

HIS MAJESTY THE KING, UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

1917
Nov. 20.

PLAINTIFF;

AND

ELIZA TORRENS AND ROBERT T. BAIRD,

DEFENDANTS.

Expropriation—Compensation—Building lots—Loss of Access—Costs.

In an expropriation of building lots by the Crown in the city of Fredericton, N.B., for railway purposes, the owner was held not entitled to special damages for the depreciation in value to the remainder of the land as factory sites because of their being cut off from the proposed extension of a public street. As factory sites the losses, if any, were offset by the advantages.

(2) Notwithstanding the recovery of more than the amount tendered, a party having failed to establish his main claim cannot be allowed full costs of the action.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Sir Walter Cassels at Fredericton, N. B., October 1, 2, 1917.

Hanson, K.C., for plaintiff; *A. J. Gregory*, K.C., for defendant.

CASSELS, J. (November 20, 1917) delivered judgment.

An information exhibited by His Majesty upon the Information of the Attorney-General of

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Canada, to have it declared that certain lands the property of the defendant, Eliza Torrens, required for the line of the Intercolonial Railway, are vested in the Crown, and to have the compensation money payable in respect of the lands expropriated ascertained.

Fredericton is a city containing a population of between seven and eight thousand people. While beautifully situate, it is a city which, according to the evidence, has not advanced in growth for a number of years past. There are a few large manufactories located there.

It is quite clear from the evidence that the building of factories at Fredericton is not active. The factories are few and far between, and real estate does not command large values.

Somewhere about 20 years ago, probably a longer period, Mrs. Torrens had a plan prepared by Mr. Beckwith, a civil engineer, who died several years ago. This plan is marked Exhibit "A" in the suit. The plan was never registered. It is in point of fact inaccurate, as I will point out later; but a glance at this plan will indicate the contentions on the part of Mrs. Torrens.

York Street is a street that runs up from King Street on the south passing the lands of Mrs. Torrens, and leads to the Station of the Canadian Pacific Railway in Fredericton. Aberdeen Street was opened in the year 1898. It was opened on the north-westerly side of York Street, extending to York Street, but not extended beyond York Street.

On the plan to which I have referred, Mrs. Torrens divided her property into 3 lots fronting on York Street. Each of these lots contained a front-

age of 53 feet, and extended southerly about 150 feet. She also laid out 5 other lots, Numbers 4, 5, and 6; also 7 and 8. These two latter lots are not shown on Beckwith's plan. In addition to the 8 lots which she owned according to the plan, there was reserved 50 feet on York Street for the extension of Aberdeen Street. In point of fact she had not the 50 feet to reserve. From Mr. McKnight's evidence, the engineer, she had only 35.2 feet.

The railway has expropriated a portion of this so-called reserve for the extension of Aberdeen Street, but have not taken all the land belonging to Mrs. Torrens so reserved. They have expropriated 14,533 square feet, which have a frontage of 33 feet on York Street and running back southerly a distance of 410 feet.

No portion of the lots Numbers 1 to 8 inclusive has been taken by the railway. There is still a strip of land a portion of the so-called reserve between the southern boundary of lot 3 and the lands expropriated by the railway. The measurements in regard to this strip differ. On York Street there are several feet, but as the expropriated piece goes south-easterly it narrows down and is not so wide at the rear of lot 3, as at the front on York Street. I will refer to this more in detail later on.

At present I am endeavouring to explain the situation in order to understand the claim made by the defendant. I may mention that Mrs. Torrens never intended to dedicate the portion reserved by her for the proposed extension of Aberdeen Street. She apparently contemplated that the city would extend Aberdeen Street from York Street south-easterly as far as Regent Street; and her idea was

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that the city would have to expropriate this reserve and pay her compensation for the land so taken for the extension of Aberdeen Street. The city has never done so and Aberdeen Street has never been extended beyond York Street.

