

1917
Dec. 12.

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

PLAINTIFF,

AND

HENRY MONTGOMERY-CAMPBELL and HERBERT MONTGOMERY-CAMPBELL, and THE NORTHFIELD COAL COMPANY, LIMITED,

DEFENDANTS.

Expropriation—Compensation—Coal handling site—Lease—Access.

In an expropriation of land leased as a coal-handling site the owners were awarded compensation for the value of the land taken and for the injurious affection to the remainder, with means of access thereto, together with a 10% allowance for the compulsory taking, without regard to the special use of the land, and the lessees were allowed for the loss they have been put to from the interference with their business and the necessary removal of their weigh-scales to another site.

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

Tried before the Honourable Mr. Justice Cassels, at Fredericton, N. B., October, 3, 4, 1917.

Hanson and J. B. M. Baxter, for plaintiff; A. J. Gregory and J. J. F. Winslow, for defendants, Montgomery-Campbell; M. G. Teed, K.C., and Jas. Friel, for Northfield Coal Co.

CASSELS, J. (December 12, 1917) delivered judgment.

The evidence in this case was taken at the same time as the evidence in the case of *The King v. Henry Montgomery-Campbell and Herbert Montgomery-Campbell*. The information was exhibited to have it declared that certain lands expropriated are vested in the Crown, and to have the compensation ascertained.

The defendants, Henry Montgomery-Campbell and Herbert Montgomery-Campbell, are the owners in fee of the lands in question. They leased the property to their co-defendants. The date of the lease is July 18th, 1913, and it is a lease for a period of 21 years. A right of purchase is given by the Montgomery-Campbells to their co-defendants The Northfield Coal Company, Limited, to purchase the properties in question at any time within ten years from July 1st, 1913, for the price of \$1,000. This right has not been exercised, although it is stated that the coal company contemplated purchasing.

The land prior to the expropriation contained 12,523 square feet. The railway have expropriated the whole of the lands fronting on Aberdeen Street. According to Mr. Winslow, 7,225 square feet have been expropriated. According, however, to Mr. Ross Thompson, who is a civil engineer, there is left in the property after the expropriation some 7,200 feet.

The plan known as the Colter plan, which is marked Exhibit "E," in the case, shows the situation of the property as it existed before and after the expropriation. It is admitted that the coal shed of the coal company is partly erected on lands belonging to the Canadian Pacific Railway. It has

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been erected since the year 1913, and apparently with the consent of the railway.

The Crown offers by the information the sum of \$1,278 together with interest from October 2nd, 1914, the date of the filing of the plan, up to the date of tender, namely, June 14th, 1916.

At the trial it was agreed between counsel that the sum of \$1,000, the price at which the option of purchase was fixed, should be accepted as the market value of the land, without regard to the erections thereon, or to any special value it might have to the lessees for the purposes of their particular business.

The Montgomery-Campbells, by their defence, claim the sum of \$2,970. They claim for the value of the land taken under the lease \$650; for severance \$150; in all \$800. They also made a claim for Aberdeen Street which was not entertained at the trial, the parties being left to any independent proceedings that they might be advised to take as against the city in any action to which the city would be a party.

The contention is put forward that when the Crown expropriated part of Aberdeen Street, it ceased to be any longer a street, that there was a reverter to the grantors, namely, to the Campbells. On the present record the defendants, the Montgomery-Campbells, claim that by reason of the expropriation the lands, the value of which have been agreed upon as being \$1,000, have been depreciated by the sum of \$800 leaving what is left as of a value of \$200 only.

The lessees, The Northfield Coal Company, Limited, claim by their defence the sum of \$6,345, made up as follows:

A. Value of leasehold interest in land actually taken	\$1,000.00
B. Injurious affection to the residue of the leasehold lands not actually taken	1,000.00
C. Value of coal shed	765.00
D. Value of scale-house	100.00
E. Value of scale installed	235.00
F. Loss of business site	1,000.00
G. Damages for loss of business	2,000.00
H. Removal expenses, etc., and interest	245.00
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	\$6,345.00

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By the information it is stated in paragraph 6, "that His Majesty the King is willing to provide and construct and hereby offers to provide and construct a good and sufficient crossing for horses, teams and vehicles over the said lands so taken as aforesaid, for the use of the defendants or such of them as may be found entitled, his, it, or their heirs, successors and assigns,"

The information was filed on September 9th, 1916, and for the first time the offer of this crossing was given to the defendants. Without a crossing the defendants would not have access to their premises.

