BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... PLAINTIFF;

1912
June 28.

AND

ARTHUR S. KENDALL ..... DEFENDANT.

Expropriation of land—Market value—Material in situ giving potential value to land—Basis of compensation.

In assessing compensation for the expropriation of lands for the purposes of a public work, damages must be measured by the market value of the lands as a whole at the time of expropriation.

2. While certain material in the soil of the lands expropriated may largely increase the potential value of such lands, the Court will not go into abstract calculations with respect to the quantity of such material *in situ*, but will treat the lands as possessing a value that is entire and indivisible.

THIS was an information filed by the Attorney-General of Canada for the expropriation of certain lands required for harbour improvements at Sydney, N.S.

The facts are stated in the reasons for judgment.

May 29th, 1912.

The case was heard at Sydney, N.S.

J. W. Maddin, for the plaintiff, contended that the defendant was seeking compensation for the sand and gravel on a purely speculative basis, and one not supported by the facts. Not a pound of material had been taken out below the level of the water up to the present time; and the demand for it in the future is problematical in view of the difficulty of working the bar as compared with other pits in the neighborhood

1912

THE KING v. KENDALL.

Argument of Counsel.

more easily got at. The case of *Burton v. The Queen* (1), is distinguishable from this case, because there the gravel-pit was the only one in the vicinity of Winnipeg and that fact gave it a distinctive value.

G. A. R. Rowlings, for the defendant, submitted that under the *Burton* case (*supra*) and *Vezina v. The Queen* (2) the defendant was entitled to full compensation for the property taken on the basis of a prospective use which would give the lands their highest value. The evidence shews that the whole of the sand and gravel can be taken out of the bar, and this prospective element of value is an extremely large one. The authorities shew that the prospective capabilities of property taken in expropriation proceedings are part of its market value. He cited *Macarthur v. The King* (3) *Buccleuch v. Metropolitan Board of Works* (4); *Re Wadham and the North Eastern Railway Co.* (5).

AUDETTE, J. now (June 28th, 1912), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, inter alia, that the Government of Canada has expropriated, under the provisions of *The Expropriation Act* (R.S., 1906, ch. 143) a certain lot or strip of land, situate, lying and being on the northern side of the South Bar, Sydney Harbour, in the County of Cape Breton, N.S., for the purposes of a public work of Canada, to wit: the harbour protection works at South Bar, Sydney Harbour, N.S.

The area expropriated is (22½) twenty-two and one-half acres, for which a plan and description have been deposited in the office of the Registrar of Deeds for the

(1) 1 Ex. C. R. 87.
(2) 2 Ex. C. R. 11.
(3) 8 Ex. C. R. 245.
(4) L. R. 5 H. L. 418.
(5) 14 Q. B. D. 747.

County of Cape Breton, on the 5th day of September, A.D. 1911.

The Crown by its information tenders the sum of $4,000.

The defendant, by his plea, avers that the amount tendered is grossly insufficient and inadequate, and claims the sum of $300,000 for the lands taken and for all damages resulting from the said expropriation.

It is now well established and settled that the Crown, by its prerogative and by law, is entitled to the foreshore on all of our Canadian coasts, unless and except so far as any subject can establish title to it by Crown grant before Confederation. The claim of the defendant's title to the sand and gravel bar in question in this case runs as far back as the 14th June, 1788, under a Crown lease or grant of George III. This grant is confirmed by an Act of the Legislature of Nova Scotia, passed in the year 1850, cap. 41, whereby lands held under Crown leases are declared to be held in fee simple. As will, therefore, be seen the Crown grant dates before Confederation, and the defendant's *auteurs* were in possession for over a century.

The defendant's title was admitted by the Crown's counsel at the opening of the trial.

The defendant purchased, on the 2nd July, 1888, one hundred and twenty-five acres for the sum of $240. The twenty-two and one-half acres expropriated herein are part and parcel of these one hundred and twenty-five acres which he then acquired for the sum of $240.

On behalf of the defendant were examined the following witnesses, viz.:—George J. Ross, Arthur S. Kendall, Duncan M. Campbell, Harry J. McCann, Clarence A. Lowe, Alfred Bouthillier, George E. Bool, William

1912

THE KING v. KENDALL.

