
IN THE MATTER OF THE PETITION OF RIGHT }
 OF THE SISTERS OF CHARITY OF } SUPPLIANT;
 ROCKINGHAM }

1923
Oct. 29.

AND

HIS MAJESTY THE KING..... RESPONDENT,

*Expropriation—Compensation—Market value—Measure of Compensation
—Value to owner—Injurious affection to remaining lands—Railway
yard.*

Suppliant's property, a young ladies' academy established in 1872, was a very valuable one. It consisted of lands situated on the east and west side of a public road existing from time immemorial, and a railway. By the expropriation all suppliant's lands to the east, in and on the margin of a public harbour, were taken, consisting of two small

NOTE: The appeal which was taken to the Supreme Court of Canada from this judgment has been abandoned.

1923
 SISTERS OF
 CHARITY OF
 ROCKING-
 HAM
 v.
 THE KING.

promontories upon which had been built a bathing-house and wharf used in connection with the academy; and upon an area wholly to the east of the railway and comprising these promontories, the Crown made a large shunting railway yard. By a judgment of this court, affirmed by the Supreme Court, suppliant was compensated for lands taken, but nothing was allowed for injury to its property on the west. On appeal to the Judicial Committee of the Privy Council it was held that the suppliant was entitled to compensation for injurious affection to its remaining property on the west by reason of the apprehended legal user to be made of said promontories, and referred the case back to this court to assess the compensation to be paid therefor. Respondent contended that it was impossible to segregate the noise from operations in the yard as a whole, or any part thereof, from that originating on the said promontories.

Held, that while it may be impossible to divide the noise in the yard with mathematical accuracy, yet, as it appears from actual fact, and from the conformation and distribution of the yard, that one part is more used than another, and as noises from the operations concentrated on the said promontories can be ear-marked and segregated, the court may appreciate and deal with the injurious affection to suppliant's lands on the west due to the noise arising from the user of said promontories, as distinct from that due to noise from the use of the yard as a whole, and may fix the compensation due therefor.

Semble: Where it is impossible to ascertain the actual market value of a property by the usual tests which presuppose a willing buyer, the value of the property to the owner is the real value to be ascertained in fixing the compensation.

PETITION OF RIGHT to have certain properties expropriated by the Crown in 1913, and the damage caused to suppliant thereby, assessed by the court. This court, on the 7th of March, 1919, (1) assessed the compensation to be paid for the property taken, but refused to allow anything for injurious affection to that part of the property not taken. This judgment was affirmed on appeal to the Supreme Court of Canada, but on appeal to the Judicial Committee of the Privy Council, both judgments were reversed and the case was remitted to this court to have assessed the damage to which the suppliant was entitled for injurious affection to its remaining property, arising from the apprehended legal user of said two promontories taken by the Crown and used as part of a railway yard (2).

September 12, 1923.

Action now heard on the above reference before the Honourable Mr. Justice Audette, at Halifax.

(1) [1919] 18 Ex. C.R. 385.

(2) [1922] 2 A.C. 315.

I. F. Tobin K.C. and L. A. Lovett K.C. for suppliant.

J. L. Ralston K.C., J. E. Rutledge and C. J. Milligan for respondent.

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

AUDETTE J. now (this 29th of October, 1923) delivered judgment.

This is an action in expropriation which has already been adjudicated upon by this court, the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council. The question of injurious affection involved in the same has now been referred back to this court by the judgment of the Judicial Committee of His Majesty's Privy Council, bearing date the 29th June, 1922.

The scope of the question now under consideration for determination is to be found in the judgment of reference which is in the following language, to wit:—

that the matter ought to be remitted to the said Exchequer Court in order that it may be ascertained to what damages the appellants (suppliants) are entitled for injurious affection of their remaining property which has not been expropriated limited to such injurious affection as arises from the apprehended legal user of the two promontories part of the subject matter of these proceedings as part of a railway shunting yard.

