

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

FRANK BEECHDEFENDANT.

1929
Sept. 13, 16,
17, 18.
1930
Feb. 14, 15,
March 24.

Expropriation—Powers of Minister—Speculative value—Advantages to property by expropriation

The Crown expropriated a certain area for use in the building of the terminal of the Hudson Bay Railway at Churchill and for a port on Hudson Bay. At the date of the taking there were no permanent habitations anywhere in the vicinity save a Hudson Bay Post and Mounted Police Post. The future of Churchill was altogether dependent upon the completion of the work for which the land was taken.

Held, that under the Expropriation Act a Minister of the Crown may take any land for the use of His Majesty as he thinks advisable to take, and his decision or judgment that the lands so taken are necessary for a public work is not open to review by the Courts. That this power or authority does not interfere with the security in the enjoyment of private property, as the Crown must compensate the owner of any lands so taken for the value thereof and all damages resulting from the expropriation. [*Boland v. The Canadian National Railway* (1927), A.C. 198 referred to and discussed.]

- 2. That speculative prices paid by purchasers of real estate in the vicinity, some fifteen years before the expropriation in question, are not a fair criterion of the market value of similar property at the date of the expropriation thereof.
- 3. That the advantages due to the carrying out of the scheme for which the lands were taken cannot be considered in fixing the compensation to be paid for the said lands.

INFORMATION exhibited by the Attorney-General of Canada to have the amount of the compensation to be paid to the defendant for certain properties expropriated fixed by the Court.

It was contended and argued on behalf of the defendant that more land was taken by the expropriation proceedings than was necessary for the public works in question, that no part of the defendant's subdivision was necessary for

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such works and that no part had, since the expropriation, been made use of for the works except that taken for the railway, and he contends that only such lands can be expropriated as are reasonably necessary for the construction and operation of the public works.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Winnipeg, when H. A. Robson, K.C., and W. C. Hamilton, K.C., appeared for the plaintiff, and A. J. Andrews, K.C., F. M. Burbidge and E. S. Wilson appeared for the defendant.

The action was further heard and tried at the city of Ottawa on the 14th and 15th February, 1930.

W. C. Hamilton, K.C., and *H. L. Robson*, for plaintiff.

E. S. Wilson, K.C., and *W. Manahan* for defendant.

The contentions of the parties and the facts are stated above and in the reasons for judgment.

THE PRESIDENT, now (March 24, 1930), delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, on behalf of His Majesty, for the purpose, *inter alia*, of fixing the amount of compensation to be paid to the defendant for certain lands, situated at Churchill, Manitoba, taken by the plaintiff under the provisions and authority of the Expropriation Act, Ch. 143, R.S.C. 1906, for the purpose of public works of Canada, that is to say, the construction of the Hudson Bay terminus of the Hudson Bay Railway and terminal port facilities, at Churchill. A plan and description of the lands taken, was signed by the Secretary of the Department of Railways and Canals on August 11, 1927, and was deposited of record at the office of the District Registrar for Neepawa Land Titles District, Manitoba, on August 15, 1927. The plaintiff asks that it be declared that the sum of \$1,586.25, and interest from the date of taking is sufficient and just compensation to the defendant for the lands so taken; the compensation claimed by the defendant is in excess of \$50,000. The case is in many respects an unusual one, and not without its difficulties. The nature and extent of the evidence is such that I should perhaps state the facts of the case at some length.

The whole of the lands taken for the public works mentioned, inclusive of that of the defendant, is designated on the plans as the East Peninsula of Churchill, Hudson Bay. The Peninsula is about five miles in length, and at its base is about six miles across, the Churchill River being on the one side, and the Hudson Bay on the other. The Peninsula varies in width and ends in a narrow rocky promontory or cape. A high rocky plateau which extends throughout the length of the Peninsula on the Hudson Bay side, comprises a very considerable portion of the peninsula. The continuity of the plateau is broken for short distances in two places, I think. A large area of land, including that taken from the defendant, lies at a suitable level between the edge of the plateau, or the escarpment, and the Churchill River, the railway, docks, sheds, elevators, etc., being beside the Churchill River; the distance between the escarpment, and the railway—which follows quite closely the Churchill River—is about one half of a mile, the distance between the end of the railway and defendant's lands being roughly two miles or more.