Reasons for Judgment

Rutledge, Hector F. McDougall, Thomas J. Brown and Thomas Cozzolino.

The first witness, G. J. Ross, of Sydney, a contractor, in the cement business for one year, says he knows the property in question for 30 years, and that the bar contains at least 12 to 14 feet of sand and gravel through the 22½ acres taken, and values the material *in situ* at forty cents a yard. There are other places in Cape Breton where such material can be had at some distance from Sydney; the bar is only four miles from Sydney, and the material is getting scarce while the demand is increasing. He contends that with modern appliances the material could be procured at the bar for ten cents a yard. Gravel costs in Sydney as much as $1.05 to $1.10 a ton, including freight. The witness prepared the plan filed as Exhibit "G", and he saw the boring of the holes indicated on the plan. He purchased some of that gravel at five cents a barrel from the owners, costing him twenty-five cents to transport it to Sydney. At twelve feet deep he estimates the total quantity at 530,000 cubic yards with 25,000 to 30,000 tons of large stones on some part which would have to be crushed. He used the material for plastering and concrete and says it is the best they can get,—contends that every storm brings in sand and gravel and looks upon it as practically inexhaustible. He values at from $400 to $500 the yearly revenue which could be derived from the kelp and seaweed. His company was organized in July last and they procured gravel from the Grand Narrows, where the gravel is loaded on the cars from the beach. He says he knows that last year, when things were not as prosperous as this year, the defendant's property could not be bought for $25,000 to $30,000 and adds he would quickly give $25,000 for the property,—it is

1912

THE KING v. KENDALL.

Reasons for Judgment.

worth a good deal more. He admits the bar is subject to attacks by gales from the ocean, and that it has been broken through at times; but that would not alter his figures. He admits that there are a number of places where sand and gravel can be had in Cape Breton but not so near Sydney as the South Bar.

Arthur S. Kendall, the defendant, testifies that in 1901-02 he took from 2,000 to 3,000 tons of gravel from the bar for which he received five cents a barrel,—which represents a little less than thirty-three cents a ton. In 1900 there was as much taken away that was not paid for. He says he had an idea to equip for working and using this sand and gravel, and that it would be a source of very good returns to him. Sand and gravel are worth about ninety-five cents a ton in Sydney. He says that the first two borings went down to 17 feet, but if measurement had been taken from the crest, it would have shown 22 feet. He contends he shipped in fifty-ton scows and made a profit of 40 cents a ton,—the cost being about 15 to 17 cents a ton to place it on the scow, and as much more for the tug, with 10 to 15 cents to put it ashore, together with 25 to 30 cents to distribute it in the city. He says that kelp is not much of a manure, and that used alone, without phosphate, it would hurt the land. There was not much last year, but some years he has seen as much as 20,000 tons. If he were in a position to use it, it would be worth from $400 to $500 a year. He says that his property was of very little use before the Steel works came here, and that it is becoming more and more valuable. He acknowledges having received the $4,000 tendered by the information, which is to be applied *pro tanto*, he says, on the amount he would recover. There are other places where sand and gravel can be had, but it is far away and not always of easy access.

1912

THE KING v. KENDALL.

Reasons for Judgment.

Duncan M. Campbell, the City Engineer at Sydney, under whom concrete works have been carried on, has seen the property in question during May last, when test pits or holes were bored in his presence, and contends that there is sand and gravel there not less than 12 to 14 feet deep, but the largest proportion is sand,—there is sand, gravel and stones. He values the material at fifty cents a ton, and says that is what they pay. Estimates the quantity for every foot in depth at 35,350 cubic yards, and the total quantity, at 15 feet deep, at 544,500 cubic yards. The contractors working for the city have used material coming from South Bar in concrete and sewer work, and it was found good and satisfactory. From the witness's printed annual report of the City of Sydney, for the year 1911, exhibited in court and noted in the evidence, it appears at page 97, that gravel was paid for by the city at the rate of 50 cents per ton, freight 38 cents per ton, and truckage at 36 cents per ton. The witness said he would not care to put a price upon the bar, and gave as his opinion that if the bar were wiped out, carried away, by a storm, it would be put back by nature.

