HENRI JALBERT (SUPPLIANT) AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC (INTERVENANT) ..... APPELLANTS;

AND

HIS MAJESTY THE KING, IN THE RIGHT OF THE DOMINION OF CANADA (RESPONDENT) ..... RESPONDENT.

1936
* May 1, 4,
* May 27.
** Nov. 27.
1937
** Feb. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Land taken by Dominion for harbour purposes—Public domain—"Public harbour"—Interpretation—Evidence—Petition of right—Trespass—Land not property of Dominion—Damages—Determination of amount—Expropriation proceedings—B.N.A. Act, 1867, section 108, and third schedule—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19, 19 (b), 31—Railway Act, R.S.C., 1927, c. 170, ss. 164, 166, 215, 219, 220, 221, 222, 232,—Chicoutimi Harbour Commissioners' Act, 1926, 16-17 Geo. V, c. 6.

The suppliant in his petition of right alleging to be the owner by letters patent from the province of Quebec of a certain water lot in the township of Chicoutimi and that the respondent entered into possession thereof, save for a small strip, for public purposes, claimed compensation for the land taken and for the damages suffered by such taking, to wit: $43,125. The respondent admitted the erection of a wharf on the property in question; but alleged that the suppliant was not the owner thereof, and that by virtue of section 108 of the *British North America Act* and its third schedule it formed part of the public domain of Canada in right of the Dominion, being, having been and forming part of a public harbour of the port of Chicoutimi in and before 1867. The province of Quebec intervened to support the letters patent issued by it to the suppliant, claiming that at such time it formed part of the public domain of the province. The Exchequer Court of Canada held that, from the evidence, the port of Chicoutimi was a public harbour in 1867 and previous thereto and it dismissed the suppliant's action and the intervention.

Held, reversing the judgment of the Exchequer Court of Canada ([1936] Ex. C. 127), that, upon the evidence, there was no ground for judicially finding that the beach lot owned by the suppliant appellant was at the time of Confederation part of "a public harbour" within the contemplation of that term in the *British North America Act.*—Without considering whether there was any "public" harbour within the meaning to be attributed to that term in the above Act, it is *held* that the beach lot in question became vested at Confederation in the province of Quebec, that the province had the right to convey it to the suppliant appellant as it did in 1897 and that therefore the latter is entitled to compensation in respect of the taking of the beach lot by the Dominion for the purpose of its public works.—Without

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ.

** PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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attempting to define strictly what sort of locality by its natural formation or constructed works may properly be regarded as susceptible for use as a potential shelter for ships, it is obvious that there must be some physical characteristic distinguishing the location of a harbour from a place used merely for purposes of navigation; the mere fact that there are wharves and commercial activity along an open river cannot in itself constitute great stretches of the river a harbour. The provisions of the *British North America Act* dealing with harbours cannot have intended to include within the expression "harbour" every little indentation or bay along the shores of all inland lakes and rivers as well as along the sea coast and the shores of the Great Lakes, where private owners had erected a wharf to which ships came to load or unload goods for commercial purposes.

Held, also, on the question of damages or compensation to be awarded to the suppliant appellant, that, although in view of this Court's decision on the first branch of the case the suppliant's action in the Exchequer Court of Canada on the petition of right should be treated, if a technical rule is applied, as an action in trespass and the damages assessed as in any other action in trespass, nevertheless the lands were virtually expropriated; and the Court is of the opinion that the proper course is to proceed to determine the amount of compensation to which the suppliant would have been entitled as if expropriation proceedings had been taken. The suppliant is entitled to recover besides the value of the lands, substantial damages for the severance of his property and the subsequent interference with his right of access to the river; but, in order to arrive at a fair amount of damages, the Court should have some evidence of what was the fair value to the suppliant of his estate at the time of the commencement of the construction of the public work complained of and of what is the fair value of the estate he has now after such construction. If the Chicoutimi Harbour Commission commence within one month expropriation proceedings, the compensation to the suppliant should be fixed in accordance with the provisions of the *Railway Act,* 1919, made applicable *mutatis mutandis* by the provisions of the *Chicoutimi Harbour Commissioners' Act;* otherwise, a new trial should be held in the Exchequer Court of Canada limited to the ascertainment of the damages or compensation.

APPEAL from a judgment of the Exchequer Court of Canada, Angers J. (1) dismissing a petition of right by the suppliant appellant, claiming compensation for land taken by the Dominion Government for public purposes and for damages suffered by such taking, which the suppliant appellant fixed at a sum of $43,125.

The material facts of this case and the questions at issue are stated in the above head-note and in the judgments now reported.

At the first hearing of the appeal on May 1, 1936, the Court confined the argument to the question whether the lands of the suppliant appellant were part of a public

(1) [1936] Ex. C. 127.

harbour within the meaning of section 108 and the third schedule of the *British North America Act*, 1867, as property that passed at Confederation to the Dominion, leaving for later consideration, if necessary after the decision of this Court on that point, the question of damages or compensation to be awarded to this suppliant appellant.

