

HIS MAJESTY THE KING, on the information of
the Attorney-General of Canada

1912
Oct. 10.

PLAINTIFF;

AND

T. MEDLEY RICHARDS and GERTRUDE RICH-
ARDS

DEFENDANTS.

Railway—Public Work—Injurious affection of property—Construction—Operation and Maintenance.

In enacting that compensation be paid to persons whose lands are injuriously affected by the construction of a railway, Parliament must be taken to have contemplated not only such damages as result from the actual construction of the embankments, tracks and buildings of the railway, but also damages arising from the maintenance and operation of the railway when completed.

2. In assessing compensation for real property expropriated by the Crown primarily only such damages may be allowed as are referable to the land itself and not such as purely and simply affect the person or business of the owner; but where the whole of the owner's property upon which he has been carrying on business, is taken and the property has a special value for the purposes of his business, then its special value as a business site becomes an element in the market value of the land and must be considered in assessing the value.

THIS was an information filed by the Attorney-General of Canada seeking to have compensation assessed for the taking of certain lands for a public work, and for the injurious affection of other lands belonging to defendants.

The facts of the case are stated in the reasons for judgment.

The case was heard before the Honourable Mr. Justice Audette at Edmundston, N.B., on the 10th and 11th days of September, 1912.

J. M. Stevens, K.C., T. J. Carter, K.C. and H. Lawson for the plaintiffs;

H. A. Powell, K.C., for the defendants.

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AUDETTE, J. now (October 10th, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that the Commissioners of the National Transcontinental Railway have entered upon and taken for the use of His Majesty The King, in the construction of the Eastern Division of the said railway, certain land and real property, belonging to the defendants herein, and described in the information as two pieces or tracts of land, viz.: A.—containing seventy-one hundredths (.71) of an acre; and B.—containing one acre and fifty-seven hundredths (1.57) of an acre.

A plan and book of reference relating to the same were deposited of record on the 23rd July, A.D., 1907, in the office of the Registrar of Deeds for the County of Madawaska, N.B.; and a corrected plan and description of the said lands and real property were also deposited in the said registry on the 20th April, A.D., 1910.

At the opening of the trial, a discussion having taken place with respect to the actual area taken by the Crown, William C. McDonald, C.E., was examined by the plaintiff, and it having been made clear from his evidence that the area taken, under description B., mentioned in the information, was one acre and eight hundred and seven thousandths of an acre (1.807) (inclusive of that portion of the reserved road),—leave was given the Crown to accordingly amend the plan and description, and the information.

A further corrected plan and description were accordingly deposited in the said registry on the 30th September, A.D. 1912, and the information amended accordingly. The actual area taken is then the area

taken in description A.....0.71
 In corrected description B.....1.807.
 Making a total of.....2.517 acres.

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It was admitted at the trial that a tender of \$3,568, the amount offered by the information, had been made on the 6th October, 1910. This tender was for the area of 0.71 acres together with 1.57 acres. The Crown did not alter its tender in view of the larger area actually taken, alleging the same was, in its estimation, still large enough, and it remains at the same figures.

The defendants' title is admitted.

It is further admitted that possession of the lands was taken by the Crown in 1907.

The plaintiff, by the information, offers to pay the defendants the said sum of \$3,568, in full satisfaction for the land taken and for the location, construction and *maintenance* of the said railway. The defendants, by their plea, declare that the amount tendered is wholly insufficient and inadequate and claim the sum of \$20,000.

While at Edmundston, where the trial took place, the court, accompanied by counsel for both parties, had the advantage of viewing the locus in quo,—examining the land taken, what was left, and how close to defendants' property both railways are passing.

On behalf of the defendants, two witnesses were heard,—the defendant T. M. Richards and Beloni Nadeau.

