

BETWEEN

1921
December 3.

THE KING, ON THE INFORMATION OF }
THE ATTORNEY-GENERAL FOR THE } PLAINTIFF;
DOMINION OF CANADA..... }

AND

THOMAS P. KELLY, AND OTHERS.. DEFENDANTS.

Expropriation—Harbour improvements—Previous expropriation—Undertaking to grant easement in mitigation of damages—Undertaking unfulfilled—Subsequent expropriation by the Crown—Assessment of damages in view of undertaking giving an enhanced value to the lands.

A portion of the defendants' lands had been previously expropriated for the improvement of navigation in the harbour of Fort William, Ont. On the trial of the issue of compensation an undertaking was filed by the Crown that the defendants were at liberty whenever they so desired to construct upon such portion of the land expropriated "wharves, docks or piers extending out to and abutting upon the harbour line . . . subject to compliance with the provisions of the Navigable Waters Protection Act, R.S.C. 1906, c. 115." The Crown further agreed to execute any conveyance or assurance of the right or easement forming the subject of the undertaking as might become necessary to give effect to the purpose of the undertaking. Instead of fulfilling the undertaking the Crown subsequently expropriated the lands of the defendants beneficially affected by such right or easement.

Held: That in assessing the compensation for the subsequent expropriation the Court must have regard not only to all the elements of value inherent in the lands themselves at the time of such expropriation, but also to the value to the owner of the easement in question.

INFORMATION exhibited by the Attorney-General of Canada to have the compensation for property expropriated fixed by the Court.

10th and 11th of November, 1921.

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Case now heard before the Honourable Mr. Justice Audette, at Fort William.

W. A. Dowler, K.C., for plaintiff.

F. R. Morris for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 3rd December, 1921) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to some of the defendants herein were, under the provisions of the Expropriation Act, taken and expropriated for the purposes of a public work of Canada, namely, the improvement and enlargement of the harbour at Fort William, in the Province of Ontario, by depositing, on the 13th December, 1919, a plan and description of the said lands with the local master of Titles, at the said city of Fort William, in which district the same are situate.

The area of the piece or parcel of land expropriated by the present proceedings is (4.964) four acres and nine hundred and sixty four thousandths of an acre, being the balance of, in round figures, a piece of land of ten acres,—out of which (2.83) two acres and eighty-three hundredths of an acre were expropriated in 1906 and (2.79) two acres and seventy-nine hundredths of an acre were taken under a second expropriation in May, 1909. (See *The King v. Bradburn*) (1).

By this present third expropriation, the balance of the property is taken by the Crown for, among other purposes, enlarging the turning basin at the junction of the Mission and Kaministiquia rivers and materially

(1) [1913] 14 Ex. C.R. 419, at pp. 448, 426, 427, 428, 438 and 440.

improving navigation at this dangerous place, thereby answering the requirements imposed upon it in the public interest. I have had the advantage, accompanied by counsel for both parties, of viewing the *locus in quo* and realized the advisability and necessity of the present expropriation in the interest of navigation in these waters.

For the lands taken by the present proceedings (3rd expropriation) the Crown offers, by this information, the sum of \$4,248.29—an amount somewhat lower than \$1,000 an acre.

The owners of the lands, the defendants Thomas P. Kelly, John J. Flanagan, Young & Lillie, Limited, Arzelie Rochon, and Esther A. Flanagan, by their statement in defence, claim the sum of \$35,000.00.

The Toronto General Trusts Corporation were not represented at trial, but by their statement in defence, state they are judgment creditors, and submit their rights to the Court asking that the compensation moneys be applied to satisfy their claim. The other defendants, be they mortgagees, or judgment creditors as stated at bar, although duly served with the information did neither file any statement in defence nor appear at trial. However, the compensation moneys will be made payable to the proprietors, free from all incumbrances.

The whole property, composed of about ten acres, was purchased in 1906, by some of the present defendants, for the sum of \$14,250.00, including the right to the compensation for the piece of land taken by the first expropriation. The property was bought for speculative purpose, and it had from the outset the inherent defect that its very site would work against it, because it would be required as part of the general scheme for the improvement of navigation and in

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fostering the development of industrial sites. However, the owners are entitled to the market value of this property, at the date of the expropriation, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities or value it may obtain within a reasonably near future.

