THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF.

1917
Feb. 7

AND

WILLIAM KYLE FARLINGER, ISABELLA KYLE FARLINGER, AND JOHN CLINTON CASSELMAN, EXECUTORS AND PERSONAL REPRESENTATIVES OF THE LATE ISABELLA F. FARLINGER, DECEASED.....DEFENDANTS.

Expropriation—Compensation—Canal—Riparian rights—View—Water.

Upon an expropriation of land by the Crown for the enlargement of a canal, compensation will not be allowed for an obstruction of view to property fronting thereon, by earth left piled up in the course of construction, not necessarily incidental to the expropriation ,nor for the loss of the use of the canal for watering purposes, to which there are no riparian rights as such in the ordinary sense.

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

Tried before the Honourable Mr. Justice Cassels, at Ottawa, September 15, 16, 1916.

I. Hilliard, K.C., and *E. E. Fairweather*, for plaintiff; *J. A. Hutcheson*, K.C., and *R. F. Lyle*, for defendants.

CASSELS, J. (February 7, 1917) delivered judgment.

An information exhibited on behalf of His Majesty to have it declared that certain lands expropriated for the enlargement and straightening of the Rapide Plat Canal are vested in His Majesty, and to have the compensation payable therefor ascertained.

The expropriation plan was filed on December 7, 1911. The lands expropriated comprise 6·362 acres. The Crown offers as full compensation the sum of $1,673.60. The defendant by her defence claims the sum of $8,016.50.

The action came on for trial on September 15, 1916. Counsel were to send in written arguments. Subsequently, the defendant Isabella F. Farlinger died, and the suit has

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been revived by making the executors and trustees of the estate of Isabella F. Farlinger, defendants.

There are certain legal propositions which may be of importance in arriving at the amount of compensation to which the defendants are entitled.

Exhibit No. 1 shows the lands in question. There is a large block of land comprised within the parcel marked in red, which embraces 5·759 acres. The small parcel immediately east, surrounded by green, marked Isabella Farlinger, is stated as containing ·039 acres, and the small portion on the north of what is called the public highway is marked on the plan Isabella Farlinger, as containing 0·213 acres.

The canal in question was constructed a great many years back, and was subsequently enlarged, the contract work for such enlargement being executed by Poupore and Fraser, as contractors, referred to in the evidence

A further enlargement of the canal is proposed, and for the purposes of such further enlargement the present expropriation plan was filed in 1911. The situation of the property is as shown on the map. The canal is south of the highway. The defendants have a large farm situated to the north of this highway, and a residence situate a considerable distance from the north side of such highway.

The claims amounting to $8,016, are set out in the defence. Two of these claims are for damage for loss of water and water front $2,000, and damage for interfering with the view of the river, $1,000.

Stress is laid upon the damage to the defendants by reason of the obstruction of the view from the house, and also by reason of the right to watering the cattle in the old canal being taken away. In my judgment neither of these claims can be entertained.

First with regard to the view. One reason, in my judgment, why the claim should not be entertained is that I do not think the view has been materially interfered with. One witness refers to the fact that seated outside of the house they are unable to see the hull of any vessels which pass up the canal.

Now, in point of fact, Mr. Sargeant points out that prior to the present expropriation the surface of the water in the

canal was about 20 feet below the top of the bank. When the second enlargement of the canal was proposed, the Crown obtained from Mrs. Farlinger a conveyance of a certain portion of the lands, the consideration money being $5,200. In that conveyance the following appears : "The "above sum includes payment for all lands composed of "three and three-quarter acres off the front of the west, "three -fourths of Lot No. 4, and the east quarter of lot No. "5, both in the first concession of the township of Matilda— "all buildings damaged or taken, apple trees, well, and all "other damages of whatsoever kind, and also for the "removal from the three and three-quarter acres, the said "sum to be in full."

The lands referred to in the deed as the west three-quarters of Lot No. 4, and east one-quarter of Lot No. 5, are all north of the highway in question.

After this expropriation the Governemnt piled a large amount of earth on the lands expropriated between the canal and the highway. On the centre 100 feet the bank was as high as at present. It now continues further east and west.

If in point of fact any injury was occasioned to the farm property by reason of the view being interfered with by any of the works proposed to be executed, it was taken into account at the time of the purchase referred to.

There was nothing to prevent the Government under the earlier expropriation, when constructing the new canal, to have raised the northerly bank of the canal 40 or 50 feet if they chose to do so, in which case the view would have been obstructed. The present bank is but little higher than the former bank, and I think the witnesses who testify to the loss of view and the injury caused thereby cannot be depended upon. Moreover, there is a further reason in my opinion which negatives any such claim as that put forward. The so-called obstruction to the view is caused, as alleged, by the Government officials having dumped earth excavated in the course of the construction of the canal on the land owned by the government immediately north thereof. Now, this in no sense forms any necessary part of the construction of the canal. The earth might have been carted away or spread in a different manner so as to

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form no obstruction at all. It was in no sense a necessary incident to the construction of the canal that this earth should be placed, as it has been contended it has been placed. If any injury arises therefrom of an actionable kind, it is not an incident to the expropriation. It is something done subsequent to the expropriation which was in the year 1911, and how in these proceedings could a claim of this nature be put forward. If any action could lie it would have to be an action in the nature of a tort, some injury done to the defendant by reason of the wrongful act of the servants of the Crown in so depositing the earth as to cause a detriment to the defendant. I do not think such an action would lie. It would certainly not lie as against the Crown.

The next cause of complaint is for damage for the loss of watering places and water front for which the defendant claims the sum of $2,000. The defendant has no riparian rights, in the ordinary sense, which entitled her to the use of the Canal for watering purposes. There is no reservation in her favour of any such right. If she exercised such a right prior to 1911, it would merely be a matter of tolerance on the part of the Crown. The Crown in forming the enlarged canal have made what is called a riprap wall which effectually prevents the cattle reaching the waters of the canal. The Crown had the right to do so, and there is no right in the defendant to prevent that kind of construction.

The damage for loss of the boat house site is also without any legal right in the defendants. Without the privilege claimed, it seems to me that $100 an acre would be ample compensation for the land taken. This would come to the sum of $636. Even if $150 were allowed it would amount to only $954.

The house which is the subject matter of contention I do not think could be placed at a value of more than $200. This would make for the land and the house about $1,154. The Crown has offered $1,673.60. Deducting the $1,154, from the $1,673.60 would leave $519 to cover the claims outside of the value of the land, and I think the defendant is fully compensated.

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There is conflicting evidence as to the value of 12 gooseberry bushes, 6 blackberry bushes, 3 raspberry bushes, 20 apple trees, etc. Without analyzing the evidence in detail, I am of opinion, as I have stated, that the defendants are amply compensated by the amount which the Crown has tendered.

I understand there was no tender by the Crown prior to the tender by the information. This being the case, I think the proper disposition of the costs is that the defendants should receive the costs up to and inclusive of the service of the information. The costs subsequent should be paid by the defendants to the Crown. There should also be allowed on the amount of compensation interest at 5% from the time of the expropriation until the date of the service of the information.

I have waited a considerable time for the written arguments of counsel. None have been sent. Also as to the plan of the expropriation if there is one at the date of the deed. I think it material. The Crown were certainly in occupation of land North of the Canal —see the evidence of Sargeant and Frederick Robertson as to the previous dump. The Crown was certainly the owner of the North bank of the former canal and could have raised it to any height, view or no view.

Judgment accordingly.

Solicitor for plaintiff : *I. Hilliard.*

Solicitor for defendant : *R. F. Lyle.*