1912
Nov. 27.

HIS MAJESTY THE KING, UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF;

AND

LE COLLEGE DE SAINT BONIFACE, DEFENDANT.

Expropriation—Practice—Information—Right to amend at Trial reducing the amount of Tender.

It is open to the Court in an expropriation case to permit an information to be amended at the trial for the purpose of reducing the amount tendered as compensation.

THIS was an information exhibited by the Attorney-General of Canada seeking a declaration that the lands and premises mentioned therein were vested in the Crown, for the purposes of the National Transcontinental Railway, and that the sum of $120,000 be adjudged to be fair and reasonable compensation to the defendant.

The facts are stated in the reasons for judgment.

The case was heard at Winnipeg before the Honourable Mr. Justice Audette, on the 15th, 16th and 17th October, 1912.

A. J. Andrews, K.C., and *A. Sullivan for the Crown.*

G. A. Elliott K.C., and *L. McMeans* K.C., *for the defendant.*

AUDETTE, J. now (November 27th, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the Commissioners of the Transcontinental Railway acting under the authority of 3 Ed., VII. ch. 71, have

entered upon and taken possession of certain of the defendants' lands and real property described in the information herein, for the use, construction and maintenance of the National Transcontinental Railway.

A plan and description of the said lands were, on the 15th day of June, A.D. 1911, deposited of record in the Land Titles Office, in the City of Winnipeg, for the Winnipeg Division of the Province of Manitoba. However, it is admitted by both parties that the Crown took possession of these lands on the 15th day of September, A.D. 1910.

It is admitted that the title of the lands in question herein is in the defendants.

It is admitted by both parties that a farm building, belonging to the defendants, was removed off the right of way, and taken away, the cost of the same amounting to $5,000.00, which, in the final adjustment should be added to the compensation money fixed by the present judgment.

It is admitted that with respect to the lot first described in the information, and which is closer to Winnipeg, that the defendants own property only on one side, and that is on the North side. And it is admitted that with respect to the lot secondly described in the information, that the defendants own land on each side of the piece taken for the right of way.

Mr. Andrews, of counsel for the Crown, moved to amend the information by deducting from the acreage taken, in the lot first described in the information, an area of nine-tenths of an acre, as having already been expropriated for what is called on plan Exhibit "D", filed of record herein, an old right of way, afterwards abandoned—what might be called a false start. Counsel for the Crown further alleging that the defendants had already been paid for the same.

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Mr. McMeans, of counsel for the defendants, then asked that the application should stand until he was given an opportunity to consult with his clients, as he was ignorant of these facts.

This plan, Exhibit "D," would at first sight confirm that statement made by the plaintiff, but the plan does not make any proof, and has no character of authenticity, as it bears no signature or certificate under the hand of the proper officer.

The application then stood for the time being.

However, the testimony of the witness Louis Verhoeven would bear out the allegations of plaintiff's counsel, and it would be idle to delay the delivering of this judgment any longer to get any further information. The plaintiff's motion to amend, as above mentioned will be allowed.

Mr. Andrews, of counsel for the Crown, further moved to amend the information by changing the amount tendered, that is by striking out the following figures "$134,607" in the second line of paragraph five, and in the first line of the second paragraph of the prayer of the information and substituting therefor the following figures "120,000." The learned counsel had first asked to substitute for the tender of $134,607 the sum of $90,000., but it having been found that the Crown had already paid on account on one occasion $90,000 and on a second occasion $30,000,—in all $120,000—asked to substitute for the original amount the last mentioned sum.

Mr. McMeans showed cause *contra*, and the application was granted,—the tender by the information now standing at $120,000.00.

At the request of counsel for both parties and accompanied by them, the president of this Court has had the advantage of viewing the premises in question

herein, of walking over part of it, of seeing the embankment, observing the lay of the land and the general topography of the surroundings.

The total area expropriated, as appears by the information, after amendment, is (40.21-100) forty acres and twenty-one hundredths of an acre, more or less, for which the tender now stands at $120,000,—instead of the tender of $134,607.00 mentioned in the information at the opening of the trial for the (41.11-100) forty one acres and eleven hundredths of an acre.

The defendants by their plea aver, *inter alia*, that, for the reasons therein set forth, the sum of $134,607 is not a sufficient and just compensation for the land taken and the damages resulting from the expropriation, and that they are entitled to recover the sum of $250,000 with interest and costs. They also refused the substituted tender of $120,000.00.

[Here His Lordship reviewed the evidence for both parties.]

