HIS MAJESTY THE KING.....PLAINTIFF; 1913 June 26.

AND

THE NEW BRUNSWICK RAILWAY COMPANY AND THE GENERAL TRUST COMPANY.....DEFENDANTS.

Expropriation—Railway—Timber Limits—Compensation—The Exchequer Court Act, sec. 50—Matters of Set-off as regards advantage and disadvantage.

For the purposes of the National Transcontinental Railway a portion of certain lands in the Province of New Brunswick consisting of timber limits was expropriated. It was shewn that owing to the railway the remaining portion of the limits was enhanced in value by reason of the following facts:—The lumber could be taken from the limits at all seasons and in summer more expeditiously than by water; less capital was required in working the limits; the loss of logs incidental to the practice of driving was saved; if desired the logs could be shipped by rail to distant mills without being cut, while portable mills could be used on the limits; and lastly, lumbering supplies could be taken to the limits more cheaply by reason of the easier and quicker means of access provided by the railway.

Held, that in view of the provisions of sec. 50 of *The Exchequer Court Act* these advantages should be set-off against the damages to the owner of the limits arising from the interference by the railway with the logging roads and landings on the river front, the possible interference of the railway culvert with the work of driving in the spring, and the additional risks of fire arising from the operation of the railway.

THIS was an information exhibited by the Attorney-General of Canada for the expropriation of certain lands for the purposes of the National Transcontinental Railway in the province of New Brunswick.

The facts of the case are stated in the reasons for judgment.

June 17th, 1913.

The case came on for hearing before the Honourable Mr. Justice Audette at St. John, N.B.

R. B. Hanson and *J. E. Hartley* for the plaintiff;

H. H. McLean, K.C., and *F. R. Taylor*, K.C., for the defendants.

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Counsel for defendants contended that while the gravel pit on the limits had no market value until the railway came there, it was not taken until two years after the first expropriation of the limits had been made, and the defendants were therefore entitled to the enhanced value the pit had acquired between the years 1908 and 1910. (*Dodge* v. *The King* (1).)

The damage from the severance is assessable without reference to a crossing, because the Crown need not give one. (*Re Armstrong and James Bay Ry Co.* (2); *Vezina* v. *The Queen* (3).

Defendants are entitled to a substantial allowance for increased risk from fire. (*In re Stockport, &c. Ry. Co.* (4); *Masson* v. *Robertson et al* (5); *La Cie de Chemin de Fer de L'Atlantique au Nord-Ouest* v. *Prud'homme* (6); *La Cie du Chemin de Fer de L'Atlantique au Nord-Ouest* v. *Betournay* (7).

The driving facilities on the river are seriously impaired; and the effect of the railway culvert may prove disastrous in the spring.

Counsel for the plaintiff relied on *Caledonian Ry. Co.* v. *Walker's Trustees* (8); *Straits of Canso Marine Ry. Co.* v. *The Queen* (9); *McPherson* v. *the Queen* (10); *In re Ontario and Quebec Ry. Co. and Taylor* (11); *Pryce* v. *City of Toronto* (12); *James* v. *Ontario and Quebec Ry. Co.* (13).

AUDETTE, J., now (June 26th, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that

(1) (1906) 38 S.C.R. 149
(2) (1906) 5 Can. Ry. Cas. 306
(3) (1889) 17 S.C.R. 1
(4) (1864) 33 L.J.Q.B. 251
(5) (1879) 44 U.C.Q.B. 323
(6) (1889) 18 R.L. 143
(7) (1891) 21 R.L. 190
(8) (1882) 7 A. C. 259
(9) (1889) 2 Ex. C. R. 113
(10) (1882) 1 Ex. C.R. 53
(11) (1884) 6 O.R. 338
(12) (1892) 20 O.A.R. 16
(13) (1886) 12 O. R. 624; 15 O. A. R. 1.

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the Commissioners of the Transcontinental Railway have taken and expropriated, for the use of His Majesty the King, certain lands and real property required for the use, construction and maintenance of the said Transcontinental Railway.

The lands expropriated and described in the information are part of a timber limit owned by the defendant The New Brunswick Railway Company, and plans and descriptions of the said lands have been respectively deposited of record, in the offices of the Registrars of Deeds for the County of Carleton, N.B., on the 3rd day of September, A.D., 1910,—for the County of Victoria, N.B., on the 6th September, A.D., 1910,—and for the County of York, N.B., on the 7th September, A.D., 1910.

The defendant's title is admitted, and both parties are agreed that the compensation money be paid to the defendants.

It is admitted that the total area expropriated is of 619.09 acres.

Both parties further admitted that the Crown took possession of the lands in question on the 15th August, 1908.

The Crown by the information tenders the sum of $9,351.02 in satisfaction of the said lands and damages.

The defendants, by amendment at trial, claim the sum of $190,000. The particulars filed have not been adhered to, or proved, the defendants resting their claim on the evidence as adduced.

[His Lordship here reviewed the evidence.]

