

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

1916
Nov. 17

PLAINTIFF;

AND

WILLIAM H. STUDD, AND THE NOVA SCOTIA PERMA-
NENT BENEFIT BUILDING SOCIETY AND SAVINGS FUND
AND ARTHUR C. THEAKSTON.

DEFENDANTS.

Expropriation—Railways—Compensation for severance—Dedication.

A severance of development land occasioned by an expropriation by the Crown for railway purposes, whereby the owner is prejudiced in his ability to dispose and use certain lots thereof, entitles him to compensation for the damage caused by the severance; the measure of damages is the market value of the land at the time of the expropriation.

Holditch v. Canadian Northern Ry., [1916] 1 A.C. 536, 27 D.L.R. 14, distinguished; *Cowper Essex v. Acton Local Board*, 14 A.C. 153, followed.

A dedication of highways by registered plan, approved by the municipality, does not, until they are accepted as highways, divest the owner from the fee therein, so as to be considered in any pecuniary advantage to the land as a whole.

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

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 22, 23, 25 and 30 and October 2, 1916.

T. S. Rogers, K.C., and *J. A. McDonald*, K.C., for plaintiff; *L. A. Lovett*, K.C., for defendants.

CASSELS, J. (November 17, 1916) delivered judgment.

An information exhibited on the part of the Crown to have it declared that certain lands expropriated for the use of the Terminal Works in the city of Halifax are vested in the Crown and to have the value thereof and of any damages the owner thereof may be entitled to ascertained. The lands were expropriated on March 7, 1913. The value has to be ascertained as of that date.

For a proper understanding of the questions involved a knowledge of the location of the property and its general

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situation is required. In April, 1911, the defendant Theakston purchased a block of land containing about 13 acres and a conveyance was executed granting him these lands on May 12, 1911. The consideration paid by him for these lands was the sum of \$15,000. The block so purchased was bounded on the east by Oxford street and on the south by Cobourg Road.

The land was vacant land, well situate and in a good residential district. Oxford street is a street running north and south. Cobourg Road runs east and west and is a continuation of Spring Garden Road. Its western end terminates on the North West Arm. The next through street north of Cobourg and running parallel thereto is Jubilee Road which also extends to the North West Arm. There is an extensive piece of land lying to the south of Jubilee Road intervening between Jubilee Road and the property of Theakston and bounding the property in question on the north.

To the west of the property in question and adjoining is a piece of property and immediately west of that the grounds of the Waegwoltic Club which extend to the waters of the Arm. On Cobourg Road south side and opposite the Waegwoltic Club grounds is the Birchdale Hotel property comprising about 10 acres and also extending to the Arm. On the easterly front of the Birchdale property and extending from Cobourg Road to what is known as the Kenny property is a road the private property of the Birchdale Company with an easement over it in favour of the Kenny property. A portion of this road has been expropriated as I will explain later.

Further to the north of Jubilee Road and running parallel thereto is Quinpool Road referred to in the evidence. Oxford street extends from South Street which is further south from Cobourg Road and running parallel thereto from the centre of the city to the North West Arm. Oxford Street runs from South Street north to beyond Quinpool Road. The Halifax Street Railway have tracks extending down Spring Garden Road and Cobourg Road as far as Oxford Street. The street railway runs as far as Oxford Street and then runs both north and south along Oxford Street.

In 1911, at the time of Theakston's purchase Oxford Street was partly paved on both sides of the street, was well lighted by electric lamps and with a good roadway. Cobourg Road was well lighted and also had a good roadway. With the exception of the piece of land fronting on Oxford Street on the west side purchased by Theakston a good class of residential houses had been erected on a considerable portion of Oxford Street on both the east and west sides. Although sewers for the purpose of draining were ordered by the City Council on May 18, 1911, on Oxford Street and Cobourg Road, they were not actually laid on the streets until 1912. Both streets were supplied with water from the city water works. An important consideration in this case is that from Oxford Street west down Cobourg Road and also on the 13 acres in question there is a decline until Connaught Avenue is reached of about 20 feet. This makes it impossible to give sewage facilities to the Oxford Street drain to any of the houses that may be erected on Waegwoltic Avenue with the exception of the lots fronting on Oxford Street, and possibly 2 or 3 lots fronting on Waegwoltic Avenue immediately adjoining the Oxford Street lots. If city sewage is required it must be by connections down Waegwoltic Avenue and along Connaught Avenue to the Cobourg Road drain.

