

IN THE MATTER OF THE PETITION OF RIGHT OF
 JAMES D. LEBLANC.....SUPPLIANT,

1917
 Feb. 3

AND

HIS MAJESTY THE KING.....RESPONDENT

Damages—Injurious affection—From change of level of street—Subway—Loss of business.

The Crown having substituted for the level crossing on Main Street, in the City of Moncton, a permanent subway which resulted in a material change in the level of the street opposite the suppliant's property, who claimed both damages to his property and loss of business.

Held, That where no land is taken, the owner of property on such street is precluded from recovering for loss of business. The only damages he is entitled to recover are such only as are referable to the land itself and not to the person or to his business.

Where no portion of the land of the proprietor is taken, but his lands are injuriously affected by the construction of the works, causing special damages to the property differing from that to the rest of the public, then the claim for damages is let in; but it is restricted to the damages to the land and cannot be extended so as to let in any personal damages or loss of business.

PETITION OF RIGHT for the recovery of damages against the Crown on account of the substitution of a subway for a level crossing:

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at St. John, N.B., December 12-13-14, 1916.

M. G. Teed, K.C., and *E. A. Reilly*, for suppliant;
H. A. Powell, K.C., and *R. W. Hewson* for respondent.

AUDETTE, J. (February 3, 1917) delivered judgment.

The suppliant is the owner of certain land and premises in the City of Moncton, N.B., in close proximity to the Intercolonial Railway station, and more particularly shown on plan, Exhibit No. 1, herein.

In the course of the years 1914-15, the Crown, acceding to the request of several petitions presented by the citizens of the City of Moncton, decided to do away with the level crossing on Main Street of the said city, and to substitute

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therefor a permanent subway. The works began some-time in the Autumn of 1914 and were completed during the following Autumn.

As a result of these works, Main Street was, for a certain distance on both sides of the subway lowered from the former level, leaving the suppliant's building upon a fairly high elevation over the level of the street. Before the construction of the subway there was a slight grade from east to west opposite the suppliant's property, while there is now a grade of about 5% in the other direction, with the result that this building is now on the eastern end thereof 3.6 feet above the level of the new sidewalk, and the western end 6.18 feet; and at the western end of the lot, from points B to C, on Plan Exhibit "B," there would be a difference of level of about 7 feet. The suppliant's property has been injuriously affected by these works, and the building has to be taken down to a new level, consistent with the present level of the street. The ground floor of the building is used as a fruit and candy store business, where fruit, confectionery, soda water, soft drinks, pipes and cigars are sold, and the upper stories rented as offices.

During the construction of the works the traffic on Main Street, opposite the suppliant's property, was seriously interfered with. The street was closed for a short period and the general traffic was very much disturbed and affected during the whole time of the construction. The original sidewalk was about 13 feet wide, and the Crown with the view and object of maintaining access to these properties and in some cases to avoid endangering the solidity of the building, left along the front of the building a strip of earth of about six feet wide, with a railing on the outer edge. However, by the undertaking filed at trial, the respondent has undertaken among other things, to remove this strip whenever it will be convenient to the owners of the adjoining properties.

Under the circumstances the suppliant is claiming, 1st, Damage to his property; and 2nd, Damage to his business.

Dealing first with the question of loss of business, it must be found that where no land is taken, as in the present case, the suppliant is precluded from recovering for any loss of business. The only damages he is entitled to recover

are such only as are inherent in the land itself, and not to the person or to his business. As I have already said, in the case of *The King v. Richards*¹ the damages which the suppliant can recover are only those which would affect or would go to decrease the market value of the property. The damages must refer to the land or to some interest in the land and do not include personal damages. The damage for loss of business purely and simply depend on the commercial ability and industry of the individual and are, therefore, too remote. They are not an element inherent in the land.

*Cripps on Compensation*² states that where no land has been taken, the words "injuriously affected," or words of a similar import, refer to damages that are limited to loss and damages which are an injury to land, and not a personal injury or an injury to trade. The same view is taken by *Browne and Allan, on law of Compensation*.³

Of course, where no portion of the land of the proprietor is taken, but his lands are injuriously affected by the construction of the works, causing special damage to the property differing from that to the rest of the public, then the claim for damages is let in; but it is a claim restricted to the damages to the land which cannot be extended so as to let in any personal damages or loss of business. *Cowper Essex v. Local Board of Acton*⁴; *Lefebvre v. The Queen*⁵; *McPherson v. The Queen*⁶; *The King v. London Dock Co.*⁷; *Ricket v. Metropolitan Ry.*⁸; *The Queen v. Barry*⁹; *Paradis v. The Queen*¹⁰; *Metropolitan Board of Works v. McCarthy*¹¹; and *Caledonian Ry. Co. v. Walker's Trustees*¹².

However, while the suppliant, under the pronouncement of the above authorities, is not entitled to any loss of business resulting from the construction of the subway, he is entitled to damage to his property as resulting from the same, and in that respect as well as upon the value of the property we have very conflicting evidence, as is, however, usual in cases of this kind.