The defendant, as set out in her answer, states that the land so taken, referring to that portion of the proposed extension of Aberdeen Street (to which I have referred) formed part of a larger tract of land fronting 209 feet, more or less, on York Street, and preserving the width throughout. The said larger tract of land, owned by the said Eliza Torrens, had been sub-divided prior to the taking of the said land for railway purposes, into 8 building lots, and in the said sub-division provision was made for a portion of the land required for the extension of Aberdeen Street. She alleges that 3 of the said building lots, Numbers 1, 2 and 3, front on York Street, each with a width on York Street, of 53 feet, and a depth of 150 feet, and the remaining land fronting on York Street 50 feet, and running back preserving the same width for a distance of 405 feet, was set apart or laid out as a portion of the land required for the extension of Aberdeen Street, the same being in prolongation south-easterly of said Aberdeen Street, and it was the intention of the City of Fredericton to extend the said Aberdeen Street taking in the said strip of land in prolongation of said Aberdeen Street. Five of the said building lots, namely, Numbers 4, 5, 6, 7 and 8, front on the said proposed extension or prolongation south-easterly of Aberdeen Street.

She proceeds to allege that the said lot 3 is bounded south-westerly by the said proposed prolongation

or extension of Aberdeen Street as laid out a distance of 150 feet.

The defendant then states that upon the taking and using of the said land for railway purposes, it became impossible to extend the said Aberdeen Street as was intended, and the said lots 4, 5, 6, 7 and 8 are forever cut off from access to any public street, and have become useless for building lots.

She claims the sum of \$6,160. Of this amount she claims for the value of the land actually taken \$1,500. She sets up a claim of \$500 for the depreciation in value of lot No. 3; \$300 for depreciation in value of lot No. 2; \$300 for depreciation in value of lot No. 1; and \$3,000 for the depreciation in value of lots 4, 5, 6, 7 and 8.

I have had the opportunity of viewing the premises in question with the counsel for the various parties, and I am of opinion that the claim made for the value of the land taken is excessive. I am also of the opinion that any claim for depreciation of the various lots 3, 2 and 1, 4, 5, 6, 7 and 8, has not been sustained by the evidence in the case.

I think there can be no question but that the future of these lots, 4, 5, 6, 7 and 8, can only be for factory purposes, if in point of fact they can be sold to any person desiring to erect factories upon this particular property. Moreover, as I will point out more in detail, Mrs. Torrens must have held the same view, as these rear lots, 4, 5, 6, 7 and 8, had been leased by her for a period of years, ending in the year 1928, for use as coal and wood yards, to be held and used in conjunction with the land held by Mr. Baird fronting on York Street. I will have to deal with the evidence more in detail, but I desire

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to point out that the lease of lot 3, and the leases of the rear lots 4, 5, 6, 7 and 8, all expire about the same time, namely, 1928; and that Mrs. Torrens is now receiving a cash payment for that portion of the so-called reserve for Aberdeen Street expropriated. The balance of the so-called reserve, the property of Mrs. Torrens, has since the expropriation been leased to Mr. Baird for a period of 14 years from the 22nd November, 1914. Mr. Baird has obtained access to these rear lots by means of a lane from York Street. The various leases are renewable on terms set out in these instruments. These rear lots, from 4 to 8 inclusive, as I have stated, can only be of use for factory purposes,—and the construction of the Intercolonial Railway on the land in question has enabled the lessee of these rear lots, 4 to 8 inclusive, to obtain trackage accommodation, a matter of considerable value to the lots; and if there were any damage occasioned by the expropriation of this so-called reserve to the lots, it is more than compensated by the additional value given by reason of the railway facilities.

The evidence of Mr. Mitchell, the Mayor of Fredericton, impressed me as having the greatest weight in regard to the value of the lots taken. He places the area of the land taken at 14,533 square feet. Of this land taken he puts a value on the part fronting on York Street, and running back a distance of 150 feet, of ten cents a square foot. The square feet of this particular piece are 5,700. For the balance in the rear, amounting to 8,753 square feet, he places a value of 5 cents a square foot, amounting to \$437.50, or in all \$1,007.50. And in my opinion if she receives this amount, together with ten per cent. for

compulsory taking and interest to the date of judgment, she will be well compensated.