J. A. Gagné K.C. for the suppliant appellant.

Louis St-Laurent K.C. for the Attorney-General for Quebec.

L. A. Pouliot K.C. and *M. L. Beaulieu* for the respondent.

On May 27, 1936, the Court made the following announcement:

For the information of the parties, we now announce our conclusion on the questions of right involved in this appeal before continuing the hearing of the argument on the question of damages.

The reasons of the judgment of the Court were delivered by

DAVIS, J.—Henri Jalbert, of the town of Chicoutimi, in the province of Quebec, claimed by petition of right against the King in the right of the Dominion of Canada, the sum of $43,125, alleging that he is the owner of a beach lot at Chicoutimi on the Saguenay River granted to him by letters patent of the province of Quebec dated June 16, 1907, and that he is the owner of other land of approximately 150 feet in width fronting on the Saguenay River and adjoining the beach lot at the rear thereof; that His Majesty in right of the Dominion of Canada, acting through the Chicoutimi Harbour Commission incorporated by 16-17 Geo. V (1926), chapter 6, has taken possession of the greater portion of the beach lot, has demolished the appellant's private wharf thereon used by him in connection with his lumbering business, and has erected on the beach lot a part of public wharves and that the Commission has, by the erection of such works upon the said beach lot, destroyed the right of access to the river from the adjoining land lot. The respondent admits having taken possession of the greater portion of the beach lot where the works of the Chicoutimi Harbour Commission have been erected but

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claims, in so far as the beach lot is concerned, that this was part of the foreshore within an area that constituted a public harbour before July 1, 1867, and therefore became Crown land, in right of the Dominion of Canada, by virtue of section 108 of the *British North America Act,* and that the province of Quebec had no right to convey the land in 1907 to the appellant, and, in so far as the land is concerned, the respondent claimed that such land did not in fact border on the Saguenay river and that the appellant had no legal right of access therefrom to the Saguenay river but in any event that the appellant could use the new wharves built by the Chicoutimi Harbour Commission in front of the said land and that, in the alternative, the appellant consequently did not suffer any damages even if his land lot enjoyed a right of access to the river, which was denied, and further, that any damage that might have been suffered by the appellant in respect of the land lot was compensated by the increased value of such land due to the advantages afforded by the public works of the Chicoutimi Harbour Commission in front of the land. The respondent further alleged that the appellant had not obtained authorization from the Dominion Government to build the private wharf he had built on the beach lot as required by the provisions of the *Navigable Waters' Protection Act,* R.S.C. 1927, c. 140, and that the appellant's private wharf upon the beach lot constituted an unauthorized work which the Minister of Marine and Fisheries under the Act could require to be removed or destroyed without compensation, and that in any event the claims of the appellant were grossly exaggerated.

The Attorney-General for the province of Quebec intervened in the case to support the validity of the letters patent granted by the province of Quebec in respect of the beach lot and alleged that the beach lot had become the property of the King, in right of the province of Quebec, at Confederation, that the letters patent granted to the appellant in 1907 were consequently legal, valid and operative and denied the plea of the respondent to the effect that the beach lot formed part of a public harbour at Confederation.

The action by petition of right was tried in the Exchequer Court of Canada by Mr. Justice Angers who dismissed

the petition and intervention with costs, holding that the portion of the Saguenay river and foreshore where the beach lot is located formed a constituent part of a public harbour at the date of Confederation and became vested in the King in right of the Dominion of Canada. From that judgment the appellant appeals to this Court and the Attorney-General of the province of Quebec intervenes in support thereof.

The appeal raises again the important and difficult question as to what in point of fact is to be regarded as a "public harbour" within section 108 and the third schedule of the *British North America Act*. The beach lot is entirely on the foreshore between high and low water marks. In the early stages of the argument we stated that we would not hear or consider the matter of damages until we had disposed of the legal questions as to whether or not the appellant had acquired title to the beach lot by virtue of the letters patent granted to him by the province of Quebec and as to whether or not the appellant had any right of access from the land lot to the river that had been interfered with by the works of the Chicoutimi Harbour Commission.

The Saguenay river has a length of about seventy-five miles from its mouth at Tadoussac on the St. Lawrence river. It is a tidal and navigable river and at Chicoutimi is about half a mile in width. Chicoutimi was an early settlement and trading post located at the head of navigation on the river and as early as 1857 was an active trading centre with a population of about 1,000. It is plain upon the evidence that before Confederation there was considerable lumbering business carried on at that point and extensive trade and transportation by water. Ships and schooners came up and down the Saguenay river, some of the ocean vessels sailing to and from Europe. Chicoutimi became a place where ships came for the purpose of loading and unloading goods, especially lumber which was the principal industry, and there being no railroads, the entire trade of the community was carried on by water transportation. There is no necessity to review the evidence in detail as to the commercial user of the Saguenay river up as far as Chicoutimi long before Confederation. That fact is clearly established. What we are mostly con-

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cerned about in this appeal is whether or not there was at the specific location of what is now the appellant's land a harbour within the meaning of that word as found in the third schedule of the *British North America Act*. Unless the particular land was within the area of what was in fact a harbour before Confederation, there is no necessity for us to go farther to ascertain what is precisely involved in the words "public harbours" in the third schedule of the *British North America Act* in relation to section 108 of the Act which provides that

> the public works and property of each province enumerated in the third schedule to this Act, shall be the property of Canada.