At the trial of the cause, it having been pointed out that one crossing would not be sufficient as coal carts entering the premises do not have room to turn, the Crown made an offer of two crossings at any point to be designated by the defendants, the effect of which would be to enable coal carts to enter by one crossing and depart by the other. I suggested that the undertaking should be in writing and signed, and filed as required by the statute. A written undertaking has been placed on file.

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The Canadian Pacific Railway siding is used in connection with the coal shed as well as with the Everett property situate alongside.

In reference to this plan Exhibit "E" there is some confusion in regard to the lettering, but there is no difficulty when the distances are looked at. For instance, from the iron pipe to the letter marked "D," as it appears on the plan, the distance is 155 feet; the distance on the railway is 123 feet; and the distance on the other side from the iron pipe is 109 feet.

As shown by the plan in connection with the coal shed, the defendants had a "scales house" for the purpose of weighing their coal, this being raised about 3 feet, the idea being to prevent flooding and also freezing during the winter. Having this scales house and scales elevated require approaches on both sides, which are practically of about 28 feet on the inner side, and 24.8 feet on the street side. The railway, as appears on the plan, have cut off the greater part of the scales house, rendering it useless.

The contention was raised by the counsel for the Crown that the company did not require a weigh-scales at their premises, there being a provision in the city's by-laws requiring all coal to be weighed on the city's scales prior to delivery. I do not think the contention well founded. The defendants were entitled to carry on their business in a manner which they considered best in their own interest, and I think according to the evidence of Mr. Baird that they were right in having their own scale-house.

It is quite clear that a scale-house can be erected elsewhere on the premises as left after expropria-

tion. It is not necessary to have it higher than one foot, which would require short approaches. This scale-house can be constructed of cement, and the scale removed as well as the building which protects it. It is a mere matter of expense. It will probably cost, according to Mr. Mitchell, the sum of \$300. The rail of the railway is only 12 inches above the surface of the lot. This is shown by Mr. Mitchell, the mayor, who measured it the night previous to the giving of his evidence, and would not be a serious grade for teams.

The coal shed is in precisely the same position now as it was prior to the expropriation. The only interference with the property is the cutting off the portion of the land fronting on Aberdeen Street, and the destruction of the scales-house.

There was considerable evidence given at the trial in regard to the difficulty of loading and unloading from the Canadian Pacific Railway siding, but whatever difficulty existed after the date of the expropriation also existed prior thereto. There has been no change in the facilities for carrying on the particular business there, other than the frontage on Aberdeen Street taken and the destruction of the scales-house, to which I have referred.

I think it was the duty of those acting for the Crown to have made the offer of the crossings at the time the land was taken, and it may be that technically the Northfield Coal Company, Limited, would not have the right to cross the lands so expropriated. I think, however, had the lessees really contemplated the continuance of the business they would have approached the Crown officers, and no doubt would have acquired the necessary crossing.

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They neither did that nor did they investigate to find out whether other suitable premises could be obtained. I think the evidence shows that there would be no difficulty in obtaining such premises together with trackage. Any new site may not be as favourably situate for the purposes of their business as the present one. To my mind there are certain facts that have to be kept in mind. In the first place, as I have mentioned, the City of Fredericton is a small place, the whole population being under 8,000. The coal supply is from the Minto mines, and is usually sold direct, according to the statement of the witness to which I will refer to, the Intercolonial Railway being the largest purchaser.

It is quite apparent from the evidence which I will quote of the officers of the coal company that they had not intended to enter upon an extended business in the City of Fredericton. The business done during the portions of the years 1913 and 1914 is comparatively small, and a certain portion of it was not loaded into the shed.

I can quite understand that if the defendants intended or contemplated a large and extensive business the taking away of this portion of their land might diminish it to such an extent as to prevent them from so extending their business to a great extent. Had, however, such been their intention, the moment they made up their mind to stop carrying on business at the site in question they would have looked out for another site.

