Supreme Court of Canada
Power v. The King, (1918) 56 S.C.R. 499
Date: 1918-05-07

William Power and Others (Defendants) Appellants;

and

His Majesty The King (Plaintiff) Respondent;

and

The Quebec Harbour Commissioners (Defendants) Respondents;

1918: April 19; 1918: May 7.

Present: Davies, Idington, Anglin and Brodeur JJ. and Lavergne J. *ad hoc.*

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Crown grant—Clause of resumption—Extinction of right —Prescription.

The appeal from the judgment of the Exchequer Court of Canada (16 Ex. C.R. 104), was allowed, Davies and Idington JJ. dissenting.

In a grant from the Crown of a water-lot to the appellants' predecessor in title, it was provided for the resumption of it by the Crown at any time for purposes of public improvement upon giving twelve months' notice in writing of its intention to exercise that right.

Per Anglin, Brodeur and Lavergne JJ.—The Crown, by instituting expropriation proceedings in respect of this water-lot, elected not to exercise its right of resumption.

Such right, having been vested in the Quebec Harbour Commissioners under 22 Vict. c. 32, does not form part of the Crown domain, notwithstanding their public character and the nature of their trust.

Per Brodeur and Lavergne JJ.—This right, not having been exercised for a period of over thirty years, was extinguished by prescription under art. 2242 C.C. Anglin J. contra.

Per Davies and Idington JJ. dissenting.—The appeal should be dismissed as the appellants have no reason to complain of the amount of compensation allowed.

APPEAL from the judgment of the Exchequer Court of Canada[1], rendered in expropriation proceedings taken by respondent.

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The material circumstances of the case and the questions of law in issue on the present appeal are stated in the head-note and in the judgment now reported.

[1] 16 Ex. C.R. 104; 34 D.L.R. 257.

Lafleur K.C. and St. Laurent K.C. for the appellants.

Gibsone K.C. for the respondent His Majesty The King.

Dobell for the respondent the Quebec Harbour Commissioners.

DAVIES J. (dissenting).—I would dismiss this appeal and confirm the judgment of the Exchequer Court with costs with a small variation arising out of an admitted error of $2,000 made by the learned judge in allowing twice over for the 6,335 square feet, being the block conveyed to the R. C. Bishop.

The judgment should be reformed by deducting this $2,000.

IDINGTON J. (dissenting).—I do not see that the appellant has any reason to complain of the amount of compensation allowed and therefore would dismiss his appeal with costs.

ANGLIN J.—No appeal has been taken against the valuation of $20,049 placed by the learned judge of the Exchequer Court upon the expropriated wharves. The parties interested have also agreed that compensation for a strip of land comprising 720 square feet held by the appellants under an emphyteutic lease from the authorities of the Church of England should be determined as if the latter had no interest in it and that they and the appellants will subsequently arrange amongst themselves what should be the share of the Church in whatever amount may be awarded.

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For a strip of land covered by water lying between the two parts of the water lot No. 2411 owned by the appellants, comprising 6,503 square feet, the Harbour Commissioners, whose title to it is no longer in dispute, have also accepted the compensation awarded, 25 cents per square foot, or $1,625.75. They are satisfied with the same valuation upon 2,220 square feet owned by them at the south end of lot 2415, amounting to $555. The Crown contests neither of these items.

Only two matters, therefore, form the subject of this appeal—the respective rights of the Harbour Commissioners and the appellants in the parallelogram, comprising 6,335 square feet, forming the south-east part of lot 2411, and the value of the interest of the appellants in the properties taken other than those above mentioned and of the appellants and of the Harbour Commissioners (if any) in the parallelogram of 6,335 square feet.