The particular lands taken from the defendant consisted of 153 lots, each having a frontage of 50 feet and a depth of 100 feet, in what is known as the Beech subdivision, which altogether comprised 1,413 lots; the whole of the subdivision was taken, and this, I think, comprised all the privately owned lands on the Peninsula. In 1905, as I understand it, the defendant's father obtained a homestead entry for the area later known as the Beech subdivision, under the provisions of the Dominion Lands Act, but in 1909 the Government of Canada apparently withdrew from homestead entry the lands on the Peninsula, and laid out a townsite covering the whole Peninsula. When Beech, Sr., applied for his patent he was granted the townsite lots now referred to as the Beech subdivision. No explanation was given as to why a homestead entry on the Peninsula was granted, or why, later, the townsite was laid out, but this is of no importance; the Peninsula always remained a mere paper townsite.

It was alleged on behalf of the defendant, that more land was taken by this expropriation proceeding than was necessary for the public works in question; that no part

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of the Beech subdivision was necessary for such public works and no part of it has since been used for the public works, except that taken for the railway right of way; that the end of the railway, the railway shops, docks, sheds, elevators and other terminal facilities are more than two miles from the nearest limits of the Beech subdivision, and that the nearest end of the railway terminal yard is one half mile or more removed from the limits of the subdivision. The defendant contends that only such lands can be expropriated as are reasonably necessary for the construction and operation of the public works. It will be convenient to dispose of this point before proceeding further. The Hon. C. A. Dunning, who was Minister of Railways and Canals when the lands in question were expropriated, stated in evidence, that immediately it was determined that Churchill should be the terminal port of the Hudson Bay Railway, he was advised by his officers, engineers and experts, that it was highly desirable that the whole of the Peninsula, privately owned and Crown lands, should be acquired for the purpose of the undertaking. It was said they were dealing with an unusual public undertaking, accompanied by unusual problems, difficulties and uncertainties, which rendered it desirable to control the whole Peninsula in the interests of the undertaking, presently and for the future; in his evidence the Minister admitted, that one consideration in his mind, among many others, was the desire to avoid speculative land transactions at Churchill. I have no doubt the Minister, his officers and expert advisers, believed the facts of the situation justified the action taken in this connection.

Adverting now to the Expropriation Act. It appears to me, upon a consideration of the terms of that Act, that the Minister may, if he deems it advisable so to do, take any lands for the use of His Majesty by depositing a plan and description of the same, signed by himself or an authorized officer of his department, at the appropriate registration office, and such lands thereupon become and remain vested in His Majesty. If, in the Minister's judgment the land thus taken, is necessary for a public work, then I think it is not open to review. Section 3 (b) of the Act authorizes the Minister to enter upon and take possession of any

land or real property, the expropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of a public work, a public work being defined. Having exercised his judgment, and fixed upon the area and the bounds of the lands desired to be taken, the proceedings for consummating the expropriation and vesting title in His Majesty is as I have just mentioned, that is by filing a plan and description under the provisions of sec. 8 of the Act. Thereupon the lands become and remain vested in His Majesty. Sec. 11 provides that when any such plan and description, purporting to be signed by the deputy of the Minister or some other authorized person, is deposited of record, the same shall be deemed and taken to have been deposited by the direction and authority of the Minister, and as indicating that in his judgment the land therein described was necessary for the purposes of the public work; and the said plan and description shall not be called in question except by the Minister or by some person acting for him or for the Crown. The powers granted to the Minister by the Act seem to be unlimited. But, this power or authority cannot be exercised so as to interfere with security in the enjoyment of the private property, or that private property should be confiscated for public purposes without payment to its owner of its fair value. The legislature in such cases has provided what it considers sufficient means for securing adequate compensation to the owner of the land, and leaves to the public authority interested in the undertaking to say to what extent it will be useful to them to exercise the statutory powers. The Act provides that the compensation adjudged for any land or property acquired or taken shall stand in the stead of such land or property. I am therefore of the opinion that it is not open in this proceeding for the defendant to attack the expropriation in question upon the grounds stated. So then, the question here, as in all expropriation cases, is what compensation shall the owner receive for the lands expropriated.

Before departing from this point I should perhaps refer to the case of *Boland v. Canadian National Railway* (1), which was cited by counsel for the defendant, as authority

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(1) (1927) A.C. 198.