It is inexpedient to make general observations that may prejudice questions which may arise and come before us on other appeals, by any attempt to define strictly what sort of locality by its natural formation or constructed works may properly be regarded as susceptible for use as a potential shelter for ships. It is obvious that there must be some physical characteristic distinguishing the location of a harbour from a place used merely for purposes of navigation. The mere fact that there are wharves and commercial activity along an open river cannot in itself constitute great stretches of the river, a harbour. The provisions of the *British North America Act* dealing with harbours cannot have been intended to include within the expression "harbours" every little indentation or bay along the shores of all the inland lakes and rivers as well as along the sea coast and the shores of the Great Lakes where private owners had erected a wharf to which ships came to load or unload goods for commercial purposes. Lord Dunedin in delivering the judgment in the Judicial Committee in *Attorney-General for the Dominion of Canada* v. *Ritchie Contracting and Supply Company* (1), said:

> "Public harbour" means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material.

The witnesses for the respondent located the limits of the harbour at Chicoutimi, as they termed it, as being from La Rivière du Moulin to the Basin, a distance of approximately two miles along the river shore. These witnesses

(1) [1919] A.C. 993, at 1004.

gave evidence, and it is not in fact disputed, that there were three wharves along the river between these points; one at La Rivière du Moulin, another one farther up the river at Rat River, and a third still farther up the river at the Basin. Several maps and plans were put in at the trial but plan 13 is a very good indication of the Saguenay river, its width and meanderings, between La Rivière du Moulin and the Basin. Plan 11 shews the town of Chicoutimi as surveyed in 1845 by Ballantyne and the town site as then surveyed includes the area surrounding Rat River and the Basin. The appellant's land lot is part of lots 3 and 22 on the said plan, approximately 300 feet from the Rat river. Now in the stretch of the river from Rivière du Moulin to the Basin, the distance between Rivière du Moulin and Rat River is about a mile and a half, and the distance between Rat River and the Basin is somewhat less than half a mile. It is plain on the evidence that big ships, that is, three-masters, did not proceed farther up the Saguenay river than La Rivière du Moulin but that smaller ships and schooners did go up as far as Rat river and the Basin, anchoring out in the river. At the junction of Rat river with the Saguenay was situated in early days the business of a general merchant, Johnny Guay, often referred to in the evidence, who had a sawmill and wharf and carried on a general merchant's business at that point. In the Basin were located the wharves of the family of Price, who were pioneers in the lumbering business in that part of the province of Quebec. There were admittedly no public works or undertakings by the province along this stretch of the river, before Confederation. Now having regard to the natural formation of the river in this vicinity, can we say there was a single harbour—from La Rivière du Moulin up to the Basin (a distance of some two miles) including the localities at the mouth of La Rivière du Moulin and at Rat river and at the Basin? Without laying down any criterion or test applicable to all cases I think we may safely say upon the evidence in this case that there is no solid ground for judicially finding that the small piece of land with which we are concerned in this appeal was within any harbour.

It is unnecessary in that view to consider whether there was any "public" harbour within the meaning to be

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attributed to that term in the *British North America Act* which transferred the public works and property of each province in public harbours to the Crown in the right of the Dominion, and we may conclude that the beach lot in question became vested at Confederation in the province of Quebec and that the province had the right to convey it to the appellant as it did in 1907. The appellant is therefore entitled to compensation in respect of the taking of the beach lot by the Dominion for the purpose of its public works.

There remains, apart from the ascertainment of damages, the question whether there was a right of access from the land lot, at the rear of the beach lot, to the river Saguenay and whether that right of access has been interfered with. The evidence leaves it perfectly plain that there was the right of access to the river from this land lot. A strip of land, about 40 feet in width, marked Street No. 1 on the Ballantyne plan of 1845, lying originally between the river and the land lot, was as a matter of fact never opened up as a street because in early days it disappeared by erosion and the river at high water came right up to the appellant's land lot. It is contended by the respondent that even if that is so, the appellant has now a right of access to the river across the public wharves erected in front of the property by the Chicoutimi Harbour Commission and has really suffered no damages in respect of interference, and, in any event, that the appellant's land has been increased in value by the advantages afforded by the new wharves of the Harbour Commission fronting on this land. All those matters, however, are matters to be considered in ascertaining the amount of damages.

The Court has for these reasons come to the conclusion that the appeal should be allowed but the learned trial judge unfortunately did not ascertain the damages, no doubt because of his conclusion that the suppliant was not entitled as a matter of law to any damages. Instead of sending the case back for the assessment of damages, the hearing of the appeal on the question of damages will be continued at the October sittings of the Court.

