BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY ..... PLAINTIFF.

AND

ELMER J. PALMER ..... DEFENDANT.

1964
Apr. 22, 24
1965
Mar. 12

Expropriation—Compensation for expropriation—Increase in value of expropriated lands before expropriation—Value of land at time of expropriation—Injurious affection—Railway spur line splitting land into two parcels—Exchequer Court Act, R.S.C. 1952, c. 98, s. 49—Expropriation Act, R.S.C. 1952, c. 106 s. 46.

On September 21, 1960 the plaintiff expropriated certain lands owned by the defendant on Tilbury Island, Municipality of Delta, British Columbia, the said lands being 11.92 acres in area. A further 7.35 acres of land were agreed to be treated as expropriated, making a total of 19.27 acres. The defendant was left with two parcels of land,

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one of 18.6 acres lying to the south of the spur line subsequently built by the plaintiff, and the other of 44.13 acres lying to the north of the spur line.

The lands were purchased in two parcels, 42 acres purchased on December 31, 1957 at $1,000 per acre, and 40 acres purchased on April 3, 1959 at $2,225 per acre. On or about April 7, 1959 the plaintiff committed itself to construct a spur line to service a new plant to be built and operated by Dow Chemical Company, and this necessitated the subsequent expropriation of the defendant's lands.

The main issue to be determined is whether the enhancement in value of the defendant's lands should be considered as having occurred on or about April 7, 1959, when the plaintiff committed itself to Dow Chemical Company to built the spur line, or only after the railway had duly implemented this commitment in early April 1961, i.e., subsequent to the expropriation date.

Held: That the land in question appreciated in value to $3,000 per acre as industrial land, from $2,000 per acre as agricultural land, when the plaintiff committed itself to construct the spur line for Dow Chemical Company, which it did well before the date of expropriation, and, accordingly, the land expropriated had a value of $3,000 per acre at the time it was taken.

2. The governing principle set out by the Supreme Court of Canada in *Fraser v. The Queen* (1963) 40 D.L.R. (2d) 707 at 726 is applicable to the instant case.

The action was tried by the Honourable Mr. Justice Dumoulin at Victoria.

K. E. Meredith and *C. J. Irwin* for plaintiff.

R. C. Bray for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (March 12, 1965) delivered the following judgment:

The Canadian National Railway Company, plaintiff, expropriated, on September 21, 1960, certain lands of the defendant situated on Tilbury Island, Municipality of Delta, Province of British Columbia.

The parties agree on the extent of the land taken, 11.92 acres, plus 7.35 acres agreed to be treated as expropriated, a total of 19.27 acres.

This area was taken for the purpose of establishing a right-of-way for the C.N.R., called the Tilbury Spur.

The defendant, Elmer J. Palmer, engaged in the lumber trade, owned, prior to September 21, 1960, in the aforesaid sector, 82 acres more or less, which the building of the spur line severed in two portions, one to the south, comprising 18.6 acres, and a northerly one containing the remaining 44.13 acres.

In para. 8 of its statement of claim, plaintiff stated its willingness to pay for the land and for any loss or damage caused to the defendant by reason of the taking, a total compensation of $47,430 with interest. This offer was refused, the defendant setting out thus the indemnity sought:

19.27 acres taken at $3,000 per acre	$57,810
18 6 acres, located south of the right-of-way, for injurious affection and severance at $1,000 per acre ..	18,600
	$76,410

At the start of the trial, counsel for plaintiff withdrew the amount offered pretexting that, even though compensation for 19.27 acres at $2,000 an acre and indemnity for injurious affection to 18.6 acres might reach the figure of $57,140, this was fully set off by a sum of $62,730 resulting from a $1,000 per acre increase in value to 62.73 acres after the trackage extension over Palmer's land. This withdrawal was based upon s. 49 of the *Exchequer Court Act,* 1952 R.S.C. c. 98, of which more later.

The Court is asked to determine three questions:

(*a*) the value of 19.27 acres expropriated;

(*b*) injurious affection to 18.6 acres severed from the remaining property owned by the defendant, south of the railway track;

(*c*) whether the set off contemplated in s. 49 applies in this case.

