Privy Council Appeal No. 105 *of* 1927.

Sir Alexandre Lacoste and others - - - - - *Appellants*

v.

The Cedars Rapids Manufacturing and Power Company - - *Respondents*

The Cedars Rapids Manufacturing and Power Company - - *Appellants*

v.

Sir Alexandre Lacoste and others - - - - - *Respondents*

(*Consolidated Appeals*)

FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD CARSON.
LORD DARLING.
LORD MERRIVALE.
LORD WARRINGTON OF CLYFFE.

Delivered by LORD WARRINGTON OF CLYFFE.

This is an appeal from an order of the Court of King's Bench of the Province of Quebec (Appeal Side) dated the 22nd October, 1926, setting aside two awards dated the 21st April, 1921, made by arbitrators appointed to fix the amount of compensation to be paid by the respondents to the appellants in respect of two items of property belonging to the appellants,

and taken by the respondents in exercise of their statutory powers of expropriation, and referring back to the arbitrators the question of the amount of such compensation.

There is a cross appeal by the respondents raising the question as to the date at which for the purposes of compensation the property must be treated as taken, and seeking to have the award of the arbitrator appointed by themselves substituted in each case for that of the other two.

At about 29 miles above the City of Montreal are the Cedars Rapids, which begin near the head of an island called the Isle aux Vaches lying in the bed of the river near the left or northern bank and end about two miles farther down the river just east of a piece of land called the Pointe du Moulin. The fall of the water surface in this bit of river is about 32 ft.

In 1911 the appellants or their predecessors in title were the absolute owners of the Isle aux Vaches, and were entitled to certain "reserves" over the Pointe du Moulin, the precise nature of which will be stated presently.

The respondents were incorporated in the year 1904 by a statute of the Parliament of Canada for the purpose of constructing, maintaining and operating hydro-electric works at Cedars Rapids, with power to expropriate lands for that purpose.

On the 28th January, 1911, the respondents served on the appellants or their predecessors in title three notices of expropriation in respect of (1) the reserved rights over the Pointe du Moulin; (2) the Isle aux Vaches; and (3) an island in the stream between the Isle aux Vaches and the Pointe du Moulin called the Isle Bédard. No question as to this last item now arises.

The respondents by their notices offered $1,700 for No. 1 and $2,800 for No. 2.

These offers were not accepted, and the question of the amount of compensation was referred to two arbitrators, one appointed by each party, and an umpire appointed by the Court.

The arbitrators, by a majority, awarded in each case the sum offered by the respondents. The arbitrator appointed by the proprietors desired to award $80,000 for No. 1 and $62,000 for No. 2.

The proprietors appealed to the Superior Court for Quebec. The appeal was heard before Davidson, C.J., who on the 19th February, 1913, gave judgments reforming the award in each case and substituting therefor an award as desired by the arbitrator appointed by the proprietors.

The present respondents appealed to His Majesty in Council, and by an Order in Council dated the 9th February, 1914, both awards were set aside and certain directions were given which will be set out hereafter as to the principles by which the arbitrators should be guided.

The matter accordingly went back for further consideration by the arbitrators. Meanwhile the third arbitrator had become

indirectly interested in the respondent company, and the Court appointed the Hon. Louis Tellier, a retired Judge of the Superior Court, in his place.

The arbitrators sat for 145 days to hear evidence and arguments, and met in consultation 59 times. They again differed, the majority awarding in the case of the Pointe du Moulin $75,000, and in that of the Isle aux Vaches $45,000. The dissentient arbitrator would have awarded $11,712 in the first case and $4,848 in the second. The respondents appealed to the Court, with the result above stated.

It is now necessary to state certain matters in further detail, and first as to the nature of the appellants' rights over the Pointe du Moulin.

These are expressed in the deed of conveyance, dated the 10th November, 1879, by which the predecessors in title of the appellants granted to one, François Clement, lots 337, 341, 343, 345 and 347 in the parish of St. Joseph de Soulanges. The land so granted was a piece of land of irregular shape containing altogether about 60 acres, bounded on the north by an old road, the Chemin du Roi, and on the west, south and east partly by the river and partly by other lands. At its south-eastern corner there was a promontory jutting out into the river. Through the neck of this promontory ran a canal, constructed for the purpose of bringing the water to an old mill which, in 1879, was no longer in use. The grant to Clement was made subject to certain reservations in favour of the vendors expressed in the following terms :—

