HIS MAJESTY THE KING (PLAINTIFF) ..... APPELLANT;

AND

DAVID TANCRÈDE TRUDEL AND ARTHUR PAQUIN (DEFENDANTS) ..... RESPONDENTS.

1913
*Nov. 14.

1914
*March 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of lands—Estimating compensation—Prospective value—Evidence.

In expropriations of lands for public purposes, under the 198th section of the "Railway Act," R.S.C. 1906, ch. 37, as authorized by section 15 of the "National Transcontinental Railway Act," 3 Edw. VII. ch. 71, the estimation of compensation to be awarded to the owners of the lands should be made according to the value of the lands to such owners at the date of expropriation. The prospective potentialities of the lands should be taken into account, but it is only the existing value of such advantages at the date of expropriation that falls to be determined. *In re Lucas and the Chesterfield Gas and Water Board* ((1909), 1 K.B. 16), and *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste*, (30 Times L.R. 293), followed.

Per Duff J.—The opinions of witnesses to the effect that certain values would be assigned to expropriated lands upon a comparison of those lands with other lands in the vicinity for which selling prices might be estimated in a vague way cannot be deemed evidence sufficient to establish values for the expropriated lands.

(Leave to appeal to the Privy Council was refused, 20th May, 1914.)

APPEAL from the judgment of the Exchequer Court of Canada which awarded the defendants, respondents, the sum of $18,203.72, as compensation and indemnity for the expropriation of their lands taken, under the provisions of the "National Transcontin-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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ental Railway Act," 3 Edw. VII., ch. 71, and section 198 of the "Railway Act," R.S.C., 1906, ch. 37, for the purposes of the National Transcontinental Railway.

The circumstances of the case and the issues on the present appeal are stated in the judgments now reported.

G. G. Stuart K.C. and *Alfred Désy* for the appellant.

Belcourt K.C. and *Guillet K.C.* for the respondents.

THE CHIEF JUSTICE.—In this case, His Majesty, upon the information of His Attorney-General, asks that the compensation due the respondents for certain lands taken for the right-of-way of the National Transcontinental Railway be ascertained.

The tract of land expropriated contains sixteen acres and a fraction and forms part of lots Nos. 26, 27, 28, 29 and 30 in the Township of Mailhiot, County Champlain, Province of Quebec; the amount offered as compensation by the Crown is $3,280.51, the amount claimed by the respondents is $43,688.94, and the amount of the award below is $18,203.72 with interest.

The total area of the five lots traversed by the line of railway, and out of which the sixteen acres in question were taken, is about 914 acres. These lots were acquired from the Crown between the year 1881 and 1903 for $274.20. The respondents purchased them for $3,211.25 in 1910 and 1911.

The line of railway was first located across the property in question in 1905 and it was subdivided into building lots several years afterwards.

In July, 1908, formal notice of expropriation was

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given. The question to be determined is the value of the land at the time the property was taken by the Crown.

In a very recent case, the *Cedar Rapids Manufacturing and Power Company* v. *Lacoste*(1), at page 294, their Lordships said:—

> The law of Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*(2), where Lord Justices Vaughan Williams and Moulton deal with the whole subject exhaustively and accurately.
>
> For the present purpose, it may be sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

And their Lordships add further:—

> That price must be tested by the imaginary market which would have ruled had the land been exposed for sale (at the time notice of expropriation was given).

In railway expropriation cases, section 198 of the Act provides:—

> The arbitrators or the sole arbitrator in deciding on such value or compensation, shall take into consideration the increased value common to all lands in the locality that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same, or 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. 3 Edw. VII. ch. 58, sec. 161.

It is common ground that the lots in question are totally unfit for agricultural purposes and their bare value is very trifling. The respondents, however, con-

(1) 30 Times L.R. 293.

(2) [1909] 1 K.B. 16.

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tend that they are in large part well adapted for building sites, hence their claim that they should be dealt with as building lots. The value of the property for that purpose depends upon the law of supply and demand. The evidence is not, it is quite true, very satisfactory, but it establishes beyond all doubt, in my opinion, that in view of the quantity of land available, the needs of the relatively sparse population and the prospect of future industrial development, the amount awarded is out of all proportion to the present value of the land or to any advantage which it has or is at all likely to possess for many years to come.