¹ 14 Can. Ex. 365 at 372.

² (5th Ed.) p. 136 and seq.

³ (2nd Ed.) p. 113 and seq.

⁴ 14 A.C. 161.

⁵ 1 Can. Ex. 121.

⁶ 1 Can. Ex. 53.

⁷ 5 Ad. and E. 163.

⁸ L.R. 2 H.L. 175.

⁹ 2 Can. Ex. 333.

¹⁰ 1 Can. Ex. 191.

¹¹ 7 L.R. (E. & I. Ap.) 243.

¹² 7 A.C. 259.

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The suppliant's property is of irregular shape, more or less of a triangular shape, which indeed renders it less valuable and more difficult to value as compared with the other lots of standard sizes and shapes in the city. In any case the building must be lowered to a certain extent to make it accessible from the level of the new sidewalk, consistent with the allowance of a cellar, with proper ventilation above the level of the sidewalk and proper sewerage facilities, and this can be easily obtained, according to the lengthy evidence on the record, and without running to excesses one way or the other.

On the question of the cost of lowering the building we have estimates from different contractors. The one heard on behalf of the suppliant gives us such extreme figures and assumes such extreme occurrences, that the figures on their face defeat their very purpose. Attempting to prove too much proves nothing. On behalf of the Crown, two contractors of considerable experience made estimates for the lowering of the building at figures almost two thirds less than those adduced on behalf of the suppliant.

There can be no doubt that the level crossing that existed before the subway was of a great disadvantage. That it interfered seriously with the traffic which was at times absolutely tied up on Main Street, because the railway used their tracks not only for the purpose of through traffic but also for shunting. The subway is of a great advantage and benefit to the City of Moncton generally, and when the suppliant's property is brought down to proper elevation, it must be taken that it will also share in the general advantage; but, he should be compensated for the damage, within legal elements, he has suffered.

The Crown at the trial filed the following undertaking:

"The respondent undertakes:

"I. To remove the strip of earth mentioned in the "sixth paragraph of the respondent's statement of defence, "down to the level and grade of the new sidewalk in front "of the suppliant's land and to complete the sidewalk in "conformity with the grade of the portion of the new side- "walk already constructed thereat.

"2. If the suppliant desires the respondent will make
 "the necessary excavation for and construct and maintain
 "a good and sufficient concrete retaining wall over the land
 "or right of way of the Intercolonial Railway along and
 "continuous to the south-easterly line thereof—said
 "retaining wall to connect with the north-eastern wing
 "of the subway as now constructed and extend along the
 "said line to the northerly corner of suppliant's land and to
 "be of proper width and height and of a depth such that
 "the level of the bottom of said retaining wall shall be at the
 "level of 83.00 above datum according to the datum used
 "by the Intercolonial Railway in the construction of the
 "subway.

"3. The respondent will construct a branch sewer
 "pipe line from and connected with the present "Y"
 "opposite the suppliant's lands on the (18) eighteen inch
 "sewer leading from Archibald Street to the man-hole
 "at or near the junction of Foundry and Main Streets
 "The said branch sewer pipe line to extend from said
 ""Y" to such point at the street line in front of suppliant's
 "land as the suppliant may desire and to have a grade of
 "not less than one quarter of an inch to the lineal foot."

The property in question was purchased by the suppliant in 1908 for \$4,000, some repairs and alterations were subsequently made to it, but we have no satisfactory statement of the cost of the same, the suppliant stating that no actual account was kept of such expenditure although he claims having spent something in the neighbourhood of \$4,000 in such repairs. For municipal assessment the value of the property is placed at \$8,000, and that is \$2,000 for the building and \$6,000 for land, and the suppliant in his testimony, before the court, values the whole property at \$16,000 to \$17,000.

The suppliant by his petition of right, claims the sum of \$12,000, and the Crown avers by the defence that he is not entitled to any compensation.

Upon the land is a wooden building without any cellar, which is heated with gas.

It is, indeed, obvious the suppliant has suffered serious damage resulting from the construction of the subway, and a fair and generous compensation should be paid to

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him. A reasonable amount should be allowed for lowering the building, fixing up the land, the slope, together with a certain amount for repairs occasioned by the lowering of the building and to cover all incidental expenditure in respect of the same but within the legal elements of compensation; taking into consideration the substantial advantage derived in favour of the suppliant, from the undertaking filed by the Crown, and not overlooking either the general advantage derived from the public work in which the suppliant will in some degree share when his building is lowered and settled down to its final position.

Therefore, taking all the circumstances of the case into consideration, I hereby assess the compensation which the suppliant is entitled to recover from the Crown, at the sum of \$2,500, with interest thereon from January 1, 1915, the approximate date at which substantial injurious affection originated.

The suppliant is further entitled to the performance, execution and advantage conveyed by the Crown's undertaking filed of record herein.

The suppliant is entitled to the costs of the action.

Judgment for suppliant.

Solicitor for suppliant: *E. A. Reilly.*

Solicitor for respondent: *R. W. Hewson.*