Before entering into the consideration of the subject matter of this reference, leave was granted to both parties, upon application, to adduce further evidence in respect of the same, and in accordance therewith additional evidence was adduced on behalf of both parties and all of the old record was tendered and made available on the hearing of the question submitted by the reference.

The two promontories, or knolls, above referred to are known and described upon the plan as areas "A" and "B." Area "A" contains 13,730 square feet and area "B" 1,220 square feet. The total area of the yard is 1,128,810 square feet; which area compared with areas "A" and "B" represents a proportion of about $1\frac{0}{755}$ or $\frac{1}{75}\frac{1}{2}$.

As disclosed by witness O'Dwyer, on parcel "B" there is now one track and no room to place a portion of another. On parcel "A" there is room for 5 tracks, more or less.

The capacity of the whole yard is about 1,600 cars.

1923

SISTERS OF
CHARITY OF
ROCKING-
HAM
v.

THE KING.

Audette J.

1923
 SISTERS OF
 CHARITY OF
 ROCKING-
 HAM
 v.
 THE KING.
 Audette J.

According to witness Emerson, on parcel "A" there is

	Running length of feet	No of cars allowing for fouling points
On track No. 1.....	432	5
On track No. 2.....	340	4½
On track No. 3.....	330	6
On track No. 4.....	155	1½
On track No. 5.....	90	None

On parcel "B" there is a running length of feet to allow the placement of 5 cars thereon.

The distance between the nearest point of parcel "A" to the south-western corner of Mount St. Vincent is about 294 to 295 feet; and from parcel "B" to the south-east corner of the Chapel, 260 feet.

The elevation of the mount over the tracks is from 15 to 18 feet.

The yard, as a whole, is more or less of a fan-shape; that is while there are (see plan No. 14) twenty-two tracks on the north there are much less on the south. The yard is called by witness MacDonald a "receiving and classification yard."

The yardmaster testified that ladder-track "A" is the main artery of yard "A."

The actual value of Mount St. Vincent is difficult to ascertain in a satisfactory manner. We are told that about \$505,000 were spent upon the property since 1872. One witness states that it would cost, in 1914, between \$900,000 to \$1,000,000 to put up similar buildings and plant. Witness Clark, a person of repute and of great experience in valuing property placed a value of \$500,000 upon the property in 1913; however, he adds that this valuation is really a guess, he might say \$1,000,000; but that he cannot say what that property is worth on the market.

The market value of this property must be deduced from its intrinsic value, that is, its value to the owners for their special purpose.

The property has been held and improved in such a manner as would serve its destination, its useful purposes to the owners, and if they were desiring to sell they would be un-

able to obtain a price like its real value. It is impossible, in a case like the present one, to ascertain the actual market value of such a property by the usual tests which presuppose a willing buyer; the conditions upon which such values are based are not present. In a case of this character, market value is not the measure of compensation. Therefore some other measure must be sought. In the absence of market value, the intrinsic value or value to the owners is the real value to ascertain for measuring the compensation.

It is common ground that Mount St. Vincent is in good shape, well kept and is a very fine property. The damages to such a property, used for educational purposes, are larger than would be for an ordinary dwelling house. To an industrial property the neighbourhood of the railway would be beneficial.

The damages to the property resulting from the whole yard is reckoned by some of the witnesses at from 25 per cent, 50 per cent to 75 per cent of its value. Some say that it is impossible to carry on the work of the institution as successfully as it should be; that the expropriation has spoiled the institution and that the work has been carried on at great inconvenience.

The Reverend Superior General of the School testified that they had come to the necessity of putting up a new building at a cost of \$450,000 as per plans which are being prepared, this new building to be erected somewhere behind the present buildings which would act somewhat as a muffler to the back land. There is no intention of abandoning the present buildings, which however, might be remodelled.