The total population of LaTuque in 1905 was under 1,000. It increased to two thousand in 1908 and to four thousand in 1912. Any future increase depends admittedly upon the further development of a water-power which is in the immediate neighbourhood of the land taken. In 1911, or thereabouts, a pulp-mill was built which, when completed, will employ five or six hundred people. That is the only local industry permanently established and the possibility of further development is very remote. There is no reasonable prospect that other industries will be established there in the near future. LaTuque is the western terminus of a branch line of the Lake Saint John Railway built to serve the purposes of the pulp-mill and it is traversed by the National Transcontinental Railway, but it does not appear that any material addition to the population has resulted, or is likely to result, from the existence of those roads; on the contrary, there is some evidence produced by the respondents to shew that, by reason of the construction of the railway bridge across the river the development of the water-power has been retarded, if not permanently pre-

vented, so that, on the whole, there is a very poor prospect of anything like a fair demand for building lots.

The next question is: What is the area of the land available to satisfy any demand that may reasonably be expected to arise? In addition to the 914 acres owned by the respondents there is available and open for purchase the large area, owned by the Stuart and Tessier Syndicate, more favourably situated as regards the water-power and the pulp-mill and, therefore, more attractive for places of residence for those engaged in that industry. That property has this additional advantage that the church, the convent, the school and the railway stations are all built upon it.

In these circumstances I find evidence that there is no considerable demand for building lots — the floating population engaged at the mill and in connection with the railways in process of construction is not likely to reside permanently in LaTuque, and the area available is far in excess of the demand. It is impossible, in my opinion, to say that, if, at the time the land was expropriated, it had been put up for sale, it could have been sold for building purposes, and, if sold at public auction in the open market, it would not have brought anything like the price awarded by the judge of the Exchequer Court.

It is quite true that there is evidence of the sale of some lots at six cents a foot, but I am not satisfied that these sales represent anything like the value realizable at an open, honest sale.

In any event, in 1908, barely three per cent. of the lots located were sold and there were in all ten to twenty small houses built on them.

If one compares the prices at which the property held by the Stuart and Tessier Syndicate was sold,

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we get, I think, the only reliable evidence of value on which a satisfactory conclusion can be reached. That syndicate sold, on the 30th of January, 1908, 19 acres for $2,850, on the 20th December of the same year three acres and a fraction for $477; on the 11th of November, 1910, thirty-two acres for $4,914.60. As I have already said, these are the prices realized in the open market for land more advantageously situated than that of the respondents. On the whole, I am satisfied that the indemnity offered by the Crown was not only fair, but generous. The respondents will be recouped the whole of their original outlay and they will still have available for sale, as building lots, over 930 acres. If their previsions are realized they will have a very handsome profit out of the balance of their lands, due, no doubt, to some extent, to the existence of the National Transcontinental Railway.

Much reliance was placed upon the evidence of witness Bourgeois. Here is what he says:—

Q. Voulez-vous dire quelle était la valeur de ces terrains en mille neuf cent huit?

R. La valeur de ces terrains-là, ils avaient acquis plus de valeur parce que c'était une site de ville.

Q. Combien est-ce que ça valait dans le temps à l'arpent ?

R. Pour moi, ça ne valait pas absolument grand'chose.

Q. Donnez-nous donc un chiffre, donnez-nous donc ce que ça valait pour vous; c'est ce que nous voulons savoir.

R. Ah— ça valait . . . je ne sais pas comment les lots se vendaient. Je n'ai pas demandé combien ça se vendait, ni, quelle était la valeur de ce terrain-là à l'arpent au mois de juillet mil neuf cent huit.

PAR LE COMMISSAIRE:—

Si vous n'êtes pas capable répondre, dites-le.

R. Je préfère ne pas répondre que de lancer des chiffres sans être capable de les appuyer.

Q. Voulez-vous nous dire quel était le maximum de la valeur de ces terrains-là au mois de juillet mil neuf cent huit, au meilleur de votre connaissance?

R. Pour moi, personnellement, ça valait trois à quatre cents piastres de l'arpent.

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I do not think that such evidence can be taken into consideration in the face of that given by Tessier, Scott and others.

I would allow the appeal with costs on the ground that the amount offered by the Crown was full compensation for the land taken.

IDINGTON J.—This is a most unsatisfactory case. The judgment seems to have some evidence to support it. Indeed, there can be found evidence in the case to support almost any conceivable judgment.

Yet the result seems apt to shock the ordinary man if allowing his stock of common knowledge to be brought to bear upon the evidence. It is the market price which must govern.

