemnity for the value of property taken, for injurious affection or resulting injury to other property and for incidental damage, is the expropriated party entitled to a percentage allowance as compensation for his forcible and compulsory dispossession? It is my firm view that he is so entitled, on grounds of equity, on principle and on the authority of a substantial jurisprudence, and that the proper rule to be followed is that he should be granted the extra allowance for forcible taking in every case where there is not some special and compelling reason against it.

The legality of the additional percentage has in the last few years been frequently questioned in the Exchequer Court, and the recent jurisprudence of the Supreme Court of Canada (notably the cases of *Diggon-Hibben, Limited* v. *The King* and *The King* v. *Lavoie*), though continuing to grant the allowance in certain cases where the circumstances present difficulty or uncertainty in appraising values, has not only departed from its own earlier decisions without any reference to them, but in my view has laid down a criterion for the allowance so difficult to apply in practice that it will seldom be granted. These earlier decisions of the Supreme Court, which have been departed from, acted on the rule than an allowance *should be made for forcible taking unless there is some special reason for not making it.*

To try to make good my point, this article attempts an analysis of the jurisprudence in England, the jurisprudence both federal and provincial in Canada, and the opinions of text writers. To do so, I must freely use and quote again quotations appearing in the course of the scholarly judgment of Thorson P. in *The Queen* v. *Sisters of*

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Charity of Providence,[1] and adopt some of his affirmations—although over-all he finds support in the material for his view that the extra grant is not justified in law, and I find in it justification for the suggested proper rule.

II

As Thorson P. points out, the practice of making an allowance for forcible dispossession appears to have originated in England before the Lands Clauses Consolidation Act of 1845, though no statute expressly authorized it. In that year a Select Committee of the House of Lords, studying the principles to be followed in assessing compensation, accepted the principle of special compensation for forced dispossession. It is difficult, says the report, to establish a fixed rate. The witnesses agreed that in practice they added to the marketable value of property taken a percentage because the taking was compulsory—a percentage which varied with different witnesses, but:

> . . . the committee are of opinion that a very high percentage, amounting to not less than 50% upon the original value ought to be given in compensation for the compulsion only to which the seller is bound to submit, the severance and the damage being distinct considerations. . . .[2]

After noting that it is often necessary to consider the property, not merely as a source of revenue, but as having been embellished and enjoyed by the owner for his pleasure and recreation, the report adds:

> Public advantage may require all these private considerations to be sacrificed; but as it is the only ground on which a man can be justly deprived of his property and enjoyments, so, in the case of railways, though the public may be considered ultimately the gainers, the immediate motive for their construction is the interest of the speculators, who have no right to complain of being obliged to purchase, at a somewhat high rate, the means of carrying on their speculation.[2]

English text writers found fifty per cent to be too high. The opinion was expressed in *Lloyd on Compensation* in 1895[3] that ten per cent for house property and up to twenty-five per cent for agricultural property was more appropriate, and in *Hudson's Law of Compensation*, in 1905,[4] is found the same general opinion, though the percentage should, it is suggested, be applied to the value of

[1] *The Queen* v. *Sisters of Charity of Providence*, [1952] Ex. C.R. 113, at pp. 132 *et seq.*

[2] Quoted by Thorson P. at p. 132 of his judgment.

[3] (6th ed.) p. 71.

[4] (1905), Vol. 1, p. clvii. See also Browne and Allen, The Law of Compensation (2nd ed.) p. 97.

the land exclusive of any allowance for injurious affection. Cripps, the leading English text writer on compensation, in his 1905 edition (the earliest edition available in Montreal) speaks of the "customary addition of 10 percent", though stating that:

> The fact that lands have been taken under compulsory process does not alter the principle of valuation, and the customary addition of 10 percent can only be justified as a part of the valuation and not as an addition thereto. In practice the 10 percent is applied to the value of lands only, and not to incidental damage; this percentage may be taken to cover various incidental damage; . . .[5]

The jurisprudence in England and Ireland, though the cases are few, recognizes the allowance either expressly or impliedly.[6] Indeed the practice was so generally accepted in England even in 1870 that section 43 of the Tramways Act[7] provided that, if a local authority exercised its statutory right to take over a private tramways company after a certain number of years on payment of compensation, no allowance would be made for compulsory sale in fixing the compensation. Estey J., in *Diggon-Hibben, Limited* v. *The King*, held:

> The allowance for compulsory taking is founded upon a long established practice in the Courts and is granted as part of the compensation. It is a factor in the compensation separate and apart from what would be included as disturbance allowance. So well established was the practice in Great Britain that as early as 1890 when it was deemed undesirable to make this allowance in connection with certain properties a statute was enacted to that effect (s. 21. of the Housing of the Working Classes Act, 1890, 53 & 54 Vict., c. 70). It was there provided that when land was taken in an unhealthy area 'no additional allowance in respect of compulsory purchase' shall be made. The distinction between the allowance for disturbance and that for compulsory taking was emphasized in Great Britain in 1919 with the Acquisition of Land (Assessment of Compensation Act, 1919) where in sec. 2(1) it is specifically provided that an allowance for compulsory taking is not permitted under that Act while in Sec. 2(6) it is specifically provided that rule 2 should not affect the allowance for disturbance.[8]

The point being made by Estey J. was that, the accepted practice being so established, where for special reasons it was deemed

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[5] (5th ed., 1905) p. 111. To the same effect is Arnold, The Law of Damages and Compensation (2nd ed., 1919) p. 248; and Halsbury (2nd ed.), Vol. VI, no. 45, p. 47.