On November 27, 1936, the Court heard the argument of the counsel for the suppliant appellant and the respondent on the question of damages or compensation claimed by the suppliant.

J. A. Gagné K.C. and *B. Devlin K.C.* for the suppliant appellant.

L. A. Pouliot K.C. and *M. L. Beaulieu* for the respondent.

On February 2, 1937, the Court delivered the following judgment:

The appeal of the appellant Jalbert is allowed and the judgment appealed from set aside. Unless expropriation proceedings are commenced within one month judgment shall be entered declaring the rights of the suppliant and ordering a new trial in the Exchequer Court limited to the ascertainment of the damages or compensation. The suppliant shall be entitled to one-half of his costs (including counsel fees) here and below, together with all other disbursements in full, the costs of the new trial to be in the discretion of the trial judge. No order should be made with respect to the intervention and appeal of the Attorney-General for Quebec.

The reasons for judgment of the Court were delivered by

DAVIS, J.—This appeal was argued and considered by us in two steps. We first confined the argument to the question whether the lands of the suppliant were part of a public harbour within the meaning of the schedule of the *British North America Act* 1867 as property that passed at Confederation to the Dominion. If that was the true position of the land, and it was the conclusion of the learned trial judge, then the suppliant might have no right to damages or compensation in respect of lands taken or injuriously affected. Having taken time to consider that branch of the case we announced our conclusion that upon the evidence it could not be found that the lands in question were at Confederation part of a public harbour within the contemplation of that term in the *British North America Act*. That conclusion gave recognition to the suppliant's title and made it necessary for us to continue

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the hearing of the appeal on the question of damages or compensation.

A difficulty at once presented itself in the fact that, in the absence of expropriation proceedings, there has been technically a trespass on the part of the Dominion in the view that we had taken of the case that the lands were not Dominion property. That the Dominion, acting through its Harbour Commission at Chicoutimi, had actually taken possession of part of the suppliant's land and had constructed substantial and permanent public works upon it and had thereby injuriously affected by severance the remaining portion of the suppliant's land is really not in dispute. On the assumption that our conclusion on the first branch of the case was correct, counsel for the Dominion and for the suppliant merely disagree upon the proper measure to be adopted in ascertaining the amount of damages or compensation. Had expropriation proceedings been taken, the rights of the parties and the procedure for determining compensation would have been found to have been covered by statutory enactment. The *Chicoutimi Harbour Commissioners' Act,* 1926, 16-17 Geo. V, c. 6, provides for the appointment of commissioners by the Governor in Council who shall have jurisdiction within the limits of the harbour of Chicoutimi, as in the Act defined, and who shall likewise have administration and control of the harbour and all harbour property. By the said statute, the commissioners may, with the approval of the Governor in Council, acquire or expropriate such real estate or personal property as they deem necessary or desirable for the development, improvement, maintenance and protection of the harbour but all such real estate shall be acquired in the name of and vested in His Majesty. It is further provided that should the commissioners be unable to agree with the owner of lands to be acquired for any of the purposes of the Act as to the price to be paid therefor, the commissioners shall have the right to acquire such lands without the consent of the owner, and the provisions of *The Railway Act,* 1919, relating to the taking of land by railway companies shall, *mutatis mutandis,* be applicable to the acquisition of such lands by the commissioners, and in any such proceeding the powers of the Board of Railway Commissioners under *The Railway Act* shall be exercised by the Governor in Council.

The provisions of *The Railway Act*, 1919, relating to the taking of land by railway companies, are now contained in the Revised Statutes of Canada 1927, c. 170. By section 164 the railway company shall make

> full compensation in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise

of the powers of the company. By section 166 the railway company shall not, except as in the Act otherwise provided, commence the construction of the railway, or any section or portion thereof, until the general location has been approved by the Board of Railway Commissioners as thereinafter provided nor until the plan, profile and book of reference have been sanctioned by and deposited with the Board and duly certified copies thereof deposited with the registrars of deeds, in accordance with the provisions of the Act. The provisions relating to expropriation commence with section 215 of the Act. By section 219, when the parties cannot agree upon the amount of compensation or damages, either party may apply, in the province of Quebec, to a judge of the Superior Court for the district or place in which the lands lie, to determine the compensation to be paid. Section 220 provides that such judge shall, upon application being made to him as aforesaid, become the arbitrator for determining such compensation, and he shall proceed to ascertain such compensation in such way as he deems best and except as to the limited right of appeal given by section 232, his award shall be final and conclusive. Section 221 is what is sometimes called a betterment clause whereby the arbitrator shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands. Section 222 provides that the railway company may offer an easement in mitigation of any injury or damage caused or likely to be caused to any lands by the exercise of the company's powers.

