CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE EUGENE FUGERE, and LOUIS JOSEPH FUGERE .....SUPPLIANTS,

AND

HIS MAJESTY THE KING.....RESPONDENT.

1917
Feb. 10.

Expropriation—Compensation—Water-lots—Crown grant — Reservations—Abandonment of proceedings — Advantages — Crossing—Costs.

In an expropriation by the Crown of lands held under a Crown grant subject to a reservation in favour of the Crown of the right to retake the lands if required for public purposes:

Held, that the owners were entitled to have their rights duly adjusted without fixing the actual value of the rights remaining in the Crown under the grant.

(2) That want of registration did not affect the validity of the conditions or reservations.

(3) That the rights reserved affected lands within the category of "banks, sea-shore, lands reclaimed from the sea, ports and harbours", and forming part of the Crown domain were imprescriptible.

(4) That the rights were not extinguished by a sheriff's sale of the land.

(5) Where expropriation has been abandoned, but no legal rights are invaded and no damage suffered, compensation cannot be allowed.

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(6) An advantage to the property by the construction of a railway crossing is to be taken into consideration in estimating the amount of compensation.

(7) That the Crown having made no offer by its statement of defence was liable for the costs.

PETITION OF RIGHT to recover compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, November 21, 22, 1916; February 10, 1917.

E. Baillargeon, K.C., and *F. O. Drouin, K.C.*, for suppliants; *Alleyn Taschereau, K.C.*, for respondent.

AUDETTE, J. (June 2, 1917) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $50,000 as representing the value of a certain piece or parcel of a beach lot, expropriated by the Crown, for the purposes of the National Transcontinental Railway, at Levis, P.Q., covering also all damages resulting from such expropriation, including damages arising from the detention of the whole property during a few months, together with all damages resulting from the erection of a pier in front of the property, as the whole is hereinafter more clearly set forth.

On the 9th January, 1913, the Crown expropriated the whole lot, No. 314, at Windsor Indian Cove, Levis, P.Q. This property is a beach lot, lying between high and low water marks of the Saint Lawrence, and according to the original Crown grant, contains an area of 149,000 feet more or less, —and according to the suppliant's title from their immediate *auteurs*, contains an area of 162,482 feet, more or less without warranty as to measurements.

Having expropriated the whole lot in January, 1913, the Crown, on the 13th May, 1913, abandoned the expropriation of the same and returned the lot to its owners, the whole in pursuance of sec. 23 of *The Expropriation Act.*

Then on the 31st December, 1914, the Crown, by depositing plans and descriptions in the Registry Office, for the County of Levis, expropriated 17,000 square feet of the said beach lot No. 314—as shewn coloured red on the plan filed herein as Exhibit "B".

The Crown having erected a pier or "Fender Crib" opposite the northern boundary of the lot 314, but outside of the boundary of the said lot and below low water mark, the suppliants claim damages for such erection, contending that it interferes with the access to their property.

Therefore, the suppliants' claim may be stated as follows, to wit:

1st. For the damages resulting from the expropriation of the whole of lot 314 which remained vested in the Crown between the 9th January, 1913, and the 13th May, 1913, when it was abandoned and returned to them.

2nd. For the value of the 17,000 square feet expropriated on the 31st December, 1914, and for damages resulting from such taking.

3rd. For the damages resulting from the erection of the said "Fender Crib" below low water mark.

The Crown by the statement of defence, traverses all the *claims* set up by the suppliants, denies any liability and makes no offer of any amount of money in compensation for the said expropriations, relying

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upon the Crown grant, under which this lot left the hands of the Crown, whereby this beach lot No. 314 was granted to the suppliants' predecessors in title (*auteur*), on the 23rd July, 1859, subject to a number of provisos and conditions, amongst which the following is to be found, namely:

"Provided further, and we do also hereby ex-
"pressly reserve unto us, our heirs and succes-
"sors, full power and authority, upon giving
"twelve months' previous notice to our said
"grantee, his heirs or assigns, to resume for the
"purpose of public improvement, the possession
"of the said lot or piece of ground hereby grant-
"ed, *or any part thereof,* upon payment or tender
"of payment to him or them of a reasonable sum
"as indemnity for the ameliorations and improve-
"ments which may or shall have been made on
"the said lot or piece of ground, or on such part
"thereof as may be so required for public im-
"provements, and upon re-imbursement to our
"said grantee, his heirs or assigns, of such sum
"as shall have been by him or them paid to our
"Commissioner of Crown Lands for such lot or
"piece of ground or such part thereof so required
"for public improvements; and in default of the
"acceptance by our said grantee, his heirs or as-
"signs of such sum so as aforesaid tendered, the
"amount of indemnity, whether before or after
"the resumption of possession by us, our heirs
"or successors, shall be ascertained by two ex-
"perts." . . . .