In the case of *The King v. Kelly* (1) (see also the case of *The King v. Bradburn* (2)), wherein the question of compensation in the two previous expropriations in respect of the two parcels of land taken from these ten acres above referred to, the Crown filed the following undertakings which were embodied in the judgment of the Court, bearing date the 29th August, 1913, affirmed on appeal to the Supreme Court of Canada on the 2nd May, 1916, viz.:—

“The Attorney-General on behalf of His Majesty, being thereunto duly authorized by Order in Council of the first day of July, 1913, undertakes and consents that the defendant and his successors in title may, without further assurance or consent on behalf of His Majesty, construct, maintain and use upon such portions of the lands expropriated and described in the information herein as lie between the expropriation line and the harbour line such wharves, docks, or piers extending out to and abutting upon the harbour line, as they may desire to construct, subject, however, to compliance with the provisions of the Navigable Waters Protection Act, R.S.C. 1906, Chapter 115, and any Acts passed or to be passed in amendment or in substitution thereof, or in addition thereto, and that His Majesty will, as may be reasonably required, execute such further conveyance or assurance, if any, as may be necessary,

(1) [1913] 14 Ex. C.R. 448

(2) [1913] 14 Ex. C.R. 419, at pp. 426, 427, 428, 438 & 440.

in order to give full effect to this consent or undertaking and in the event of the above permission as to said use of such portions of the lands expropriated as lie between the expropriation line and the harbour line so fixed as aforesaid, being revoked by Parliament or otherwise, or rendered nugatory by future expropriations, the owner of any structures erected upon the same shall be entitled to compensation for such structures, to be determined as usual in expropriation cases."

"The Attorney-General, on behalf of His Majesty being thereunto duly authorized by Order in Council of the first day of July, 1913, hereby undertakes that the lands expropriated and described in the information herein if not already dredged as hereinafter mentioned will be dredged to the harbour line as soon as the work can reasonably be done in connection with the scheme of harbour improvement proposed to be carried out by the Government save and except the natural slope required to protect and safeguard the bank of the channel and unexpropriated property from erosion; and that in the event of docks or other structures being built out to the harbour line the channel will be forthwith dredged clear to such docks or other structures so as to enable vessels to approach to and lie along the same, the whole subject to the Navigable Waters Protection Act."

Great stress has been laid upon these undertakings in the reasons for judgment in the above mentioned case (*The King v. Kelly* (1)) wherein the learned judge says: "...in my opinion the effect of the work in question, coupled with the undertaking of the Crown, is to enhance enormously the remainder of the land....." and the judgment gave effect to the

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same in the adjustment of the amount of the compensation therein allowed, a set off was allowed in view of the same both under sec. 30 of the Expropriation Act and sec. 50 of the Exchequer Court Act.

Dealing first with the compensation which should be allowed for the (4.964) four acres and nine hundred and sixty-four thousandths of an acre upon which issue the proprietors have adduced evidence placing upon the piece of land a very high valuation, bearing in mind that they were getting the right to build docks and trackage. Witness Lillie puts it in this language "figuring getting the right to build docks and tracks." And witness Paterson "cannot see any reason for refusing right to build dock, on account of maritime interests, my valuation is with clear right to build dock." Witness Duncan says: "My value is based on my right to have the docks and in anticipating no difficulty in getting tracking right."

Witness Lillie testified that they had had an opening enquiry for the purchase of their land, but that it fell through because they had not succeeded in getting from the Crown the leave to build docks under the provisions of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, and the several acts amending the same in 1909, 1910, and 1918. (See also examination on discovery upon this question.)

The proprietors of this land—as appears by exhibit C—applied to the Crown, under the statute, for leave to build docks on the said property and the Crown never acquiesced in such petition or demand.

The defendants had no legal right or franchise to build such wharves or docks and nothing but a legal right can form or be the subject of an element of

compensation. See upon this question *Raymond v. The King* (1); *The King v. Bradburn* (2); *Gillespie v. The King* (3)—all three cases confirmed on appeal to the Supreme Court of Canada; *The Central Pacific Railway Co. v. Pearson* (4); *Corrie v. MacDermott* (5); *Benton v. Brookline* (6); *May v. Boston* (7); *Lynch v. City of Glasgow* (8); *Cunard v. The King* (9); *Wood v. Esson* (10).

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Therefore, the valuation by the defendants' witnesses at figures ranging from \$50 to \$70 a foot frontage for 807 feet on the Kaministiquia bears on its face an apparent fallacy and being adduced upon a wrong basis, a wrong principle, leaves the Court without any help therefrom. The numerous sales referred to at trial always covered the right to erect docks and piers.

The Crown, on the other hand, rests upon the price paid for the Hamilton property, a sale much commented upon. But here again it is obvious that this sale was made under such special circumstances that it makes it impossible to use it as a criterion of the market value of property in that neighbourhood at the time. Dr. Hamilton when disposing of his properties was very ill and was seeking to sell at his price with the view of liquidating and settling his estate before his death, which, according to the statement of counsel at bar, happened shortly afterwards. Furthermore, that sale was made in 1917, before the termination of the war.