It will be realized, from the perusal of the evidence as is usual in expropriation cases, that the testimony is most conflicting. It is a hectic valuation with intermittent fluctuations that has to be considered with care and premonition. Is it not, indeed, strange that people of the same place, with the same opportunity and, in most cases, engaged in the same avocation, with kindred aspirations and identical views of what constitutes right and justice, should differ so widely, and materially in their conception of the value of land and the damages resulting from the expropriation?

For the defendants we have witness Verhoeven who values the land in Lots "A" and "B" inclusive of the damage to Lot "A," at $242,500,—and exclusive of the damage to 50 feet on each side of Lot "B", which are damaged by 20% of their value. Henderson

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values the two lots and damages at $381,320, Peers at $357,012, Pace at $298,000, and Pickering at $595,312. On behalf of the Crown, Sheppard values the two lots at $78,750, Black at $88,750, Bain at $43,750, and Batley values Lot "A" at $15,000. All of the defendants' witnesses allow a large, a very large, sum for damages; and for the Crown no damage is allowed,—some say there is no damage, and others that the damage, if any, is offset by the advantage derived from the construction of the Transcontinental Railway.

One set of witnesses goes perhaps to one extreme, and the other to the other extreme. Taking all the circumstances into consideration, the value of the land in St. Boniface, and the continuous and steady growth of the place, and the increase in value of property, as obviously demonstrated by the evidence, only one conclusion is acceptable, and that is some of the Crown's witnesses put upon the property a too conservative valuation,—while perhaps some of the defendants' witnesses are carried away by the brilliant prospects of the growth and development of St. Boniface. Then the municipal valuation in the present case appears to be below the market price, as is usually the case. This Court is also of opinion that some of the defendants' land, held in unity with the property expropriated, has obviously been damaged by the construction of the high embankment, and some also damaged by the severance. Both elements of damage are serious and substantial. While the witnesses for the defendants magnify in a large degree the damages resulting from the expropriation, the Crown's witnesses do not give it enough consideration. A proper conclusion could be arrived at by the reconciliation of both classes. There can be no doubt that the 289 acres adjoining Lot "B", are not all equally damaged,—the

land close to the railway has been damaged as building lots, but that damage decreases and comes to nothing as we get away from the railway—while the railway enhances the value for commercial purposes, of the land near the right of way. A fair amount should be allowed for the land taken, and a fair amount should be allowed for the damages,—and there are damages, but not to the amount mentioned by the defendants' witnesses.

The property in question must be assessed on its market value, with the best uses to which it can be applied, taking into consideration its prospective capabilities. The defendants are entitled to a fair and liberal compensation,—allowance being made for the compulsory taking and for all damages.

The area taken, after deducting the nine-tenths of an acre already settled for as part of the old right of way—is now only (40.21) forty acres and twenty-one one hundredths of an acre. The change in area is so small as compared with the total quantity taken, that the Court treats it as *de minimis*.

This Court is of opinion that if the defendants are paid the amount of the original tender,—namely the sum of $134,607 for the land described in the amended information, together with $5,000 agreed upon respecting the farm building removed from the property in question, they will be fairly and liberally compensated. This will allow a very large average price per acre inclusive of damages,—and when taking a large area, as in the present case, a smaller price is usually arrived at. The defendants will also be entitled under the circumstances,—the tender now standing being $120,000—to both interest and costs.

The sum of $90,000 has already been paid the defendants, on the 21st March, A.D. 1911, and the

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further sum of $30,000 on the 11th September, 1911,—namely, the total sum of $120,000 on account of the compensation to which they ultimately are declared entitled to.

There will be judgment, as follows:—

1st. The lands and real property described in the amended information are vested in the Crown from the 15th September, A.D. 1910.

2nd. The defendants upon giving a good and sufficient title, and a release of all incumbrances, if any, upon the said property, are entitled to be paid the sum of ($139,607.00) one hundred and thirty nine thousand six hundred and seven dollars, the whole in full satisfaction for the land taken and for all damages resulting from the expropriation, including the removal of the farm building,—from which amount will be deducted the sum of ($120,000.00) One hundred and twenty thousand dollars, already paid to them as above mentioned, leaving an unpaid balance of ($19,607.00) Nineteen thousand six hundred and seven dollars, the whole with interest on the sum of $139,607 from the 15th day of September, A.D. 1910, to the 21st day of March, A.D. 1911,—and with interest on the sum of $49,607 from the 21st day of March, A.D. 1911, to the 11th day of September, A.D. 1911, and on the sum of $19,607 from the 11th day of September, A.D. 1911, to the date of judgment.

3rd. The defendants are also entitled to the costs of of the action.

Judgment accordingly.

Solicitors for the plaintiff: *Rothwell, Johnson & Bergman.*

Solicitor for the defendant: *L. McMeans.*