Palmer acquired his Tilbury Island holdings by means of two purchases. He first bought 42 acres on December 31, 1957, at a price of $1,000 an acre, from one Beintima, a foreigner who, retiring from business, agreed to sell at a rather low price. The remaining portion, 40 acres, was obtained on April 3, 1959, from a local resident, Kabal Singh, at the increased cost of $2,225 an acre. When the deals were concluded, the best possible use for these lands was agriculture. Palmer acknowledges that his aim in the transactions was a speculative one, and surely no blame attaches to so normal an expectation.

It so happened, as the Court is told by J. A. Duff, manager of industrial development for the Canadian National Railway Company, that, on or about January 13, 1959, an important industrial concern, Dow Chemical Company, "approached us (the C.N.R.) in confidence advising that they were proposing to set up a phenol plant in the Greater

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Vancouver area and were looking for property of around 100 acres, and they indicated that they would require property serviced by power, gas, deep sea and rail, and they particularly stressed the rail angle". (transcript, p. 78)

The witness emphasizes the fact that "Dow had indicated to (him) that trackage was . . . absolutely essential". (p. 79). The railway agreed to this proposition and definitely committed itself to put in a line connecting Brownsville in the east to a C.N.R. ferry slip built on Tilbury Island on the west side.

Dow Chemical, according to the witness' recollection, was officially advised of this decision "on or about April 7, 1959", and agreed to pay for the trackage on their own property. Some time after the expropriation of September 21, 1960, the spur line was installed and the large industrial plant constructed.

The experts practically agree on the value of the expropriated property at all material times, their assent bearing upon the following points:

(*a*) prior to the assurance given in April of 1959 by the C.N.R. to Dow Chemical Co., that trackage would be installed as aforesaid, the value of the subject property was $2,000 per acre;

(*b*) immediately after the above commitment between plaintiff and Dow Chemical, the value of the subject property increased to $3,000 per acre;

(*c*) after the taking, September 21, 1960, defendant's land continued to be worth $3,000 an acre.

At page 3 of plaintiff's written argument appears an admission that the expropriated right-of-way intersecting "the Dow property . . . now serves the Dow plant. It further serves the Tilbury ferry slip of the Plaintiff. It will in future serve the purposes of any heavy industry which may be established on the land of the Defendant".

The promotion of defendant's property from agricultural to industrial brackets remains uncontested but the parties disagree about the interpretation of this material improvement.

The plaintiff seemingly rests its case on a "before and after" outlook, claiming it should be entitled to treat the "before" as prior to the assurance of trackage to Dow Chemical Co. in 1959, and that "after" should apply only from September 21, 1960. Were this argument accepted,

the result would completely defeat the possibility of an award to the defendant for 19.27 acres taken from him and for the injurious affection to 18.6 acres severed from his remaining property.

Then, should the enhancement in value of $1,000 be considered as intervening on or about April 7, 1959, when the C.N.R. advised Dow Chemical of its promise to build a spur line connecting the proposed plant to the Tilbury Island ferry slip, or only after the railway had duly implemented this commitment in early April, 1961, subsequently to the expropriation date, September 21, 1960?

The plaintiff contends (cf. Argument, p. 5) that:

> The land in the present case is particularly well adapted to the use of heavy industry . . . . The property had, therefore, something more than an agricultural potential. Its potential was for heavy industry as there was a possibility of rail. It is in this condition that the land was worth $2,000.00 per acre. *Once the railway was assured the potential for industrial use was realized and the property increased in value by $1,000.00 to acquire a value of $3,000.00 per acre.* The plaintiff says that this realization of the potential is the very factor which must be excluded when the value of land for expropriation purposes falls to be determined for it is an advantage "due to the carrying out of the scheme for which the property was compulsorily acquired". (italics added)

And, now, this conclusion:

> It would be patently unfair that the railway should be required to pay for the very advantage that it is bestowing upon the property.