T. M. Richards bought in 1891 the property upon which his store, dwelling, &c. are situate for \$3,500 including the piece to the north of the Temiscouata Railway, upon which the Royal Bank is situate. The latter piece he sold to the Bank last year for \$5,000, after having materially improved and repaired

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the building which was there when he bought. He values the land left to him alongside of the Royal Bank at \$1,000—a piece of land 60 feet by 100 feet.

He built his store and the house in which he is now living 17 years ago. Before that time he was carrying on business on Main Street. It is admitted that the part of the land east of Ferry Street was bought for \$280 in exchange for another piece of land for which \$280 was mentioned in the deed (December 30th, 1896). It is further admitted that \$3,500 was paid in 1891, for lot 320, including the Royal Bank property, and being all the land held by the defendants excepting 320A. He moved his business from Main street to the present place on Ferry Street, because it put him more in contact with the American people,—he thought the Ferry Road brought him considerable business from the St. John River. He contends that his business increased on Ferry Street; but since the running of the trains, for the last three years, it decreased. The business carried on by the defendant is that of general groceries, hardware, and catering generally to the farmers. He admits the construction of the road benefited the business and that the fact of making Edmundston a divisional point has given an increase in value to the property, followed by an increase in the municipal valuation.

The defendant claims he has suffered a loss in his business of \$3,000 a year,—that his land is worth to him \$25,000. Further on he values the land taken at \$5,000. The increased risk by fire at \$2,000,—his property is not insured. He insured it for one year only. Finally he values the land taken and damages at \$12,000,—that is \$5,000 for the land, and \$7,000 for damages, including \$2,000 for damages resulting from increased risk by fire. He is unable to name

anyone who does not now come to his store and deal with him since the building of the railway. He values the property left to him, as a business proposition, at \$7,000 to \$8,000.

Beloni Nadeau, the other witness heard on behalf of the defendants, testified that in 1909 he valued, for the Crown, the land taken and all damages at \$6,000; and, if the defendants were obliged to go, leave the place and seek other premises, his valuation was \$12,000. He valued all the lands, including that part upon which the buildings are erected at \$5,000 and the damages at \$1,000.

On *T. M. Richards*, the defendant, being recalled, he said that Mr. Sloat who, in 1909 was as well as the said *Beloni Nadeau* a government valuator, put a value of \$5,000 for the lands and damages, when in company with one *Michaud* they all three came to his place. He says Mr. Sloat, in January last, when he was no longer a government valuator, repeated the same thing to him. Counsel for the Crown admitted at the trial that both Messrs. Sloat and *Nadeau* were acting as government valutors under the authority of the Commissioners of the National Transcontinental Railway.

The following witnesses were heard on behalf of the Crown—*Joseph M. Martin*, *Levite Gagnon*, and *Dr. P. H. Laporte*.

Joseph M. Martin, a farmer of *Edmundston*, calls the lands taken “intervale lands,” and says the best purposes to which they can be put is farming; because it could not be built upon, as most of it is flooded in the Spring—and he values all the land taken at \$1,000. He contends that while the Transcontinental Railway has decreased the value of what remains of the store-stand by \$200 or \$300, it has increased the

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defendants' other lands on the north of the Temiscouata Railway by 20 per cent. He says that land north of the Temiscouata Railway, about five acres, which he values at \$4,000 is worth as much as the land where the store is. He values the remaining lands, where the store is at \$500 and the buildings at \$4,000 since the expropriation.

This witness is a municipal assessor at Edmundston and has occupied that office at three different times. He does not think that the fact of the defendants' property being now between the two railways would prevent him from going to the store,—but admits it might prevent some one. He says there are other business sites in the town which are better than the one now occupied by the defendant, and that there are a number of other general stores in the town. The Temiscouata Railway passes on the highway, at a level crossing and the Transcontinental passes over the same on an overhead crossing.