Now had the Dominion or its statutory agent, the harbour commission, taken expropriation proceedings as pro-

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vided by the *Chicoutimi Harbour Commissioner's Act,* the amount of compensation would under that statute by virtue of the provisions of *The Railway Act* have been determined by a judge of the Superior Court of Quebec for the district in which the lands lie. The decisions upon *The Railway Act* have clearly established what is the proper measure of compensation within the language of the statute and applying the decisions a judge of the Superior Court would have fixed and determined in the expropriation proceedings the full compensation to which the suppliant would have been entitled. Expropriation would have been the simple and proper course for the Dominion to have taken had it not been for the fact that the Dominion claimed ownership of the property itself.

But the Dominion taking the view that it did that the lands in question were in fact the property of the Dominion as part of a public harbour at Confederation could not, nor could the harbour commission acting on its behalf, take expropriation proceedings without excluding the Dominion's claim that these lands were its own property and that the suppliant therefore was not entitled to compensation. When we announced our conclusion on the first branch of the case the Dominion could not then have commenced expropriation proceedings without acquiescing in that conclusion and thereby depriving itself of the right to have our judgment reviewed by the Judicial Committee if leave were given. The Dominion has not, in any case, commenced expropriation proceedings and we must therefore now deal with the petition of right as a claim for damages or compensation against the Crown for the actual taking of part of the lands of the suppliant and for the alleged injurious affection to the adjoining lands of the suppliant.

The first difficulty presented is to determine upon what basis the quantum is to be arrived at. Technically the acts of the Dominion are acts of trespass. There is no lawful authority for the actual taking possession of the lands in question. From that point of view the action in the Exchequer Court on the petition of right should be treated, if a technical rule is applied, as an action in trespass and the damages assessed as in any other action in trespass. But virtually the lands were expropriated and

we think the proper course is to proceed to determine the amount of compensation to which the suppliant would have been entitled had expropriation proceedings been taken. The authorities amply justify that course.

In *Parkdale* v. *West* (1), no land was taken but there was interference by a railway subway with the plaintiffs' enjoyment of their lands and the question at issue was whether the municipal corporation of Parkdale was liable to the plaintiffs for damage done to the premises of which the plaintiffs were owners. The effect of lowering the roadway in front of the plaintiffs' property had been to deprive the plaintiffs of the access to a public street which they had previously enjoyed and to injure their property seriously. At the trial the claims of the plaintiffs were amended by setting out that the corporation of Parkdale alleged that the work was done by the railway companies under the Dominion Act, 46 Vict., c. 24, but that in fact the subway was being constructed by the corporation of Parkdale and not by the railway companies, and by claiming that if the work was done by the corporation of Parkdale under the Ontario Act, 46 Vict., c. 45, a mandamus should issue to them to compel the assessment of compensation under that Act. The railway companies were not made parties to the action. In their defences, as amended, the corporation of Parkdale relied on the ground that the work was done by the railway companies, through the corporation of Parkdale as their agents, pursuant to the requirements of the railway committee acting under the Dominion Act, 46 Vict., c. 24, and denied that they had acted under the Ontario Act, 46 Vict., c. 45. Wilson, C.J., who presided at the trial, gave judgment for the plaintiffs on the ground that the acts complained of were wrongful, not being authorized by the Order in Council. This judgment was upheld by a Divisional Court of two judges on the ground that the corporation could not act as agents for the railway companies, and on the further ground that by proceeding under the Ontario Act the corporation of Parkdale could by taking the necessary steps have legally done the work, and that consequently " the matter could not be treated as one to all intents *ultra vires* " and that the cor-

(1) (1887) 12 App. Cas. 602.

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poration " were trespassers but within the scope of their authority." The judgment of the Divisional Court was reversed by the Court of Appeal of Ontario by a majority of three judges to one. The majority of judges held that the work was done by the railway companies under the order of the railway committee of the Privy Council of Canada and that the plaintiffs must look to the railway companies for compensation. This Court, upon further appeal, reversed this last-mentioned judgment and affirmed the judgment of the trial judge and of the Divisional Court. Gwynne, J. dissented, holding that the corporation of Parkdale was in fact acting under the Ontario statute and was liable thereunder to make compensation. The case was carried to the Judicial Committee and the appeal was dismissed. Lord Macnaghten in delivering the judgment of the Board said that their Lordships regretted that the railway companies had not been made parties to the action and that the litigation might have been disposed of more satisfactorily in the presence of the railway companies but that the absence of the railway companies did not relieve the corporation of Parkdale, which claimed to have acted as agent for the railways, from the obligation of showing that its principals were duly authorized to do the acts complained of. Their Lordships came to the conclusion that an order of the railway committee of the Privy Council for Canada under the 4th section of the Dominion Act of 1883 did not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's rights. The provisions of law at the date of the order of the railway committee

