

1900  
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 June 28.  
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IN THE MATTER OF THE PETITION OF RIGHT OF

JAMES S. GIBBON AND CHARLES }  
 H. GIBBON..... } SUPPLIANTS.

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

THE SAINT JOHN TERMINAL }  
 RAILWAY COMPANY ..... } THIRD PARTY.

*Lease—Expropriation of demised property—Lessees' loss of profits—Increased cost of carrying on business—Measure of damages.*

The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid two thousand five hundred dollars for the improvements they had made.

*Held*, that the measure of compensation to be paid to the suppliants was the value at the time of the expropriation of their leasehold interest in the lands and premises.

Apart from the sum payable for improvements there was no direct evidence to show what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss and that the cost of carrying on their business had been increased.

The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was in addition to the sum mentioned taken to represent the value to them or to any person in a like position of their interest in the premises.

The suppliants also contended that if they had not been disturbed in their possession they would have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed.

**PETITION OF RIGHT** for damages resulting from the expropriation of property whereof the suppliants were lessees.

The suppliants were lessees of certain premises in the City of Saint John, N.B., which were required for the purposes of the Intercolonial Railway. During their tenancy, and while their term had six months more to run, they received notice to quit on behalf of the Dominion Government; and, acting on such notice, they left the property and secured other premises wherein to carry on their business. They brought a petition of right for loss of profits and incidental damages. The other material facts are stated in the judgment.

June 14th and 16th, 1900.

The case came on for trial at St. John, N.B. before the JUDGE OF THE EXCHEQUER COURT. At the conclusion of the trial counsel asked that the argument be postponed to be heard at Ottawa.

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The argument of the case was proceeded with at Ottawa.

*C. N. Skinner*, Q.C. for the suppliants, contended that the suppliants were entitled to the loss of the profits they would have been entitled to if they had been allowed to carry on their business on the premises taken. In addition to this they were entitled to the increased cost they were put to by reason of carrying on their business elsewhere during the remainder of the term.

*H. A. McKeown*, for the Crown, argued that the suppliants were not entitled to loss of profits which they might never have earned.

*A. P. Barnhill* replied.

*A. A. Stockton*, Q.C. appeared for The St. John Terminal Railway Company (Third Party).

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At the conclusion of the argument judgment was given for the suppliants in the sum of \$8,296 and costs.

Reasons for judgment having been subsequently asked for, His Lordship handed the following to the Registrar:—

It was thought by the court that in view of the expropriation proceedings of the 20th August, 1898, the telegram of the Acting Minister of Railways and Canals, of August 19th, 1898, to Mr. A. A. Stockton, Mr. Stockton's notice to the suppliants of August 25th, 1898, and Mr. W. B. Mackenzie's notice, as Chief Engineer, to the suppliants, of the 3rd of September, 1898, the suppliants were fully justified in securing other premises in which to carry on their business of coal merchants, and in selling out as quickly as possible, and in the manner in which it was done, the coal stored at the time in the premises at the Long Wharf. It was not possible for them even at an increased charge for rent to get premises as suitable as those they had had for their business, and in consequence the business was carried on at an increased expense to them.

It was thought that what the suppliants were entitled to as compensation was the value at the time of the expropriation proceedings of the leasehold interest held by them in the Long Wharf property. Under their lease they were entitled to be indemnified for their improvements to the extent of twenty-five hundred dollars, and to the possession of the premises for six months after notice. But for Mr. Mackenzie's notice, the effect of which was to make the possession which the Crown permitted the suppliants to retain of very little value, the suppliants might have been put to very little loss, if any. Nor was the effect of this letter in any way destroyed by the notice subsequently given to terminate the lease. The Crown

was entitled to take possession of the premises immediately the plan and description were filed. (*The Expropriation Act*, secs. 8 and 21.) The possession that Mr. Mackenze's letter left to the suppliants was temporary and for a limited object; a possession that did not permit the latter to store on the premises coal arriving was not worth much.