No improvements or ameliorations have been made upon this property as contemplated in the said Letters Patent.

Therefore the Crown concludes that since a portion of this lot is required for the purposes of the National Transcontinental Railway, *for the purpose of public improvement,* no indemnity is due the suppliants under their title for the land so taken.

However, at the opening of the trial, counsel at Bar, on behalf of the Crown, offered the suppliants the sum of $4,250 for the 17,000 square feet expropriated, this amount to cover all damages resulting from the said expropriations, and the damages, if any, for the time the whole property remained vested in the Crown, under the first expropriation, &c.

This offer, the suppliants, through their counsel, then declined to accept.

The expropriation is in the nature of a second invasion, the Grand Trunk having already, for a long period, intersected the property by its line of railway.

The question of damages resulting from the neighbourhood of a railway with respect to this lot is to-day only one of degree, as compared with the time when the expropriations herein were made. There was a railway adjoining the property before the expropriation, and there is one more to-day, and the owner over which one railway has obtained a right of way is entitled to other and different damages from a second railway expropriating land alongside the first, the property having already adjusted itself to the first invasion. (1).

EVIDENCE.

On behalf of the suppliants the following witnesses were heard in respect of value and damages.

(1) *Re Billings & C. N. Ont. Ry. Co.*, 15 D.L.R. 918; 16 Can. Ry. Cas. 375; 29 O.L.R. 608 and 31 O.L.R. 335, (reversed in 32 D.L.R. 351).

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E. Lamontagne values the land taken at 15 to 20 cents a square foot, stating it should not be too much for one who needs it; but to give the property any value wharves must be erected. His attention being called to the proviso of redemption in the Crown grant, he says that with such a provision the property is worth less. He would not purchase. It is a great risk for a purchaser.

George Peters values the piece taken at 20 cents a foot and adds that the remaining portion would retain the same value as before, if there was a good crossing. He would not have bought with the proviso, unless it had been for two or three years.

Eugene Trudel values the piece taken at 20 cents a foot; with a crossing the damages to the balance would be greatly reduced.

Charles J. Laberge also places a value of 20c. a square foot.

On behalf of the Crown, *Robert H. Fraser,* the right of way agent of the Department of Railways and Canals, values the Fugere property at 5c. a foot. He bought the two adjoining lots at 5c. a foot for the land, and $3 a yard for the wharf, adding 10 per cent. to that price and interest. He was offered a property at Hadlow, ½ mile higher, at 2½ cents a foot. He did not take it because it was not opposite the Quebec Landing of the "Leonard."

E. Giroux was offered the Bennett property at Hadlow at 2½ cents a foot, and values the Fugere property at 10 cents a foot, and he reckons the damages at 10 to 15 cents on the 17,000 feet. He further adds that the "Fender Crib" is an advantage and not a source of damage.

UNDERTAKING.

A good deal of evidence was adduced in respect of a crossing over the Grand Trunk Railway, and over the Transcontinental, from the King's highway to the suppliants' property. Some of the witnesses even testified on the assumption that such a crossing was impossible. Surveyors were sent to the *locus in quo*, with the result that the following undertaking was made and filed on behalf of the Crown. This undertaking reads as follows, to wit:

"I, the undersigned counsel for the Attorney-"General of Canada, in pursuance of sec. 30, Ex-"propriation Act of Canada, hereby undertake to "build, give or cause to be built and maintain a "crossing for heavy and small vehicles over the "railway constructed on the piece of property taken "from lot No. 314 of the Cadastre of the City of "Levis, Province of Quebec, the property of the "petitioners and expropriated from the petitioners.

"The undersigned counsel, Alleyn Taschereau, "further undertakes to build, cause to be built and "maintain said crossing over the branch of the "Transcontinental Railway, constructed on the "south part of said lot No. 314, and over the "main line of the Grand Trunk Railway Com-"pany to the public road as shown on a plan "attached to the present document, and in accord-"ance with the regulations of the Railway Act."

This crossing, as explained by witness Dick, is of a length of 170 feet, with the following grades: From the King's highway fence to the centre of the Grand Trunk, for 16 feet, there is a grade of one foot in 8.07; then it is level for 8 feet. Thence it falls one foot in 50 for a distance of 13 feet. Then

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it is level for another 8 feet, and thence falls one foot in ten for a distance of 125 feet. All of this appears on plan Exhibit "D."

