BETWEEN

1915
April 12.

HIS MAJESTY THE KING,

PLAINTIFF;

AND

THE CANADIAN PACIFIC LUMBER COMPANY, LIMITED, AND CAMPBELL H. D. ROBERTSON, OFFICIAL LIQUIDATOR OF THE SAID COMPANY,

DEFENDANTS.

Expropriation—Value of water-lot—Right to make erections—Abandonment—The Expropriation Act, sec. 23—Measure of Damages.

Where a water-lot, with no erection thereon, is expropriated for the purpose of a public work its value must be assessed as at the date of the expropriation, without considering such enhanced value as would be given to the water-lot if the approval of the Crown to make erections were obtained. On the other hand such assessment must be made in view of such riparian rights as are actually enjoyed by the owner at the time of the taking. *Lyon* v. *Fishmongers Co.* (L.R. 1 A.C. 662) referred to.

2. Where property used in connection with a saw-mill, is taken by the Crown and subsequently abandoned under sec. 23 of *The Expropriation Act*, the owner is entitled to damages measured by what the property would have been worth to him if used in such connection during the time it was vested in the Crown and the owner was out of possession.

THIS was a case arising out of the expropriation of certain real property at Vancouver, B.C., by the Dominion Government for the purposes of harbour improvements.

The facts are stated in the reasons for judgment.

February 22nd, 23rd, 24th, 25th, 26th, and March 1st, 2nd and 3rd, 1915.

The case was heard at Vancouver before the Honourable Mr. Justice Audette.

W. B. A. Ritchie, K.C., and *R. Maitland* for the plaintiff;

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Douglas Armour, K.C., *J. L. G. Abbott*, and *E. Herne* for the defendants.

AUDETTE, J. now (April 12th, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain land and a water-lot, belonging to the defendant Company, were taken and expropriated, under the provisions of *The Expropriation Act*, for the purposes of a public work of Canada, namely the construction of wharves, piers, docks and works for improving and developing the Harbour of Vancouver, Burrard Inlet, B.C., by depositing, on the 27th February, 1913, a plan and description of such land and water lot, in the office of the Registrar of Deeds for the County or Registration Division of Vancouver, B.C.

This case first came on for trial before the Honourable Mr. Justice Cassels, in November, 1913, upon the original information filed on the 6th September, 1913, when the Crown was expropriating both a strip of land 44 feet wide together with the water lot extending in front of the same. Mr. Justice Cassels, in his reasons for judgment, filed in the case of *The King* v. *Investment Corporation of Canada, Limited*, speaking of the present case said that the evidence had been made common to the three cases therein mentioned "and "that he had been notified that the Crown would "likely give an undertaking or possibly abandon the "proceedings relating to the strip of 44 feet, together "with this water lot in front of the same. Adding "that in this case uncontradicted evidence was adduced "to show that if the 44 feet were expropriated by the "Crown, the whole of the property held in connection

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"with the strip would practically be destroyed for mill "purposes—as this was practically the only land "available for the piling of lumber—lately, notice of "abandonment has been registered pursuant to the "statute, abandoning the 44 ft. strip so far as it is "composed of land, and about the southerly half of "the water lot extending in front of the 44 ft. strip. "The practical result of this abandonment is to render "the trial abortive."

On the 17th February, 1914, the Minister of the Public Works Department, acting under the authority and power conferred upon him by sec. 23 of *The Expropriation Act*, abandoned 450 ft. by 44 ft. in width of lot 14 in question herein. That is abandoning the whole of the land from Stewart St. for 290 ft. on the west side and 310 on the east side, by 44 ft. in width, up to the original high-water mark—together with 160 ft. on the west side and 140 ft. on the east, by 44 ft. in width, of the water lot—leaving 30,140 sq. feet, the balance of the water lot retained by the Crown as shewn on plan exhibit No. 21.

The defendant company's claim is: 1. For the value of this piece of the water lot first mentioned. 2. Alleged loss of profits caused by the closing of the mill during the period of 8½ months, from 15th July, 1913, to 31st March, 1914, at $53,516.71 per annum equal to $37,907.66. 3. Standing charges borne by the Vancouver mill during the above mentioned period being a direct loss in addition to the above loss of profits, viz.:

Insurance	$ 6,942.50
Taxes	2,875.17
Depreciation on buildings and plant (on $203,918.98 for 8½ months at 5% per annum)	7,222.13

Watchman's wages.....	$ 785.00	
Head office expenses estimated 8½ at $5,000 per annum...	3,541.67	
		$ 21,367.27