> " 1°. Un chemin de vingt-quatre pieds de largeur sur toute la profondeu du susdit terrain depuis le chemin de la Reine jusqu'au Fleuve St. Laurent.
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> " 2°. Un emplacement sur la susdite terre suffisamment grand pour la construction d'un moulin, d'une manufacture ou de toutes autres bâtisses propres à des fins industrielles.
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> " Ces deux réserves sont faites à perpétuité et l'acquéreur, ses hoirs et ayants-cause seront obligés de payer toutes taxes municipales ou scolaires qui à l'avenir seront imposées sur les terrains ci-dessus réservés, sans pouvoir prétendre à aucune indemnité ou compensation.
>
> " Le vendeur es-qualité aura le droit de prendre possession des réserves susmentionnées quand il le jugera à propos, et, de plus, il se réserve tous les débris de l'ancien moulin et le droit de les enlever en aucun temps sans que son passage à cet effet sur la terre susvendue soit considéré comme l'ouver ture de l'exercice de la réserve en premier lieu mentionnée ' d'un chemin, &c., &c., &c."
>
> " L'acquéreur, ses hoirs et ayants-cause n'auront aucunement le droit de se servir des pouvoirs d'eau qui se trouvent sur le bord de la grève du St. Laurent dans le voisinage de la terre susvendue ou sur icelle, le vendeur es-qualité, en faisant, par les présentes, une réserve expresse.
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> * * * * *
>
> " La dite terre restera aussi hypothéquée pour la garantie du plein et libre exercice des réserves ci-dessus faites en faveur du dit vendeur es-qualité."

Putting aside the reservation of the road which is for the present purpose of no importance, it will be seen that there are

two separate reservations: (1) That of the site for the construction of a mill, factory, or other buildings for industrial purposes; and (2) that of the right of making use of the water power on the shore of the St. Lawrence in the neighbourhood of the land sold or upon it.

As to the first of these, whether it amounted in law to an absolute right of property in the site to be selected, or to a perpetual right to use and occupy it for the specified purpose, seems to their Lordships to be immaterial. It is clear that neither Clement himself nor a purchaser from him could make any use for industrial purposes of the land without first acquiring or extinguishing the rights reserved to the vendors.

So also as to the reservation of the water power. It may be that, in order to make use of the water power referred to, the owners of the reservation would have to acquire powers from the Crown as the owner of the bed of the river and entitled to prevent any unauthorised diversion of its waters: still, neither Clement nor a purchaser from him could avail himself of powers so acquired without first acquiring or extinguishing the rights reserved to the vendor.

Of the Isle aux Vaches, the appellants, or their predecessors in title, were at all material times the absolute owners.

As to the topographical situation of the two properties, it seems that the obvious site for a power-house, destined to make use of the power afforded by the drop of 32 feet already mentioned, would be in the eastern part of the land included in Clement's conveyance, and that the necessary channel for conducting the water to such power-house would have to pass through or over the promontory already referred to. Again, as to the Isle aux Vaches, the natural starting place for the necessary channel would be just above that island, and for the purpose of making such a channel a dyke would have to be constructed in the bed of the river from the Isle aux Vaches to the Pointe du Moulin. The island would be a natural abutment for the upper end of the main dyke and for the lower end of such subsidiary dyke as might be erected on the bed of the river above the island. To make effectual use of these advantages, the ownership of the island would have to be acquired, and the respondents have testified to their appreciation of this fact by their notice of expropriation.

It has been suggested that the dyke might have been constructed in the bed of the river without touching the island, but their Lordships find some difficulty in believing that an engineer of experience would, with a natural abutment at his service, go to the expense of constructing an artificial one, still less that he would be content to leave a gap between the island and the dyke which would be a constant source of anxiety as to the stability of the latter.

It is now necessary to advert to the specific directions given to the arbitrators by His Majesty in Council in the Order in Council of the 9th February, 1914. By that order it was directed that as

regards the Isle aux Vaches and the rights reserved at the Pointe du Moulin, the matter ought to be remitted to the arbitrators to hear evidence and make an award upon the following principles: (*a*) That the value to be paid for is the value to the owners as it existed at the date of the taking and not the value to the taker; and (*b*) that the value to the owners consists of all advantages which the land possesses, present or future—but it is the present value alone of such advantages that falls to be determined.

In delivering the judgment of the Board, and after stating the two propositions embodied in the Order in Council, Lord Dunedin proceeded to say:—

> "Where, therefore, the element of value over and above the bare value of the ground itself . . . consists in its adaptability for a certain undertaking . . . . the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price enhanced above the bare value of the ground which possible 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 realised possibility."

The judgment then states that their Lordships had sought in vain in the testimony before them for any evidence directed to the true question as they had expressed it, and that *all* the testimony was based on the fallacy that the value to the owner is a proportional part of the value of the realised undertaking as it exists in the hands of the undertaker. The point is that there was, in their opinion, no evidence directed to the true question, all of it being based on the fallacy particularly mentioned and on other fallacies as well. After some detailed criticism of the evidence pointing out the fallacies into which the witnesses had fallen, the judgment contains the following important paragraph:—

> "The real question to be investigated was for what would these . . . subjects have been sold had they been put up to auction without the company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers."