Such a crossing is a great boon to the property, since it assures a good crossing over the two railways, and gives a perfectly good access to the balance of the suppliants' property. Not only does it reduce the damages, but it is an advantage to the suppliants in respect of the balance of the property.

It is true that the only question put to the witnesses who were asked to testify in respect of the value of this property, that their attention was only called to the proviso of redemption by the Crown, as mentioned in the grant; but on looking over this Crown grant, it will be seen there are a number of other conditions and reservations therein mentioned which would certainly go to again reduce the market value of that property, looked at with such a title. Indeed, on looking over the grant, it will be seen, among other things, that it is made subject to the express conditions of—1st, building, and erecting and maintaining wharves upon this beach lot, within three years. 2nd, in default of erecting such wharves, an additional yearly rent would become due. 3rd, in default of maintaining wharves in certain cases,—exception being made when the property is used for storing logs,—the land reverts to the Crown and the grant becomes void. 4th, the grant is further subject to any right any previous grantee of the land in rear of said beach lot may have. 5th, it is also subject to the delivery of the necessary ground for a 36 foot width road on the whole length of the beach lot. 6th, subject further-

more to the rights, privileges and easements or servitudes of a railway company more particularly provided by 13-14 Vict., &c., &c.

All of these conditions and reservations are in addition to the proviso respecting redemption, and there is no evidence as to whether the original grantee, or his successor in title, ever paid this additional rent or whether or not such additional annual rent ever became due and what use was made of the property.

This property was sold by the Sheriff on the 14th February, 1891, to the Fabrique de St. David de l'Auberivière, for the sum of $195, under the usual legal title in such case made and provided by the Code of Procedure.

On the 10th August, 1912, the said Fabrique sold to the suppliants the same property for the sum of $25,000, of which $7,500 were at that date paid,—the balance, bearing interest at 5 per cent., is made payable on demand upon three months' notice.

Therefore the suppliants in August, 1912, bought the whole of the property at a figure of about 15 cents and a fraction of a cent, or between 15 and 16 cents a foot. The suppliants are manufacturers of men's clothing, and it is testified they had so bought to sell to a lumbering company for which they were promoters. And one of the suppliants heard as a witness testified they never used the property—it yields them nothing, and never did yield them any revenue. The company was formed and it bought a property at Cap à la Madeleine.

The suppliants did not have the property long in their hands before, as we have seen, they were troubled by expropriation. However, there is not

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on the record any clear and direct evidence that their scheme, as promoters, did actually suffer therefrom, and there is no such contention in the suppliants' written argument. Whether or not the suppliants, when they bought, at a figure between 15 and 16 cents a foot, contemplated, as promoters, to ever sell that property to their company at a profit, is not in evidence; but what is quite certain they purchased at a higher figure than property was held in the neighbourhood, as established by the respondent's evidence—and, after all, there is no more cogent evidence than the evidence of sale of property immediately adjoining the property in question and of the same nature.

The suppliants' evidence, as a whole, would not justify any more than 15 cents a foot. Even some of the suppliants' witnesses who, after fixing a value of 15 to 18 cents upon the property, when their attention was being called to the proviso of redemption in the Crown grant, said they would not purchase with such a title.

At the date of the expropriation, the property, with the conditions and reservations enumerated in the Crown grant would hardly be worth 15 cents a foot, the price paid by the suppliants in 1912. Could it be explained from the fact the Fabrique sold to the suppliants with covenants? It may, however, be a fair price for the small piece taken in 1914, as the sale of a small piece always commands a somewhat higher price than where the sale is made for a large one or for the whole property.

The Crown did not choose to exercise this right of redemption under the grant, but proceeded under the provisions of *The Expropriation Act,* therefore

the value of the property is to be determined with reference to the nature of the suppliants' title. *Samson v. The Queen* (1); *Corrie v. MacDermott* (2); *Stebbing v. Metropolitan Board of Works* (3); *Penny v. Penny* (4). It is also a right which is still alive and which the Crown could exercise with respect to the balance of the property.

For the reasons mentioned in the case of *Raymond v. The King* (5), the suppliants are found entiled, under their petition of right, to have their right duly adjusted herein, without fixing the actual value of the rights remaining in the Crown under the grant.

QUESTION OF LAW.