To say that the market price for a block of ninety-three lots, not to be selected by way of picking them out, but by virtue of an arbitrary line drawn directly across a survey of over two thousand such lots cut out of a recent wilderness to form part of a future city, must be measured by the prices got for isolated sales of a few single lots a year, spread over a period of years, seems to me unsound.

Yet something like this seems the process of reasoning adopted, default evidence having been directed to the purchase or possible purchase of such large blocks as is involved herein.

There is only one instance given in this survey of such way of looking at the matter and that is of an alleged offer for twenty lots which was refused and it affords no fair comparison with the block here in question. That block seems to have been compact and may have presented exceptional advantages which this does

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not, stretching over a long space of some possibly well-situated, and of others ill-situated.

If, as seems likely, the whole survey is on the average no better or worse than this block in question, then it is worth four hundred thousand dollars.

I imagine, if valued for purposes, for example say of succession duties, those concerned would be much surprised if asked to pay on such basis as adopted.

By comparison of this with sales made by a syndicate of a neighbouring block the price seems grossly excessive. And allowing most liberally for special collateral advantages possibly entering into that transaction, the price fixed here seems yet greatly excessive.

If there had happened to be an active market for these lots in respondent's survey, even if at excessive prices as result of temporary speculation when appellant's plan of expropriation declared, there would have been more ground for accepting such sales as a guide.

If we estimate the whole survey as worth even only a hundred thousand, instead of four hundred thousand dollars, the interest and taxes would eat up all the proceeds of sales and shew it was monstrous folly to expect to realize a profit by holding at similar prices and awaiting the building of the future city that might, in half a century hence, warrant such prices.

On the evidence before us, I do not think respondents have supplied a foundation for claiming any sum beyond that tendered by the Crown.

I would allow the appeal with costs.

DUFF J.—This appeal arises out of an information exhibited in the Exchequer Court under the "Expropriation Act." The lands in question comprise about

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sixteen acres in LaTuque, which is now a small town, on the River St. Maurice in the Province of Quebec. The lands were required for the way of the National Transcontinental Railway, and, a plan and description having been filed on the 2nd of July, 1908, it is with reference to that date that the compensation and damages are to be ascertained. The defendants advanced a claim for compensation and damages at the rate of six cents per square foot, the Government having tendered the sum of $3,280.51. The learned trial judge allowed the defendants for compensation and damages two and one-half cents per square foot — $18,203.72 in the aggregate. The Crown appeals.

I have come to the conclusion that the amount allowed by the learned trial judge is excessive, but that the amount tendered by the Crown was insufficient. At the time in question — July, 1908 — the terminus of the Quebec and Lake St. John Railway, which had been in operation for a year, was in the locality now the Town of LaTuque. The locality had also been for some time the centre of supply distribution in connection with the construction of the National Transcontinental Railway. There were, it appears, some twenty or thirty houses in the vicinity of the property in question and there were some two thousand people — mostly living in tents — a transient population brought there largely, if not exclusively, in connection with the construction of the railway. There were no other industries then established. But there was a water-power on the River St. Maurice which had been acquired by the Quebec, St. Maurice and St. John Industrial Company, and arrangements had been made for the development of it, which subsequently took place, and for the establishment of a pulp-mill,

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which was afterwards erected and is now in operation. The locality had already attracted the attention of speculators as the probable site of a future town, and, in 1907, a syndicate (referred to throughout the evidence as "the syndicate") had purchased a considerable tract of land which lies immediately to the north of the defendants' property. The defendants' lands, which comprised parts of lots 26, 27, 28, 29 and 30 of the Township of Malhiot, were granted by the Crown at various times, between 1881 and 1903, the prices paid amounting in the aggregate to $274.20. The defendants acquired lots 29 and 30 in June, 1910, for $2,000, and lots 26, 27 and 28 in the following year for $1,211.25; the total areas comprised within the five lots amounted to 914 acres. The strip which has been taken for the purposes of the railway is worthless for agricultural purposes and is capable of being used economically only as affording sites for building. In 1907, it had been surveyed and laid off in small building lots of about 50 by 200 feet. The learned judge has held that these lots had a market value which he puts at 2½ cents per square foot, including in this, however, an allowance for the injurious affection of other parts of the defendants' lands not included in the part expropriated.