The question of title to this parallelogram depends upon the effect that should be given to a condition in the grant of it by the Crown to the appellants' predecessor in title, the R. C. Bishop of Quebec, providing for the resumption of it by the Crown at any time for purposes of public improvement on giving twelve months' notice in writing of its intention to exercise that right and on payment of the value of any improvements made on the property, and to a statute vesting certain lands, revenues, etc., in the Quebec Harbour Commissioners. The learned judge treated the right of resumption as subsisting at the date of the expropriation and held that it had passed to the Harbour Commissioners.

There are no improvements on this water lot. Instead of itself giving notice of intention to resume possession under the condition in its grant, or having

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the Harbour Commissioners do so, the Crown saw fit to include this parcel in proceedings for expropriation. It relies upon the condition, however, as minimizing the value of the appellants' interest. The appellants on the other hand assert that by instituting expropriation proceedings in respect of this parcel the Crown elected not to exercise its right of resumption; that it should therefore be deemed to have been waived; and that it had been extinguished by prescription.

As the property affected forms part of a public harbour and any public improvement for which the right of resumption might be exercised would be in the nature of harbour works, if that right were still vested in the Crown at the date of Confederation, it would, in my opinion, thereafter belong to the Crown in right of the Dominion. *Samson* v. *The Queen*[2].

I cannot assent to the suggestion of counsel for the Crown that the commencement of expropriation proceedings may be regarded as tantamount to the giving of notice of intention to exercise the right of resumption. I accept the view of the appellants that the pendency of these proceedings was inconsistent with the exercise of that right.

But up to the moment they were begun it was competent for the Crown (or the Quebec Harbour Commissioners) unless the right of resumption had been prescribed, to have given the requisite notice and to have acquired possession on the expiry of twelve months without payment of any compensation whatever. The appellants' interest would in that view have been merely a right to retain possession for twelve months. Why the Crown did

[2] 2 Ex. C.R. 30.

not proceed in regard to this parcel by giving this notice itself or having the Harbour Commissioners give it is not now material. It is

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incontestable that it is the value of the owner's interest immediately before the expropriation for which he is entitled to compensation. Upon all the evidence I should incline to the view that that interest, if subject to this condition of resumption, had no substantial value.

But was the right of resumption vested in the Crown or in the Quebec Harbour Commissioners? And, in either case, was it prescribed?

The learned trial judge has found that it passed to the Commissioners under 22 Vict., ch. 32, and against this finding the Crown has not appealed. The Harbour Commissioners, through their counsel, stated that they were willing to accept an equal division between themselves and the appellants of the $2,000 allowed as compensation for this parcel as suggested by the learned trial judge; and the Crown has not appealed against the amount awarded. The appellants could not hope to increase that amount if the right of resumption still existed at the date of the expropriation. Therefore, unless the condition for resumption has been extinguished by prescription, neither the amount of the compensation nor its apportionment need be further considered.

If the right of resumption had remained vested in the Crown, I should have been inclined to regard it as a real right declared imprescriptible by art. 2213 C.C. and therefore not within art. 2215 C.C. invoked by counsel for the appellants. But a right vested in the Quebec Harbour Commissioners, notwithstanding their public character and the nature of their trust, does not

> form part of the Crown domain.

Quebec Harbour Commissioners v. Roche[3]. On the

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other hand, I find it difficult to understand how the appellants holding under a deed subject to the condition under consideration can claim its extinguishment by prescription. Having shewn their title under the Crown grant there is no room for the application of the law of

[3] Q.R. 1 S.C. 365.

prescription to establish an independent possessory title in them. *Labrador Co.* v. *The Queen*[4]. Moreover a title so shewn helps to establish the defects of the possession which hinder prescription. Art. 2244 C.C. Had the condition entailed an obligation on the part of the grantee, that obligation would, perhaps, have been susceptible of negative prescription under art. 2210 C.C. by nonfulfilment of it during a period of thirty years, or during a shorter period under some other prescription provision. But I incline to think that the Crown's right of resumption did not impose any obligation upon the holder of the land. If there was anything that could properly be called an obligation contracted by the grantee and binding his successors in title, it was to surrender or deliver up possession of the property. That obligation would arise, however, only when twelve months had elapsed after notice had been duly given of intention to exercise the right of resumption and the other terms of the condition, if applicable, had been complied with. Since no one may prescribe against his title (art. 2208 C.C.) unless in the sense of freeing it from an obligation (art. 2209 C.C.), the possession of the appellants under their title derived from the Crown grant implied a constant and continued acknowledgement of the terms of that grant, including the right of resumption to which it was subject. For these reasons I should, with respect for my learned brothers who are of the contrary opinion, be disposed to accept the conclusion of the learned