Now it is contended on behalf of the suppliants that the provisos containing the conditions and reservations in the Crown grant are of no effect for the want of registration, in the Registry Office, of their Crown grant. This appears to be a mere forensic assertion in face of and contrary to a clear text of law, as enacted in Art. 2084 of the C. C. I cannot read such meaning in this statutory enactment. This Art. 2084 must be read in its plain grammatical sense, without restriction or addition. And, as is so well said by Mr. Mignault, in Vol. 9, p. 195, Droit Civil Canadien:

"C'est l'ancienneté de ces titres qui les a fait "exempter de la formalité de l'enregistrement. "D'ailleurs, personne ne songerait à les contester."

(1) 2 Can. Ex. 30.
(2) [1914] A.C. 1056.
(3) L. R. 6 Q. B. 37.
(4) L. R. 5 Eq. 227 at 236.
(5) 16 Can. Ex. 1 at 5, 29 D.L.R. 574.

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And Langelier, Cour de Droit Civil, Vol. 6, at p. 324, says: "Les titres originaires de concession "d'un immeuble sont exemptés d'enregistrement, "parce que tous ceux qui acquièrent des droits réels "sont au droit du concessionnaire primitif, et qu'ils "n'ont point d'interêt à invoquer le défaut d'enreg- "istrement."

See also *Corp'n. of Quebec v. Ferland* (1).

If the original title need not be registered, how can it be contended that the charges, or conditions and reservations in favour of the Crown, be subject to such registration? The title is but a unity and the right of redemption and other conditions and reservations form part of the title, which is in its very essence an original title from the Crown, and which is indivisible in that respect. There is no more necessity under the law as enacted, to register in one case than in the other. And, indeed, are not most of these grants made under some reservation or another? Under the law as it stands, the maxim *caveat emptor* obviously applies and the prospective purchaser is, under Art. 2084, put upon his inquiry to ascertain what the original Crown grant contains. He has constructive notice under Art. 2084, and he should search his title. If he does not do so, he has but himself to blame.

Moreover, the Crown, under the grant, retained real rights upon the lot No. 314, and these rights still form part of the public domain, and are clearly set out in the grant and are imprescriptible. The Crown could grant an absolute title, but it chose in this case not to do so,—it retained certain rights in the property.

(1) (1888) 14 Que. L.R. 271; 11 L.N. 364.

These rights so reserved to the Crown under the grant are imprescriptible, since they form part of the public domain; and they do form part of the public domain, since the land in question comes within the ambit of Art. 400 C.C.—"*Banks, sea-shore, lands reclaimed from the sea, ports and harbours,*" and are as such considered as being dependencies of the Crown domain,—and as such, under Arts. 2212 and 2213, they are imprescriptible,—the property being in a public harbour, and a part of the shore or bank of a navigable river—*Nullum tempus occurit regi.* Moreover, the reservation, condition or provision in the grant are rights in the Crown which form part of the public domain and as such are not subject to prescription. *Lachapelle v. Nault* (1), and statutes of limitations are not binding without apt language therefor in the case of the King.

How could prescription run? The grantee and his successor in title were always rightly and legally in possession under the terms and tenure of the grant, and there was never any adverse possession. *Coppin v. Fernyhough* (2).

It is further contended that the sheriff's sale in 1891, to the Fabrique, the suppliants' direct *auteurs,* has discharged the property from all real rights, under the provisions of Art. 781 of C.C.P., and that therefore the reservation mentioned in the provisos of the grant have been discharged. With this contention I cannot agree. This Art. 781 must be read in the light of Art. 2084 C.C., and, moreover, the sheriff's sale, as usual, only transferred and conveyed to the purchaser the rights to the

(1) 6 R. d. J. 3. (2) Brown Ch. Cases, 291, 29 E.R. 159; *Watson's Compendium,* Vol. 1, p. 150.

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property which the judgment debtor might have exercised. Therefore the sheriff's sale only conveyed such rights which originally were mentioned in the grant when the property left the hands of the Crown, under the conditions and reservations therein mentioned. Nothing but what left the hands of the Crown under the grant was or could be sold by the sheriff.

Pigeau, 2nd Ed., Vol. 2, at p. 145, says:

"L'adjudication definitive ne transmet a l'adju-"dicataire d'autres droits à la proprieté que ceux "qu'avait le saisi; si donc il n'etait pas propriétaire "ou s'il ne l'était qu'en partie, ou sa propriété etait "conditionnelle, rèsoluble ou grevée d'usufruit, "l'adjudicataire ne serait propriétaire ou ne le se-"rait que comme l'était le saisi."