4. Loss sustained in the realisation of lumber piled on lot expropriated due to the enforced sale, estimated at $3 per M. ft. (For inventory of lumber piled on lot expropriated):

1,721,282 ft. at $3 per M. ft...	$ 5,163.84	
Cost of pile bottoms.....	850.13	
		$ 6,013.97

In view of the abortive trial during November 1913, resulting from the above-mentioned abandonment, at the opening of the present trial, during February 1915, I ordered out of the present case all the evidence already adduced in the three cases, both documentary and *viva voce*, and which had been made common to the present case; subject however to the leave by either party of applying to the Court to put in any part of such evidence. No such application was made and we therefore now face the present issues upon the evidence adduced solely at the trial during February 1915.

The defendant company, which is the result of a merger or amalgamation of several companies, own large saw-mills in British Columbia and had been in operation for twenty-three months at the date of the expropriation. It is perhaps idle to go into the numerous details of their amalgamation, sufficient will it be to mention that after the consummation of the amalgamation they decided to borrow £400,000—of which £350,000 were underwritten in England at 93 and brokerage, netting in round figures $1,413,000, 25 years bonds at 6%, payable half-yearly. The balance

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of £50,000 are held by the bank in Canada as security on loans.

The proceeds of the bonds were used to purchase the other companies. The sum of $1,000,000 was for the payment of the liabilities of each company—putting them in the amalgamation free from other incumbrances. The balance was placed over to the different other companies and they started business with $15,000 to $20,000.

In 1913 the company borrowed from the directors over $100,000 to meet the liabilities on the bonds, and in 1914 the two February and August payments were defaulted.

On the 18th November, 1914, under an order of the Supreme Court of British Columbia, C. N. D. Robertson, a party hereto, was appointed liquidator. He is also the receiver who is presently operating the Vancouver mill in question, which is the only mill of the Company which is presently operated.

I have had the advantage at the time of the trial of viewing the premises in question accompanied by counsel as well for the plaintiff as for the defendant. The mill, which is a large one, was then in full operation.

Value of water lot.

This water lot was sold to one John Hendry on the 16th May, 1905, under a Crown Grant from the Dominion Government for the sum of $500 subject to the following clause: "Provided that nothing in these "presents shall be held to absolve the grantee, his "heirs and assigns, or any of them, from fulfilling in "that respect the requirements of the Act, chapter "ninety-two of the *Revised Statutes of Canada* (1886); "and it is an express condition of this grant that no " 'work' within the meaning of the said Act shall be "undertaken or constructed on the said lands by the

"grantee, his heirs or assigns or any of them or shall be "suffered or allowed by them or any of them, to be "constructed thereon until as regards such works the "provision of the said Act shall have been fully com- "plied with. (See also 49 Vic. ch. 35; R.S.C. (1906) ch. 115; and 9-10 Ed. VII, ch. 44.)

The whole lot 14—land and water lot—was subsequently sold to Mr. Meredith on the 17th September, 1907, for $22,000 and on the following day he sold it to The Anglo-American Lumber Company for $25,000. And then it was sold to the defendant company on the 17th August, 1911, for $150,000—but it cannot be overlooked that the last sale was made at the time of the amalgamation of the several companies, as already mentioned, and one only knows too well what it means when promoters are handling properties under such circumstances. It should also be qualified by the fact that the asset of each company was not put in at the full value of their appraisal.

In tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which *prima facie* is in the public (1). The subjects of the Crown are entitled as of right to navigate on tidal waters. The legal character of this right is not easy to define. It is properly a right enjoyed so far as high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed it did not in fact take rise in them. The right into which the practice has chrystalized resembles in some respects the right to navigate the

(1) Atty Gen. B.C. v. Atty Gen. Can. (1914) A.C. 168.

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seas, or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding the subjects exercising this right as from immemorial antiquity, the Crown, as *parens patriæ*, no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts. (1).

It would, therefore, appear that the Crown, as trustee for the public is the guardian of such right held by the public to use navigable and tidal rivers as a public highway and it thus rests with the Crown to protect its subjects against any right which might arise by adverse possession, in violation of such *jus publicum*. The defendant's grant is subject to the *jus publicum*, or public right of the King and people, to the right of passing and repassing both over the water and the *solum* of the river. (2)

While the grantee of this water lot, owns the bed of this water lot, he is not entitled to place erections or stretch booms thereon without the approval required by the statute, and its value must be ascertained by reference to that approval, which is not obtainable as of right.