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trial judge that the provision for resumption was not extinguished by prescription. I am also of the opinion that, as a right held by a public authority for the purposes of a "port," the right of resumption for public improvements, although it had ceased to form part of the Crown domain, should nevertheless be deemed imprescriptible under art. 2213 C.C.

The precarious title of the appellants to this considerable area at the south-east of lot 2411, and their lack of title to the strip already referred to as vested in the Harbour Commissioners lying between the two portions of the water lot in front of lot 2411 held by them and also to the 2,220 square feet at the south end of lot 2415 likewise owned by the Harbour Commissioners, materially affect the value of the remainder of their property as a wharf site. As shewn by exhibit 15 there is at low tide at the end of the existing wharf on the latter lot from 6 ft. 7 ins. to 7 ft. 7 ins. of water and at the end of the wharf on lot 2411 from 7 ft. 3 in. to 8 ft. 5 ins. of water. According to the evidence of the witness Leclerc a deep water wharf should have fourteen feet of water at low tide. The depth of water at the

[4] [1893] A.C. 104, at p. 122.

Harbour Commissioners' line in front of these lots appears to range from fourteen to eighteen and twenty feet. They seem to have been the most western properties on the north shore of the harbour on which it was thought worth while to build substantial wharves. Opposite the adjoining land to the west owned by the Lampsons, where the shore is indented by a cove, the depth of water at the Harbour Commissioners' line is materially less, especially along its western half. That property is therefore not at all so suitable as a site for wharves as that owned by the appellants. There also would seem to have been some question as to the title of the Lampsons to the water lot on the eastern part of their

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property, which probably affected the price of it. In placing a value on the appellants' property, however, the learned Judge of the Exchequer Court appears to have been influenced by the fact that the entire Lampson property had been acquired by the Crown at a price equal to about twenty cents a square foot. On the other hand, the Hearn property, which adjoins that of the appellants to the east, was valued in the Exchequer Court at $1.64 a square foot and in this court at 65 cents a square foot[5]. We are told by Mr. Fraser, its purchasing agent, that the Crown paid for part of the Molson property, somewhat farther east, 65 cents and for the remainder 50 cents; for the Bélanger property 70 cents and for the Allan property 95 cents. These properties are of course nearer to the centre of shipping activities in Quebec. In some respects, however, they resemble the appellants' property more than that acquired from the Lampsons does.

It is no doubt extremely difficult to arrive with even approximate accuracy at the value of a property such as that with which we are dealing. Taking into account all its features—its advantages as well as its disadvantages—disclosed by the evidence, its value seems to me to have been somewhat underestimated. For the area of 49,394 square feet taken from the appellants (which includes the 720 square feet leased from the rector and churchwardens, but not the parallelogram containing 6,225 square feet for which the sum of $2,000 was allowed separately) I think an average of 45 cents a square foot, or $22,027.30, approximately represents its value at the date of expropriation. In arriving at this figure I have, of course, considered all the evidence and I have not

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[5] 55 Can. S.C.R. 562, at p. 585.

lost sight either of the materially higher prices offered by the Crown in its information of 1911, afterwards withdrawn, or of the much lower prices paid by the appellants when purchasing the property in 1901. I would vary the judgment in appeal accordingly and would fix the compensation of the appellants as follows:—

For 49,394 sq. ft. of land	$22,227.30
For 6,335 sq. ft. (½)	1,000.00
For wharves	20,049.00
Total	$42,276.30

The Harbour Commissioners are entitled;

For strip comprising 6,503 sq. ft. at 25 cents, to	$1,625.75
For 6,335 sq. ft. at S.E. end of lot 2411 (½), to	1,000.00
For 2,220 sq. ft. at S. of Lot 2415	555.00
Total	$3,180.75

Both sums bear interest from the 8th Nov., 1913.