Harry J. McCann, the purchasing agent of the Dominion Iron & Steel Company, says his company uses a deal of sand and gravel. In 1911 they used 35,000 tons at a cost of $29,770.15,—of this, 20,000 tons were procured from the Grand Narrows and 15,000 tons from Mira. He says the bar is 4 to 5 miles from Sydney, and that he would work it by suction in the good months,—Lingan bar was partly washed out two years ago,—a hole was washed through thirty feet wide, but now it does not show, it has all been filled up and is quite as good as before. There is in Sydney a good opening for one man dealing in gravel and sand as there would be about 100,000 tons used per year.

1912

THE KING v. KENDALL.

Reasons for Judgment.

Clarence A. Lowe, the Intercolonial Railway Agent at Sydney, under whose supervision come all the shipments to Sydney, produced as exhibits "H" and "I", two statements showing the shipments for 1910 and 1911. From Iona the charge is 45 cents a net ton, or 2½ cents per 100 lbs.

Alfred Bouthillier, of Sydney, who has an experience of 15 years in boring, was, last week, in charge with his partner Boyd, of the borings made at South Bar. He heard the statements as to depth made by the previous witnesses and says they are correct. He is satisfied there was sand and gravel as far down as they went.

George E. Bool, manager for building-contractor, says they used sand and gravel in their works last year to the extent of 600 cars, at 20 tons to the car. He has seen South Bar—he went over it once the day before his examination and all he saw on that beach is good. He says he has used very little of the sand and gravel coming from the bar; but has used some for plaster and found it very good. He values the bar at thirty cents a ton, as a commercial commodity. The material is getting scarcer,—the beaches are getting exhausted. He has, however, no idea what it would cost at Sydney; he would have to look into the matter before expressing an opinion.

William Rutledge, in the course of an experience of ten years, has handled a large quantity of sand and gravel and knows the property at South Bar. Some years ago had some holes bored there about seven feet deep, and found all sand. He did not notice any gravel in the particular locality where the test pits were made; but knows no better sand in around Sydney. The sand and gravel on the bar is good for masonry and cement purposes. He contracts for the Steel and Coal companies and shipped sand and gravel from Mira and

1912

THE KING v. KENDALL.

Reasons for Judgment.

Lingan. He reckons the requirements of .the Coal company is in the vicinity of 5,000 tons a year, and has no idea whether their requirements will increase or not. There is loose stone on the bar which could be used for cement, and the sand and gravel represents a value of 30 to 35 cents a ton on the ground to. the owner. The cost of transportation by water from the bar would be between 28 to 30 cents. With respect to the future market, he contends the banks are getting exhausted, and that would have the effect of increasing the cost of the sand. He says further that continuous dredging would affect the bar, but that, however, it fills as fast as any material is taken away. The bar was broken a couple of years ago and it has all made up.

Hector F. McDougall, contractor, chiefly engaged in shipping building material, sand and gravel, to Sydney, knows South Bar,—has gone over it, and says there would be no difficulty in handling two or three feet of the sand and gravel there. Taking an average of three feet deep a quantity he thinks could be easily worked—he values it at 52 to 30 cents a ton *in situ,* or in other words, 4,840 cubic yards in an acre, at a depth of three feet. He estimates there would be 7,260 tons in an acre, which at 25 cents, he value at $39,930.00; and at 30 cents at $47,916. The market price of sand now is 65 cents, and gravel 50 to 55 cents, both delivered on the cars. To work the bar below three feet, mechanical appliances would have to be resorted to, and he believes the nature of the bar would justify the expenditure,—as the gravel goes down deeper than it does on the Bras d'or lakes,—where clay is struck after taking the surface gravel washed upon it by the waves. He thinks by building small piers in batches, he could protect the bar against being washed away. There is sand and gravel at North Sydney, but there is no market there.

There would be the transportation that would make it expensive, and the distributing point is Sydney.