Shortly after his purchase Theakston prepared and registered a plan sub-dividing the 13 acres purchased by him into building lots. A copy of this plan is Exhibit A filed in this case. By his plan 2 streets were laid out. Connaught Avenue to the west is a street of 120 feet in width extending from the northern side of the block to Cobourg Road. A tier of lots were laid out on the plan on the west side of Connaught Avenue being lots 20 to 27 both inclusive and on the east side of Connaught Avenue lots 17-18-19-34-35-33. Waegwoltic Avenue a street 60 feet wide extends from Connaught Avenue to Oxford Street. The southerly side of lot 19 and the northerly side of lot 35 are bounded by Waegwoltic Avenue. On either side of Waegwoltic Avenue a tier of lots are laid down 16 to 10 inclusive on the north side and 36 to 42 inclusive on the south side. A tier of lots from 1 to 9 inclusive were laid

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out on Oxford Street and on Cobourg Road lots 28 and 29-30-31-32 and 48 to 43 inclusive.

Prior to the expropriation on March 7th, 1913, Theakston had sold all the lots fronting on Oxford St. and lots 43 to 48 inclusive on Cobourg Road, also lot 30 on Cobourg Road. This lot 30 has been acquired by the Crown. A small corner of lot 31 on Cobourg Road was expropriated. This small corner of lot 31 has been reconveyed and is not in question in this action. The lots sold fronting on Oxford St. and Cobourg Road were with a few exceptions sold during the year 1911, the exceptions comprise 1 or 2 lots in the early part of 1912.

On September 6th, 1911, the defendant Theakston granted and conveyed to the defendant Studd the lots on the west side of Connaught Avenue. This conveyance was executed to enable Theakston through Studd to obtain a loan from the Building Society. No beneficial interest in the said lots ever passed or was intended to pass to Studd. He was merely a bare trustee for the purpose of raising a loan for Theakston. At the time of the filing of the plan of expropriation on the registry Studd appeared to be the owner and was made defendant to these proceedings. Subsequently Theakston was added as a party, and prior to the trial, the mortgage having been paid off, Studd reconveyed to Theakston and has no further interest. Counsel for the Crown and for the defendant are eminent counsel and familiar with the laws of Nova Scotia and do not disagree as to the effect of the registration of this plan so far as it is a dedication of Waegwoltic Avenue and Connaught Avenue as streets. The plan was approved by the City Council but the streets have not yet been accepted by the city and therefore the fee in the street is still vested in Theakston. I have considered the statutes relating to the city of Halifax and agree with the conclusions of counsel on this question. Theakston having sold lots according to this plan cannot it is conceded by counsel change the plan, and while at present the fee in the streets is vested in Theakston, any pecuniary advantage for the land occupied by these streets is small outside of the benefit arising therefrom to the lots fronting thereon. See *Pugh v.*

*Peters.*¹ No work has been done or expenditure made on either of these streets. There is no drainage, no water, no lighting on either Waegwoltic or Connaught Avenue.

Such being the position of matters on the ground the expropriation plan was filed. The railway cuts through a field on the east side of the Road owned by the Birchdale Company, crosses Cobourg Road, cuts through the southerly end of Connaught Avenue and the Crown expropriates a large portion of lot 29 fronting on Cobourg Road and a small portion of lot 28 fronting on Cobourg Road, the whole of lots 25 and 26 on the west side of Connaught Avenue and portions of lots 27-24-23-22 and 21 on the west side of Connaught Avenue. The lands expropriated are shewn marked yellow on plan A.

The total area of these lands is 32,060 square feet. The railway right of way is 150 feet in width. The depth of the roadway cutting is between 20 and 26 feet as it crosses Cobourg Road and the lands expropriated from the defendant Theakston. That portion of Connaught Avenue expropriated by the Crown was not included in the description in the information as filed, the Crown advisers reasonably assuming Studd to be the owner. At the trial, however, counsel for all parties agreed that the information be amended by including the area of that portion of Connaught Avenue expropriated. It is said to contain 26,000 square feet.

The Crown recognizes Cobourg Road as a public road and as required by the Expropriation Act has provided temporary bridges over the cutting of the railway and has also made provisions for a permanent bridge over the railway cutting so as not to interfere with Cobourg Road and has also made provision for the construction of a sewer on Cobourg Road under the railway crossing. The fall towards the west permits this to be done and I am informed the city council are satisfied with the proposed plans for a bridge and drainage. The Crown has, by its undertaking, agreed that any sewer that may be constructed along Connaught Avenue to receive the sewage from Waegwoltic Avenue or Connaught Avenue properties may connect

¹ 2 Russell & Chesley, 11 N.S.R. 139.