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were to be found in the *Consolidated Railway Act,* 1879, and in the opinion of their Lordships those provisions included the provisions contained in that Act for compensation in respect of land injuriously affected though not actually taken. Those provisions were so intermixed with the provisions applicable to the taking of land strictly so called, that their Lordships thought they might be properly included under the head of " provisions of law applicable

to the taking of land." It was admitted that no plan or book of reference relating to the alterations required by the railway committee had been deposited as required by the provisions of the *Consolidated Railway Act*, 1879, and as the provision as to the deposit of a plan or book of reference was the foundation of all steps for assessing compensation it appeared to their Lordships therefore that the railway companies had not taken the very first step required to entitle them to commence operations. Further, their Lordships held that under the provisions of the Act compensation had to be paid before the land could be lawfully taken or the rights over land interfered with and that the payment of compensation, or the giving of security, was a condition precedent. Their Lordships held on these grounds that the corporation of Parkdale could not justify its acts by pleading the statutory authority of the railway companies. The judgment proceeds at p. 615:

> If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the Court would probably not interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation * * * As a general rule, it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner, or guilty of some other misconduct.
>
> Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.
>
> Their Lordships express no opinion as to the rights of the appellants to recover over again against the railway companies, either under the general law of principal and agent, or under the express provisions of their agreement with those companies. Whatever those rights may be, they are untouched by their Lordships' judgment.

Although the construction of the subway had not been lawfully undertaken, the work had actually been done, and though the municipal corporation were strictly trespassers " but within the scope of their authority " and as the injury committed was complete and of a permanent character, the Judicial Committee held that the plaintiffs were entitled in their action against the corporation of Parkdale to compensation " to the full extent of the injury inflicted."

Then in *Dominion Iron and Steel Company Ltd.* v. *Burt* (1), the Judicial Committee had to consider a Nova Scotia

(1) [1917] A.C. 179.

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case where the appellants owned a provincial railway which crossed a highway. In pursuance of an order made by the Governor in Council under section 178 of the Nova Scotia *Railways Act* (R.S.N.S. 1900, c. 99), the appellants altered the highway so as to pass under the railway, and thereby necessarily caused injury to the respondent's property. The appellants did not deposit a map or plan of the alteration under section 124 of the Act, nor did they take any steps to compensate the respondent. The respondent had brought a prior action against the city of Sydney to recover the damages which he had sustained but that action had been held not to be maintainable. *Burt* v. *The City of Sydney* (1). Then he commenced this action against the owners of the railway and it went to the Privy Council. Lord Parker, in delivering the judgment, said that the works had been carried out by the appellant company pursuant to a direction of the Governor in Council under the provisions of section 178 of the Nova Scotia *Railways Act* but that such a direction could not of itself confer on the company any power to interfere with the rights of others, though there could be no question that the appellant company had, under section 85 of the Act, general powers wide enough to enable them to carry out the works. Nevertheless the works, in their Lordships' opinion, had been commenced before the company had made a new map or plan of the alteration in the highway which alteration had been designed with the object of carrying such highway under the railway and getting rid of the dangerous level crossing which had previously existed, and that if such map or plan had been deposited it could not have failed to show that the access of the respondents to the highway from their adjoining lands must necessarily be interfered with and that the alterations could not properly be commenced until compensation for such interference had been paid or tendered under section 159. No such compensation was, in fact, paid or tendered. Their Lordships said:

> The result is that, in executing the works directed by the Governor in Council, the company acted illegally, not because they had no power to carry out the alterations, but because they did not trouble to observe the conditions precedent upon which alone their powers could be exercised. What they have done in Victoria Road constitutes, therefore, a nuisance

(1) (1914) 50 Can. S.C.R. 6.

in the highway, for which the respondents, who undoubtedly suffered special damage, had their common law remedy.

And their Lordships were therefore of the opinion that the respondents were entitled to damages in the action. "Indeed," their Lordships said,

the respondents might, strictly speaking, also claim a mandatory order for the restoration of Victoria Road to its former condition.

It had been suggested that, inasmuch as the Act contained a betterment clause, the measure of damages in an action of nuisance is not necessarily the same as the measure of compensation payable under the Act, but their Lordships said:

It is, however, difficult to see how the amount of damages to which the respondents are entitled can in any event exceed the amount which would have been payable to them by way of compensation if the appellant company had proceeded lawfully. The fact that it could have proceeded lawfully and that had it done so the betterment clause of the Act would have applied is not without materiality in assessing the damage.

In that case the Judicial Committee said the Court in its discretion would be entitled to refuse to make or to postpone the making of any mandatory order. Further, though it was a matter of indifference to the respondents whether what they received in respect of any injury to their land were by way of damage or by way of compensation, that was not necessarily so with regard to the appellant company, for in the one case it might have, and in the other it might not have, some remedy over against the corporation of Sydney under the order of the Governor in Council. It was "under these circumstances" that it appeared to their Lordships that while the judgments below ought to be affirmed, any proceedings thereunder for ascertaining the amount of damage sustained by the respondents ought to be stayed so as to give the appellant company an opportunity of doing what they ought to have done in the first instance. For this purpose a reasonable interval was allowed, within which time if the company deposited a proper map or plan and proceeded with due diligence to have the compensation payable to the respondents ascertained in accordance with the provisions of the Act, the stay would become absolute. If within the time limited the company did not take such proceedings to ascertain the compensation, the stay would be removed.