[6] *Lock* v. *Furze* (1865), 19 C.B.N.S. 94; *In Re Wilkes Estate* (1880), 16 Ch. D. 597; *Jervis* v. *Newcastle Waterworks* (1896-97), 13 T.L.R. 14 and 312; *In Re Athlone Rifle Range* (1902), 1 Ir. R. 433; *Lord Mayor of Dublin* v. *Dowling* (1880), L.R. Ir. 6 Q.B. 502.

[7] (1870) 33-34 Vict., c. 78.

[8] [1949] S.C.R. 712, at pp. 719-720. See also *Re West Canadian Hydro Corp.*, [1950] 3 D.L.R. 321, at p. 433.

undesirable it had to be cancelled expressly by statute. And Cripps clearly states the distinction:

> In cases where land is taken compulsorily by Government departments or local or public authorities, the Acquisition of Lands Act, 1919, applies and section 2 of that Act specifically enacts that no additional allowance shall be made for compulsory purchase.

And again:

> In cases coming within the provisions of the Lands Clauses Act, 1845, a sum of 10 percent in England is always added to the value of the land taken compulsorily. Where land is taken compulsorily by a Government department or a local or public authority no such extra sum can be granted by the official arbitrator.[9]

III

Express statutory authority has never existed in Canada for the long established practice of granting an allowance for compulsory taking in expropriation by or on behalf of the federal government. The earliest reference to an existing practice of which I am aware occurs in the 1904 judgment of Burbridge J. in *Symonds* v. *The King*, where he said:

> With regard to an allowance, which is now usually put at ten percent, for the compulsory taking, I am of opinion that it should only be added in cases where the actual value of lands can be closely and accurately determined. Where that cannot be done, and where the price allowed is liberal and generous there is, I think, no occasion to add anything for the compulsory taking.[10]

And the judgment concludes with an award for the value of the land taken and for an added ten per cent for the compulsory taking. Subsequent to this judgment the allowance was made in a large number of Exchequer Court decisions by Burbridge, Cassels, Audette, Angers and MacLean JJ., without any particular comment or explanation, other than that the land had been taken against the will of the owner.[11] In some cases more detailed reasons

[9] Cripps on Compensation (8th ed., 1938) pp. 214, 265.

[10] (1904), 8 Ex. C.R. 319, at p. 322.

[11] *The King* v. *Dodge* (1907), 10 Ex. C.R. 208, at p. 222; *The King* v. *Condon* (1910), 12 Ex. C.R. 275, at p. 282; *The King* v. *Moncton Land Company* (1912), 13 Ex. C.R. 521, at p. 525; *The King* v. *Kendall* (1914), 14 Ex. C.R. 71, at p. 85, affirmed by the Supreme Court in an unreported judgment on October 29th, 1912; *The King* v. *Falardeau* (1914), 14 Ex. C.R. 265, at p. 284, affirmed by the Supreme Court in an unreported judgment on November 12th, 1913; *The King* v. *New Brunswick Railway Company* (1914), 14 Ex. C.R. 491, at p. 497; *The King* v. *Bickerton* (1916), 15 Ex.C.R. 61, at p. 67; *The King* v. *Collège de St. Boniface* (1916), 15 Ex. C.R. 68, at p. 73; *The King* v. *Loggie* (1916), 15 Ex. C.R. 80, at p. 89; *The King* v. *Wilson* (1916), 15 Ex. C.R. 283, at p. 301; *The King* v. *Roy* (1916), 15 Ex. C.R. 472, at p. 485; *The King* v. *Peters* (1916), 15 Ex. C.R. 462, at p. 470;

were advanced for the allowance, such as, "to recoup the purchaser for certain contingent items which cannot be taken into account";[12] to cover the expenses of moving, contingencies and goodwill;[13] and for the goodwill of a hotel and any other loss incidental to closing down a going concern.[14]

The allowance was not made in all cases and was refused where the court considered that for special reasons no grant should be made. Among the reasons given for refusing an allowance for forcible taking were that "the Crown had acted liberally in not exacting the full claim which it might have set up for the increased value to the various lands arising by reason of the works";[15] that "the owners . . . for a number of years were endeavouring to part with their property";[16] that the property had been purchased or