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under the tracks on the property of the Crown with the sewer down Cobourg Road. They decline however to erect or permit to be erected any bridge over their railway to connect Connaught Avenue with Cobourg Road. I have no reason to doubt that this decision has been arrived at after due consideration by their engineers.

Practically Connaught Avenue is closed as a street connecting with Cobourg Road and damage is occasioned by destroying this right of access to a portion of the property.

A question of considerable importance arises as to whether the case is governed by the principles enumerated in *Holditch v. Canadian Northern*,¹ or by the decision in *Cowper Essex v. Acton Local Board*.² If the reasons in the *Holditch* case govern a considerable portion of the defendants' claim for damage by severance, smoke, noise, vibrations, etc. disappear. While there would probably be a cause of action to the owners of a number of the lots by reason of the access to Cobourg Avenue being destroyed the fact that these lots are owned by Theakston would not entitle him to counterclaim in this action as any proceeding on his part would require a fiat.

At the trial I suggested to counsel that this question would probably arise and while at the time I was inclined to the view that the decision in the *Holditch* case governed, I suggested, in order to avoid any mistrial, that all the evidence should be adduced as if the claim was let in under the reasons of the *Cowper Essex* case. Counsel for both parties assented to this course. Further consideration has convinced me that the *Holditch* case does not govern and that the defendant Theakston is entitled to claim for damages by severance—smoke, etc., if damages can be shown. There are material differences between the facts as stated in the *Holditch* case and the present. In the head note in the case³ before the Lords of the Privy Council it is stated as follows:—

“Upon the compulsory taking of lands under the
 “Railway Act of Canada the owner is not entitled to com-
 “pensation for severance from other lands owned by him

¹ 50 Can. S.C.R. 265, 20 D.L.R. 557; [1916] 1 A.C. 536, 27 D.L.R. 14.

² 14 A.C. 153.

³ [1916] 1 A.C. 536.

"unless the lands taken are so connected with, or related to, the lands left that he is prejudiced in his ability to use or dispose of the latter."

The facts in the *Holditch* case show that the streets were numerous. They were public highways. The total number of building lots was great. All had access to a street and some to two streets. Numerous lots had been sold scattered over the property. In the case before me, excluding Oxford Street and Cobourg Road, there are but two streets laid out on the plan, viz. Waegwoltic Avenue and Connaught Avenue. Neither of these streets have become public highways. Owing to the fall in the level of the land from Oxford Street to Connaught Avenue it would be impossible to provide sewage for the greater number of the lots except by drainage down Waegwoltic Avenue and along Connaught Avenue to Cobourg Road. By the expropriation and nature of the cutting, were it not for the undertaking of the Crown as to drainage, it would be a great prejudice in the owners ability to use or dispose of the lots. It has also to be borne in mind that the statute under which the land is expropriated in this case is not the same as the statute under which the land was taken in the *Holditch* case. I therefore deal with the case as if the owner is entitled to damages under the principles which govern the decision in the *Cowper Essex* case.

In considering the value to be allowed for the lands actually taken and the damages to be allowed for lots part of which have been expropriated and any damage to the other lots by severance there are certain points which have to be kept in mind. First it must be remembered that neither Waegwoltic Avenue nor Connaught Avenue are streets that have been accepted by the city and while it is likely they may be so accepted if buildings are erected thereon of a sufficient number to warrant it the land at present lies vacant. Second. There are no sewers, no water, no electric lighting on either of these avenues. These things may come in time. Third. As I have pointed out, lots on Oxford St. and Cobourg Road were sold in 1911 and the early part of 1912. These streets were roads well lighted, well paved and sewers provided for by

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the city council in 1911 and constructed in 1912. Oxford Street is fairly well built up by a good class of residences.

I have as far as I am able to assess the market value as of March 9, 1913. I cannot come to the conclusion that lots on Waegwoltic Avenue and Connaught Avenue having regard to the rule that governs, viz., that market value is the test, should be considered as of the same value as lots on Oxford St. and Cobourg Road. I accept the view that property had increased in value between the date of the purchase in 1911 and the date of the expropriation, March 9, 1913. I think probably an increase of 25% is reasonable. A further point that I consider important is this. I am of Mr. Longard's opinion that in dealing with outside residential property the basis of valuing building lots by so much per square foot is not a satisfactory method. Of course the extra depth of a lot must give some additional value and if the lot be deep enough to give a frontage on two streets with sufficient depth for a sale of a lot on each street as is the case in respect of some of the properties referred to in the evidence then the depth is of importance. Nothing of this nature arises in regard to the properties in question.