Thomas Brown, the General Superintendent of the Nova Scotia Steel Company, says his company use from 3,000 to 5,000 tons of sand and gravel a year. The quantity of sand and gravel has been more of less depleted on the beaches; but he entertains no fear of disappearance for a number of years, and is under the impression the demand will increase. He offered $10,000 to the Defendant for the whole of his property, the 125 acres, and the defendant refused it. He though the site would appeal to the company as a good site for a pier.

Thomas Cozzolino, says he was on the South Bar recently and that the breaches indicated on the plan are filled, but there is water in the centre,—he could walk around. He is a contractor and says he could make between $10,000 to $12,000 a year with the bar.

On behalf of the plaintiff, the following witnesses were examined, viz.: Donald M. Curry, John Burke, Thomas C. Harold, Charles M. O'Dell, and Ronald Gillis.

Donald M. Curry, the Municipal Clerk, says the defendant's property has been assessed during the last six or seven years at $650.

John Burke, the County Assessor for 1905 to 1912, says that the assessment on the defendant's property was made when he came in office, and he did not disturb it. It was assessed at the same value as the other farms in the neighbourhood. It was not assessed as sand and gravel property.

Thomas C. Harold, speaks of the manner in which lands taken for the Steel works were assessed, and is not cross-examined.

1912

THE KING v. KENDALL.

Reasons for Judgment.

Charles M. O'Dell, is a Civil Engineer who has been with the Dominion Coal Company, in the capacity of Resident Engineer, since 1893, with an interruption of three years,—and has been engaged in the purchase of land for the company during the last ten years. He has made, at the request of the company, a plan of the property in question (which is filed as exhibit No. 6). The survey for the plan was made in 1910. He has examined the bar for the Steel Company and he did not consider it worth exploiting on account of the difficulty of loading by lighters and reloading at the wharf and then on the cars, He thought this difficulty overcame any advantage it had, and found that they could get sand and gravel elsewhere in by cars much more conveniently. He valued the lands in question as a sand and gravel proposition at $3,000 to $4,000. He has experience in the purchase of land, and bought within the last four years, about 2,000 acres of land for the company. He bought a sand proposition, the McDonald property, within four miles of Louisburg,—36 miles from Sydney, at $100 an acre; however, it was not bought as such, but purely as part of the right-of-way for the railway. He made a contract to load on the cars at thirty cents, and then raised that to thirty-five cents. Did not make any estimate of the quantity of sand and gravel at South Bar. Two breaches are indicated on the plan, showing where the bar was broken by a storm—he does not know whether it has since filled in,—would be surprised if it did. He is President of the Silicate Brick Co., at North Sydney,—also referred to by witness McDougall. They have there 7 acres of sand above high water and 10 below. This is nearly directly across the harbour from the property under discussion.

Ronald Gillis, a contractor for over 40 years, has used a quantity of sand from the South Bar for plaster-

ing. It is very fine, but very good. He has not used it for concrete to any extent—and everything he saw of it was too fine for concrete; but it would do well for brickwork.

This concluded the evidence.

The Court is of opinion that the property in question must be assessed at its market value in respect of the best uses to which it can be put by the owner, taking into consideration any prospective capabilities and any inherent value it may have. One must discard the idea of arriving at its value by measuring every yard of sand and gravel on the bar. What we are seeking in this case is the value in the market of the 22½ acres expropriated from the defendant, taking in consideration all that has just been mentioned. This property, comprising 125 acres belonging to the defendant, changed hands in 1878 and was bought for $200. Ten years after, on the 2nd July, 1888, the present defendant bought it for $240. Now, inasmuch as it had a price as a whole in 1878 and again in 1888, taking into consideration its prospective capabilities, it should also have a market value as a whole at the date of the expropriation, without one being obliged, in arriving at such value, to go into abstract calculations with respect to the quantity of material *in situ*. To pursue such a course would lead one to a fanciful valuation, if, indeed, it would not appear on its face, as preposterous and absurd. In endeavouring to estimate the market value of this property on such a basis, one would be confronted with many contingencies. For instance there is always that *alea*, more or less uncertain under the evidence, but it exists,—of having the whole bar either wiped out or partly washed away by a gale or storm from the ocean. Then the material taken from the bar is sold like all other public commo-

1912

THE KING v. KENDALL.