Levite Gagnon, the Sheriff, a resident of Edmundston for 20 years, who has been an alderman, engaged in fire insurance business—bought and sold land at that place, and says that previous to the building of the Transcontinental Railway, the freshets brought the water to the northern line of the Transcontinental Railway, and that the land taken was not fit for building purposes. He values the land taken at between \$800 to \$1,000 and the damages to the balance at \$2,000. Contends that the lands to the north of the Temiscouata Railway have increased in value because of the Transcontinental Railway coming to Edmundston and making it a divisional point—and that his valuation of \$2,000 should therefore be decreased by 25 per cent, as representing such increase, leaving it at \$1,500. As a condition for getting the

Divisional Point, the Municipality had to install water works in the town, and supply the government shops with it; and because of the water works being installed the fire insurance rates have gone down since the building of the Transcontinental Railway. Prior to January 1912 the rates for stores were 2½ per cent,—since that date they have come down to 1½ per cent. For dwelling houses previous to January, 1912, the rates were \$1.75,—since that date the ratio is \$1.25. He says there are better business stands in Edmundston than Richards' place and contends that the business generally has been materially increased in the town by the building of the Transcontinental Railway, and especially by its being made a divisional point.

Dr. *Pio H. Laporte*, Mayor of Edmundston, who was alderman and assessor in previous years, has been a resident of the place for eleven years and has bought land there. He says that the municipal valuation at Edmundston is made on a basis of 80 per cent. of the market value for the land, and 35 per cent. for the dwellings. When assessor, in 1908, he valued the part of the defendants' property on the north of the Temiscouata Railway, and the part in green on plan exhibit No. 3 at \$2,000. On St. Francis Street, where the Royal Bank Building is which Richards then owned, including the garden lot, he valued at \$3,000,—the little building and shed at \$250. The land where the store is, excepting the little building and shed, he valued at \$1,000 and the buildings at \$3,000. He says that property in Edmundston has increased in value because of the Transcontinental Railway.

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He does not think that the building of the Trans-continental Railway will affect the driving to Mr. Richard's shop. This closes the evidence.

Dealing first with the question of loss of business, the Court has arrived at the conclusion that it is not an element calling for compensation, and that the defendant cannot recover upon that ground in the present case. The damages the defendant is entitled to recover are such as are inherent in the land itself, and not to the person or to the defendant's business (1).

The damages which he can recover are those which would go to decrease the market value of the land, taking into consideration its prospective capabilities and putting it to the best purposes the owner can apply it. The damages resulting from the expropriation are only those which refer to land or to some interest in the land, and do not include personal damages (2).

The only case where damages for loss of business could be allowed, would be where the whole of the defendant's land and property is taken and where a business site which is part of the value of the land is taken away,—forcing the owner to abandon a locus upon which he had established a business—as in the cases of *The King v. Rogers* (3); *McCooley v. City of Toronto* (4); and *The King v. Condon* (5). But in this latter class of cases it must be noticed that it is

(1) *Lefebvre v. The Queen*, 1 Ex. C. R. 121; *McPherson v. The Queen*, 1 Ex. C.R. 53.

(3) 11 Ex. C.R. 132.

(4) 18 Ont. R. 416.

(5) 12 Ex. C.R. 1.

(2) Browne & Allan.

Law of Compensation, p. 284.

not damages of a personal nature that is allowed, but damages for the loss of a good business site, having its market value over and above the inherent value of the land itself, taking in consideration the special good purposes to which it can be put.

The damages for loss of business purely and simply are too remote and depend on the commercial ability and industry of the individual, are and not an element inherent to the land (1).

