1918
June 4.

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

PLAINTIFF,

AND

ROBERT A. BRENTON, MINNIE E. BRENTON, AND EDWIN D. KING,

DEFENDANTS.

Expropriation—Water lots—Valuation—Riparian rights—Damages—Loss of access—Right of way.

The Crown having expropriated some water lots in the outskirts of Halifax, N.S., for the purposes of Halifax Ocean Terminals, it sought by an information to have determined the amount of compensation.

Held, that in the absence of any sales of similar property in the neighbourhood from which the value of the property could be ascertained, a valuation of seven and a half cents per square foot was a fair basis of compensation, adding thereto a 10% allowance for the compulsory taking; that the owners were also entitled to damages for the depreciation of property not expropriated, occasioned by the loss of access to the water-front for boating and bathing purposes, and of a right of way they enjoyed over a railway, as a result of the expropriation.

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

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 27, 1916.

J. A. McDonald, K.C., and *T. S. Rogers,* K.C., for plaintiff.

L. A. Lovett, K.C., and *E. King,* for defendants.

CASSELS, J. (June 4, 1918) delivered judgment.

This is a proceeding on behalf of His Majesty on the information of the Attorney-General of Canada

against Robert A. Brenton, Minnie E. Brenton, and Edwin D. King, to have it declared that certain lands expropriated for the purposes of the Halifax Ocean Terminals be declared vested in His Majesty and that the compensation payable therefor be ascertained by this Court.

The defendant, Edwin D. King, was made a defendant, as mortgagee holding a mortgage against a portion of the lands. This mortgage has been paid off, according to the statement of counsel, and he is no further interested in the present action.

The case came on for trial before me at Halifax on September 27th, 1916, and subsequent days.

Counsel undertook to file a memorandum in reference to the title, and certain other material, and it is only lately that I received a memorandum signed by both counsel agreeing upon certain facts of importance in connection with the decision of one branch of the case. I shall have to refer to this later on.

The properties in question are situated in the village of Rockingham, about 4 miles from the post office in Halifax. There is not much difference of opinion as to the values of the particular properties expropriated.

The property of Robert A. Brenton, the husband, contains 19,634 square feet, and situate upon his property is a small bungalow. Exhibit No. 3, filed in the action, shows the properties. The Crown have offered for this particular property the sum of $1,410, *viz.*, at the rate of five cents a square foot. The defendant, Robert A. Brenton, claims the sum of 7½ cents a square foot, the difference in dollars and cents being comparatively small.

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The property owned by Mrs. Brenton comprises an area of 10,527 square feet. On this property is situate a house and sheds. In the same way the valuation placed upon the land by the owner is 7½ cents a square foot, the Crown's offer being five cents a square foot.

It is difficult to arrive at an accurate valuation, on account of the absence of sales of this particular class of property in the neighbourhood.

The properties both of Robert A. Brenton, and of Mrs. Brenton extended to high water mark. In front of the property of Mrs. Robert A. Brenton is a water lot granted subsequent to Confederation. The question of the validity of the title to this water lot has not arisen in this case. The Crown in the information filed have not claimed the water lot; and, as stated by Mr. Lovett at the opening of the case, there is no claim made in this case to the water lot, the claim being based upon the riparian rights.

There is some confusion as to the number of square feet in these particular properties, but not of any material moment. The figures which I have given are the figures stated in the information and are the figures shown by the plan.

I will deal first with the question of the value of the lands expropriated before proceeding to deal with the legal question, namely, the question of the damage which Mrs. Brenton claims by reason of the depreciation of certain lands to the west of the railway right-of-way.

Mr. Clarke, who acted for the Government in making the valuation, concedes that the value of five cents per square foot placed by him upon the lands in question, is merely an arbitrary figure arrived at without the advantage of any sales in the

neighbourhood to guide him in regard to the matter. He does, however, admit that the lands in question are of greater value than the lands which were valued by him in the *Maxwell* case,[1] in which I had occasion to give judgment. In that case he had placed a valuation upon the land of five cents a square foot.

James E. Roy is a gentleman whose evidence impressed me as being very fair, and he is a man with good knowledge of the values of suburban properties. Mr. Clarke, referring to Mr. Roy, states as follows: "Mr. Roy has a good knowledge of subur-"ban properties. He has a lot of money in suburban "properties."

"Q. You would call him competent to judge, pro-"vided he gives his evidence in a fair way?—A. "Yes."

I may state that I think Mr. Roy unquestionably gave his evidence in a fair way, and I accept his statement as to values. I think in fairness to Mr. Clarke, I should state, that his evidence was also given with a desire to be fair, but I do not think he is as competent to judge as Mr. Roy in regard to this particular class of property. The difference in question between these two gentlemen was comparatively trifling.

Robert A. Brenton gave his evidence. He valued the 19,636 square feet at 7½ cents per square foot; and the bungalow at $250, making in all the sum of $1,722.55—and with this valuation Mr. Roy concurs —and I find that for this property the proper sum to be allowed to Mr. Brenton would be the sum of $1,722.55, to which should be added 10 per cent.

[1] 17 Can. Ex. 97, 40 D.L.R. 715.