Mr. James Barnes is president of the Northfield Coal Company, Limited. He is asked:

“Q. How long has the Northfield Coal Company been operating?

“A. We commenced operations I think in 1907.

“Q. Where is your mine?—A. Minto, Kent County.

“Q. You have been doing business in Fredericton?

“A. Yes.

“Q. For how long?—A. I think we purchased this property in connection with the Minto property in 1913.”

He then refers to the lease with the option of purchase.

“Q. Before that had you been doing business in Fredericton selling coal?”

“A. Not to a very great extent.

He states that the business in Fredericton was managed from the office in Minto through an agent. He then proceeds to state:

“That when the railway put down a trial line, we pulled up stakes, when we saw what was going to happen, after building up the properties. Then we waited developments, and did very little. The next thing was, the government expropriated. We were advised not to interfere with it at all then.”

He says:

“Q. Do you remember when it was that you found that it (referring to the railway) was laid out through your land?

“A. I could not give the exact date.

“Q. But when you did find out, you stopped doing business?

“A. We dropped right out.

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He is asked:

“Q. Have you yourself set any damages, have you any figure in your mind as to how much you are damaged?”

“A. No. I cannot say offhand now. The secretary-treasurer might be able to do so.”

In answer to a question he states:

“We were holding that as part of our mining property in Minto. We used this as a safety valve. We got rid of any demurrage. If a man did not call for his coal for a day we shipped it on here.”

He also states that they never used the coal shed to its full capacity. “I think we could put 8 or 10 cars in it.”

I do not think this is correct. A car holds an average of 35 tons. Lately they have been loading them up to as much as 40 tons, probably on account of shortage of cars; but, I think it clear that it would never have paid them to fill the coal shed right up to its full capacity. The expense would be too great, Mr. Baird points that out. Barnes is asked:

“Q. You were not doing a very active coal business in the summer of 1914?”

“A. Where?”

“Q. Right there, at that coal shed?—A. We did not do very much.

“Q. Did you do anything during the whole summer, from the time the warm weather came in?”

“A. We kept this here, to take the surplus.

“Q. So you had no surplus during the summer of 1914?”

“A. We did not send it there.”

And he goes on to point out that after the war was declared the Minto mines cannot supply the demand. "There has been a good demand."

"Q. Did you ever try to provide another location, did you ever seek another location?—A.

"No, I did not."

James M. Kennedy was the secretary-treasurer of the Northfield Coal Company. He says:

"The mines are at Minto, in Kent County."

"Q. And carry on operations there?—A. Yes.

"Q. Soft coal, bituminous coal?—A. Yes."

He is asked by his counsel:

"Q. Tell me, what induced you to open this plant in Fredericton?—A. We had two reasons. "One was, the irregularity of the I. C. R. orders. "Some weeks there would be 120 or 150 tons, and "the next week 200. Then it would drop to 150, "while our labour was pretty nearly the same, "especially during the winter season, and we "thought by having a shed over here that when "we got stuck with a car of coal on our hands "which we could not put in to the I.C.R. we could "slip it over here and retail it. The next was that "we could obtain better prices than the I.C.R. was "paying at the time."

He refers to the cost of the buildings, but places a much higher figure upon them than what they cost.

Mr. Moses Mitchell, who constructed them, states their cost.

Mr. Kennedy of the company states:

"Q. When did you commence?—A. The first car "came here in November, 1913, or part of a car.

"Q. That autumn or that year?—A. That year, "1913.

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“Q. You continued during that winter, did you?”

“A. We continued during that winter, and up to the following June. In that time we sold over 800 tons, between 800 and 900 tons I think.”

He is asked:

“Q. How much coal did you ship in that period?”

“A. We shipped 893.78 tons.

“Q. That was sold and disposed of, practically all of it?—A. All here.

“Q. On these premises?—A. Through this agency.”

“Q. But on these premises?—A. I said through this agency we had established here.”

“Q. Was it through these premises?—A. Yes, through these premises, sure, as far as is known to me. It was sent to Mr. Baird’s order, our agent.”