The King v. *Woodlock* (1916), 15 Ex. C.R. 429, at p. 435; *The King* v. *Canadian Pacific Lumber Company* (1916), 15 Ex. C.R. 350, at p. 357; *The King* v. *Ross* (1916), 15 Ex. C.R. 33, at p. 36; *The King* v. *Carslake Hotel Co.* (1918), 16 Ex. C.R. 24, at p. 33, affirmed by the Supreme Court in an unreported judgment, June 13th, 1916; *The King* v. *Hearn* (1918), 16 Ex. C.R. 146, at pp. 172, 174, 175; *The King* v. *Studd* (1918), 16 Ex. C.R. 365, at p. 374; *The King* v. *King* (1918), 17 Ex. C.R. 471, at p. 481, affirmed by the Supreme Court in an unreported judgment on December 11th, 1916; *The King* v. *Hudson Bay Co.* (1918), 17 Ex. C.R. 441, at p. 445; *Fugère* v. *The King* (1918), 17 Ex. C.R. 1, at p. 17; *The King* v. *Torrens* (1918), 17 Ex. C.R. 19, at pp. 30, 31; *The King* v. *Northfield Coal Co.* (1918), 17 Ex. C.R. 32, at p. 45; *The King* v. *Vassie & Company, Limited* (1918), 17 Ex. C.R. 75; *Belanger* v. *The King* (1918), 17 Ex. C.R. 333, at p. 350, affirmed by the Supreme Court in an unreported judgment on May 26th, 1921; *The King* v. *Quebec Gas Co.* (1918), 17 Ex. C.R. 386, at p. 411, affirmed (1917-19), 59 S.C.R. 677; *The King* v. *Bowles* (1918), 17 Ex. C.R. 482, at p. 486, affirmed by the Supreme Court in an unreported judgment, December 11th, 1916; *The King* v. *Griffin* (1919), 18 Ex. C.R. 51, at p. 56; *The King* v. *Jalbert* (1919), 18 Ex. C.R. 78, at p. 80; *The King* v. *Brenton* (1919), 18 Ex. C.R. 138, at p. 149; *The King* v. *Grass* (1919), 18 Ex. C.R. 177, at p. 197; *The King* v. *Hunting* (1919), 18 Ex. C.R. 442, at p. 451, affirmed by the Supreme Court (1917), 32 D.L.R. 331; *The King* v. *Lynch* (1920), 19 Ex. C.R. 198, at p. 201; *The King* v. *Lynch's Limited* (1921), 20 Ex. C.R. 158, at p. 163; *The King* v. *Royal Nova Scotia Yacht Squadron* (1923), 21 Ex. C.R. 160, at p. 162; *The King* v. *Goldstein*, [1924] Ex. C.R. 55, at p. 62; *The King* v. *Stuart*, [1926] Ex. C.R. 91, at p. 98, reversed on other grounds, [1926] S.C.R. 284; *The King* v. *Coleman*, [1926] Ex. C.R. 121, at p. 127, affirmed by the Supreme Court, [1926] Ex. C.R. 101; *The King* v. *Elite Café*, [1929] Ex. C.R. 56, at p. 61; *The King* v. *Frost*, [1931] Ex. C.R. 176, at p. 179; *Federal District Commission* v. *Dagenais*, [1935] Ex. C.R. 25, at p. 37; *The King* v. *Pierce*, [1938] Ex. C.R. 129, at p. 135; *The King* v. *Spencer*, [1939] Ex. C.R. 340, at p. 354. See also recently *The King* v. *Berger*, [1951] Ex. C.R. 305, at p. 309.

[12] *The King* v. *MacPherson* (1916), 15 Ex. C.R. 215, at p. 232.

[13] *The King* v. *Condon* (1910), 12 Ex. C.R. 275, at p. 282; *The King* v. *Blais* (1919), 18 Ex. C.R. 63, at p. 66.

[14] *The King* v. *Carslake Hotel Co.* (1918), 16 Ex. C.R. 24, at p. 33, affirmed by the Supreme Court in an unreported judgment on June 13th, 1916.

[15] *The King* v. *Bradburn* (1914), 14 Ex. C.R. 419, at p. 470.

[16] *Raymond* v. *The King* (1918), 16 Ex. C.R. 1, at p. 22, affirmed (1917-19), 59 S.C.R. 682; *The King* v. *McCarthy* (1919), 18 Ex. C.R. 410, at p. 437, affirmed by the Supreme Court in an unreported judgment on Octo-

held for purposes of speculation:[17] and that the property was unoccupied and earned almost no revenue.[18] Although ten per cent was the usual allowance, a smaller percentage was sometimes granted for specific reasons.[19] So general was the practice of making an allowance for compulsory taking that in 1914 the order in council bringing into force the War Measures Act provided specifically that in expropriations under that statute no allowance would be made for compulsory taking.[20]

The majority of cases in the Exchequer Court up to 1942, when Thorson J. was appointed president, granted the allowance. After his appointment, Angers J. continued the practice, although the other judges largely discontinued it until after a series of three decisions of the Supreme Court in the cases of *Diggon-Hibben*, *Lavoie* and *Woods Manufacturing Company*, rendered in 1949, 1950 and 1951, respectively. Thorson P. has repeatedly expressed the opinion that there is no justification for the allowance.[21] In the *Sisters of Charity* case[22] he traces the history of the practice in England and Canada in great detail, and at page 142 sets forth his reasons for believing that the practice should be abolished by statute:

> As I saw it, the Court was not obliged in law to grant any additional allowance. No Act of Parliament, either English or Canadian, authorized it and no rule of law required it. The only reason for granting it was the English practice to which I have referred. But that practice had been formally abolished in England in 1919, which was subsequent to the decision in the *Hunting* case, *supra*, in the case of all expropriations of the same kind as those made in Canada under the Expropriation Act and I could not see any reason why a practice should continue to be maintained in Canada when the English practice on which it was dependent had itself ceased to exist. Moreover, considerations of principle similar to those that led to the abolition of the practice in England weighed strongly with me, namely, that where property

ber 11th, 1931. But see contra, *The King* v. *Carslake Hotel Co.* (1918), 16 Ex. C.R. 24, at p. 33.

[17] *The King* v. *Picard* (1918), 17 Ex. C.R. 452, at p. 460, affirmed by the Supreme Court in an unreported judgment, March 26th, 1917.

[18] *The King* v. *Hearn* (1918), 16 Ex. C.R. 146, at p. 176; *The King* v. *Lynch's Limited* (1921), 20 Ex. C.R. 158, at p. 163.

[19] *The King* v. *MacPherson* (1916), 15 Ex. C.R. 215, at p. 232. See more recently *The King* v. *Richardson*, [1951] 3 D.L.R. 653, at p. 674 (Cameron J.).

[20] *The King* v. *Halifax Graving Dock* (1921), 20 Ex. C.R. 44, at p. 54.

[21] *The King* v. *Thomas Lawson Ltd.*, [1948] Ex. C.R. 44, at p. 106; *The King* v. *Diggon-Hibben*, April 15th, 1948, unreported; *The King* v. *Woods Manufacturing Company*, [1949] Ex. C.R. 9, at p. 59, reversed [1951] S.C.R. 504; *The Queen* v. *Sisters of Charity*, [1952] Ex. C.R. 113, at pp. 131 *et seq.*; *The Queen* v. *Potvin*, [1952] Ex. C.R. 436, at p. 446; *The Queen* v. *Cowper*, [1953] Ex. C.R. 107, at p. 113.

[22] *The Queen* v. *Sisters of Charity*, [1952] Ex. C.R. 113.

> has been lawfully expropriated by the government pursuant to an Act of Parliament and Parliament has determined that the compensation payable to its owner shall be measured by the value of the property to him the Court ought not to give him ten per cent more than its value. Consequently, since the owner had no legal right to an additional allowance for compulsory taking, I did not give him any. It was, and still is, my view that where all the proper factors of value have been taken into account and adequate compensation has been awarded there is no justification in principle for any additional allowance for compulsory taking and that such an allowance is an unwarranted bonus.

From 1951 until the present time, four of the six reported judgments of the Exchequer Court have awarded something for forcible taking. In the *Sisters of Charity* case, *The King* v. *Northern Empire Theatres*[23] and *The Queen* v. *Cowper*,[24] Thorson P., following the decisions of the Supreme Court which will presently be referred to, allowed ten per cent. He refused to make any such allowance in *The Queen* v. *Potvin*,[25] because he considered that there were not in that case the uncertainties required under the recent jurisprudence of the Supreme Court to justify granting it. In the *King* v. *Richardson*,[26] Cameron J. awarded only five per cent because, at the time of the taking, the owner was not in possession and had no intention of resuming possession; and he appears to have made no allowance for forcible taking in *The King* v. *MacCulloch*,[27] for his judgment contains no mention of it.

IV

Coming now to the jurisprudence of the Supreme Court of Canada, the earliest judgment on this matter known to me is *Dodge* v. *The King*,[28] where Idington J. said, "There may be added as usually is added, a percentage to cover contingencies of many kinds". Subsequent judgments[29] made an allowance of ten per cent for compulsory taking without reasons or comment, other than that the owner was dispossessed against his will. In *The King* v. *Larivée*,[30] it was held that the allowance could not be claimed as of right in all circumstances, but no indication was given as to when it could or could not be claimed. In *Berlin* v. *Berlin & Waterloo Street Ry.*,[31] no allowance was made for compulsory taking because the special

[23] [1951] Ex. C.R. 321, at p. 333.
[24] [1953] Ex. C.R. 107, at p. 113.
[25] [1952] Ex. C.R. 436, at p. 446.
[26] [1951] 3 D.L.R. 653, at p. 674.
[27] [1951] Ex. C.R. 59.
[28] (1906), 38 S.C.R. 149, at p. 156.
[29] *The King* v. *Trudel* (1914), 49 S.C.R. 501, at p. 517, leave to appeal to P.C. refused, May 20th, 1914; *Lake Erie & Northern Ry.* v. *Schooley* (1915-16), 53 S.C.R. 416, at p. 427; *The King* v. *Hearn* (1918), 55 S.C.R. 562, at pp. 574, 576.
[30] (1917-18), 56 S.C.R. 376.
[31] (1910), 42 S.C.R. 581, at p. 599.

statute giving the town the right to take over the railway did not provide for it.