Following the decisions in the cases cited below (3) it must be held that the right to that approval provided by the statute is too remote and speculative to form a legal element for compensation. And, indeed, it is too obvious that the Crown requiring these lands for the

(1) (1914) A. C. at p. 169.

(2) *Mayor of Colchester* v. *Brooke*, 7 Q.B. 339; Ency. Laws of England, vol. 12, p. 566; and The King v. Tweedie, 15 Ex.C.R. 183.

(3) *The King* v. *Wilson*, 15 Ex. C. R. 288; *Cunard* v. *The King*, 43 S.C. R. 99; *The King* v. *Brown*, 14 Ex. C. R. pp. 463; 471; *The King* v. *Bradburn*, 14 Ex. C.R. 432–437; *Lynch* v. *City of Glasgow* (1903) 5 C. of Sess. Cas. 1174; *The King* v. *Gillespie*, 12 Ex. C.R. 406; and the *Central Pacific Railroad Company of California* v. *Pearson*, 35 Cal. 237.

purposes of a public work would not grant such leave and the property must therefore be assessed without that right.

Several witnesses have expressed their opinion upon the value of this water lot, with and without the right to erect wharves and stretch booms. Some have valued it as real estate land—but that valuation is not applicable in the present case. Witness Bateman, a witness heard by the defendant, said that without the right to erect wharf and stretch boom, the lot is not worth much. Witness Heap was negotiating for the purchase of some additional water lot and was offering 10 cents a square foot. He declined to purchase at 25 cents—the price fixed in 1914 by the Vancouver Harbour Commission, saying it was too high a price.

This water lot must be assessed at its market value, at the date of the expropriation, without the right to erect wharves and stretch booms, but with such rights as are defined in *Lyon* v. *Fishmongers* (1), that is to say with such right as are enjoyed by a riparian owner, *ex jure naturæ*, which are quite distinct from those held in common with the rest of the public. Besides the use of the water for domestic purposes—which in a case of salt water is however obviously less valuable, the riparian owner has over and above the rights enjoyed by the public, the right of access to and from the river.

Taking as a basis for the market value of this water lot the price now asked by the Harbour Commission I hereby fix the value of the same at $7,535.00—to which should be added 10% for compulsory taking, making in all the sum of $8,288.50.

Claim resulting from Abandonment.

The defendants claim that, as a result of the expropriation of their piling ground on lot 14, and which was

(1) L.R. 1 A.C. 622.

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subsequently abandoned and returned to them, they were compelled to close down their mill and thereby suffered very heavy damages.

The expropriation of the piling ground, which was made at the same time as the water lot, took place on the 27th February, 1913. On the 20th June, 1913 (Exhibit C.) the defendants were asked by the Crown, for the possession of lot 14 not later than two months from that date. On the 29th July, 1913 (Exhibit D) the defendants are requested to vacate without contest the lands in question. At a meeting of the defendant company on the 4th July, 1913, it is decided to close down the mill and stop operations on the 7th July, 1913, and they do so and remain closed until the 1st April, 1914. On the 17th July, 1913, Mr. Meredith, the Managing Director, writes to the Minister of Public Works asking that either the whole of the Hastings Shingle Co. be expropriated leaving the defendant's property intact or that the whole of the defendant's property be taken leaving the other intact, because if the expropriation is pursued as projected these two companies will have to shut down and alleging further that the notice to vacate the lot expropriated within 60 days from the 20th June, 1913, had compelled them to close down their mill—as it would be impossible to clear off this lot and keep the mill in operation.

In November, 1913, the defendant company had still about 500,000 feet of lumber on lot 14 and the balance was only removed at the end of December, 1913.

Mr. Meredith tells us that this mill is usually closed down every year for taking stock and overhauling for a couple of weeks or a month and the Secretary-Treasurer mentions about the same period.

There is an unaccountable error of fact which has slipped in and has been worked upon almost all through the trial, and that is the statement made by Mr. Meredith, that after the Crown had taken the water lot 14, the company remained with 275 feet by 400 feet of water lot for booming purposes opposite their property. That statement is not borne out by the title which only shows 95 feet frontage. A material difference indeed as between 95 and 275 feet. A great many questions put to witnesses have been answered on this basis and assumption of 275 by 400—instead of 95 by 765 on one side and 690 feet on the other side. The difference in the statement is so large that it becomes impossible to reconcile it.