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for the contention that the powers of the Minister in taking lands under the Expropriation Act, are limited to the present actual physical needs of the undertaking. I do not think that the decision rendered in this case has any such meaning. The Judicial Committee of the Privy Council held that the railway company authorities got the position of the Minister, not absolutely, but solely for the purposes of the undertaking of the railway; that the construction of a certain subway which was the real subject of the litigation was not a part of the undertaking of the railway; and that the Expropriation Act could only come into operation if the necessity for taking the land in question was such, that had sec. 13 of the Canadian National Railway Act not cut out the railway clauses, the land could have been taken under the clauses of the Railway Act. This case is not, I think, authority for the point for which it was cited.

Now as to the general character, location and utility of the property taken, and any conditions affecting its value. It may be conceded, I think, that the property is for all practical purposes valueless except for the purposes of the undertaking, or for building sites of one kind or another. At the date of the taking, there were no permanent habitations of any kind on the Peninsula, though I think there was a Hudson Bay Post and a Canadian Mounted Police Post, across the Churchill River, on the Western Peninsula. The land was described by one witness as "mostly clay flats with gravel sub-soil with a slight overburden of moss and muskeg, and is strewn to some extent with boulders." It is perpetually frozen, except that in summer the frost is released for a distance of two or three feet in exposed places. It cannot be cultivated. It is located in an almost treeless territory. Conveniences, such as a water supply system, will be difficult of successful construction and operation and will, I conclude from the evidence, only be possible if done as a public work by the Hudson Bay Railway; even then, the same may be possible for only a very limited part of the year, the difficulty being to protect pipes and mains from freezing. The climate at Churchill, I gather from the evidence, is not of itself, calculated to add to the value or demand of property in that

vicinity. Churchill is accessible by water only for about four months of the year, and this must of necessity confine the major activities of the port to this period. It was suggested by Mr. McLachlan, the engineer in charge of the terminal development at Churchill, that the employees of the railway and port terminals there should largely be removed at the close of navigation each year, and that only a skeleton organization should be retained during the period of closed navigation; he seemed to entertain the view that Churchills population would and should be largely a seasonal one. The conditions I have described—and which were stated in evidence—are not, ordinarily speaking, those that promote or create an active or stabilized demand or market for real property. The extent of business activities and population at Churchill will, so far as one can now see, be altogether dependent upon the completion and operation of the railway and port facilities, and the dimensions of traffic in and out of that port. It is impossible yet to say with any degree of certainty what will be the character, volume or value of traffic passing through the port, what population the port will sustain,—and what will be the demand for real estate. The expectations of the most enthusiastic concerning the future of the Port of Churchill may be greatly exceeded, and it may transpire, that this will be due to causes which to-day are unseen or unknown. It is not within my duty to speculate upon all this, nor is it necessary to do so, in a consideration of the issue before me. It is sufficient for my purpose, to say that without the railway and port facilities constructed and in operation, the defendant's lands, would, in my opinion, be without any substantial market value. The evidence is altogether that way.

The defendant's principal witness as to the value of the lands taken was Mr. Christie, an experienced and favourably known real estate broker, of Winnipeg. He placed the net sale value of the lots, after a deduction of fifteen per cent commission for selling, at \$9.35, \$8.50, \$7.65, \$6.80 and \$5.95 per foot frontage, all dependent upon the distance of the lots from a stated base, 32nd Avenue; the average value per front foot of each lot would be \$7.65, upon this basis of valuation. Upon this basis, the value of