Coming now to the fixing of the compensation. There is a claim made for the time the whole lot 314 remained vested in the Crown, that is, between the 9th January, 1913, and the 13th May, 1913, when the Crown abandoned and returned the same to the suppliants. The Crown derived no benefit from the expropriation and did not interfere with the possession of the lot. This property never yielded any revenue to the suppliants, and there is no evidence of any damage suffered by them during the interval in question. Such a claim does not lie in tort, and does not arise out of the violation of a legal right or a contract. There was no invasion of any legal right. For the reasons given in the case of *The King v. Frontenac Gas Co.* (1) no compensation or damages under the present circumstances can be allowed.

(1) 15 Can. Ex. 438 at 442, et seq.; affirmed 51 Can. S. C. R. 594, 24 D.L.R. 424.

The evidence upon the question which may result from the "Fender Crib," although meagre, is controverted. Some witnesses say it is a source of damage, and others say it is an advantage. The Crown has dredged to the east of the crib, which is obviously an advantage to the suppliants' property. Counsel for the Crown, in his argument was willing to allow $500 for the same. No doubt the Crown could not derogate from its grant and erect a pier or wharf in the immediate front of the suppliants' property without due compensation. *North Shore Ry. Co. v. Pion* (1), and *Lyon v. Fishmongers' Company* (2).

It is not the value of the full fee, the whole interest in these 17,000 feet which has been expropriated by the Crown, that has to be ascertained; it is the value of the interest in this land which was vested in the suppliants at the date of the expropriation. There is a separate and distinct interest in the land which is not vested in the suppliants as controlled by their title with the conditions and reservations in question. What is the value of that interest held by the Crown it is herein unnecessary to ascertain; but, what has to be determined is the value of this land under the suppliants' title, at the date of the expropriation, and the court, acting as a jury, must decide.

In order to arrive at the value of the land taken, all the circumstances above mentioned, which it is unnecessary to repeat here, must be taken into consideration. And, in view of the fact mentioned several times, by the witnesses for the suppliants, that their valuation was on the assumption it was im-

(1) 14 App. Cas. 612. (2) 1 App. Cas. 662.

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possible to establish a proper crossing, it must be found that a very good crossing has been given the suppliants, not only over the Transcontinental, but also over the Grand Trunk, and that the Crown is for all time to maintain the same. That is a very great advantage to the property as a whole, which under the provisions of sec. 50 of *The Exchequer Court Act,* should be taken into consideration. This piece of land was expropriated in January, 1914, and the evidence shows there was no difference in the value of that property in 1913 as compared to 1914.

The taking of this strip of 17,000 feet, alongside the Grand Trunk Railway right of way, is no detriment to the balance of the property, under the circumstances. Before the expropriation the tide came up to the Grand Trunk Railway embankment, and since the expropriation of these 17,000 feet, which were formerly submerged at high tide, the Crown has erected an embankment for the railway and given the crossing. If the balance of this property is to be used for warehouse, industrial or other purposes, the fact of having access to an additional railway is another advantage to the property.

If 16 cents a foot were allowed for the part taken it would amount to.....$2,720.00
and if the amount of 500.00
suggested by counsel is allowed in respect of the Fender Crib, that would give a total of $3,220.00

Leaving a large margin still between that amount and the offer by the Crown of $4,250, which was made before the undertaking for the crossing was filed.

The suppliants are in any event entitled to their costs, the Crown having made no offer by the statement in defence. They would also be entitled to costs even if they did not accept the sum of $4,250, at the opening of the trial, because at that time the Crown had not offered the undertaking to build and maintain the crossing, which crossing of itself is of very great value to the suppliants' property. I am, however, of opinion to fix the compensation at the sum of $4,250 the unaccepted offer made by the Crown, but in order to make the compensation more liberal under all the special circumstances of the case, I will allow the ten per cent. for the compulsory taking, making in all the sum of $4,675.

Therefore, there will be judgment as follows, to wit:

1. The lands expropriated herein, namely, the 17,000 square feet taken from the beach lot No. 314, are declared vested in the Crown from the 31st December, 1914.

2. The compensation for the said land so taken is hereby fixed at the sum of $4,675 with interest thereon from the 31st December, 1914, to the date hereof.

3. The suppliants are entitled to be paid the said sum of $4,675 with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, charges or incumbrances whatsoever.

4. The suppliants are further entitled to the performance and execution of the obligations on behalf of the Crown, set forth in the above mentioned undertaking.

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5. The suppliants are further entitled to their full costs.

Judgment for suppliants.

Solicitors for suppliants: *Drouin, Sevigny & Drouin.*

Solicitor for respondent: *Alleyn Taschereau.*