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In regard to Mrs. Brenton's property expropriated, containing 10,527 square feet, at 7½ cents per square foot, the value would be $789.52. On this property is a house and outbuilding which Robert A. Brenton values, for the house $1,200 and for the outbuilding $50. Mr. Roy valued the dwelling on this property at $1,000, and the outbuilding at $50, which amounts to $1,050. This amount being added to the sum of $789.52 would make a total of $1,839.52, which, I think, would be the fair value to be allowed to her, and in addition she should be allowed ten per cent.

This disposes of the question of values of the properties of Robert A. Brenton and of Mrs. Brenton actually expropriated.

The defendants by their defence have claimed the sum of $8,500. This sum of $8,500 includes both the sum claimed by the husband, and the sum claimed by the wife. I do not know whether or not they propose to treat their moneys which are allowed as joint property or not. In the settlement of the judgment this matter can be adjusted.

A further claim is made on behalf of Mrs. Brenton, which involves more of a legal question than a question of values. As I will point out there is practically but little difference of opinion on the question of value.

It would appear that in the year 1854, what was then called the Nova Scotia Railway was constructed. This railway subsequently became a part of the Intercolonial Railway, and it was with a view of widening the right-of-way for the purpose of creating shunting yards that the properties of the Brentons have been expropriated.

In 1854, Mrs. Brenton, or her predecessors in title, owned a piece of land situate on the west side of the old Nova Scotia Railway as then constructed. They also owned the land on the western side of the main highway from Halifax to Bedford, a highway which has been in existence from time immemorial.

It would appear that when the Nova Scotia Railway expropriated the land for their right-of-way, they gave to the owners a right-of-way extending across the railway tracks. This right-of-way was used to enable the owners of the land to reach a wharf which had been constructed on the waterfront in connection with the property of Mrs. Brenton expropriated by the Crown, and the other properties now owned by her. Owing to the lapse of time it has been difficult to procure accurate evidence. Mr. Davidson, who was called, shows that at all events for nearly 50 years there was the right-of-way across the railway. Apparently this right-of-way was guarded by gates and was planked during the summer months, and that the wharf was used for the purpose of shipping lumber and lime from the properties on the other side of the track. There is no contest practically in regard to this point. Mr. Rogers, K.C., who was acting for the Crown, and who has spent a considerable amount of time in considering the facts, puts it in this way at the trial: "I say the right-of-way is from the "public way down to the shore. It is separate. It "is a question whether any damages could be re-"covered, but if so, it should be very inconsiderable.

"HIS LORDSHIP—Those lands on the west side are "connected with the right-of-way.

"*Mr. Rogers*—Yes, Mr. Brenton, when he bought "the whole of the land, in that connection bought

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"the right-of-way which extended from the east side "of the public road across down to the railway and "thence across the railway.

"HIS LORDSHIP—I asked the question whether the "right-of-way was limited to those lots on the water "side of the highway down to and across the rail- "way, or as well to the lots on the west side of the "road.

"*Mr. Rogers*—It was purchased all at the same "time.

"HIS LORDSHIP—I asked Mr. Lovett whether it "was not a right-of-way which was confined to the "lots on the other side of the highway.

"*Mr. Rogers*—The lots are described in three "different parcels.

"*Mr. Lovett*—And the right-of-way is attached "to all of them, each one of them having a right-of- "way to the shore.

"*Mr. Rogers*—I am expressing some doubt as to "whether the legal situation was not somewhat dif- "ferent. Supposing that on that lot where Brenton "lived there was held to be a right-of-way, a right "to go through someone else's land to the shore; "that was this case: undoubtedly that man would "be entitled to recover damages; but there were "three lots, and the deed says, 'Together with a "right-of-way from the east side of the road to the "shore,' as a separate parcel or easement. The "owner of the land, while he owned all those three "lots, of course, could use all that right-of-way. He "bought it and could use it, but the question is, is "that in a commercial or business sense so pertin- "ent to this land up here that it is anything more "than a nominal value to the land down there?"

The lots referred to include lots both on the west side of the right-of-way taken by the Nova Scotia Railway and bounded on the west by the highway, as also the lots held and owned by the same owner on the west side of the main highway.

An agreement was filed describing the title, signed by the solicitor for the plaintiff and by the solicitor for the defendant, in the words following:

"1. The whole of the property of Mrs. Brenton, "consisting of the lot between the railway right-of- "way and the shore of Bedford Basin (the expro- "priated area), the lot between the railway right-of- "way and the main road and the lot on the west of "the main road, together with the adjoining lands "on both sides, and together with the railway right- "of-way before same was expropriated, was held as "one undivided property by Thomas Davison, who "procured title thereto by deeds dated 1838 and "1839, recorded in Book 66, page 50, and Book 67, "page 500.

"2. In June, 1854, the plans of the Nova Scotia "Railway were filed in connection with the expro- "propriation of the right-of-way.

"3. In August, 1854, Thomas Davison conveyed "the whole block of land to John Davison by deed "recorded in Book 107, page 581. The description "of the lands so conveyed makes no reference to "the railway right-of-way.