In contradistinction with this viewpoint, the defendant argues, on p. 4:

> That the railroad had for all intents and purposes become a reality in 1959 (April 7) when it was committed to go into the Dow Chemical plant by the C.N.R., *and that the increase in value to the subject property from $2,000.00 to $3,000.00 per acre took place at that time. It is therefore submitted that at the date of expropriation (September 21, 1960) the value of the subject property was $3,000.00 per acre* and that no benefit accrued to the Defendant as a result of the railroad severing the Defendant's property. (italics have been inserted)

Since the material factors are, as previously noted, undisputed, I may at once review the precedents on whose authority the litigants mainly rested their submissions.

The plaintiff company considered as particularly illuminating a passage from the case of *Sidney* v. *North Eastern Ry. Co.*[1] appearing in the judgment of Rowlatt, J. quotation:

> But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the require-

[1] [1914] 3 K.B. 629 at 636.

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ments of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

Special adaptability is an expression which is wide enough to include special adaptability for any purpose, but where the special adaptability is for purposes other than those of the compulsory purchaser it is merely an element in the calculation of the probable competition for the land, that is, an element in its general value. It only gives rise to a question in compensation law, where, existing for the purposes of the promoters, its consideration seems at first sight to infringe the principle that value due to the scheme is to be excluded. For example, a piece of land may have special value for a particular crop, for a particular sort of building scheme, or for a reservoir, or for several of these purposes. But if it is going to be taken for an artillery or rifle range, or for a railway, these are elements of general value only and raise no question. Suppose, however, it is to be taken for a reservoir, its special suitability for that purpose (being the purpose of the scheme) does raise the question how far that can be taken into consideration without infringing the rule against giving value due to the scheme.

Referring to special suitability for "the purpose of the scheme", in the language of Rowlatt, J., and avoiding, I trust, the danger of a play on words, it might not appear unreasonable to entertain the possibility of a special suitability in defendant's land for plaintiff's particular purposes. Had it not offered the shortest, most economical route to the C.N.R.'s ferry slip, why then this recourse to the exceptional power of expropriation?

The leading case supporting the proposition put forth by the defendant is the recent Supreme Court decision of *Fraser v. The Queen*[1], and particularly this passage of Mr. Justice Ritchie's pronouncement when speaking for the majority:

When the property in question was taken from the Appellant by the Province of Nova Scotia in 1950, the potential market for the rock which it contained was still a matter of speculation, as no decision had been finally made about the causeway, but when the lands were re-acquired by the Appellant on July 2nd, 1952, the years of speculation, study and planning concerning the building of the causeway had already culminated in the letting of a contract for its construction, which contemplated the use of an estimated nine million tons of rock from these lands, *and the potential market for this commodity had thus become a reality before the lands were re-acquired by the Appellant.* It was these lands with this potentiality which were expropriated by the Dominion Government, and it is their value at the time of that expropriation which is required to be assessed of (for) the purpose of compensation. (italics are mine)

I would immediately note and repeat the plaintiff's clear and explicit acknowledgement that *"the potential for industrial use was realized and the property increased in value by $1,000.00 to acquire a value of $3,000.00 per acre once the*

[1] (1963) 40 D.L.R. (2d) 707 at 726.

railway was assured", a year and a half prior to the expropriation. That the C.N.R.'s determination remained a confidential matter between itself and Dow Chemical is not even hinted at. On the contrary, this assured development became a matter of general knowledge in the vicinity, with the sure result that from April 7, 1959, up to September 21, 1960, all concerned could appreciate the enhanced real estate value.

Owing to the plaintiff's binding undertaking to run a spur line for the use of the chemical factory and with a view of expanding its own affairs, the instant case bears a close resemblance to that of *Fraser v. The Queen (supra)*, wherein the decisive factor was "the letting of a contract" for the construction of the causeway. Then and now, "the potential market" had become a reality long before expropriation. Such a potential market existed in April, 1959, when Palmer paid $2,225 per acre to his vendor, Kabal Singh. It would be sheer insanity to dispute that these rates astronomically overshoot farm land prices, usually averaging a hundred dollars or so an acre. Any sane man buying 40 acres at $2,225 apiece, has something in mind other than growing parsnips. In all likelihood, Palmer, from the day of his acquisition, April 3, 1959, would have waived aside any offer below $3,000 per acre.