Reasons for Judgment.

dities, under a keen competition, and much more so in the present instance, as there are quantities of sand and gravel on the Bras d'Or lakes, which, perhaps, do not lie so close to Sydney, but which can be exploited much easier. Mr. O'Dell a witness of great experience, who examined the property for his company, did not, without taking any price into consideration, recommend the purchase of it, because of the difficulties of working it. The only way to work it is by water. Horses could hardly draw a reasonable load on the beach itself. Then why should an amount, arrived at by measuring every yard in the bar, be paid at one time? Admitting it could be sold,—it would take a number of years to sell it with heavy expenditure for getting it out and with profits coming in gradually and by very small amounts at a time. Then if it is to be worked by water with perfected appliances, if the undertaking is not properly managed—and that depends on the industry and capacity of a manager most of the time—the undertaking might go into insolvency instead of appearing so profitable, and would have to be abandoned. Furthermore, if it is to be worked by water, there is also the contingency of the elements to be reckoned with. Indeed, while the dredge, scows and tugs would be lying at the bar, a storm or gale from the ocean might wreck them all. Then there is the outlay of a capital which has to be taken into consideration in promoting such an undertaking.

The continuous working of the bar or excavating from it would also affect it and made it more liable to be wiped out and washed away by the storm. It is said it can be worked down from 12 to 14 feet—some even mentioned 30 feet—but there is no evidence that sand and gravel banks were ever worked in that

1912

THE KING v. KENDALL.

Reasons for Judgment.

manner. It may also happen that the owner would never care, in view of the difficulties in working it, to engage capital in such a venturous undertaking as buying an expensive plant. The present owner worked it during 1901 and 1902 with scows and tug. If it were so profitable, why did he not do so for any length of time; and why did he abandon it? It appears from the evidence there are sand and gravel banks on the Bras d'Or lakes, and possibly new ones may be discovered and exploited in competition with the South Bar.

This Court is of opinion that this theory of measurement, while it must be taken into consideration to some extent in arriving at its valuation, is not to be accepted blindly and as the controlling element to be considered in arriving at a fair compensation. What we are seeking here is the market value of the 22½ acres as a whole.

The Supreme Court of Massachusetts, in the case of *Manning* v. *Lowell* (1), puts the case very clearly, viz.:—

"All of the evidence relating to the value of the sand "as merchandise might have been excluded in the "discretion of the presiding justice, as the question "in the case was the market value of the land, and "not the value of sand. *Providence & Worcester* "*Railroad* v. *Worcester*, 155 Mass. 35. As was said "in *Moulton* v. *Newburyport Water Co.* 137 Mass. "163, 167, the value for special and possible purposes "is not the test; 'but the fair market value of the "land in view of all the purposes to which it was "naturally adapted.'"

(1) 173 Mass., 103.

1912

THE KING v. KENDALL.

Reasons for Judgment.

In *Moulton* v. *Newburyport Water Co., (supra),* also decided by the Supreme Court of Massachusetts, will be found, following, viz.:—

"The damages must be measured by the market "value of the land at the time it was taken.....
"The petitioners were not entitled to swell the dam-"ages beyond the actual fair market value of the "land at the time, by any consideration of the chance "or possibility that, in the future, authority might "be acquired, by legislation or purchase, to carry "the water in pipes to neighbouring towns. Such "chance or probability must needs enter to some "extent into the market value itself; and, so far as "the market value might be enhanced thereby, the "petitioners were entitled to the full benefit of it. "If there were different customers who were ready "to give more for the land on account of this chance, "or if there were any other circumstances affecting "the price which it would bring upon a fair sale in "the market, these elements would necessarily be "considered by the jury, or by a witness, in forming "an opinion of the market value. Nevertheless, "the value for these special and possible purposes "is not the test, but the fair market value of the land "in view of all the purposes to which it was naturally "adapted. *Cobb* v. *Boston,* (1); *Lawrence* v. *Boston,* "(2); *Drury* v. *Midland Railroad,* (3)."

Defendant's counsel cites the case of *Burton* v. *The Queen,* (4) lays great stress upon it, and says that under that case he is entitled to recover all he is asking. But this case must be distinguished from the present one on two grounds—First, the Bird's Hill ballast pit there dealt with was situated but a few miles

(1) 112 Mass. 181.
(2) 119 Mass. 126.
(3) 127 Mass. 571, 581.
(4) 1 Ex. C.R., 87.