BRODEUR J.:—La principale question qui se présente dans cette cause est de déterminer la valeur du terrain exproprié. Il y a aussi une question de titre pour une partie de ce terrain; mais, au point de vue pratique, cette dernière question n'a pas l'importance de la première.

Le terrain exproprié fait partie des lots 2411 and 2415 du cadastre de Québec, et il est exproprié pour la construction du Transcontinental National. Il se trouve sur les bords du St. Laurent, dans le Hâvre de Québec, et il consiste surtout en quais et en lots à eau profonde. Il se faisait autrefois à cet endroit un commerce de bois considérable; mais depuis plusieurs

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années ces quais ont été peu utilisés. Nous avons eu dans une cause de *Hearn* v. *The King*[6], à examiner la valeur de terrains situés à proximité de celui dont il est question en la présente cause. Même l'un des dix lopins de terre expropriés dans cette cause de Hearn était voisin à Test du No. 2411.

[6] 55 Can. S.C.R. 562.

Par la preuve qui a été faite dans la cause de Hearn et que je retrouve dans cette cause-ci, il apparait que des propriétés semblables mais un peu plus rapprochées du centre de la ville et appartenant aux successions Molson & Bélanger et à la Compagnie Allan ont été vendues au Gouvernement. Celle de la succession Molson, qui se trouvait la plus rapprochée des propriétés Hearn, a été vendue en partie pour 65 cents du pied. Me basant sur cette dernière vente, j'ai été d'opinion qu'on devait accorder 65 cents dans cette expropriation Hearn.

Dans la présente cause, notre attention a été particulièrement attirée sur la valeur de propriétés situées plus à l'ouest, savoir celles du Séminaire de Québec, de William Power, de A. O. Falardeau, de Frank Ross, de la succession Dobell, de la Marquise de Bassano et de la succession Lampson, qui ont été payées de cinq cents du pied à vingt cents du pied. Mais ces dernières propriétés n'étaient pas aussi bien situées pour les fins de la navigation que la propriété en question dans la présente cause et, de plus, celle qui se trouve la plus rapprochée de cette dernière a été vendue au prix de 20 cents, mais il ne s'agissait que d'une vente sans garantie. Les vendeurs ne paraissaient pas avoir un titre parfait.

La Cour d'Echiquier a accordé une somme de 30 cents du pied aux appelants en la présente cause. Je crois qu'en prenant en considération les ventes

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ci-dessus mentionnées, ainsi que le jugement rendu dans la cause de Hearn, je serais d'opinion que les appelants seraient parfaitement indemnisés en leur accordant 45 cents du pied, ce qui ferait pour les 55,729 pieds de terrain $25,078.05. Il faudrait ajouter à cela la somme de $20,049 pour les quais qui leur a été accordée par la cour inférieure, que je trouve raisonnable. Cette dernière somme est basée sur le prix que nous avons accordé pour les quais dans la cause de

Hearn.	Ces deux sommes réunies de
	$25,078.05
et de forment un total de	20,049.00
	$45,127.05

Cette somme correspond à peu près à celle qui avait été offerte et acceptée par les parties en 1911. A cette dernière date, en effet, la Couronne avait offert aux appelants,

devant la Cour d'Echiquier, une somme de $42,597.00 pour 45,000 pieds de terrain. Cette somme avait été acceptée par les expropriés.