- (1) [1916] 16 Ex. C.R. 1 at p. 15; (5) [1914] A.C. 1056, at 1065.
29 D.L.R. 574; affirmed 49 (6) [1890] 151 Mass. 250.
D.L.R. 689. (7) [1893] 158 Mass. 21.
(2) [1913] 14 Ex.C.R. 419, at p. 437. (8) [1903] 5 Ct. of Sess. Cas. 1174.
(3) [1909] 12 Ex. C.R. 406. (9) [1910] 43 S.C.R. 88.
(4) [1868] 35 Cal. 247. (10) [1883] 9 S.C.R. 239.

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In the result that would leave the Court with very little help or evidence upon the question of value, but for the statements of two of the proprietors when examined on discovery. Indeed both defendants Lillie and Kelly testified on discovery, which was filed at trial, that this property, without the right to build docks, was worth in 1919 about \$2,000 an acre. I will accept their figure for the value of the solum for the land actually taken—which had become improved industrial lands as a result of the government works on the river and the construction of the bridge between the main land and the island—namely (4.964) four acres and nine hundred and sixty-four thousandths of an acre at \$2,000 an acre, \$9,928.00.

However, there is more in the present case. To the land so taken was attached a most valuable easement resulting from the above undertakings, in favour of the owners of the land so taken. Indeed, the owners of the land expropriated herein, had the “right to construct, maintain, and use—upon the lands adjoining and taken by the two previous expropriations, as lie between the expropriation line and the harbour line . . . such wharves, docks or piers extending out to and abutting upon the harbour line, as they may desire to construct, subject, however, to compliance with the provisions of the Navigable Waters Protection Act.”

In other words, while they were not *eo nomine* proprietors of the lands expropriated in 1906 and 1909, they had—under the undertakings, the right to build piers upon the same, as if they had been owners thereof—subject however—alike the balance of the land left to them and expropriated by the present proceedings—to obtaining, as a condition precedent the right to do so under the Navigable Waters Pro-

tection Act. These undertakings, thus creating an easement, are a charge on the land formerly expropriated for the benefit of the lands taken by the present expropriation. The rights resulting from such undertakings including the dredging mentioned in the second paragraph thereof are most valuable rights and were considered so in the case in which the undertakings were given and deduction and set off were made and allowed in fixing the compensation to be paid therein.

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As a result of these undertakings, the Crown has on the one hand granted valuable rights to the proprietors upon the lands so taken in the former cases and on the other hand, by the present expropriation the Crown has taken them away.

I have come to the conclusion to place upon this easement, resulting from the undertaking, the value of \$1,000 an acre for the rights the defendants had and still retained upon the lands taken by the previous expropriations.

That is to say for the (2·83) two acres and eighty three hundredths of an acre and (2·79) two acres and seventy nine hundredths of an acre above referred to, making a total of (5·62) five acres and sixty-two hundredths of an acre—I will allow \$1,000 an acre, namely, \$5,620.00.

The total compensation will then be: for
 the land or solum taken by the
 present proceedings.....\$ 9,928.00
 and for the so called easement..... 5,620.00
 making the total sum of.....\$15,548.00

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Therefore, there will be judgment, as follows, viz.:—

1°. The lands and the easement attached thereto expropriated herein are declared vested in the Crown from the date of the expropriation, namely, the 13th December, 1919.

2°. The compensation for the said lands and easement expropriated herein is hereby fixed at the total sum of \$15,548.00 with interest thereon at the rate of 5 per cent from the 13th December, 1919, to the date hereof. The whole in full satisfaction for the land and easement so taken and for all damages whatsoever resulting from the said expropriation.

3°. The defendants-proprietors of the said lands, upon giving and delivering to the Crown, a good and valid title free from all incumbrances and sufficient release or releases of all claims, liens, charges, mortgages, or incumbrances of any kind or nature whatsoever which existed upon the said lands at the date of the expropriation herein—are entitled to recover from the plaintiff the said sum of \$15,548.00 with interest thereon, as above mentioned. Failing the said proprietors to discharge the said incumbrances, the compensation moneys will be used to satisfy the same, and the balance, if any, will be so paid to the said defendants-proprietors.

4°. The defendants are further entitled to the costs of the action.

Judgment accordingly.

W. A. Dowler, K.C., solicitor for plaintiff.

Morris & Babe, solicitors for the owners.

Payne & Bissett, solicitors for General Trusts Corporation.