Moreover, in the present case the court must find that the statement prepared by the defendant to show decrease in his business, is not one prepared on a good business basis, and is one which would not be accepted by any Bank, and it would not be relied upon in any business transaction. It is further in evidence that business generally has increased in the present locality since the building of the Transcontinental Railway, and from the fact of its being made a divisional point of the railway—and this view must be accepted as the one naturally expected under the circumstances. It is perhaps also well to mention that the defendant left Main Street, about 17 years ago, to carry on business on Ferry Street, and he says he did so with the view of catering to the American trade. This trade would now be materially affected by the building of a railway on the American side of the River St. John, and which passes on the other side of the river where it has a station directly opposite the Ferry and Ferry Street. The construction of this railway would necessarily entail the settlement of business places near the station, thus retaining the American people on their side of the river. The defendant when on the stand was also unable to name any person who had discontinued to go to his shop since or on

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(1) *Rez v. London Dock*, 5 Ad. & E. 163; *Ricket v. Metropolitan Ry.* 2 H.L. 175.

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account of the building of the Transcontinental Railway.

There is, however, no doubt that the building of the Transcontinental Railway has damaged the defendant's property; and that he should recover therefor.

There is another question of law raised by the Crown's counsel, which should also be disposed of before coming to the assessment. He contends, "the defendant is not entitled to damages resulting from the operation of the railway." In support of this view the learned counsel alleges that under sub-sec. (e) of sec., 3, chap., 39 R. S. C. 1886, the Minister is authorized to contract for the purchase of any land "or other property necessary for the *constructing, maintenance and use* of the public work....", and to pay any damage "sustained by reason of anything "done under and by authority of the said Act." But, he says, in the present Expropriation Act, chap. 143, R. S. C. 1906, the above sub-section is wholly omitted, and the amount of compensation is limited by sections 15 and 22 to the value of the land and for damages occasioned thereto by the *construction* of the public work, and further that under section 50, of the latter Act, damages caused by the construction shall be off-set by the advantages derived from the *construction and operation*.

This court cannot agree with the learned counsel when he says that sub-sec. (e) of sec. 3 of R. S. C. 1886, has been wholly omitted in chapter 143, R. S. C. 1906. Indeed, sub-section (b) of section 3, chapter 143 R. S. C. 1906, gives the Minister authority to enter upon and take possession of any land, etc., necessary for the *use, construction, maintenance, &c.* of the public work. Therefore the words "*use, con-*

struction and maintenance" appear still in the R. S. C., 1906. The necessary inference being, and it naturally arises from the law of eminent domain, that compensation is assessed for all damages sustained through the exercise of the statutory powers of constructing the railway.(1) Even if the Act did not contain substantial provision therefor, taken as a whole it would give the owner of the land which has been injuriously affected, by the operation of the railway or otherwise, a right to claim compensation.

The legislature when giving the proprietor the right to compensation for the land taken and for injurious affection, must have had in view the ultimate object aimed at, the works when completed and in operation, not abstractedly as a mere embankment, but in connection with its appropriate traffic and with ordinary incidents of a business undertaking.(2)

Then the tender by the information is in full satisfaction for the location, construction and *maintenance* of the said railway. Would not the word *maintenance* imply 'operating'? A railway after its construction would not, as a business proposition, be maintained if not operated. Sir Frederick Peel, in delivering judgment in *re The Portpatrick Ry. Co. v. The Caledonian Ry. Co.*(3) said: "In our decision we referred particularly to "the 4th and 5th articles of the agreement 1864, with the "view of showing how many different items we intended "in the word "*maintenance*" as we used it; and the "order therefore when it speaks of *maintenance* must "be deemed to refer, not only to the *maintenance*

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(1) Cripps on Compensation, 5th Ed. pp. 134, 135, 206. of Buccleuch's case, L. R. 5 H. L., 418; City of Glasgow U. Ry. Co. v.

(2) Hammersmith Ry. Co. v. Hunter, L. R. 2 H. L. Sc. 78; The Brand, L. R. 4 H. L. 171, 187; Straits of Canseau Marine Ry. v. Simkin v. London & N. W. Ry. Co., The Queen, 2 Ex. C. R. 113; McLeod 21 Q. B. D. 453; Cowper-Essex v. v. The Queen, 2 Ex. C. R. 106.
Local Board 14 App. Cas. 153; Duke (3) 3 R. & C. Traf. Cas., 201.

