1915
Jan. 27.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA,

PLAINTIFF;

AND

THE FRONTENAC GAS COMPANY, A BODY POLITIC AND CORPORATE HAVING ITS PRINCIPAL PLACE OF BUSINESS IN THE CITY OF JERSEY IN THE UNITED STATES OF AMERICA, AND HAVING A BRANCH OFFICE IN QUEBEC,

DEFENDANT.

Expropriation—Abandonment—The Expropriation Act, sec. 23—Damages—Costs.

Under sec. 23 of *The Expropriation Act* the Crown, through its proper Minister in that behalf, may abandon in whole or in part any land previously taken for the purpose of a public work. Where the owner is allowed to retain possession and such abandonment is made in full, no loss having been sustained by the owner between the time of the taking and of the abandonment, compensation even in the nature of nominal damages will not be allowed because the taking was authorized by statute.

2. The Court, however, may declare the owner entitled to the costs of and incidental to making his defence to the information and order such costs to be taxed as between solicitor and client including all legitimate and reasonble charges and disbursements under the circumstances.

3. In such a case there should be no allowance of interest to the owner either upon the amount offered as compensation by the information or upon the amount of compensation claimed by the owner.

THIS case arose out of an expropriation of land for the purposes of the National Transcontinental Railway, such land being subsequently abandoned to the owner.

The facts are stated in the reasons for judgment.

The case was heard at Quebec before the Honourable Mr. Justice Audette on the 21st and 22nd days of

September, 1914, and on the 18th, 21st and 22nd days of January, 1915.

G. G. Stuart, K.C., for the plaintiff;

T. Chase Casgrain, K.C., and *E. A. D. Morgan* for the defendant.

AUDETTE, J. now (January 27th, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that a certain piece or parcel of land belonging to the defendant was duly expropriated on the 23rd day of April, 1913, for the purposes of the National Transcontinental Railway.

The area taken contains 32,137 square feet, and adjoins the new workshops of the Transcontinental Railway, at St. Malo, Quebec. The Court, accompanied by counsel for both the plaintiff and the defendant, viewed the premises in question and ascertained that the lands expropriated were vacant and rough, and not built upon, but duly fenced in with the rest of the property. The buildings and workshops of the defendant company are on the front of the property, while the lands so expropriated are at the back and unused, with the exception of a spur line connected with the Canadian Pacific Railway.

The case was proceeded with at Quebec on the 21st and 22nd days of September, 1914, when the defendant company adduced part of its evidence, without closing its case which, on the 22nd September, 1914, was adjourned to a day to be named upon the application of either party to the suit.

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The matter came on again ,at Quebec, on the 18th 21st and 22nd days of January, 1915, by way of a motion, on behalf of the plaintiff, for leave to withdraw or discontinue the present action, the Crown in the meantime, namely on the twenty-third day of October, A.D. 1914, by a writing under the hand of the Minister, pursuant to the provisions of sec. 23 of *The Expropriation Act*, having abandoned the lands so expropriated, no money having as yet been paid—such abandonment having been registered on the 29th October, 1914.

When the motion was first made on the 18th January, 1915, the Court gave directions, under the provisions of sub-sec. 4 of sec. 23 of *The Expropriation Act*, that if the defendant company had any claim to make in connection with such abandonment, it should be so made as to enable the Court to hear and dispose of such claims at the same time as upon the pronouncement on the motion for leave to discontinue.

On the 21st January, 1915, the defendant company filed a supplementary statement in defence on the abandonment, whereby *inter alia* it claimed that by the evidence already adduced on its behalf—(the Crown so far having adduced no evidence)—it appeared that the 32,137 feet expropriated were of the value of $1.00 a foot, making a capital of $32,137, upon which interest at the rate of five per cent per annum should be allowed them for the time the land remained vested in the Crown.

The plaintiff joined issue on such supplementary plea by denying all the allegations of the same.