Dealing first with the question of the gravel pit, for which the sum of $20,000.00 is claimed by the amended information, it must be approached in the light of the admission made by both parties at the very threshold of the trial. Indeed, while the information

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alleges that the plans and descriptions were deposited in the Registry Office, during September, 1910, the parties at the opening admitted that the Crown had taken possession of the *lands in question on the 15th August, 1908*,—it is common ground at bar that the gravel had no commercial value as such before the coming of the railway; but the learned counsel for the defendants say that while the land for the railway track was taken possession of during August, 1908, it is in evidence that the Crown did not use or take possession of the gravel pit until the Spring of 1910, and that the value of the pit must be established at that date when the Crown had already taken possession of the right of way in 1908, thereby giving an enhanced value to the pit which it had acquired between 1908 and 1910. While the principle that the value of the land must be ascertained at the time of the expropriation is well settled, it would not do justice to the law to stretch its meaning to the extent asked for under the circumstances. It must receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit (*See The Interpretation Act*, R.S.C., 1906, ch. 1, Sec. 15, and *The Exchequer Court Act*, R.S.C. 1906, ch. 140, sec. 47). The common sense view to take of this matter is that there was in this case but one expropriation as shown by the set of plans and descriptions filed of record. Carrying to the extreme the doctrine propounded by the defendant, it might be said that because the taking possession in 1908 was started at one end, the far end had increased in value in the meantime on account of its prospective value. Or again, because the plans and descriptions were, during September, 1910, deposited at different dates, that each

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parcel of land should be assessed on a different basis, because the second and third parcel had acquired an additional prospective value in the meantime.

In view of all the facts in evidence it is only fair to conclude and for the Court to find that there was in this case but one expropriation of both the right of way and the ballast pit in question, and they must both be assessed as if expropriated at the same time.

A great deal has been said on the question of damages; and it is apparent to anyone that the building of the railway has seriously interfered with the logging roads and the landings, and that perhaps the culvert has to some extent interfered with the work of driving in the spring. There is also the additional risk of fire resulting from the operation of the railway. Much evidence has been adduced on this last head, and with all the plausibility which usually marks the evidence of experts; but it is impossible to adopt their view when it practically amounts to the opinion that the railway is a calamity to the country it crosses. Upon this question of risk of fire, while the risk ought not to be disregarded, it must not be overlooked that if the railway set fire the owner has his recourse against the railway under the provisions of the *Government Railways Act*, a remedy limited, it is true, but still a remedy which Parliament in its wisdom has seen fit to provide.

Conceding all these disadvantages, there are on the other hand great advantages to the timber limits resulting from the operation of the railway through that country, and under the statute the one must be set off against the other. There cannot be any doubt upon the broad fact that the railway facilitates the transport of pulp wood, hardwood, cedar ties. It takes the lumber from the limits in less time than by water, requires less capital, and gives quicker returns,

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and saves the loss of logs which necessarily happens in driving, and enables shipment to be made at all seasons during summer and winter. By the use of portable mills, which the overwhelming weight of the evidence favours, all of these advantages will be increased. The supplies are taken up in a cheaper manner, the access to and exit from the lands are easier. Even logs are shipped by rail to the American market and to the mills.

The advantages are so manifest and manifold that they seem at first sight more than offset the disadvantages already mentioned. In the result the timber limit is benefited by the railway, notwithstanding what may be said to the contrary.

It is needless to say that the value of the land must be arrived at by looking at the property as it stood at the time of the taking, and that to arrive at such value the modus operandi presented by witness Ritchie cannot be accepted. What we are seeking here is the value of the land as it stood, as a whole, at the time of the expropriation with standing timber, and to arrive at that value one is not to take each tree growing upon the right of way, calculate the board measure feet that could be made out of it and the profits derived from it when placed on the market. That manner of proceeding is erroneous and cannot be accepted. One might illustrate it here again as was illustrated by the Court at the trial, which, although somewhat crude, gave the true idea. If by accident, driving an automobile, a steer were killed,—the measure of damages would be the value of the steer as it stood on its four legs and not after it had passed through the hands of the butcher who had cut it up and retailed it by the pound.

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On the question of value we have for the defendants Donald Fraser who values ten miles at $5.00 an acre, and the balance at $20.00 an acre. Witness Ritchie at $1,000.00 a mile, Archibald Fraser at $14.00 an acre, and witness Oakes at $12.50 to $17.00 per acre. This last witness informed us also that by compromise, against his view, they were allowed a little less than $5.00 an acre for land and damages on the Intercolonial Railway, which runs through the limits in question herein.

For the Crown we had witness Baird who values the land with the timber at $5.00 an acre; Rogers values some part as high as $15.00 an acre; Hanson at $16.00 an acre, without taking the fire element into consideration; and Anderson's highest figures for the same part were $12.00.

Taking all the circumstances into consideration, and all legal elements of compensation whatsoever involved in the case, the sum of $18.00 an acre for the land taken inclusive of all damages whatsoever, past, present and future, resulting from the said expropriation, including increased risk from fire, will be a fair, just and liberal compensation to the defendants, amounting to the total sum of $11,143.62, to which should be added 10% for compulsory taking.

Therefore there will be judgment as follows:

1st. The lands expropriated herein are declared vested in His Majesty the King from the date of the taking possession and expropriation.

2nd. The defendants, upon giving to the Crown a good and sufficient title, including a release of all mortgage or mortgages upon the property, are entitled to recover from His Majesty the King, the sum of $12,257.98, with interest thereon from the 15th day of August, A.D. 1908, to the date hereof. The whole

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in full satisfaction for the property so taken, and for all damages whatsoever resulting from the said expropriation.

3rd. The defendants are also entitled to the costs of the action after taxation thereof.

Judgment accordingly.

Solicitors for the plaintiff: *Slipp & Hanson.*

Solicitors for the defendant: *Weldon & McLean.*