The above extracts show quite clearly on what principles their Lordships thought the arbitrators should proceed and the nature and extent of the deviation from those principles which in their opinion vitiated the award then in question.

In the present case the majority of the arbitrators made two awards—one in the case of the Pointe du Moulin and the other in the case of the Isle aux Vaches. They are identical in form, except, of course, in those passages in which the property in question is described, and it is therefore enough to refer to one of them—that dealing with the rights reserved at the Pointe du Moulin.

The arbitrators begin by referring shortly to the history of the matter down to and including the decision of this Board, and giving a perfectly accurate description taken from the deed of 1879 of the rights thereby reserved. They quote verbatim from the Order in Council the principles upon which, in the opinion

of this Board, their award should be made. They then declare that they had heard, examined and considered the allegations of the parties and the documents and evidence of both parties concerning the matters of the Isle aux Vaches and the land and rights reserved at the Pointe du Moulin ; that the two cases had been, by consent, proceeded with together and united for proof and hearing before the arbitrators ; that they had viewed and visited the places in question ; and that, having, upon the whole, maturely deliberated, they had come to the following conclusions, stated in numbered paragraphs :—

The first paragraph is mainly a repetition of the statement of principles contained in the previous judgment of this Board. The others, 21 in number, are in the following terms :—

" (2) That the value to the owners as it existed at the date of the taking and to be paid for was the value of the ownership and of the right of enjoying and of disposing of the lands and water rights in question in the most absolute manner, and this without any restrictions but those imposed by law for public interest.

" (3) That the value to the owners consists of all advantages which the lands and rights possess by themselves, their nature, character, destination, capabilities, possibilities, and peculiar natural situation in and on the St. Lawrence river, which is in rapid at that place.

" (4) That the lands and water rights in question had something over and above the bare value, that is, the possibilities of being required for the construction of a water power and their capabilities of being used for water works at that place.

" (5) That the owners are only to receive compensation based upon the market value of the said lands and water rights as they stood before the scheme was authorised by which they are put to public uses ; subject to that they are entitled to be paid the full price for their lands and water rights, and any and every element of value which they did possess must be taken into consideration in so far as they increase the value to them.

" (6) That the fact that no buyer for water-power purposes in the said navigable river can be found except a buyer who has obtained parliamentary powers, does not prevent the special value being marketable, on the ground that the compulsory taker himself might become a possible purchaser, who would give a special price for the lands and rights.

" (7) That the land has an adventitious value, that is, something beyond its mere agricultural or normal value, which is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land. It is a matter no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration.

" (8) That land adjoining large works would in fact often have a special value because the owner of the works would likely be willing to give a larger price, because it adjoins his works.

" (9) That the island and the land and rights reserved on and at the Pointe du Moulin were probably certain, within a reasonable time, to be required and used for water purposes which would give them a very much enhanced value, which is a matter to be taken into consideration.

" (10) That the development and utilisation of the falls and water powers of the province of Quebec was previous to the taking a matter of public utility, as they tend to the advancement of industries already established, and the creation of new ones by allowing of the utilisation of their motive power.

" (11) That the enhanced value of the subjects in question should be taken into consideration, on account of their capabilities of being used for the construction of water works, or for any useful purpose for which persons would pay a substantial price.

" (12) That in estimating the value of the Isle aux Vaches and the lands and water rights reserved at the Pointe du Moulin, the natural and peculiar adaptability thereof for the construction of a water power is a fit and proper matter for consideration, as an element in the value thereof, in the assessment of compensation.

" (13) That the element of value over and above the bare value of the ground itself consisting in adaptability for a water-power purpose, the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending 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 realised possibility.

" (14) That the real question to be investigated is for what would these subjects have been sold had they been put up to auction without the Cedars Power Company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

" (15) That the arbitrators are not to value the lands and rights in question with reference to the particular purpose for which they are required.

" (16) That special adaptability is an element which the probability of purchasers requiring the lands and rights for such purposes gives to the lands and rights compulsorily taken for such purposes; that the element is not the fact that the lands and rights have in fact been taken, and that the probability had been realised by the promoters having obtained compulsory powers to take the lands and rights in question; but only the value of the probability as it existed before the promoters had obtained their powers.

" That the contingent value of the probability and the realised value by reason of the promoters having obtained parliamentary powers, to take the said lands and rights are not identical. That for the purposes of valuation the arbitrators must value the possibility of the site going into the market as being required for the construction of the water works, and not on the basis of a realised possibility, or on account of the promoters having obtained from parliament compulsory powers, and that they must value the possibility and not the realised possibility.

