

THE KING, ON THE INFORMATION OF THE ATTORNEY-
GENERAL OF CANADA..... PLAINTIFF;

1916
Dec. 7

AND

BIRCHDALE, LIMITED, THE CANADA LIFE ASSO-
CIATION AND JOHN W. REGAN, J. FRED FRASER,
J. FRANK COLWELL, JAMES FARQUHAR,
FREDERICK BOWES, CHARLES BUTCHER AND
W. ERNEST THOMPSON.....DEFENDANTS.

Expropriation—Compensation—Railways—Hotel property—Easement.

Upon an expropriation by the Crown of a portion of a hotel site for railway purposes, compensation should be allowed on the basis of a building lot, for injury to the property from the construction and operation of the railway, and for an easement of a right of way over a street affected by the expropriation.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. JUSTICE CASSELS, at Halifax, N.S., September 28, 29 and October 2, 1916.

J. A. McDonald, K.C., and *T. S. Rogers*, K.C., for plaintiff; *Humphrey Mellish*, K.C., for defendants.

CASSELS, J. (December 7, 1916) delivered judgment.

An information exhibited on behalf of the Crown to have it declared that certain lands expropriated for the terminal works in the City of Halifax, are vested in His Majesty, and to have the amount of compensation ascertained by this Court.

Before dealing with the question of value, it may be well to describe the property owned by the Birchdale Company, Ltd. In a recent case in which I delivered judgment *The King v. Studd*,¹ I have set out in considerable detail the character of the surrounding properties in the district in which these lands are situate. I do not propose

¹ Ante. p. 365.

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to repeat what I there stated. The property in question, namely, the Birchdale property is situate facing on the North West Arm. It is a property comprising an area of about 10 acres. The actual quantity is not definitely fixed. It is said to contain with the water-lot over 11 acres, but Mr. Bowes, who is the manager of Birchdale, is of the impression that the area of the land is less than 11 acres. The exact quantity is not of moment in this action. The whole area is composed of one lot on which is erected, what is called, the Birchdale Hotel. This hotel is situate not far from the waters of the North West Arm, and overlooks the waters of the Arm.

The property is bounded on the north by Cobourg Road which runs from the centre of the City to the waters of the Arm. Running from Cobourg Road, and along the easterly front of Birchdale is a private road said to be owned by the Birchdale Company. This road extends from Cobourg Road to what is known as the Kenny property or "Thorndale," which adjoins Birchdale on the south. This Kenny property comprises a large number of acres with a large frontage on the North West Arm on its western side. Over this street on the east side of the Birchdale property there is an easement in the perpetuity of a right of way from Cobourg Road to the Kenny property. East of the Kenny property is what is known as the Sandford Fleming house. To the east of this road there is a large field owned by Kenny, extending north and south along the whole of the Birchdale eastern front. It runs from Cobourg Road on the north southerly to the Kenny property. The railway had expropriated a right of way through this field and have excavated their cutting to a depth of over 20 feet. Before reaching Cobourg Road the railway company have expropriated a portion of this street and also have expropriated a triangular piece of land from the Birchdale Company. The land taken from the Birchdale Company exclusive of the street comprises a triangular piece of land with 53 feet frontage on Cobourg Road and extending back 128 feet to the side of the triangle parallel to the street in question. The land expropriated from the street and also that portion of the Birchdale property expropriated (exclusive of the street) are now vested in the

Dominion Crown. Out of the lands so expropriated by the Crown, the Crown has opened a street of about 30 feet in width, and the balance forms part of the right of way of the railway. The cutting of the railway is about 150 feet in width. The Crown have opened a continuation of the street on the east of the Birchdale property so as to make it a continuous street running to Cobourg Road, and they have granted an easement in perpetuity to the Birchdale property over this new portion of the street so laid out by them in substitution for that portion of the street expropriated. The result is, that while the fee in that particular portion of the street expropriated is vested in the Crown, an easement in perpetuity is granted to the Birchdale Company over this new portion of the street substituted for that portion closed. Temporary bridges have been constructed, and a permanent bridge of 42 feet in width will be erected, and will thus make a continuous street of Cobourg Road as formerly, except that where the cutting now is, it will be crossed by a bridge acceptable to the city.

In addition to the expropriation of the portion of the street running along the east side of the Birchdale property from Cobourg Road the Crown has expropriated an easement over this street in favour of what is called the Fleming property. This is done with the object of providing a right of way to the Fleming property over this street from Cobourg Road on the north. By reason of the expropriation through the Fleming land this easement becomes necessary in order to give that property a means of ingress and egress. It is needless to state that prior to the expropriation the street in question to the east of the Birchdale property extending from Cobourg Road to the Kenny property, while vested in fee in the Birchdale property, could never be alienated or disposed of. It had to remain there on account of the easement granted to the Kenny property, and while a portion of the road has been expropriated in fee, and additional easements granted over this road in favour of the Fleming property, the same right of ingress and egress from Cobourg Road to the Birchdale property exists now as before the expropriation. The Crown have also expropriated a right to lay down, construct and repair water pipes under the street in question.