Theakston when selling lots on Oxford St. and Cobourg Road sold them as lots regardless of the square feet. With the exception of the lot on the north west corner of Cobourg Road and Oxford St. the price at which the lots were sold was \$1,000 a lot and these lots had the advantages I have described.

Lots 7-8-9 on Oxford St. contain in square feet 10,522-10,675-10,236 respectively. The increase in square feet made no difference. Taking the total area of the three lots they would average about $9\frac{1}{4}$ cents per square foot. Lots 1 to 6 on Oxford St. each contained 8,200 square feet, an average of $12\frac{1}{2}$ cents a square foot. Lots 43 to 48 Cobourg Road 7,650 to 7,875 an average for each lot of about 13 cents a square foot. Each of these lots with the exception of the corner lot realized \$1,000 a lot.

When Mr. Theakston comes to value the lots in question he places a value as of the time of the expropriation on lots 20 to 27 on the west side of Connaught Avenue before expropriation of 25 cents a square foot. These lots have a

frontage of 50 feet by a depth of 110 feet and would make the value of the lots about \$1,375. An acre contains 43,560 square feet. At 25 cts. a square foot the value given would be \$10,890 per acre for property purchased in April 1911 for \$1,154 an acre showing what magic there is in a plan. Lots on the east side of Connaught Avenue 17-18-19-33-34-35 he also values at 25 cents a square foot. Lots 28 and 29 Cobourg Avenue he values at the time of the expropriation at 30 to 35 cents a square foot.

Mr. Langard a witness called by the defence is a gentleman of large experience. He places a value on lots 28 and 29 fronting on Cobourg Road as of March 7th, 1913, of from \$1,200 to \$1,400 each. The lots fronting on Connaught Avenue of about \$1,000 each.

Mr. Clarke for the Crown when placing a value on lots 28 and 29 at the time of expropriation for the purpose of tender put it at 20 cents a square foot or \$1,770 per lot. He places the market value at \$1,400 per lot on March 7, 1913, the outside value placed on the lots by Mr. Langard. Mr. Clarke values the lots on Connaught Avenue at 15 cents a square foot or \$841.50 a lot. His view is that \$168.30 should be allowed for damages to lot 20 and \$2,000 allowed for salvage on 21-22-23-24 and 28 and 29 on Cobourg Road. The result would be an allowance of \$3,540 for the two lots 28 and 29 fronting on Cobourg Road and \$841.50 a lot for 8 lots on the west side of Connaught Avenue which would amount to \$6,732, with the \$3,540 added \$10,272. To be deducted from this amount would be salvage for the 8 lots on the west side of Connaught Avenue estimated by Mr. Clarke at \$2,000, leaving a balance of \$8,272.

I think the value allowed for lots 28 and 29 and for the 8 lots on the west side of Connaught Avenue ample and I also think the salvage allowance is very liberal in favour of the land owner. Lot 28 with what is left of lot 29 on Cobourg Road will make a reasonably good lot and lots 20-21 and 22 with portion of 23 also three reasonably good lots. Having regard to the peculiar method of the crossing by the railway, the width and depth of the cut, the probable vibration, noise, etc, I am not disposed to interfere with the amounts. I do not think lots 31-32 and 34 fronting on

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Cobourg Avenue are appreciably injuriously affected. Lot 31 may be slightly affected but the liberal allowance for the other properties more than compensate. Lots 33-34-35 are I think damaged by reason of the access to Cobourg Road being cut off and also by reason of vibration, noise, smoke, etc. I should think an allowance of \$500 would be ample. Lot 33 is more seriously injured than 34 or 35. Lot 34 more than 35. I make no allowance for any damages to 17-18-19 on Connaught Avenue or the lots on Waegwoltic Avenue.

It was conceded by Mr. Lovett that these lots were not particularly damaged having regard to the undertaking as to the sewer. It was also conceded that having regard to what has been stated as to the title to Connaught Avenue there is no practical value to Theakston in that portion of the street expropriated. The allowance of 10% which I propose to add will cover any loss for this. On behalf of the Crown Mr. Rogers offered \$200 to cover any additional expense by reason of the deepening of the drain.

The result is that judgment will issue for \$8,272 plus \$500 and \$200, in all \$8,972 with 10% added \$897, in all \$9,869 together with interest from March 7, 1913, to judgment. The defendants are entitled to the costs of action and the judgment should refer to the undertaking as to drainage.

Judgment accordingly.

Solicitors for plaintiff: *Silver & McDonald.*

Solicitors for defendants: *Studd & Theakston; Lovett & Roper.*

Solicitor for Nova Scotia Permanent Benefit Society: *W. L. Payzant.*