"4. In 1869, John Davison conveyed the lot of "land between the shore and the railway right-of- "way (the expropriated area), the lot of land be- "tween the railway and the main post road, and the "lot of land west of the main post road, together "with a right-of-way over the road from the main

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"post road to the shore to George Roome by deed "recorded in Book 161, page 644. The description "in said deed is as follows:

"All those three lots and parcels of land situate "on the western side of Bedford Basin, in the County "of Halifax, immediately joining the south side of "the property of Ephraim E. Burgess, and particu- "larly described as follows; namely, lot number one, "beginning at the western shore of Bedford Basin, "at a post on the south line of Ephraim E. Burgess' "property; thence to run westerly on said southern "line or south seventy-six degrees west to the Pro- "vincial Railroad; thence southerly by the side of "the railroad two chains and eighty links to a post; "thence north eighty-one degrees and forty-five "minutes east to the shore of Bedford Basin at high "water mark; thence northerly by the various "courses of said shore to the post at the place of "beginning. Second lot, above railway, east side of "Bedford Basin. Third lot, on west side of road; "together with a right-of-way for the said George "Roome, his heirs and assigns, his and their ser- "vants, tenants and agents, at all hours of the day "and night, with cattle, carts and all kinds of "vehicles, in, over and upon the road or passage "now located at the north end of the said John "Davison's house, and leading from the main post "road to the wharf, situate on lot number one here- "inbefore described, said road or passage to be of "sufficient width for conveniently using the same for "carting and trucking thereon.

"5. The said George Roome was the predecessor "in title of Mrs. Minnie E. Brenton, the present "owner of the three lots, and said lots have always "been held and owned by one owner from the time

"same were conveyed as one property to the said "George Roome.

"6. The evidence of Christopher Davison on the "record shows that the right-of-way, or road, from "the main post road to the sea shore on lot expro- "priated existed and was used in connection with "this property owned by one person, that the said "roadway continued to exist and be used in con- "nection with said property down to the time of ex- "propriation, the only difference being that gates "were erected on each side of the railway right-of- "way and in winter time the planks which were put "between the rails in the summer months to prevent "derailment were removed and replaced by the rail- "way in the spring. The gates were maintained by "the railway. Davison's recollection does not go "back of 1865.

"7. There is no written record that can be found "with reference to the old Nova Scotia Railway pro- "ceedings after the filing of the plan referred to in "paragraph 2 hereof.

"Dated at Halifax, N.S., November 8th, 1917."

It appears there are no records obtainable in regard to the proceedings at the time the Nova Scotia Railway expropriated the lands, and all that we have is that in point of fact a right-of-way was given by the railway and was continuously used in the manner indicated. I desired to have evidence as to the dates of the erection of the houses on the lands on the west side of the highway, but have been lately informed by counsel that no such evidence can be procured.

I am of opinion that these properties being held by the same owner, that the right-of-way over the railway and the right to reach the water-front was

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a valuable asset, and that the expropriation of the property of Mrs. Brenton, taking away all access by this right-of-way to the waters of Bedford Basin was a very serious injury to the property not expropriated, situate between the right-of-way and the main highway, also to the properties to the west of the highway. The locality in question was intended as a summer resort for the citizens of Halifax, and in later years also became a winter resort. The right of access to the water-front for boating purposes and bathing purposes, etc., is a valuable right. Mr. Robert A. Brenton places the depreciation upon these properties at 25 per cent. Mr. Roy corroborates this claim. Mr. Clarke, in his valuation, paid no regard to the question of the depreciation in value of these properties. He admits, however, that the cutting off of the access to the water depreciates the rest of the property. He thinks the property has depreciated from 10 to 15 per cent., if access to the water is cut off. He is referring in his answer to the property situate between the highway and the right-of-way. He states, however, the same in regard to the lands on the west side of the highway, which, he thinks, would also be depreciated from 10 to 15 per cent., but, as he states, it is only a guess. He agrees with Mr. Brenton and Mr. Roy that a fair value for the land on the west side of the highway, as also the land on the east side of the highway, extending to the right-of-way of the old Nova Scotia Railway would be about 10 cents per square foot. He is unable to speak as to the value of the houses situate upon these two properties not expropriated, and I think the values placed upon them by Mr. Brenton, and corroborated by Mr. Roy, should be accepted.

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I accept Mr. Roy's statement, and I would allow for the depreciation to these other properties 25 per cent., amounting to $4,130. This would allow the defendants for the lands taken, the property of Brenton, the sum of $1,722.58, the property of Mrs. Brenton, $1,839.52, and for the depreciation of Mrs. Brenton's other lots the sum of $4,130, making in all the sum of $7,692.10.

The parties are entitled, I think, to 10 per cent. on the sums of $1,722.58 and $1,839.52, but not upon the damages occasioned by the depreciation of the properties not expropriated.

I think that if the defendants are allowed the sum of $8,100 they will be fairly compensated for the value of the lands taken, and all the damage which they have sustained, including all claims for compulsory taking and damage to the balance of the farm.

The defendants are entitled to interest and the costs of the action.

If I have fallen into any inaccuracies as to measurements, counsel will kindly communicate with the Registrar.

Judgment accordingly.