Most of the evidence has been adduced with respect to the damages resulting from the whole yard. With that we are not concerned. The question to determine is the damage resulting from the use of the two promontories, as set forth in the judgment of the Judicial Committee of the Privy Council. Upon that branch of the case, we have, however, the evidence of the Reverend Sister Agnes Gertrude and Reverend Sister Maria Gratia. They prepared a statement, filed as exhibit No. 15, showing the result of their observation respecting the operation over the two

1923
 SISTERS OF
 CHARITY OF
 ROCKING-
 HAM
 v.
 THE KING.
 Audette J.

1923
 SISTERS OF
 CHARITY OF
 ROCKING-
 HAM
 v.
 THE KING.
 Audette J.

promontories. Sister Gertrude testified that one time she noise was continuous on that piece of land for one hour and twenty minutes.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question and of amply visualizing the lay of the land and its surroundings, and while there I had occasion to witness the best display and operation of a freight train on the promontories in question that could have been desired by the suppliants, although it occurred quite casually, but it made one fully appreciate the truth of the statement prepared by Sister Gertrude.

I found without hesitation, as stated by witness Lovett, the yardmaster at Rockingham, that ladder-track "A" is the main artery of yard "A." Indeed while we were all standing by, that freight train loomed up and came to the head of ladder-track "A" and began shunting back and forward right on the two promontories, for upward of twenty minutes they were there without any let up and they were still at it when we left. We there witnessed with our own eyes the full operation of the train and heard with our own ears the wracking and deafening noise resulting from the shunting; the rumbling of the wheels, whistling, letting off steam, the crushing heavy noise from the sudden concussion of cars bumping together, the rattling of iron, etc. This deafening noise was resulting for the most part from the use of the two promontories fed and served by the yard as a whole.

It was contended at bar that it is impossible to segregate the noise resulting from the operation of the yard as a whole or any part thereof, from the noise originating on the two promontories. This is plausible and partly true, but it is not a whole truth, in that it is quite possible, and the facts seem to confirm it; that the tracks close to the main line—the western tracks of the yard—are a great deal more used than the eastern one. That while it is impossible to divide the noise with mathematical accuracy, it is quite easy to realize that one part of the yard is more in use than another, both from actual fact and from the very conformation and distribution of the yard. Moreover, when the noise actually arises on the promontories, as witnessed

when viewing the premises, that noise can certainly be earmarked and segregated from the noise coming from the other parts of the yard.

If the concentration of the shunting—if a great deal more of the shunting—is done on the two promontories, then shunting on these areas “ A ” and “ B ” is much more detrimental to the institution than if the shunting were far away from such places.

However, the noise arising from the user of these two promontories with such concentration at close proximity to the institution, as compared to the noise which arises from the yard as a whole, might be the last straw that breaks the camel’s back—might be the final volume of sound that would suffice to make it impossible to carry on the institution with efficiency and so constitute an injurious affection of a substantive character to be appreciated and dealt with separately from the injurious affection arising from the general noise from the balance of the yard.

Unassisted by direct evidence of any kind naming any figure of the damages resulting from this self-evident injurious affection, I have, thus unaided, to ascertain and determine to the best of my ability, what is the measure of such damages. I am unable to satisfactorily measure these damages and to arrive at any figure, aided by any mathematical reasoning; but answering, as best I can, the scope of the enquiry, as above set forth, and recited in full, I have come to the conclusion that a compensation of \$10,000 will meet the merits of the case, so far as it can be ascertained, to cover all damages, resulting in the injurious affection to the property as arises from the apprehended user of the two promontories, as part of a large railway shunting yard but fed and served thereby.

Therefore, there will be judgment ordering and adjudging that the suppliants are entitled to recover from the respondent the sum of \$10,000 with interest thereon from the date of the expropriation to the date hereof, and with costs.

Judgment accordingly.

1923
SISTERS OF
CHARITY OF
ROCKING-
HAM
v.
THE KING.
Audette J.