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each lot would average about \$350 and would give a gross valuation of over one half million dollars, to the whole of the Beech subdivision, some 1,400 and odd lots. Mr. Christie's evidence was rather to the effect that he could sell the lots at his valuation, but I did not understand him to say precisely that he placed this value upon them; probably, he intentionally put his evidence in this form. The defendant's other witnesses generally supported Mr. Christie's valuation. Mr. Ballantyne, a Crown witness, a real estate broker of Winnipeg, who visited the property as Mr. Christie also did, declined to place any valuation on the property at all. In the circumstances he suggested that the whole subdivision should be treated as acreage and not as subdivided property, and that an arbitrary value be placed upon it. He stated that no one would buy land at Churchill except for speculative purposes. Mr. Carruthers another Winnipeg real estate broker, stated in evidence that he would not sell the property to the public at all, and could place no value whatever on the property. The defendant sought to establish a value to the land taken, by evidence of former sales of Beech subdivision lots. In the years 1911, 1912, and thereabouts, some 200 lots of the subdivision were sold at prices ranging from \$250 to \$450 each. Then, a considerable number of lots were purchased, within practically the same period, by the late J. D. McArthur of Winnipeg at \$300 per lot, from Beech, Sr., through an intermediary. McArthur was a railway contractor, and at that time was one of the principal contractors engaged in the construction of the Hudson Bay Railway. At that time Churchill was the designated Hudson Bay terminal port of the railway. In 1913 a Beech subdivision lot was purchased by one Snowden, of Winnipeg, for \$750. This lot was partially subject to regular inundation by the tide, and in any event it seems to have been an imprudent purchase for the purpose for which Snowden required it, and it cannot weigh with me. There was commission evidence taken in this cause between the beginning of the trial at Winnipeg and its conclusion at Ottawa, by which it was shown apparently, that transactions in two Beech subdivision lots took place in 1921, and further transactions in the same lots close to the expropriation date, at figures as

high as \$1,500 and \$1,800 per lot. These figures are so absurdly high, and so much in contrast with the evidence given by the defendant's expert witnesses, that I cannot attach any importance to these transactions, and I propose to disregard altogether any evidence concerning them.

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In 1912 or shortly afterwards, Churchill was abandoned as the probable Hudson Bay terminal port of the railway, and Nelson was officially selected as the terminal port. Railway construction proceeded with Nelson in mind at its destination, and work was also commenced upon the port facilities at Nelson. In the fall of 1917 all construction work ceased, owing I believe to the war, with the rails within ninety miles of Nelson. From then, until the middle of 1927, as I understand it, the railway project lay dead, when it was determined to again proceed with it, but with the Hudson Bay terminus an open question. The question as to whether Nelson or Churchill should be the Hudson Bay terminal port was presented for examination and report to an expert port engineer, with the result, that Churchill was restored as the Hudson Bay port of the railway; the construction of the railway was then renewed with Churchill as its terminus and work was also soon afterwards begun upon the port facilities; the railway, I understand, is practically completed and the balance of the undertaking is nearing completion. In the meanwhile, there was, from the cessation of railway construction in 1917 down to the middle of 1927, no transactions in the Beech subdivision lots, except the two transactions to which I last referred; no improvements were made upon the property for any purpose, no revenue was derived from the lots except from their sale. I should point out that there were no taxes at any time payable upon the Beech subdivision lots, as the whole Peninsula was practically uninhabited and unorganized. It was not onerous therefore upon the proprietors of the Beech subdivision lots to hold the same, if they could not or did not sell them.

There is one other matter referred to by defence which I should mention. On August 10, 1927, the Minister of Railways, with certain officers of his department, and an expert port engineer, Mr. Palmer, who was specially retained for the purpose of investigating the relative merits

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of the ports of Churchill and Nelson and to make a recommendation thereon, were at Churchill. On that day Mr. Palmer recommended to the Minister that Churchill should be selected as the Hudson Bay port of the railway. The Minister thereupon accepted the recommendation of Mr. Palmer, and he immediately communicated with his colleagues at Ottawa and obtained their approval of the selection of Churchill. On the same day the Minister made a public announcement, through a press representative of the selection of Churchill. On the 11th day of August the plan of the expropriation was signed by the Secretary of the Department of Railways, and forwarded at once to the proper registration office in Manitoba. I understood the defendant's counsel to claim, though I am not quite sure of it, that in the interval between the announcement of the selection of Churchill by the Minister, and the filing of the plan, the value of the defendant's land had greatly increased by reason of the announced selection of Churchill as the Hudson Bay terminal port of the railway. If the advantages due to the carrying out of the scheme for which the defendant's lands were taken cannot be considered, in fixing the compensation, as I shall shortly explain, it matters little to the defendant, so far as I can see, if a few days intervene between the announcement of the selection of Churchill and the actual filing of the plan that could not improve the defendant's position. The question of the value of the property should not be influenced by an incident of that nature.