Mais en 1912 l'expropriation fut discontinuée et les propriétés remises à leurs anciens propriétaires conformément aux dispositions de la loi. Plus tard, la Couronne a décidé de les exproprier de nouveau.

La preuve au dossier n'est pas bien précise quant à la différence de la valeur de ces terrains en 1911, date de la première expropriation, et en 1913, date de la seconde; mais il parait y en avoir une légère.

Reste maintenant la question du droit de propriété quant à la partie sud-est du No. 2411. Les lettres patentes émises par le Couronne en 1854 stipulaient que Sa Majesté avait le pouvoir, en donnant un avis

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de douze mois, de reprendre cette propriété pour des fins publiques en payant au propriétaire la valeur des améliorations qu'il y aurait faites.

L'Intimé dit maintenant qu'aucune indemnité ne devrait être accordée pour ce morceau de terre, vu qu'il n'y a eu aucune amélioration de faite et que la Couronne désire le reprendre. Si on avait procédé sous les dispositions dé ces lettres patentes à exercer ce droit de rachat ou de reprise, la prétention de la Couronne pourrait avoir beaucoup de force; mais on n'a pas jugé à propos de réclamer en vertu de ce droit de reprise. On a procédé suivant les dispositions de la loi des expropriations et ce sont alors les principes de cette loi qui doivent s'appliquer.

Cette question s'est présentée devant la Cour d'Echiquier il y a plusieurs années dans une cause de *Samson* v. *The Queen*[7], et M. le Juge Burbidge a alors décidé que, les procédures ayant été prises en vertu de la loi des expropriations, l'indemnité devrait être basée sur les principes de cette loi.

D'ailleurs, ce droit de reprise ou de rachat existe-t-il encore? Si ce droit était encore entre les mains de la Couronne, je serais probablement venu à la conclusion qu'il est encore en vigueur et qu'il peut être exercé, ou, du moins, qu'il devrait être pris en considération en déterminant l'indemnité (art. 2213 C.C.).

[7] 2 Ex. C.R. 30.

Mais ce droit, ainsi qu'il a été décidé par la Cour d'Echiquier, a été cédé et transporté aux Commissaires du Hâvre de Québec par l'Acte de 1859, 22 Vict. ch. 32, et ces terrains, ainsi que les droits qui y étaient attachés, ont cessé de faire partie du domaine public de Sa Majesté. Il a été décidé par la Cour d'Echiquier que ce droit de reprise a été cédé aux Commissaires

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du Hâvre par la loi de 1859 et la Couronne n'a pas appelé de cette partie du jugement.

Ce droit de reprise est-il prescrit? La Commission du Hâvre peut-elle réclamer une partie de l'indemnité pour la valeur de ce droit?

En vertu de l'article 2242 du Code Civil, tous les droits et actions dont la prescription n'est pas autrement règlée par la loi se prescrivent par trente ans. Ce droit pour les Commissaires du Hâvre de reprendre ce terrain a commencé à exister pour eux en 1859; et, ne l'ayant pas exercé pendant les trente années qui ont suivi, il est donc éteint par le laps de temps et se trouve prescrit.

Quebec Harbour Commissioners v. Roche[8].

L'indemnité qui a été accordée par la Cour d'Echiquier aux Commissaires du Hâvre pour la valeur de ce droit ne leur appartient pas et les appelants ont le droit de réclamer la valeur entière de ce lot.

L'appel doit être maintenu avec dépens. Les appelants devraient avoir leur indemnité portée à la somme de $45,127.05.

LAVERGNE J. *ad hoc.*—I am of opinion to maintain the appeal with costs and I concur in the notes of judgment of Mr. Justice Brodeur:

Appeal allowed with costs.

Solicitors for the appellants: Pentland, Stuart, Gravel & Thompson.

Solicitors for the respondent His Majesty The King: Gibsone & Dobell.

Solicitor for the respondents the Quebec Harbour Commissioners: A. C. Dobell

[8] Q.R. 1 S.C. 365.