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The complaint is made that the entrance to the street from Cobourg Road over the new portion of the street so dedicated is not as good as it was by the old road prior to the expropriation. It is said to enter from the Cobourg Road at a more acute angle. The Birchdale Company unquestionably are entitled to some compensation for the piece of road which has been absolutely expropriated and for the extra burden imposed upon this road in favour of the Fleming property and for constructing water pipes. None of the witnesses seem able to place a sum in dollars and cents which would compensate for this changed entrance from Cobourg Road, and for the additional burden which has been cast upon the Birchdale street, and it is altogether a matter of surmise. That something should be allowed I think goes without saying. The exact amount is difficult to determine. According to Mr Bowes, the chief matter of complaint would be the extra cost of maintaining this street.

A considerable amount of evidence was furnished at the trial to show injury done to the Birchdale property during the construction of the railway through the Kenny field immediately east of the Birchdale property and east of the street in question. It would appear that considerable damage was done through careless blasting by the contractors for the work. Any damages of this nature have been compensated for.

The question arises as to the value of the 53 feet which has been expropriated from the north east corner of the Birchdale property. This piece as I have said contains a frontage running west from the corner of Cobourg Road and the street along the east side the Birchdale property extending 53 feet on Cobourg Road. If instead of being a triangular piece it was a lot 53 feet fronting on Cobourg Road, with a depth running through the whole of the 53 feet with parallel sides, it would make a good building lot. It must be borne in mind that while in point of fact $\frac{1}{2}$ of the lot only has been expropriated, the other $\frac{1}{2}$ has been seriously injured by the taking away of the Cobourg Road frontage and an allowance should be made for the depreciation of that particular piece.

It is said by Mr. Bowes that he is not valuing it for building purposes, the whole property being held as one property for hotel purposes. I do not think myself that the hotel property as such is appreciably damaged by the taking away of this small corner, a fraction of an acre. I think compensation for that particular piece of land should be allowed on the basis of a building lot.

A complaint was made that several trees standing on this particular piece of ground had been destroyed and had to be removed. The absence of these trees have not appreciably affected the balance of the property. I am familiar with this particular property, and in my opinion there are still too many trees left—and it must be borne in mind that if the particular piece of land is valued as a building lot, nearly all the trees destroyed would necessarily have to be removed in order to permit of buildings being erected thereon.

Mr. Clarke places the value of the property at 20 cents a square foot. I am not inclined to the idea of valuing residential property in outlying parts by the square foot. The lot in question is a very desirable lot. It has a frontage on Cobourg Road of 53 feet. Cobourg Road is well drained and lighted and with city water. If the lot had the same width on the rear as on the front I think \$40 a foot frontage on Cobourg Road would not be unreasonable although a large sum as prices run in Halifax. At \$40 a foot this would amount to \$2,120. The lot being triangular $\frac{1}{2}$ of it is not taken. The frontage, however, is all taken and what is left is damaged 50% at least by the taking of the front on Cobourg Road. I would therefore allow off for the salvage $\frac{1}{4}$ of the \$2,120 equal to \$530 leaving \$1,590 for the land expropriated.

In regard to the injury of the property by reason of the operation of the railway, this is difficult to arrive at. Had the matter rested until the completion and the operation of the road, it would have been easier to ascertain. I think it evident that the operation of the railway, the vibration, noise, smoke, etc., is a matter of considerable injury to a property of this nature, forming a block admirably situated for a hotel site. Mr. Bowes' evidence as to the receipts for the past few years coupled with the fact

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that all the accommodation for the winter of 1916 and 1917 has been applied for would indicate that the hotel is not likely to suffer as much damage as he anticipates. That there will be damage I have no doubt.

I think that if the compensation to the Birchdale Company for the value of the land taken on Cobourg Road, for any value which they are entitled to be compensated for, for the expropriation of the fee or a portion of this street, and also for the compensation of the right or easement over this street in favour of the Fleming property and for water pipes and also for the damage caused by the operation of the railway from the vibration, noise, smoke, etc., were fixed at \$5,000, and any interest and contingencies, fair justice would be meted out. As I have pointed out, it is extremely difficult to arrive at an exact sum in respect of the several heads of damage.

Judgment will issue allowing \$5,000 with costs to the Birchdale Company. The undertaking should be referred to in the formal judgment.

Judgment accordingly.

Solicitors for plaintiff: *Silver & McDonald.*

Solicitors for defendants: *McInnes, Mellish, Fulton & Kenny.*