Mr. J. Fraser Winslow is the main witness called on behalf of Mrs. Torrens, and there are certain pieces of his evidence which are important. He gives an account of his experience in handling real estate in Fredericton. He is asked the following question:

“Q. Now, from your experience of the selling values, and what you find purchasers are willing to pay or that you can command for land in that vicinity, etc., what would you value the land that is actually taken per foot?”

He states:

“A. To sell that land to a third party and not use it for a street, you could not put a price on it exactly, because it has such an effect on the other part of the property.

“As I understand Mrs. Torrens’ situation, it is this: The city, or she thought the city at all events, was compelled to come to her to open up that street, and she was in a position where she could make them pay a reasonable price for the street and at the same time get the benefits of the opening of the street. For the purposes of selling it for a street, I would think if she got seven and one-half cents per foot she would be well paid for it.”

He is asked:

“Q. Suppose Aberdeen Street was extended through the Torrens property, how far would it go?”

“A. To Regent Street; about two blocks, or 1,200 feet, from York to Regent Street.

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This distance from York to Regent Street, according to Mr. Winslow, is about 1,200 or 1,300 feet, of which Mrs. Torrens owns 500 feet. I think this is slightly inaccurate.

Then he is asked:

“Q. It would not pay the city to open up the street just as far as Mrs. Torrens’ property?”

“A. Not at all.

“Q. To make her lots become in any way valuable, it would require the city to extend Aberdeen Street right through to Regent Street?”

“A. Yes, Sir.”

I asked him this question:

“Q. As far as she is concerned, it might pay her to dedicate it as a street, to utilize her other lots?”

“A. There would be no object in opening that unless they were going to open up the rest of the land.”

It is quite apparent from Mr. Winslow’s view that Mrs. Torrens would gain nothing by simply dedicating that portion of the proposed extension of Aberdeen Street for her own lots, in order to enhance the value of these lots from 4 to 8 inclusive, and I agree with his view. Because, as I have stated, in addition to her getting compensation for that portion of the reserve, and these rear lots being only capable of being used for factory or other purposes, she can always give the requisite amount of land off lot 3 taken in connection with what is left of the proposed reserve for Aberdeen Street.

He is asked:

“Q. What is to prevent you taking a piece off the rear of these lots?”

“A. That is under lease; we cannot do that. We will have to take a portion off lot 3, to get in to the rear.”

He is asked:

“Q. You say they will have to do that; you are not professing that there is any legal right on Mrs. Torrens’ part to do that?”

“A. No. She owns the freehold, and she would have to get the consent of the leaseholders.

“Q. What is the occupation, so far as you know of the rear portion of Mrs. Torrens’ property, the portion which is sub-divided into lots 4, 5, 6, 7 and 8?”

“A. A wood-yard and coal sheds.

“Q. Occupied by whom?”

“A. By Mr. Robert T. Baird.”

He is asked:

“Q. I ask you this question: what in your opinion within the space of a few years would these lots 4, 5, 6, 7 and 8 be saleable at or about \$800 each? A. I think so.”

In cross-examination he is asked this question:

“Q. All your calculations are based on the hypothesis that a street goes through there, are they not? A. Yes.

“Q. As a matter of fact, you know there never was any such street there, except on that paper?”

“A. There never was.”

When Mr. Winslow places a value of \$800 on these lots, it is really valuing them at ten cents per square foot,—and the valuation is based on track-age or a street.

He is asked:

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“Q. But you do know as a matter of fact that
“he (Mr. Baird) has now a private siding from
“the I. C. R.? A. Yes.

“Q. And that is an advantage to the prop-
“erty, supposing he did not have it before, is it
“not?

“A. Yes, it is an advantage.