There is no necessity to stay the proceedings in the action before us because there is no third party against

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whom the Crown might have some remedy by indemnity or otherwise depending upon whether the matter had been treated by way of damage or by way of compensation. In *the Dominion Iron and Steel Company* case (1), their Lordships said that it was a matter of indifference to the respondents there whether what they received in respect of an injury to their land were by way of damage or by way of compensation. This indicates clearly, I think, that so far as the quantum is concerned it will be the same in a case such as this whether it be ascertained by way of damage or by way of compensation.

The authorities therefore clearly justify us in proceeding with the ascertainment of damages on the basis of the land having been expropriated.

The jurisdiction of the Exchequer Court of Canada is ample for this purpose. That court, by chapter 34 of the Revised Statutes of Canada 1927, section 19, is given jurisdiction to hear and determine

(*a*) every claim against the Crown for property taken for any public purpose;

(*b*) every claim against the Crown for damage to property injuriously affected by the construction of any public work;

The parties put in at the trial all the evidence they desired to give on quantum. The learned judge of the Exchequer Court who tried the case did not assess the amount of damages or compensation because of his conclusion that the land was the property of the Dominion and we are without the benefit of his consideration of the evidence as to damage. This is unfortunate. Even though a trial judge may take, as a matter of law, a view of a case which precludes the plaintiff from recovering damages, an appellate court is entitled to have, in case it should reach a different conclusion on the question of liability, the advantage and assistance of the trial judge's views as to the weight which should be attached to the evidence of the several witnesses who appeared before him.

The facts may be stated briefly. The suppliant owned a water lot adjoining his land lot. His upland ran back to a public street in the town of Chicoutimi. The suppliant used the entire property in the conduct of his lumber business. He had a small lumber mill upon the property

(1) [1917] A.C. 179.

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and the location was especially advantageous for his business because he brought in timber from his own limits and unloaded it directly from the boats to the lumber piles on a small wharf that he had built upon the water lot. The wharf bordered on and was attached to the upland. It was not a deep water wharf; at very low tide the water receded some distance from it. But it was a convenient means specially built by the suppliant for unloading timber that was brought in by water on flat-bottomed boats. At low tide the boats were quite secure on the beach. When the boats rested on the bottom their decks remained only a few feet lower than the top of the suppliant's wharf, causing no inconvenience in the unloading. There is said to have been a minimum amount of labour and time required in the handling of the timber under the conditions that existed before the construction of the harbour works complained of. The suppliant's lands were therefore used as a *unum quid*. Now when the Dominion, acting through the local harbour commission, constructed the public wharves at Chicoutimi a portion of the water lot alone was actually taken. The suppliant's wharf was not within the area taken nor was any of the upland. The land actually taken was of course subject to the public right of navigation and probably had little value in itself to the suppliant. The suppliant asked before us for 50 cents a square foot for this land and there is some evidence that it might be worth that amount if it were filled in but that the fill might cost about as much as the land would then be worth. The value of the land actually taken has not yet been assessed. The substantial damage to the suppliant, however, obviously lies in the severance of his property and the consequent interference with his right of access to the river. The land taken was so connected with and related to the lands that are left that it is plain that the suppliant is seriously prejudiced. Lord Sumner in delivering the judgment of the Judicial Committee in *Holditch* v. *Canadian Northern Ontario Railway* (1) said:

> The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take

(1) [1916] 1 A.C. 536, at 542.

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land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case.

The proper construction to be put upon the provision of section 164 of *The Railway Act* 1919 as to

full compensation * * * to all persons interested, for all damage by them sustained by reason of the exercise of

the powers of the company is too well established by decisions to be any longer open to question. The Privy Council in *Sisters of Charity of Rockingham* v. *The King* (1) gave to the words "injuriously affected by the construction of any public work" in the *Exchequer Act,* section 19 (*b*) the effect of the English decisions under the *Railways Clauses Consolidation Act,* 1845, and the *Lands Clauses Consolidation Act,* 1845. In *City of Montreal* v. *McAnulty Realty Co.* (2), the present Chief Justice of this Court carefully reviewed the authorities and showed that notwithstanding the obvious differences in language between the clause in the Dominion *Railway Act* and the clauses of the English statutes out of which the rules developed, it was settled law that generally speaking the principles governing the right of compensation under *The Railway Act* were the same as those which were established in England under the *Lands Clauses Consolidation Act.*

The City of Toronto v. *Brown* (3) was a case in this Court where the owner of property was held entitled to compensation for "injurious affection" though none of his land was taken. The present Chief Justice in that case at page 179 showed that the phrase "injuriously affected" used in the *Railways Clauses Consolidation Act,* 1845, and in the *Lands Clauses Consolidation Act,* 1845, imports something which, if done without the authority of the legislature, would have given rise to a cause of action.