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“of the permanent way, but also to the *management and working of the line.*”

Therefore in assessing the damages herein consideration will be given to the operation of the railway and damages allowed therefor, and the law as laid down by the Supreme Court of Canada in the case of *Vezina v. The Queen*,⁽¹⁾ is considered as still obtaining and must be followed.

It will appear from the plan, Exhibit No. 3, that part of the defendant's property is built on the land owned by the Temiscouata Railway—it is built on part of the right of way of the said railway, and the track itself passes quite close to the defendant's property. Therefore the defendant was already suffering damages from an adjoining railway before the Transcontinental Railway was constructed, and while the question of increase of danger from fire followed by an increase in premiums for fire insurance is a legal element for compensation, it must be observed that in the present case it is in a large degree shared by the Temiscouata Railway which passes in such close proximity to the defendant's property. It is contended that if the Temiscouata Railway were to oust the defendant from that part built on the railway, he would have hardly any space left on the remaining land to move his buildings back; but the court finds, after viewing the premises and hearing the evidence of the Engineer, W. C. McDonald, that there is enough land left for the defendant to so move back his buildings but with perhaps a curtailment of ease in the enjoyment of the property. However, has it ever been contemplated by the defendant to do so since the expropriation by the Transcontinental Railway? He has since that date, namely in 1910,

(1) 17, S. C. R. 1.

put up two new buildings, a cow barn and a hencoop as indicated on the plan, Exhibit No. 3.

There is, however, obviously no doubt the defendant has suffered material damages from the expropriation. The railway embankment on Ferry Street runs as high as 16 feet, and at the other end, at the point where the land intervenes with the Temiscouata Railway, as high as 7½ feet. The water front and the view have been taken away, and he is left with rather a congested place within which to carry on his business; however, it is large enough for his purposes, but with less convenience.

The whole of the evidence may be summarized, by saying that while the defendant claims by his pleadings \$20,000, under his evidence that claim is reduced down to between \$10,000 and \$12,000—and Beloni Nadeau, together with the other Government valuator, (Sloat) did respectively offer him \$6,000 and \$5,000 in 1909. It is unnecessary to decide how far an unaccepted tender could be considered, but in valuing a property it is always a starting point that one cannot overlook. Both Nadeau and Sloat, the government valuers, were not called by the Crown, and they had valued this property in 1909. One of the three witnesses heard by the Crown values the land taken at \$1,000; and the other two witnesses value the land and damages at \$3,000. The two pieces of land in question were, under the known circumstances, bought respectively in 1891 and 1896 for \$3,500 and \$280 making a total of \$3,780, and buildings were subsequently erected on part of it.

The amount tendered by the information is \$3,568, but by its amendment the Crown has taken almost an additional quarter of an acre (237-1000) and has not varied its tender. The Government's own valua-

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tors Nadeau and Sloat who valued properties for the plaintiff over a distance of 25 miles or more, now value respectively the land and damages here at \$6,000 and \$5,000. While these amounts appear high, one cannot forget they were made by men sent there by an interested party and that they had experience as valuers.

Now, taking all the circumstances into consideration, the court is of opinion that the defendant is entitled to recover for the land taken and for all past present and future damages, including the damages resulting from the operation of the railway, the sum of five thousand dollars.

There will be judgment as follows, viz.:—

1st. The lands taken herein are declared vested in the Crown from the date of the expropriation.

2nd. The defendants are entitled to recover from His Majesty the King, the sum of five thousand dollars, with interest thereon from the 23rd day of July, A.D. 1907, to the date hereof, upon giving to the Crown a good and sufficient title, including a release of dower rights in the property, if any.

3rd. The defendants will have the costs of action, which are hereby fixed at the sum of two hundred dollars.

Judgment accordingly.

Solicitors for plaintiff: *Stevens & Lawson.*

Solicitors for defendants: *Powell & Harrison.*