Now, the possession of the lands in question was never interfered with beyond the fact that the engineers and servants of the Crown entered upon the same, surveyed and staked the land so expropriated, the

defendant company remained in possession of the lands all the time from the date of the expropriation to the date of the abandonment, and used them as they liked. There is a spur line running from the Canadian Pacific Railway into these premises—and the centre of this spur being the dividing line between the properties of the defendant company and that of the Quebec Jacques-Cartier Electric Company and which was used by both companies.

The defendants apparently did not suffer any damage from such expropriation and abandonment and claim none beyond the interest on the capital that in their estimation would represent the value of the land.

Were there any damages to be assessed, the method suggested by the defendant is obviously unsound, because it rests on an unreliable basis. Indeed the Crown tendered $3,856.44 for the land expropriated and for all damages resulting from the expropriation, and the defendant company claimed $82,137. for the same, out of which $32,137. represents in their estimation, the land, and the balance is for damages. The defendants alone have adduced some evidence—their case is not closed, and the Crown has not as yet adduced a tittle of evidence on the question of value. A tribunal, desiring to do justice, should not, indeed, under any circumstances, venture to rest a judgment on such uncertain and incomplete evidence.

Now, as has already been said, the defendants have not been deprived of the possession of their land—they had a free and untrammelled use of it, as well as of the spur running into the property, in the manner already set forth.

Therefore the only actual trouble and expense the defendants have been put to is in respect to the proceedings in the present case, and in that respect

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they should indeed not only recover full costs, but, by way of damages, if it may be so-called, they should recover not party and party costs, but costs as between solicitor and client which will allow them to be recouped of all legitimate and reasonable charges and disbursements.(1)

The claim made by the defendants in respect of their property for the time that it was out of their control and vested in the Crown, does not lie in tort—it does not arise out of the violation of a legal right or a contract. The Expropriation Act gave the Crown the right and power to expropriate as it did and to abandon as it did.(2) It is a trite maxim that the defendant or proprietor, in an expropriation case and in a case of this kind, should be placed in the same position as he was before the expropriation, or the same position as that in which he would have been but for the expropriation and abandonment. The defendants having retained possession of their land and suffered no damages, they are therefore after the abandonment in the same position in which they were before the expropriation, but for the costs and expenses of these proceedings for which they should be recouped.(3)

No special damage and no damages of any kind have been proved, although full opportunity has been given the defendants to do so. And while I would feel inclined to allow nominal damages in a case of this kind, I find that nominal damages can only be allowed in a case of a breach of duty, and in tort. No nominal damages can be allowed as the result of an act authorized by statute or from an act made legal by statute.(4) If the act complained of, as in the case at

(1) Winkelman *vs.* City of Chicago, 72 N.E. Rep. 1068.
(2) Gibb *et al vs.* The King, 15 Ex. C.R.
(3) Bergman *v* St. Paul *etc., Rd. Co.* 21. Minn. R. 533.
(4) Hals. Laws of England, vol. 10, p. 365.

bar, is neither wrongful nor injurious, there is no liability.(1) No legal right has been violated in this case, and no actionable injury is complained of. And rights are legal when recognized and protected by statute and by law. The expropriation and the abandonment were both legal and authorized by statute, and by its abandonment the Crown has not been guilty of any invasion of any legal right of the subject. In doing what it did the Crown only exercised its legal rights defined and protected by statute in the interest of the community at large.(2)

Therefore, all that can be allowed in the case at bar is the recovery of all costs incurred in connection with the proceedings in the present case, and in order that full compensation may be made, such costs are ordered to be taxed as between solicitor and client, covering all legitimate and reasonable charges and disbursements under the circumstances.

There will be judgment as prayed, entitling the plaintiff to discontinue the action with costs in favour of the defendants, the said costs to be taxed as between solicitor and client.

*Judgment accordingly.**

Solicitors for the plaintiff: *Moraud & Savard.*

Solicitor for the defendant: *E. A. D. Morgan.*

(1) Winkelman *v* City of Chicago, 72 Northeastern Rep. 1067.
(2) Sutherland on Damages, 3rd Ed., Vol. 1, p. 25.

*EDITORS' NOTE: Affirmed on appeal to the Supreme Court of Canada, 51 S. C. R. 594.