Now Mr. Baird points out that a certain portion of the coal never went through the premises at all. The profits of the company were 66 cents, apparently, per ton over and above what they were getting in Minto.

He is asked:

“Q. You never tried to get another site?”

“A. We never tried to get another site; the one we had pleased us.”

Taking the evidence of the other witnesses I am of opinion that with the two crossings, and with the scale-house rebuilt on a different site on their premises, the Northfield Coal Company, if they wish to, can carry on all the business that can be done in Fredericton; and it has to be borne in mind that

there are other coal agencies furnishing coal to the people in Fredericton.

Mr. Baird, who was their agent, shows the situation of the property. He is asked:

“Q. Assuming that you had two crossings conveniently located across the railway, is there any trouble to utilize that property as a coal shed?”

“A. It could be used, I think, in a small business, but its usefulness for a big business is done.”

“Q. Was there ever any big business done there?”

“A. No. There was a great chance for a big business.”

He also goes on to point out there were other sites to be obtained, although in his opinion the one in question was the best.

He also points out what I have previously referred to, that the only difference in carrying on the business as formerly would be the crossing of the railway and the elimination of the scales.

He refers to the area left as about 5,200 square feet, differing from the measurement of Mr. Ross Thompson referred to.

I asked Mr. Baird the following question:

“Q. Coal in Fredericton would be dealt with the same as anywhere else. Suppose I order 10 or 20 tons of coal; the coal would come on the railway, it would go to the carts, be taken to the weigh scales and then to my house?”

“A. Half of it might be sold that way. The shed is there for transient orders coming in, and

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“for the people who want coal during the winter.
“If I had kept it in the business alone, I would
“have unloaded a lot into the carts.”

“*Mr. Friel*—Off the track?—A. Yes.

“HIS LORDSHIP—If you got an order, you would
“put the coal right into the cart and send it to the
“house?”

“A. There are good facilities for that yet,
“there.”

He states further in reference to the site that “It
“was an ideal site before. Of course it is a pretty
“good site yet.”

Mr. Mitchell refers to the cost of the buildings and shows, for instance, that the cost of the coal shed which the defendants value at \$765 in their defence, practically was about less than half. His idea of the cost of moving the buildings and the scales would be in the neighborhood of \$1,000. In regard to the value of what is left, he says, that if the measurement given by Mr. Ross Thompson at 6,700 square feet is correct, what is left would be worth \$500—if there are 5,225 feet left, at \$400 placing the value at 8 cents.

I am of opinion that if the defendants are allowed \$500 for the value of the land taken, and the injurious affection to the balance, without regard to the special use, they will be amply recompensed for what has been taken.

As I have stated, it was agreed that the value of the land without reference to the present use, or without regard to the buildings is \$1,000.

A question arises in regard to the disposition of this \$500. It seems to me that the defendants could agree among themselves. The Coal Company are under a covenant to pay the rent, which is \$60 a year. If they continue to be tenants they would be entitled to the interest on this \$500 during the currency of the lease. If they subsequently become purchasers, they would have to pay the \$1,000 under the terms of their agreement, but they would receive the \$500 part of the value of the land which has been turned into money. If the parties cannot come to an agreement, perhaps a statement of the views of the counsel could be forwarded to the registrar.

I think that as far as Henry Montgomery-Campbell and Herbert Montgomery-Campbell are concerned, they are entitled to a judgment for \$500, to which I would add ten per cent. for compulsory taking, making in all \$550, to be dealt with as I have suggested, and they should get their costs of the action.

The undertaking as to the two crossings should also be inserted in the formal judgment.

In regard to The Northfield Coal Company, I think if they are allowed \$1,000 for all the loss they have been put to, and for the interference with their business, and their having to place their scales upon a different site, they will be amply compensated,—and I give judgment for The Northfield Coal Company, Limited, for the sum of \$1,000, and interest to the date of the judgment. I think this will cover every reasonable claim, including any sum

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for compulsory taking if they are entitled to it.
They are also entitled to their costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *R. B. Hanson.*

Solicitors for defendants, Montgomery-Campbell:
Gregory & Winslow.

Solicitors for Northfield Coal Co.: *M. & J. Teed.*