The allowance for compulsory taking was first considered at length by the Supreme Court in 1917 in *The King* v. *Hunting*,[32] where counsel for the appellant unsuccessfully challenged the legality of the allowance of ten per cent made by the trial judge. The reasons given by the four judges who favoured the allowance varied. Fitzpatrick C.J. was of the opinion that in most cases the allowance should be granted, saying at page 331:

> The allowance of 10% for compulsory purchase has become so thoroughly established a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case.
>
> At the time of the passing of the Consolidated Lands Clauses Act, 1845, it was suggested that 50% should be the allowance for compulsory purchase; this, however, was too high and long experience has proved that 10% is a reasonable sum to add to cover anything not included in the actual valuation. That owners may have such further claims if they are to be fully compensated for the taking of their property may, I think, be seen in the present cases, where they have been brought before two Courts before they can recover the compensation to which they are entitled. I suppose it is well known that the costs they can recover from the Crown do not represent the expense to which they are put in such litigation. That this charge should be open to dispute and be specially fixed in each case would be, I think, disastrous. The 10% allowance does not, of course, propose to be anything but a covering charge, and perhaps there might be cases in which it ought not to be allowed. In ordinary cases such as the present and where allowed by the Judge, I do not think it should ever be questioned in this Court.

Idington J. stated that, although there was no rule of law requiring the usual allowance of ten per cent, ten per cent is no more, and is often less, than justice demands. He cites the case of a man holding property as an investment. When it is expropriated he is put to expense, loss of revenue and inconvenience in finding another investment. Idington J. infers that no allowance should be made where the owner has been trying to get rid of his property or where he has bought as a speculation. Duff J. dismissed the appeal, giving no reasons. Anglin J. at page 334 applied the allowance to the total value of the property to the owner, including special adaptability:

> . . . the legality of including . . . something to cover incidental and contingent losses and inconvenience is unquestionable; but the author-

[32] (1917), 32 D.L.R. 331. See also *City of Montreal* v. *McAnulty*, [1923] S.C.R. 273, at p. 278 (Idington J.).

> ity for fixing the additional allowance at 10% depends entirely upon practice.
>
> When such an important item of inconvenience and possible loss as disturbance in occupation . . . is wholly absent . . . I think a substantial reduction in the allowance of 10% may well be made.

In this case Anglin J. granted four per cent for disturbance (that is, forcible taking) and six per cent "to cover all other expenses, damage and inconvenience to the deprived owner entailed by the taking of his property", and pointed out that four per cent, like ten per cent, is an arbitrary figure. He expressed the opinion that the allowance should be greater where there has been actual disturbance of possession or serious inconvenience. Brodeur J., dissenting, thought that, since the compensation was generous and there had been no disturbance, no allowance should be made for compulsory taking. In the result, therefore, three of the five judges granted ten per cent, one granted only four per cent on the facts of the case, and one thought no allowance should be made.

This question was next considered, almost thirty years later, in *Irving Oil Company Ltd.* v. *The King*, where an appeal was allowed from the unreported decision of O'Connor J. in the Exchequer Court, because, *inter alia*, he had made no allowance for compulsory taking. No detailed reasons for granting the allowance were given other than in the reasons for judgment of Rinfret C.J. and Kerwin J.:

> Under the circumstances of this case, the Appellant is entitled to ten per cent for compulsory taking, on the total of the above items, $7013.50, or $701.33.[33]

The reasons of the other three judges, Rand, Hudson and Estey JJ., make an allowance for forcible taking without comment.

The next judgment in chronological order is the 1949 judgment in *Diggon-Hibben* v. *The King*,[34] where an unreported judgment of Thorson P. was appealed on the ground *inter alia* that no allowance had been made for forcible taking. In this case Rand J. (with whom Taschereau J. concurred) said:

> In the case of *Irving Oil* v. *The King*, it was held that while an allowance of ten per cent for compulsory taking is not a matter of right, in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here. . . . For that reason, I think the allowance should be made.

It should be pointed out that the *Irving Oil* case, as reported in the Canada Law Reports, did *not* hold that the allowance could be made in circumstances presenting difficulty or uncertainty, for

[33] [1946] S.C.R. 551, at p. 556. [34] [1949] S.C.R. 712, at p. 713.

in the reasons for judgment no reasons were given for the allowance.[35] The reasons given by Estey J. for maintaining the appeal (which I have already quoted in part) are more convincing. After pointing out that there was a long established practice of granting an allowance for compulsory taking, apart from an allowance for disturbance, he says at page 720:

> The amount allowed may be varied and there are cases where, having regard to the circumstances, no allowance should be made, but with great respect, the circumstances in this case do not distinguish it from those cases in which an amount for compulsory taking was allowed.