Now the state of the market in the lumber business in 1913, at Vancouver, had not been very good. Witness Hardy tells us that business began to slack off in the latter part of 1913, and witness Meredith states that business has not been very good. Witness Lewis says that the condition of the lumber business in 1913 was not good and there was a drop in the fall of 1913. Three or four large mills went down and were placed in the hands of Receivers. Witness Alexander who belongs to the Association of Lumber Mills Co., which issue prices that are from time to time varied by discount sheets, says that trade held fairly well up to July 1913, and after that it began to decline. Things then went to pieces and we could not recommend any prices and did not issue any. The trade picked up again in the spring of 1914; but when the war started it went to pieces again. Witness Chew says that by the end of June 1913, prices began to drop. There was no stable or fix price after that and we made the best we could. Then Witness Heap, who is in the same business as the Defendants, speaks in the same stress, and says

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it had got to a price where nobody could live and we had to close down.

The fixed charges the defendant company had to face in 1913 were as follows, as shewn by the evidence of witnesses Meredith and Hardy, viz.:

Interest on Bonds	$ 103,000
Sinking Fund	35,000
Licenses, taxes, etc	25,000
Insurance	11,000
Interest on loan from Bank in 1913, $275,000 at 6%	16,500
	$ 190,500

Then Witness Crehan, a chartered accountant, contended, from the figures and explanations given in his evidence that the Company was running its business at a loss in June, 1913—just before they decided to close down.

It is perhaps well to mention that the defendant company was also using the water-front, opposite their mill, for stretching logs, on sufferance by the Crown—because under the statute as above set forth, they had no such right to interfere with navigation without leave from the Crown. In the early days when trade was being built up at Vancouver, no objection was ever made by the Crown—but that did not give them any legal right to such use. The silence of the Crown is only referable to its grace and bounty and does not constitute an acknowledgement of such a right. And this tolerance resulting from the benevolence of the Crown may be very reasonably expected to be put an end to since the passing of the statute creating a Commission for the Harbour of Vancouver.

If the defendant's business is affected by the curtailment of booming space by the Crown exercising

its right, what of the whole business of the company if the Crown were exercising its right with respect to all the water lots?

Now, in the result, it would appear from the evidence that the lumber business and the company's business was in a very undesirable financial state at the time they closed down. That their going into liquidation and in the hands of a Receiver were, under the circumstances, its ultimate fate and a matter of time.

It would, therefore, appear to me that the closing in July was perhaps the combined result of the state of the trade and of the expropriation and would let in for a part certain compensation. The defendants did not wish to be expropriated, they protested and made suggestions to avoid it. The Crown finally returned the piling ground in face of the large claim for damages and the Company re-opens its mill in 1914, when, as witness Gibbons says the market was a little better and we closed down because it was bad. They had at the time of re-opening a very large contract with the firm constructing the Government piers in question.

In their claim as set forth in Exhibit No. 16 and in their statement of defence, the defendants claim loss of profits during 8½ months—from 15th July, 1913, to 31st March, 1914. By their particulars it would appear that they operated that mill for about ten months in the year; that they vacated the piling ground on 30th December, 1913; that they claim by such particulars 6½ months from about 3 months after the closing down of the mill; but qualified by the statement that they operated during about ten months, that would reduce it to 4½ months.

While the defendants should be confined to the particulars delivered (1), they, perhaps should not be

(1) *Chitty's Archbold*, pp. 387, 388.

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held to it, under the circumstances, in absolute strictness; but it should be taken into account as a help in arriving at a conclusion respecting the period in question.

If we are to reckon the number of months from about three after the closing of the mills, we should start to reckon up from the 7th or 15th October, and down to the 17th February, 1914, and that would give us about 4 months and a few days. Then if something should be deducted because of the usual closing up for stock-taking and over-hauling around Christmas that would still go to reduce the number of months. However, one cannot expect that they could re-open on the very day they were served with the abandonment—a reasonable time should be given them for re-organization.

Therefore about 4½ months should be allowed but to make it more liberal, I will allow five months.

By Exhibit M the defendants claim that for the 23 months therein mentioned their Vancouver Mills earned per 12 months $53,516.71, giving about $4,459.72 per month. However, in face of the lumber business which had gone to pieces at that time, it is not reasonable to expect that the mill would have maintained its earning power at that figure, especially when we have in evidence that prices were no longer fixed or stable and that mill after mill was running into liquidation and in the hands of Receivers. I will therefore take one-third off the sum of $4,459.72 and fix the monthly profits which might have been earned at the sum of $2,973.14—making in all for five months the sum of $14,865. To this amount should be added the standing charges borne by the Company while it was earning the above-mentioned figures. The amount representing these standing charges, which according

to plaintiff's witness, the chartered accountant, should also be classified as damages—because they were taken care of by the defendant company while they earned the above mentioned profits. The claim for 8½ months is made up at $21,367.27, therefor for 5 months they are hereby fixed at the sum of $12,568.98.