I think the learned judge has fallen into some misapprehension in appreciating the evidence offered in support of the defendants' claim. The principle of compensation is, of course, well settled. It is stated very clearly in the following passage from the judgment of Moulton L.J. in *Re Lucas and Chesterfield Gas and Water Board* (1), at page 29:—

> The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner

(1) (1909) 1 K.B. 16.

receives for the land he gives up their equivalent, *i.e.*, that which they were worth to him in money. His property is, therefore, not diminished in amount, but, to that extent, it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser.

Where future advantages are in question, the principle to be applied is that expounded by Lord Dunedin in the *Cedar Rapids Case*(1). His Lordship says, at page 294:—

> For the present purpose it was sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking—not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The point to be determined, therefore, in this case is:—How much was the property worth to its owners in July, 1908, taking into account the possibilities of future use, but estimating those possibilities at their value as of that date? In considering this question it may be observed one is not entitled to exclude any value arising from the advent of the National Transcontinental Railway in so far as that should be due to causes affecting lands in the locality generally and not these lands specially. (Section 198 of the "Railway Act.") Now, first, I think it is abundantly clear from the evidence that, in July, 1908, there was not a market for the property (as building lots) which the defendants had subdivided into lots and of which the strip in question formed a part. There is evidence of thirteen sales prior to that date. There is evidence also that the sum of $4,000 had been offered for twenty lots, situated a short distance from the line of the railway, but, on the other hand, there was available for building sites a large area of land owned by

(1) 30 Times L.R. 293.

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the "Syndicate" and various points yet remained to be settled to determine the comparative advantages of different localities. The expected population, as pointed out, would be largely an industrial population, and experience seems to shew that such a population usually establishes itself in the vicinity of the church, the school and the shops. Until these localities should be identified it was not to be expected that lots would be purchased in great numbers for building purposes. How is one, then, to ascertain what this land was worth in money to the owners of it at that time ? One can only figure to one's self an imaginary purchaser in touch with all the circumstances and considering the investment of money in the purchase of land in LaTuque for the purpose of re-selling it. What, to the mind of such a purchaser, would have been a fair and reasonable price (*i.e.*, a price justifiable in the eyes of a prudent investor) to pay for this property ? Now, the evidence offered on behalf of the defendants, with the exception of the evidence shewing actual sales and the offers to which I have referred, seems to be of very little value indeed, for the purpose of determining such a question. For the presupposition on which all this evidence appears to be based is the fallacious assumption expressed in the following passage in the testimony of the Reverend E. Corbeil:—

Q. Les terrains indiqués au plan?

R. En autant que dans une paroisse il y a une connaissance publique que telle terre vaut telle somme et que telle autre terre vaut telle autre somme, il y a un marché dans la paroisse, or, je sais d'après l'estimé public ce que les lots valent et je peux le dire.

The evidence of this witness and of witnesses of the same class as to value is given with reference to this loose conventional standard — if standard it can be called.

The witnesses, in a word, are not dealing with the question of what price this sixteen acres would bring or what this sixteen acres was actually worth to the owners in money; but the price which, according to the public talk in the locality, would be assigned to these lots upon a comparison with the supposed value of other lots. That is not of much assistance in view of the facts that the number of actual purchasers was so small, that the actual demand for lots for building purposes was so limited, and that the population was of the transient character that marked the population of LaTuque in July, 1908. Moreover, the prices actually paid by the defendants themselves, in 1910, afford a strong reason for thinking that this evidence does not afford any really trustworthy guide. On the other hand, there is some ground for thinking that the prices paid to the "Syndicate" by the Commissioners do not represent the full value of the land purchased and there is evidence given by one of the witnesses, called and put forward by the Crown as a competent person to pass upon the value of the property, that this property could have been sold at a price of from $300 to $400 an acre. This evidence, taken together with the prices paid and offered to the defendants for particular lots or groups of lots justifies one, I think, in holding that the defendants ought to be compensated at the rate of $400 per acre — this sum to include all damages.

ANGLIN J.—The disposition of this case is by no means free from difficulties. The parties are very far apart in their appreciation of the value of the expropriated property and they differ radically as to the proper basis of valuation. They agree that it is the

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market value of the land taken at the date of the expropriation which is to be allowed: but there is the widest possible divergence of views and opinions as to what that market value was and as to how it should be estimated.