“Q. A very decided advantage? A. It would be
“absolutely useless to him without it.”

“*Mr. Gregory*—Useless to Mr. Baird?

“A. Useless to Mr. Baird.

“*Mr. Gregory*—That is what gives it its pres-
“ent value.

“*Mr. Hanson*—Having access to a siding on
“this railway? A. Yes.

“Q. That gives it its present value? A. Yes.

“Q. So that your value of 10 cents per square
“foot for the rear of those lots is based on the
“idea of having railway communication?

“A. Altogether. Without the railway the lots
“would be worth nothing, they might as well be
“in the Sahara Desert. But now they are worth
“something.”

The leases in question are produced. One is dat-
ed April 25th, 1907; another, May 9th, 1910; and
they run, as I have pointed out, for a long period.
Mr. Baird by sub-lease assented to by Mrs. Torrens
is the lessee, and I have called attention to the fact
that these leases if not renewed will expire in 1928,
and at that time if the leases are not renewed Mrs.
Torrens can deal with the property in any manner
in which she thinks best.

Mr. Mitchell's evidence explains the position of matters. He is asked in regard to the value of the railway trackage: He states:

"I think it is increased in value even if there is no access from York Street, for warehouse purposes."

He goes on to point out:

"These lots (referring to the lots from 4 to 8) were leased by Mr. Baird from the Torrens' estate, also lot 3 on York Street. He controlled the lots on the rear and on York Street at the time the expropriation was made, and he still occupies the back lots and is provided access to them."

Mr. Hooper points out that the lots in question are dedicated for factory purposes. He states that for residential purposes it will be of very small value. He is asked:

"Q. Wouldn't the proper way of dealing with this land be, to start with some eight feet on what is the proposed street still left below that lot which was sold?"

"A. Yes.

"Q. Wouldn't the best way of utilizing that property be, to take the fourteen feet, utilizing what is left of the proposed roadway, and run it into the property at the rear?"

"A. Yes.

"Q. By utilizing that wouldn't that make the property in the rear more valuable?"

"A. I think so.

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“Q. You would get what you would lose, in
“making the lane offset by the additional track-
“age?”

“A. Yes.

And as I have pointed out, in addition to that, she gets the immediate cash sale for that portion of her land reserved for the proposed extension of Aberdeen Street expropriated.

I think she is fully compensated if she receives the amount of \$1,007.50 with ten per cent. added and interest to the date of judgment.

I do not think the tender a proper tender. If Mr. Baird has any interest there should have been a separate tender. It is stated by counsel that he makes no claim.

Before any amount is paid to Mrs. Torrens a consent should be filed on behalf of Mr. Baird.

In dealing with the question of costs, it is to be observed that a very considerable portion, if not the greater part of the evidence, is based on the claim put forward in regard to Aberdeen Street, and the injury or loss to Mrs. Torrens by reason of the depreciation of these various lots from 1 to 8, and on the best consideration I can give to the case, and for the reasons stated, I have come to a conclusion adverse to the claim of Mrs. Torrens.

In view of this I think Mrs. Torrens ought not to be allowed the full costs of the action, although she recovers something more than the amount of the compensation tendered. She certainly would not be entitled to the costs of the trial so far as they were enhanced by the abortive attempt to establish damages arising from the fact that the expropria-

tion prevents any extension of Aberdeen Street. If the costs were taxed there would have to be a set-off between the items relating to the issues upon which each party succeeded. I think that the sum of \$50 will fairly represent the difference that Mrs. Torrens would be entitled to if such a set-off were made.

There will be judgment in favour of Mrs. Torrens for \$1,007.50 with the usual 10 per cent. added thereto, together with interest at the rate of 5 per cent. per annum from the date of the expropriation. She will also have costs fixed at the sum of \$50. There will be no costs to the plaintiff.

Judgment accordingly.

Solicitors for plaintiff: *Slipp & Hanson.*

Solicitors for defendant: *Gregory & Winslow.*

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