Locke J., with Rinfret C.J., was of the opinion that the allowance is not a matter of right and could not be justified in the circumstances of the case.

The next Supreme Court judgment is *The King* v. *Lavoie*, rendered in 1950 but not reported,[36] where Taschereau J., speaking for the court, said:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10 pour cent de la compensation accordée pour dépossession forcée. Ce montant additionnel de 10 pour cent n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où 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. . . . Ici, on ne rencontre pas des circonstances qui existaient dans les deux causes que je viens de citer et qui alors ont justifié l'application de la règle. Il n'a pas été demontré qu'il existait des eventualités inappréciables et incertaines impossibles à évaluer au moment du procès.

Finally, in 1951 in *The King* v. *Woods Manufacturing Company Limited*,[37] the Supreme Court maintained an appeal from a judgment[38] of Thorson P. on the ground, among others, that he had failed to award the additional amount for forcible taking, but it gave no detailed reasons why it considered the allowance justified and stated no new principles for awarding or refusing it.

In cases under federal statutes the ten per cent has usually not been applied to the allowance, if any, for injurious affection, but merely to the value of the land and buildings actually taken. No convincing reason has been advanced for not applying it to the total damages, and recent judgments of the Exchequer Court[39] and

[35] See on this point *Re West Canadian Hydro*, [1950] 3 D.L.R. 321, at p. 435.

[36] December 18th, 1950, cited in *The Queen* v. *Sisters of Charity*, [1952] Ex. C.R. 113, at p. 144; and *The Queen* v. *Potvin*, [1952] Ex. C.R. 436, at p. 446.

[37] [1951] S.C.R. 504, at p. 515. [38] [1949] Ex. C.R. 9, at p. 59.

[39] *The Queen* v. *Sisters of Charity*, [1952] Ex. C.R. 113, at pp. 147-148. See also *Hunting* v. *The King* (1917), 32 D.L.R. 331, *per* Anglin J. at p. 334.

the Supreme Court of British Columbia[40] have calculated the ten per cent upon the entire indemnity, rightly so in my opinion. In the case of the expropriation of a large commercial undertaking, as of land and buildings, the allowance for forcible dispossession should be made unless expressly excluded by the expropriation statute.[41]

V

Now what is the attitude of the provincial courts to the matter of compensation for forcible dispossession? The courts of Ontario, Nova Scotia, New Brunswick, British Columbia, Alberta, Saskatchewan and Quebec recognize the allowance, although (except in Quebec from 1937 to 1940) there has never been any express statutory authority for it. In Ontario an allowance has frequently been made for compulsory taking, although it has not been granted in every case, and sometimes less than ten per cent has been awarded. The cases are adequately summed up in *The Canadian Encyclopedic Digest* (*Ontario*) thus:

> The arbitrators may award to the owner a reasonable sum over and above the amount of his actual damage resulting from such expropriation in order to compensate him for such matters as personal expenses, trouble, inconvenience, or loss of time, occasioned by the expropriation proceedings and expropriation itself, but which cannot properly be regarded as forming a part of such damage. It is not the law that the amount of such compensation is to be fixed on a percentage basis; it is dependent on the facts of each case.[42]

Various reasons have been given for making the allowance. In *Torrance* v. *Province of Ontario*,[43] Mulock C.J., with whom Kelly J. and Masten J. concurred (Rose J. dissenting), said:

> There is ample authority for arbitrators in a compulsory arbitration awarding to the owner . . . a reasonable sum over and above the amount of his actual damage in order to compensate him for . . . personal expenses, trouble, inconvenience, or loss of time.

In *Berlin & Waterloo Railway* v. *Berlin*, Moss C.J.O. justified the allowance as being "in the nature of a *solatium* to an owner who is deprived against his will of the proprietorship of his land and of the right to hold and enjoy it at his pleasure and to sell or not, as he sees fit".[44]

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[40] *Re West Canadian Hydro Co.*, [1950] 3 D.L.R. 321, at p. 439.

[41] *Ibid.*

[42] Vol. 2, p. 595. See also: *Watson* v. *City of Toronto* (1917), 38 O.L.R. 103; *Forbes* v. *Toronto*, [1930] 2 D.L.R. 650, at p. 653 (C.A.). In *Lennox* v. *Toronto Board of Education* (1925-26), 58 O.L.R. 427, the Court of Appeal reduced an allowance from ten to six per cent.

[43] (1923), 52 O.L.R. 325, at p. 327 (C.A.).

[44] (1908), 19 O.L.R. 57, at pp. 73-74; reversed (1910), 42 S.C.R. 581, at p. 599.