It is common ground that as agricultural land the property is worth little or nothing. Its value is derived entirely from the proximity of two railways and the location of the works of the Quebec and St. Maurice Industrial Company. In July, 1908, when the expropriation took place, no railway had yet been constructed into LaTuque, but the Lake St. John Railway was in course of construction and the location of the right-of-way and the situation of its terminal station were known. The water-power now used by the Quebec and St. Maurice Industrial Company had already been acquired by it; the approximate location of its works was well understood; but no actual work of construction was done until October, 1909. The advent of the Transcontinental Railway itself was a practical certainty (*James* v. *Ontario and Quebec Railway Co.*(1)). These facts, no doubt, gave the defendants' land a substantial value; but it was a value wholly prospective. In considering what should be the amount of compensation, these potentialities must be taken into account as such and, whatever market value they had then given to the lands expropriated must be allowed for. The owners are entitled to be treated as if bargaining with a purchaser in the market. *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste et al.* (2). Of anything which a far-seeing purchaser would take into account in estimating what he should pay for

(1) 15 Ont. App. R. 1.

(2) 30 Times L.R. 293.

the property (subject to the provisions of section 198 of the "Railway Act") the owners are entitled to the benefit in fixing the value of the land for purposes of expropriation. 6 Halsbury, Laws of England, pages 36-39. No doubt, the possibilities to which I have referred were, at least to some extent, taken into account in fixing the price when the defendants bought their property; and what they paid for it, not very long before the date of the expropriation, is a material element for consideration in determining the compensation they should receive. *In re Fitzpatrick and New Liskeard*(1).

The Rev. Curé Corbeil says that, at one time, it was expected that the parish church would be built on the defendants' property. If that expectation had been realized, the probability of their being able to dispose of a large part of their lands as building lots would have been much greater. But the site for the church was changed, probably before July, 1908, although the precise date of the change is not made clear in the evidence.

For the defendants, five disinterested witnesses pledged their oaths that the defendants' land was saleable in July, 1908, as building lots at four cents per square foot, corner lots being worth six cents per square foot.

For the Crown, four witnesses — of whom one had comparatively slight means of knowledge and another would appear to have been not wholly disinterested —deposed that the value of the lands should be estimated by the acre, and placed it at $150 per acre. Another Crown witness, Ritchie, declined to put a

(1) 13 Ont. W.R. 806.

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value on the land expropriated, and still another, Benjamin Bourgeois, city engineer of Three Rivers, when pressed by counsel for the Crown, valued it at $300 to $400 per acre. No doubt, large areas almost in the immediate neighbourhood were sold to the Transcontinental Railway and to the Quebec and St. Maurice Industrial Company at $150 an acre, but special advantages resulting to other adjacent properties of the vendors probably influenced them in making these sales. Before July, 1908, other neighbouring proprietors had sold some building lots at $200 and $300 a piece. The defendants themselves had actually sold thirteen lots at similar figures and they had refused an offer of $4,000, or four cents per square foot, for twenty lots, because corner lots were included for which they were asking six cents per square foot. But this was when it was expected that the church would be built on the defendants' property and there was much speculation as to the site of the station, shops, etc., of the Transcontinental Railway itself.

In 1908, the Municipality of LaTuque did not exist. There were some fifteen houses on the lower level and ten or twelve on the upper level. The first municipal election was held in 1909.

Taking all these facts into account and weighing all the evidence, I am convinced that, at the time of the expropriation, it was not fairly to be expected that the defendants could dispose of the ninety-three lots, or of any considerable number of them, as lots for building or other purposes, within a reasonable period of time. There was not a market for them as lots and they cannot properly be said to have had a market value as such. On the other hand, taking all the facts and potentialities into consideration, I am

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disposed to think that the figure named by Bourgeois, a Crown witness, viz., $400 per acre, approximately represents the value of this land on an acreage basis — and that, I think, is the true basis on which their value should be estimated. If anything, $400 an acre is, perhaps, a little beyond the actual value. I allow something for compulsory purchase.

Having regard to the provisions of section 198 of the "Railway Act," I think that any damage occasioned to the adjacent lands of the defendants by the construction of the Transcontinental Railway has been offset by the special advantages which these lands have derived from the immediate proximity of it. This was the opinion of the Rev. Curé Corbeil, a chief witness for the defendants.

Although always loath to interfere with the assessment of compensation in such cases by the judge of first instance, I feel compelled, for these reasons, to reduce the award in the present instance from $18,203.72 to $6,686.40. The Crown should have its costs of appeal.

BRODEUR J. agreed with the Chief Justice.

Appeal allowed with costs.

Solicitor for the appellant: *Alfred Desy.*

Solicitors for the respondents: *Belcourt, Ritchie & Chevrier.*