The principles which regulate the fixing of the compensation of lands compulsorily taken have been the subject of many decisions. The compensation to be ascribed, is the value of the property taken to the owner, in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities,—but it is the present value alone of such advantages and possibilities that is to be determined—excluding however any advantage due to the carrying out of the scheme for which the property was compulsorily acquired. In the *Cedar Rapids Case* (1)—I shall not state the facts of the case—it was held that the proper basis for compensation was the amount for

(1) (1914) A.C. 569.

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which the lands and rights acquired could have been sold had the Cedar Rapids Manufacturing and Power Company, with their acquired powers not been in existence, but with the possibility that that company, or some other company or person, might obtain those powers. Their Lordships stated that where the element of value over and above the bare value of the ground itself consists in adaptability for a certain undertaking, the value is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility. The element of special adaptability was considered with great care and precision in two other cases. In *re Lucas v. Chesterfield Gas and Water Board* (1), and *Sidney v. North Eastern Railway* (2). They lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration. But if, and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land, is an element of value and must be taken into consideration. Another test to be applied in determining the amount of compensation payable to the owner of compulsorily acquired land is this: what amount would a prudent man in the position of the owner have been willing to give rather than fail to obtain it. *Pastoral Finance Association Ltd. v. The Minister* (3).

Having described the lands, and having stated what I conceive to be the general propositions of the law applicable to matters of this kind, the difficult task still remains of fixing the compensation to be paid the defendant for his lands, as of the date of taking. The prices paid for lots by McArthur and others prior to 1914, were, in my opinion, purely speculative prices and events I think, proved this to be so; they are not a test of the value of the lands

(1) (1909) 1 K.B.D. 16.

(2) (1914) 3 K.B.D. 629.

(3) (1914) A.C. 1083.

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at the date of the expropriation, fifteen years or so afterwards, when much more was known of the actual conditions obtaining at Churchill. Any enhancement in the value of the land arising from the construction of the Hudson Bay Railway and the port development at Churchill, is to be excluded in determining the compensation. The defendant's counsel urged that the lands possessed special adaptability. If it was meant that they were specially adapted for the purpose of the undertaking, as discussed in the authorities I have mentioned, then I do not think that that principle of valuation applies here, because there is no evidence of competition or imminence of competition for the lands for railway or any other purpose. If it was meant that the lands were specially adapted for other or general purposes that is another matter; and is an element of general value only. I do not think there is any room for the factor of special adaptability in this case, except as an element of market value. It seems to me the only question here for decision is the very plain one: what was the market value of the land to the owner at the date of the expropriation? I do not think that the defendants' subdivision lots had at the time of taking, anything like the value claimed for them; and no prudent person would, I think, contemplate paying such prices. There were other equally good building sites available to intending purchasers at the date of taking, for any purpose for which they might be acquired; there was all that area lying between the escarpment and the Churchill River, a much larger area, I think, than the whole of the Beech subdivision. The Beech subdivision had no special utility or value over this area for any purpose, so far as I can see.

In a broad sense, the total quantity of lands on the Peninsula, suitable for almost any purpose, was limited, and the fact that they were located on the Churchill River, easily the best potential port on the Hudson Bay, according to the report of Mr. Palmer, would, I think give them some market value. These lands had market possibilities, even though unimproved and in a state of nature. But what would a prudent man pay for a lot? I do not care much about the idea of fixing the value of the lands taken, by lots, but I see no way of doing otherwise. The proper

way I have no doubt to value them would be by the acre; it might be said that not being agricultural lands, they have no other use than building lots, but perhaps not lots of the size in question. The value placed upon the lands by the plaintiff was, I think, arbitrarily arrived at, at least I do not recall any satisfactory explanation of how the sum was arrived at. The lots clearly vary in value and suitability, for almost any purpose, but I do not intend making any distinction between them and neither did the plaintiff; according to the evidence, the same value was placed upon each block or lot. In this rather difficult case, I confess a desire to err in allowing the defendant a greater compensation than the actual value of the lots, rather than fall below their value. The amount offered by the Crown is I think not sufficient. I propose fixing the compensation for the lands here expropriated upon the basis of \$30 for each lot. This I think is sufficient compensation for the lands taken from the defendant, and I cannot see any grounds for allowing more. The defendant will have his costs of this proceeding, he will be entitled to the usual rate of interest since the date of the expropriation, and there will be the decree usual in matters of this kind.

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Judgment accordingly.