The equitable norm obtaining is fittingly suggested by the following quotation from Cripps on Compulsory Acquisition of Land, 11th ed., p. 692, where it is said:

> The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the purchaser had secured any powers or acquired the other object which made the undertaking a realized possibility.

Section 46 of the *Expropriation Act*, 1952, R.S.C. c. 106 prescribes a similar rule in these terms:

> 46. The Court in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work or for injury done to any land or property shall estimate or assess *the value* or amount thereof at the time when the land or property was taken or the injury complained of was occasioned.

Conformably with the statutory prescription above, the Court finds that "at the time when the land was taken", its value was $3,000 per acre, or, for 19.27 acres, $57,810, a compensatory sum due to the defendant, Elmer J. Palmer.

There now remains to be determined a claim of $18,600 for injurious affection to 18.6 acres on the south side of the

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railroad tracks, thus severed from the major portion of property still owned by the defendant, and now cut off from direct access to deep water.

The railway company is adamant in its contention that the entire property automatically benefited by a one thousand dollar increase in value through its decision to extend rail service to the Dow plant.

I am not so sure that such is the true situation, especially after hearing the plausible explanations afforded by Messrs. D. C. McPherson and T. J. Boyle, two experienced realtors associated with well-known Vancouver real estate firms.

Mr. McPherson believes that none but a "big plant" might consider buying the residue of the property and would look unfavourably upon the necessity of having its men and material crossing the tracks at every moment of the day. He appraises this disadvantage at approximately $1,000 per acre.

The other realtor, Mr. T. J. Boyle, also called by the defendant, sees an element of injurious affection in that "the property south of the railway . . . is now severed from the deep sea . . .". For this reason, it is very unlikely that "one user" might be interested in purchasing the whole site in despite of the severance.

An accurate assessment of the damage thereby occasioned is something quite difficult, says the witness, who would suggest a depreciation of certainly $500 per acre, a figure reasonably borne out by the evidence. Therefore, the indemnity granted for 18.6 acres, at $500 a unit, will be $9,300.

A last proposition to determine consists in the plaintiff's argument that s. 49 of the *Exchequer Court Act* foresees a set-off the application of which would wipe out the defendant's demand for compensation accruing from injurious affection to the severed remnant.

The allotment just made would excuse me from discussing this objection if I did not look upon it as worthy of consideration.

Section 49 directs that:

> 49. The Court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit special or general, accrued or likely to accrue, by the construction and operation of the public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected.

A similar point was raised *in re Molly James et al. v. Canadian National Railway Company*[1], and decided by Mr. Justice Cattanach, with whose pronouncement I fully agree. After citing s. 49, the learned Judge's comments read thus:

> I do not need to decide this question as, on my reading of section 49, even if it is applicable to a Canadian National expropriation, it has no application to the facts of this particular case. The application contemplated by the parties was that section 49, if applicable, requires that the Court, in determining compensation to be paid to the plaintiffs for the 292.4383 acres injuriously affected by the construction of the new railway project, take into account and consideration by way of set-off any advantage or benefit likely to accrue by the construction and operation of the railway project to those 292 4383 acres of land. What the section says, however, is that what is to be taken into account is the advantage or benefit likely to accrue "in respect of any lands" held by the plaintiffs "*with* the lands so . . . injuriously affected". There were no such lands here and, therefore, section 49 has no application.

I readily adopt those reasons.

The sum total, granted as indemnity for land expropriated, $57,810, and compensation for injurious affection to the residue, $9,300, amounts to $67,110.

There will, therefore, be judgment declaring that the property described in paragraph 3 of the Statement of Claim, and also that mentioned in paragraph 5, to an agreed total of 19.27 acres, is vested in Canadian National Railway Company as from September 21, 1960; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $67,110 with interest at 5% per annum from September 21, 1960, to the date of this judgment. The defendant is entitled to recover his costs.

Judgment accordingly.