1912

THE KING v. KENDALL.

Reasons for Judgment.

from Winnipeg, a very large and populous center. It contained only a limited quantity of gravel, and with the exception of the pit at Little Stoney Mountain, was the only gravel pit known and available in the neighbourhood. Secondly, and principally, because in the Burton case, the owner's land was not expropriated; but the government took a certain quantity of gravel, which had to be paid for on the basis of its market value. These facts sufficiently distinguish the Burton case from the present one to make it inapplicable.

The principle of valuation being now clearly established, there remains the question, what is the market value of the 22½ acres expropriated herein, taking into consideration the elements above mentioned with all of its prospective capabilities—the value of the seaweed, kelp, and the damage to the balance of the 100 acres held in unity therewith by the defendant, as indeed the balance of the property is materially affected by the taking away of the water front. Witness Brown said he offered $10,000 to the defendant for the 125 acres, which price was refused by him. It appeared to him (Brown) to be a good site for any pier the company might desire to build.

Under all the circumstances of the case, the Court is of the opinion that the sum of ten thousand dollars is a fair and liberal compensation to the defendant for the 22½ acres taken, and all damages whatsoever resulting from the said expropriation, including the kelp and the damage to the balance of the property held in unity therewith; to which should be addded ten per cent. for compulsory taking, making in all the sum of eleven thousand dollars as full compensation to the defendant

1912

THE KING v. KENDALL.

Reasons for Judgment

The Court has some hesitation on the question of costs. In the case of *McLeod* v. *The Queen* (1) it was held that where the tender was not unreasonable and the claim very extravagant, the claimant was not entitled to costs, although the amount awarded exceeded somewhat the tender. The amount tendered by the Crown in the present case is not unreasonable—it is only found by the Court to be inadequate. The defendant by his plea first claimed the sum of $60,000 and then at the trial, on leave, amended and claimed the extravagant sum of $300,000 for a piece of land lying almost idle for a number of years for which he paid $240 in 1888, covering an additional area of a little over 100 acres. The theory of valuation pursued at the trial and the finding in the Burton case, must have upset the defendant's base of vision to lead him to ask for such an extravagant amount as $300,000. Should the reckless suitor be punished? Taking in consideration that this is an unusual case, and while the onus was on the defendant to prove the real market value of the land as a whole, that he failed to do so but adduced evidence which had to be considered in arriving at a conclusion, and further that the property was taken against his will—by compulsory taking—this Court is of opinion to allow costs.

Therefore, there will be judgment as follows, viz.:—

1st. The lands taken herein are declared vested in the Crown from the date of the expropriation.

2nd. The full compensation herein is fixed at the total sum of eleven thousand dollars, with interest. It appears from the evidence the defendant has already received the sum of four thousand dollars in satisfaction *pro tanto* of the compensation; he is now

(1) 2 Ex. C.R. 106.

entitled to recover from the plaintiff the sum of seven thousand dollars with interest thereon from the 5th day of September, A.D. 1911, to the date hereof, and on $4,000 from the said 5th day of September, A.D. 1911, to the date of the payment of the said sum (which date may be established by affidavit hereafter), the whole in full satisfaction for the lands taken and the damages resulting from the expropriation, upon giving a good and sufficient title to the Crown, including a release of dower rights in the property, if any, and a release of the mortgage of $5,000 mentioned in the information herein. Failing by the defendant, to give the release of the said mortgage, the moneys will be paid to the mortgagee in satisfaction of the said mortgage and interest, and the defendant will then be entitled to be paid the balance, if any, after satisfying the said mortgage and interest.

3rd. There will be costs to the defendant, which are hereby fixed at the sum of two hundred dollars in all, including disbursements.

*Judgment accordingly.**

Solicitor for the plaintiff: *J. W. Maddin.*

Solicitor for the defendant: *G. A. R. Rowlings.*

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* EDITOR'S NOTE.—Affirmed, on appeal to the Supreme Court of Canada October 29th, 1912.