

1922
 May 18.

BETWEEN

JOSEPH ALPHONSE LEMAY CLAIMANT;

AND

HIS MAJESTY THE KING RESPONDENT.

*Requisition—Rental value of tug—War Measures Act, 1914—Costs—
 Evidence viewed with suspicion*

L's. steam tug (gross tonnage 47.58 and registered tonnage 17.82) was, on the 2nd November, 1918, requisitioned by the Crown for war purposes and remained under requisition for 15 days, when the period of requisition was terminated by the close of the war.

Held: That, in view of the short period for which the tug was held, the sum of \$30.00 *per diem*, was a fair and reasonable compensation or rental for such a tug.

2. Where the evidence at the trial had been increased in volume by testimony of the claimant and his son, which the court viewed with suspicion and declined to accept as contrary to the written record, the court, while allowing the claimant costs, directed that one-fourth of the bill when taxed should be deducted and borne by the claimant himself.

REFERENCE by the Crown under the provisions of the War Measures Act, 1914, of a claim of suppliant for compensation for the use of his tug requisitioned by the Crown.

May 10th, 1922.

Case now heard before the Honourable Mr. Justice Audette, at Quebec.

The Hon. A. Galipeault, K.C. for claimant.

Win. LaRue, for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 18th May, 1922) delivered judgment.

This is a reference made by the Crown, under the provisions of sec. 7 of "The War Measures Act, 1914, (or otherwise existing in that behalf)", of the claim of Joseph Alphonse Lemay for compensation for the use of his tug *Sir Lomer* (gross tonnage 47.58 and registered tonnage 17.82) during the war, requisition by the Canadian Government.

The claimant, as set forth in the pleadings, seeks to recover the sum of \$1,653.00.

The Crown, by the statement in defence, admits liability, for the tug so requisited, up to the sum of \$754.25.

Therefore, the question in controversy between the parties, is that of a *quantum meruit*.

Negotiations had been started by correspondence on behalf of the Crown, at the time the tug was requisitioned, for fixing its rental value; but the parties never came together, they were never *ad idem* upon this point and the compensation must now be ascertained upon the basis of a *quantum meruit* and I will deal seriatim with each item of the claim.

1°. (Par. 8 of claim)—This is an item of \$250, which the respondent by par. 5 denies, but in respect of which it offers \$10.00 by par. 11. This amount is claimed in respect of changes made in the tug, such as the removal of the deck, etc., while she was in the Crown's possession, with the object of removing the engines, boilers, etc., therefrom to ship the tug on board a transport to

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England. The war having come to an end in November, 1918, the officers of the Crown placed back in the tug her deck and beams supporting the same, leaving the deck in a state of leakage and in such a weak state that some works became necessary to place the tug in her former state and condition.

For this claim I will allow, notwithstanding the exaggerated and unsatisfactory evidence to the contrary, the sum of

\$ 150.00

2°. (Par. 9)—The second item for is admitted in its entirety, by the Crown.

365 00

3°. (Par. 10)—This is an item for the daily rental of the tug, alleging further that claimant has been deprived of her services for the balance of the season, notwithstanding that the tug was idle when requisitioned.

I may say, as a prelude, the season was practically closed when the tug was returned to her owner and no claim could, in any case, be entertained in that respect.

Under the evidence and the allegation in the statement of defence, I find the tug remained under requisition for 15 days and I hereby fix as a fair and reasonable *per diem* compensation for such a short period the sum of \$30 daily

450.00

The Crown is offering \$300 for this item, or \$20 a day.

4°. Coming to the claim set forth in pars. 11 & 12 of the statement of claim, I find that the respondent tendered the tug

at Portneuf, on the last day of requisition and that the claimant refused her there and asked the Crown to deliver her at Quebec and the Crown did so in compliance with such request, the vessel having been originally requisitioned from Quebec. The claimant is thereby estopped from setting up any claim for expenses incurred in afterwards taking the vessel from Quebec to Portneuf. This item also includes the expenses the claimant yearly and usually incurred in hauling his vessel at Portneuf every season in her wintering quarters.

Nothing will be allowed in respect of this claim.

4°. (Par. 13)—This is an item of \$100 for repainting the tug, when returned she being painted in a dark grey, as customary under Admiralty Rule. The respondent is offering \$50 for this item and one of its own witnesses named a figure above \$80.00. I will allow

85.00

5°. (Par. 14)—This item covers certain minor equipment of the tug which were missing when returned, namely: a hawser, valued at \$80; two small axes, \$1.50; one large axe \$4.00; one large wrench \$2.50 and one small one \$1.50; kitchen utensils \$10.00. One wrench was returned.

The claimant Lemay testified there was at the time of delivery a hawser on board the tug of 350 to 400 feet, by 2 inches diameter, and his son testified that this hawser would be of 200 to 300 feet.

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Nil.

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Both witnesses are testifying under great misapprehension—to say the least—since under exhibit No. 4 filed on behalf of the claimant himself, which is a survey or inventory made at the time the Crown took possession and which is signed by the claimant himself and Captain Koenig, on his behalf and Major Oliver on behalf of the Crown—the only hawser on board the tug at the time was one of 10 fathoms. I will allow

30 00

The Crown offers \$29.25 in respect of this item.

I did not, by any means, find the demeanour of either the claimant or his son satisfactory when in the witness-box at trial; and their testimony respecting the hawser has considerably shaken my faith in the balance of their evidence, especially in connection with the repairs to the tug. True, another witness, one Gignac, spoke as to the valuation of such repairs, but he had not seen the tug at the time the government returned her, although he casually saw her this spring. However such repairs usually run into heavy expense. It is very difficult to arrive at a satisfactory conclusion upon such evidence.

6°. (Par. 15)—This item covers an expenditure which became due under the terms of the requisition and which the claimant, but for the requisition, would not have incurred. The full amount is allowed

20 00

 \$ 1,100.00

Therefore, there will be judgment declaring that the claimant is entitled to recover from the respondent the sum of \$1,100.00 with interest thereon from the date of the Reference, namely, 31st October, 1919.

Coming to the question of costs it is quite obvious that the Crown should not in justice be mulcted for the payment of the cost of that part of the evidence in which the claimant and his son swore recklessly and inconsistently with the facts in respect of the hawser. Therefore, whilst I will allow costs in favour of the claimant I will qualify such allowance by ordering that when the total of the bill of costs is ascertained one-fourth thereof should be deducted and borne in any event by the claimant himself.

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Judgment accordingly.

Galipeault, St. Laurent, Gagné & Devlin, solicitors for
suppliant.

Win. Larue, solicitor for respondent.