From 1947 until the present time the Ontario Municipal Board and the Court of Appeal of Ontario have made an award of ten per cent for compulsory taking in seven cases,[45] and I know of no reported case in Ontario since 1947 where it has been refused. It has also been approved in Alberta by the Board of Public Utility Commissioners[46] and by the courts of appeal of Nova Scotia and New Brunswick,[47] and the New Brunswick judgment was confirmed by the Privy Council.[48] In two recent decisions of the Supreme Court of British Columbia, involving the expropriation of considerable commercial undertakings, ten per cent was awarded for compulsory dispossession.[49] In the *West Canadian Hydro* case, Wilson J. said at page 435 that the allowance is the rule rather than the exception and that in an ordinary case the burden is on the expropriating party "to suggest some reason for refusing the allowance rather than on the owner to prove the existence, in his case, of the reasons named by the various learned Judges for making the allowance".

In Quebec, except under the Expropriation Act of 1937[50] (which was in force only until 1940 and which expressly provided in section 15 for an indemnity of fifteen per cent for forcible taking), there is not and never has been any general text of law expressly granting an allowance for forcible taking. In the 1944 special act[51] providing for the expropriation of the undertaking of the Montreal Light, Heat & Power and Montreal Island Power Companies and of the shares of Beauharnois Light, Heat & Power Company, ten per cent was provided for forcible taking. Notwithstanding the absence of statutory authority, there were, before 1937, numerous

[45] *Lafferty* v. *Trenton Public Utilities*, [1947] O.R. 307, at p. 319 (C.A.); *Hayden Warehouses Ltd.* v. *Toronto*, [1951] O.W.N. 466, at p. 468 (C.A.); *Assaf* v. *Toronto*, [1953] O.R. 595, at p. 608 (C.A.); *Townsend* v. *Upper Thames Authority*, [1953] O.W.N. 401, at p. 402 (O.M.B.); *Hill* v. *Upper Thames Authority*, [1953] O.W.N. 471, at p. 472 (O.M.B.); *Pawson* v. *Sudbury*, [1953] O.W.N. 932 (C.A.).

[46] *Re Pipe Line Act*, [1948] 2 W.W.R. 20, at p. 33. For Saskatchewan, see *Re Power Commission Act*, [1930] 1 D.L.R. 90.

[47] *O'Mullin* v. *Eastern Trust* (1915), 21 D.L.R. 375, at p. 377 (N.S.C.A.); *Inglewood Pulp & Paper Co.* v. *New Brunswick Electric Power Commission*, [1927] 3 D.L.R. 967, at p. 980 (N.B.C.A.).

[48] [1928] 4 D.L.R. 82 (P.C.).

[49] *Re Nanaimo-Duncan Utilities*, [1950] 3 D.L.R. 461, at p. 486; and *Re West Canadian Hydro*, [1950] 3 D.L.R 321, at p. 437. See also *Armstrong* v. *New Westminster Harbour Board*, [1929] 2 D.L.R. 150, at p. 153.

[50] 1 Geo. VI, c. 93. Applied in *Belanger* v. *Leduc* (1939), 67 K.B. 371; *Carignan* v. *Limoges* (1939), 77 S.C. 29; *Rigaud* v. *Fletcher* (1939), 45 R.J. 456; *Leduc* v. *Michaud* (1940), 78 S.C. 66; *Côté* v. *Montreal*, K.B.M. No. 2670, a judgment of the Court of Appeal, dated November 21st, 1946, reported in summary only at [1946] K.B. 811.

[51] 8 Geo. VI, c. 22, ss. 5, 11 and 15. See also the statute expropriating the Montreal Tramways Company, 14 Geo. VI, 1950, c. 79, s. 37.

judgments of Quebec courts[52] granting or approving an allowance for forcible taking on varying grounds, which included general inconvenience, damages, forcible dispossession, general expenses to which the owner had been put, including the costs of preparing his case, and long accepted practice.

In *Pointe aux Trembles* v. *Archambault*,[53] the president of the Public Service Board, applying the law as it stood after the repeal of the Expropriation Act of 1937, said:

> Les auteurs et une jurisprudence constante de nos tribunaux civils et de la Commission des Services Publics ont consacré la coutume, d'ajouter à la valeur intrinsèque de l'immeuble un 10% pour indemniser le propriétaire, en cas de dépossession forcée. La Régie est d'avis qu'il y a lieu de suivre cette coutume. . . .

In 1948 the granting of ten per cent for forcible taking was approved by all five judges of the Quebec Court of Appeal who sat in *Robitaille* v. *Cité de Québec*,[54] although two dissented on other grounds, and again in 1953[55] the Court of Appeal unanimously maintained an appeal because *inter alia* no allowance had been made for forcible taking. In the province of Quebec the ten per cent is usually applied, not merely to the value of the land, but to the entire compensation, including injurious affection and other indirect damage.[56]

VI

If the *Lavoie* case is the last word from the Supreme Court of Canada (and it is hoped that it is not), the allowance for compulsory purchase will be made only if it is difficult accurately to assess the compensation and if there are "des éventualités inappréciables et incertaines impossibles à évaluer au moment du procès". Consequently it will be made in very few cases. In *Stuart* v. *Bank of*

[52] *Gatineau Power Co.* v. *Selwyn* (1928), 45 K.B. 290; *Gatineau Power Co.* v. *Fleming* (1928), 45 K.B. 438; *Dutrisac* v. *Perron* (1929), 46 K.B. 317, at p. 324; Montpetit et Taillefer, Droit Civil, Vol. 3, p. 127. See also: *MacLaren Co.* v. *Lauzon* (1934), 56 K.B. 515.