With reference to the value of the six months' possession of the premises in question there is no direct evidence. There is in fact no evidence except that of James S. Gibbon, one of the suppliants. His evidence has not, in the proceedings before the court, been in any way challenged either by a demand for the production of his books or by calling other witnesses. What he states, therefore, as to his losses or the increased cost of carrying on his business the court accepts as being true. He does not directly express any view as to the value of the six months possession of the premises to any one, in a like situation with the suppliants; but he gives figures to show the increased cost at which the business was carried on during these six months, because the suppliants were deprived of the beneficial possession of the premises. He also sets up that he lost profits that otherwise he might have made. These have not been taken into consideration. But the actual increased cost by reason of the expropriation proceedings and what followed thereon, of carrying on the business for the six months, has, in the absence of any other evidence, been taken as the measure of what the value of the six months' possession would have been to any one in the suppliants' position.

The following are the items of such increased cost of carrying on business and of the losses as claimed by the suppliants:

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clearly how there might be this increased cost of handling the coal, because the suppliants could not use the very modern appliances with which they had provided themselves.)

Loss on cross hauling ..... 300 00  
 (The cost of hauling was increased by reason of change of premises.)

New scale..... 50 00  
 (Not objected to by counsel for the Crown.)

Loss on increased freight..... 600 00  
 (This, like the preceding item of \$300, represents an increase in the cost of carrying on business that the suppliants would not have been put to if they had retained possession of the premises. Counsel the Crown did not, and I think rightly, press its objection to these two items.)

Loss on telephones..... 60 00  
 (Not objected to by counsel for the Crown.)

Loss on selling coal to get out of building on Long Wharf, 35 cents per ton on 1,500 tons. 525 00

(Counsel for the Crown objected to this item on the ground that under Mr. Mackenzie's letter the suppliants might have sold out in the usual way and without lowering the price to make quick sales. But because of the additional expense and trouble of carrying on business in several places at the one time I thought the suppliants had acted reasonably and prudently in taking the means they did of selling out the coal stored at the Long Wharf as quickly as possible, and allowed the item.)

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|-----------------------------|---------------------------------------------|--------------|
| 1900                        | Loss on coal compelled to sell from vessels |              |
| GIBBON                      | because they could not get storage.....     | 375 00       |
| v.                          | (Objection to this was not pressed.)        |              |
| THE                         | Interest .....                              |              |
| QUEEN.                      | (Interest as allowed not objected to by     |              |
| THE                         | counsel for the Crown.)                     |              |
| SAINT JOHN                  | Extra men at each delivery. ....            |              |
| TERMINAL                    | (Abandoned by the suppliants.)              |              |
| RAILWAY                     |                                             |              |
| COMPANY.                    |                                             |              |
| Reasons<br>for<br>Judgment. | Total claim .....                           | \$ 16,472 00 |

Of which the following items as stated above were allowed, as constituting under the evidence the compensation to which the suppliants were entitled :

|                                                 |             |
|-------------------------------------------------|-------------|
| Improvements .....                              | \$ 2,500 00 |
| Ten per cent. on that.....                      | 250 00      |
| Half year's rent.....                           | 512 00      |
| Loss on handling 10,000 tons of coal at 25 cts. | 2,500 00    |
| Loss on cross hauling.....                      | 300 00      |
| New scale .....                                 | 50 00       |
| Loss on increased freight.....                  | 600 00      |
| Loss on telephone.....                          | 60 00       |
| Thirty-five cents on 1,500 tons.....            | 525 00      |
| Loss on coal sold on vessels.....               | 375 00      |

|                                               |             |
|-----------------------------------------------|-------------|
| Compensation assessed at.....                 | \$ 7,672 00 |
| Interest on same from 20th February, 1899.... | 624 00      |

\$ 8,296 00

Judgment for suppliants for \$8,296 and costs.

The case between the Crown and the third party was reserved.

*Judgment accordingly.*

Solicitor for suppliants: *A. P. Barnhill.*

Solicitor for respondent : *H. A. McKeown.*

Solicitor for third party : *L. A. Stockton.*