There is the further claim of $6,013.97 alleged loss sustained on the lumber piled on lot 15 due to enforced sale, estimated at $3.00 per M. ft. I find that the defendant company has failed to establish that claim. Indeed the lumber in question which was partly sold in the Middle West, was under the evidence sold at about the prevailing prices at the time and at the prices fixed by their contract of the 16th September, 1913, for the following year 1914. (Exhibit 27.) I find this claim is not meritorious and it is disallowed.

Now is the defendant company entitled to recover the above-mentioned damages. It may be said that loss of profit *per se* is not recoverable, because it is a personal claim; (*The King* v. *Richard*) (1), but it may well be that sub-sec. 4 of sec. 23 of *The Expropriation Act* contemplates a class of cases not governed by the general principles of expropriation, but standing by themselves under that particular enactment. Its language is as follows:—"The fact of "such abandonment or revesting shall be taken into "account in connection with *all the circumstances of* "*the case*, in estimating or assessing the amount to be "paid to any person claiming compensation for the "land taken." If we have to take into account all the circumstances of the case, the damages resulting from such abandonment and revesting would seem to be part of the consideration in estimating and assessing the compensation for the land taken and would let in such class of damages.

(1) 14 Ex. C.R. 372

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However, the defendants are clearly entitled to receive compensation based upon the value of the piling ground to them whatever that might be during the time it remained vested in the Crown. This piling ground has a special value to them in connection with the running of their mill. The suitability of the piling ground, for the purpose of the mill business affected the value of the land to them and the prospective profits which it was shewn would attend the use of that land in their business furnish material for estimating what was the real value of the land to them. The prospective profits are only entitled to be taken into consideration in so far as they might fairly be said to increase the value of the land to them. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to retain it. Now in this present paragraph I have mostly paraphrased the able judgment of Lord Justice Moulton upon this subject, in the case of *Pastoral Finance Association Ltd.* v. *The Minister* (1). In this latter case it will be noticed that the profits that might be realized from the land in question and which went to give it a special value to the owner were also unearned profits; but really represented the potential capability of the piece of land to the owner as in the present case. (2).

Therefore the value of this piling ground to the defendant company—between the time of the expropriation and the abandonment—must be measured by the value it had to them in connection with the running of their mill, which had a revenue producing power as established by the evidence and they are entitled to receive as well the value of the water lot as the value

(1) Pastoral Finance Ass. Ltd. v. The Minister, (1914) A.C. 1085.

(2) See also Paradis vs. The Queen, 1 Ex. C.R. 191.

of the piling ground to them for the time it remained vested in the Crown.

Now witnesses Bateman, McClay, Vassar and Albernethy have testified that the Government works will appreciate and increase in value the defendant's property as a whole. And great stress has been made upon the new facilities for shipping, as resulting from this public work. Under sec. 50 of The Exchequer Court Act such advantage should be taken into account and consideration by way of set-off. While I agree with their evidence I will not earmark any figure by way of set-off, but I will leave this advantage as part of the compensation to make it more liberal and fair, under the circumstances of the case.

The Crown having abstained from tendering any amount by the pleadings as amended, costs will go in favour of the defendants.

There will be judgment as follows, viz.:

1. The lands expropriated herein and described in the amended Information are declared vested in the Crown from the 27th day of February, 1913.

2. The compensation is hereby fixed as follows, viz.: At the sum of $8,288.50 for the water lot—together with the further sum of $14,865.00 and $12,568.98, as above mentioned making the total sum of $35,722.48, —with interest on the sum of $8,288.50 from the 27th February, 1913, to the 14th May, 1913, when the Crown paid the defendant $58,500.00. The whole in satisfaction for the land taken and for all damages resulting from the expropriation and the abandonment, upon giving to the Crown a good and sufficient title free from all encumbrances whatsoever.

3. The defendants are entitled to all costs herein inclusive of all costs incidental to the two trials.

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4. The Crown having paid the defendant company the sum of $58,500.00 on the 14th May, 1913, on account of the present expropriation, the said sum of $35,722.48 with interest as above mentioned and costs, will be deducted from the said sum of $58,500.00; and I do order and adjudge that the plaintiff recover from the defendants the difference between the said sum of $35,722.48, interest and costs and the said sum of $58,500.00.

Judgment accordingly.

Solicitors for the plaintiff: *Maitland, Hunter & Maitland.*

Solicitors for the defendants: *Davis, Marshall, Macneill & Pugh.*