[53] (1941), 47 R.J. 187, at p. 195.

[54] [1948] K.B. 787. See also: *Attorney General of Province of Quebec* v. *Denis*, K.B.M. No. 2067, an unreported judgment of the Court of Appeal, dated November 27th, 1942; *Côté* v. *Montreal*, *supra*; *Amusement Realty Co.* v. *Minister of Roads*, K.B.M. No. 2296, a judgment of the Court of Appeal, dated June 23rd, 1949, reported in summary only at [1949] K.B. 562.

[55] *Isabelle* v. *Attorney General of the Province of Quebec*, [1953] Q.B. 747; *Three Rivers* v. *Takefman*, K.B.Q. 4499, a judgment of the Court of Appeal dated February 13th, 1933, reported in summary only at [1953] Q.B. 240.

[56] *Gatineau Power Co.* v. *Selwyn* (1928), 45 K.B. 290; *Isabelle* v. *Attorney General of the Province of Quebec*, [1953] Q.B. 747. Contra: Cannon J. in *Gatineau Power Co.* v. *Fleming* (1928), 45 K.B. 438, at p. 442.

Montreal,[57] the Supreme Court said it was bound by its own previous decisions except (to use the words of Duff J.) "in very exceptional circumstances". The decision in the *Lavoie* case would grant the allowance only in cases where it is difficult to assess the compensation; in the *Hunting* case the majority of the court were in favour of awarding the allowance in all ordinary cases and of refusing it only if there were some particular reason. In the *Lavoie* case no mention is made of the earlier judgment, so that the court has in effect overruled the earlier judgment without referring to it expressly.

The criterion laid down in the *Lavoie* case is vague and difficult of application and no guidance is given on what eventualities or uncertainties are sufficient to justify the allowance. While it appears that the allowance will be made in very few cases, it will be extremely difficult for lawyers to advise their clients whether or not to claim it. It will be equally difficult for judges to determine whether, in any given case, the task of evaluating the indemnity (always far from easy) is of sufficient complexity to justify granting the allowance.

At the present time, an owner of land, expropriated by the federal government, would probably not receive from the Exchequer Court or Supreme Court compensation for forcible taking, whereas if the same property were taken by a provincial government he would likely be awarded ten per cent by a provincial court.

The arguments advanced by opponents of the allowance are not convincing. I do not think the fact that the allowance was abolished by statute in England in 1919 in cases of expropriation by the central government or local or public authorities is any reason why Canada should do likewise. The owner is entitled to full compensation from the government as from any one else. Moreover, I am unable to see that the allowance is an unwarranted bonus. Even when compensation has been calculated and awarded for property taken and for incidental damage, comprising such items as injurious affection, it must not be forgotten that the owner is in most cases extremely unwilling to part with his property and is entitled to be indemnified for the fact that it has been taken against his will. Then it is well known that the costs awarded a successful plaintiff never compensate him fully for the out-of-pocket costs of the litigation; and certainly never compensate him in any degree for the loss of his own time in preparing for and attending at the trial. Again, it is difficult enough to assess damages

[57] (1909), 41 S.C.R. 516, at p. 535.

for the taking of lands and buildings, but infinitely more difficult to estimate indirect damage, such as injurious affection. The owner is entitled to full compensation, and full compensation is more likely to have been achieved if the allowance is made.

Finally, the allowance for compulsory taking has been granted in the majority of expropriation cases under both federal and provincial statutes since 1904 and the practice was based on an earlier practice in England, which originated more than a century ago. This is sufficient authority and no express statutory sanction is required. The provisions of the federal Expropriation Act are broad and vague enough to cover such an allowance, particularly in view of subsection (f) of section 2, which defines "land" as including all

> . . . lands and all real property . . . , and all real rights, easements, servitudes and *damages*, and all other things done in pursuance of this Act for which compensation is to be paid by His Majesty under this Act.

The same thing may be said of the expropriation statutes of the provinces of Ontario and Quebec.

It is my submission that the general rule should be that the expropriated party is entitled to, and should be awarded as compensation for compulsory taking, ten per cent of the total amount awarded for land and incidental damage, unless there are some special reasons for not granting it, or for granting less than ten per cent,[58] such as the fact that the property has not been occupied or used for a long time, or that a revenue producing property has yielded no revenues for some time before the expropriation.

Natural Law

The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified human conduct—at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law. (Oliver Wendell Holmes, Natural Law, from *Collected Legal Papers*)

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[58] Fitzpatrick C.J. in *Hunting* v. *The King* (1917), 32 D.L.R. 331; Estey J. in *Diggon-Hibben* v. *The King*, [1949] S.C.R. 712, at p. 719; *Re West Canadian Hydro*, [1950] 3 D.L.R. 321, at p. 435.