It has, moreover, been settled that since a condition of the right to compensation is that the claimant's property has been "injuriously affected," it is incumbent upon him to establish that the injury he complains of was an injury to his estate and not a mere obstruction or inconvenience to him personally or to his trade; *Ricket* v. *Metropolitan Railway Co.* (4); and further that the damage complained of must be

(1) [1922] 2 A.C. 315.
(2) [1923] S.C.R. 273, at 285, 288
(3) (1917) 55 Can. S.C.R. 153.
(4) (1867) L.R. 2 H.L. 175.

in respect of the property itself (in its existing state or otherwise) and not in respect of some particular use to which it may from time to time be put. *Beckett* v. *Midland Railway Co.* (1).

In *Lake Erie and Northern Railway Co.* v. *Schooley* (2), it was held by this Court that

where property expropriated is, owing to its location and adaptability for business, worth more to the owner than its intrinsic value, he is not entitled to have the capital amount representing the excess added to the market value of his property. His proper compensation is the amount which a prudent man in the position of the owner would be willing to pay.

The principle applied was that laid down by the Privy Council in *Pastoral Finance Association* v. *The Minister* (3), that the special suitability of the lands expropriated for the carrying on of the business of the owner and the additional profits which the owner will derive from so carrying it on, are proper elements in assessing the compensation but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the land. Their Lordships said at p. 1088 of the report of that case:

That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would, no doubt, reckon out those savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

In the case before us the serious claim, as we have said, is in the interference with the conduct of the suppliant's business on his lands but in order to arrive at a fair amount

(1) (1867) L.R. 3 C.P. 82, at 94, 95.
(2) (1916) 53 Can. S.C.R. 416.
(3) [1914] A.C. 1083.

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of damages for the "injurious affection" it is really necessary that the Court should have some evidence of what was the fair value to the suppliant of his estate at the time of the commencement of the construction of the public work complained of and of what is the fair value of the estate he has now after the construction of the public work. The possibility of the betterment of his property is by virtue of section 221 of *The Railway Act* something, in the words of Lord Parker in the *Dominion Iron and Steel* case (1), "not without materiality in assessing the damage."

Serious difficulty presents itself to us in the review of the evidence as to damage. Counsel for both parties admit that there was no evidence given at the trial by any one as to the value of the suppliant's estate in the lands before or of the value after the construction of the public work complained of. Counsel for the suppliant admitted that the evidence in support of the claim for damages was directed solely to showing an increased cost in operating the suppliant's lumber business on the property under the changed conditions and establishing some capitalized value of the loss. Now that is plainly the wrong principle to apply in the ascertaining of the damages and the case will have to go back for a new trial on that branch of the case.

The suppliant's appeal must be allowed and the judgment appealed from set aside.

If the Chicoutimi Harbour Commission should now desire to commence expropriation proceedings, in which case the compensation will be fixed by a judge of the Superior Court of Quebec for the district in which the lands lie in accordance with the provisions of *The Railway Act*, 1919, made applicable *mutatis mutandis* by the provisions of the special Act of the Chicoutimi Harbour Commissioners, and such proceedings are commenced within one month, the suppliant shall be entitled to a declaration of his rights but on account of the unsatisfactory and insufficient evidence of damage given in support of his claim he shall only be entitled to one-half of his costs here and below, together with his disbursements. If expro-

(1) [1917] A.C. 179.

priation proceedings are not so taken, then judgment shall be entered declaring the rights of the suppliant and ordering a new trial in the Exchequer Court limited to the ascertainment of the damages or compensation. In the latter event, the suppliant shall be entitled to the same order as above stated as to the costs here and below but the costs of the new trial shall be in the discretion of the trial judge.

The Attorney-General for the province of Quebec intervened in the proceedings in the Exchequer Court and took an independent appeal to this Court from the judgment of the Exchequer Court. Section 31 of the *Exchequer Court Act* provides that when the legislature of any province has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies between the Dominion and such province or between such province and any other province or provinces which shall have passed a like Act, the Exchequer Court shall have jurisdiction to determine such controversies and an appeal shall lie in such cases from the Exchequer Court to this Court. Provinces which have passed such legislation have more than once resorted to this jurisdiction of the Exchequer Court and have brought actions in the Exchequer Court to recover on claims against the Dominion, as for instance in *The Province of Ontario* v. *The Dominion of Canada* (1). The province of Quebec, however, has never passed the enabling legislation provided by section 31 of *The Exchequer Court Act.* But in any case it is plain that the Exchequer Court has no power to give relief to a province in a petition of right of a subject against the Dominion and although no exception was taken to the intervention or to the independent appeal the proper course is that no order should be made with respect to the appeal of the Attorney-General for Quebec.

Appeal allowed.

Solicitors for the suppliant appellant: *St-Laurent, Gagné, Devlin & Taschereau.*

Solicitor for the Attorney-General for Quebec: *Charles Lanctôt.*

Solicitor for the respondent: *Marie-Louis Beaulieu.*

(1) (1910) 42 S.C.R. 1.