" That the lands and rights in question may be rightly valued at more than their bare value, as they had other capabilities for the construction of water works, and for the purposes of a water power, and those contingencies are fair and reasonable things to be considered not to give their full value as if the things in prospects were actually accomplished, but to give the enhanced value, that is, what they would sell to a willing purchaser for in consequence of their having these additional advantages.

" (17) That special adaptability for some purpose or other is the very basis of the market value of all lands.

" The question arises only in the cases where the special adaptability is for purposes for which lands are required, but used for works of public utility which are naturally different from the uses to which lands are put while in private hands.

" That where the special value exists only for a particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, but when the special value exists also for other possible purchasers, so that there is, so to speak, a market real, though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value t .ken into consideration.

"(18) That the lands and rights in question are specially suited for the purposes in question, and they may fairly become in private hands the subject of competition between rival companies, desirous of getting the advantage of that special suitability, and this being so, the arbitrators assessing the compensation are entitled and bound to consider what is the fair market value so arising, and if it be greater than that obtained by taking it as purchase for ordinary uses, to give to the seller the larger of the two.

"(19) That the situation is naturally favourable to the establishment of power works like those of the Cedars Power Company, and that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot after the event be taken into account.

"(20) That with regard to the reserved water rights there is no confusion made. It is not that the water power of the company will be derived from the reserved water rights, but it is that a water power like that of the company could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents.

"(21) That if the subjects had been put up to auction, as before said, there is a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realised scheme.

"(22) That here there are two subjects detached, and the value which the arbitrators attribute to them is not reached by joining them up, a process which depends on powers obtained not from the respondents and for the enhanced value of which result the respondents have no right to be compensated."

The award then concludes as follows:—

"Upon the above findings the majority of the undersigned arbitrators are of the opinion that the present value to the owners as it existed at the date of the taking consisting in all advantages which the above described property possessed, fix the value of such advantages to be paid by the company at the sum of $75,000 as compensation for the land and rights above described and for any damages caused by the exercise of their powers thereon."

As already stated, the arbitrators made a corresponding award in the case of the Isle aux Vaches, but fixed the amount in that case at $45,000.

The arbitrators have assessed the compensation as on the date —the 28th January, 1911—of the notices of expropriation.

Before dealing with the awards as a whole it is desirable to dispose of the special point raised by the cross appeal, viz., that in accepting the date of the notices of expropriation as the date of taking for the purpose of assessing compensation, the arbitrators took the wrong date and that they ought to have made their assessment as in September, 1905, when the plans of the proposed works were deposited or at latest as on the date when such plans received the approval of the Governor in Council.

By the Act of Incorporation of the respondent company (4 Edw. 7 c. 65 (Canada)) it was provided (amongst other things) that lands required for the erection of the works of the company might be taken and acquired by the company, and to this end, after

the plan of such works and the land required therefor had been approved by the Governor in Council, all the provisions of the Railway Act, 1903, which were applicable to such taking should, so far as they were applicable thereto and *mutatis mutandis*, apply as if they were included in the said Act of Incorporation, and in like manner all the provisions of the Railway Act, 1903, which were applicable should in like manner *mutatis mutandis* apply to the valuation and payment of the compensation for lands arising out of such taking and acquisition. The general effect of these provisions is, in their Lordships' opinion, to place the respondent company in the same position in reference to the matters there referred to as if they had been a company directly within the provisions of the Railway Act, 1903, with the modifications in matters of detail provided for in their Act of Incorporation.

Section 153 of the Railway Act, 1903, provides in effect that the date of the deposit of a plan and book of reference shall be the date with reference to which compensation shall be ascertained.

This section was, however, amended by the Railway Act, 1909, which provides that if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation shall be ascertained with a saving of, amongst other things, a pending arbitration.

This amendment clearly applies to all companies originally within the operation of the Railway Act, 1903, and their Lordships see no reason why it should not equally apply to the respondent company, which is brought within its operation by reference. The present arbitration was not pending in 1909 and the saving clause has no application to it. Their Lordships are therefore of opinion that the date as on which compensation is to be assessed is that adopted by the arbitrators.

Their Lordships now have to consider the main question, viz., Was the Court below justified in setting aside the present awards and remitting the matter to the arbitrators ?

The law and practice of the Province of Quebec governing the procedure of the Court in such matters appears to be in all essentials the same as in this country. Although the appeal is a rehearing, a verdict of a jury or an award of an arbitrator acting within his jurisdiction is not in general set aside unless it is shown that the jury or the arbitrator proceeded on an erroneous view of the law, or that there was no evidence on which the verdict or the award could properly be arrived at, or that there was some manifest error leading to the result. There might also, of course, be some other matter in the conduct of the proceedings such as the wrongful admission or rejection of evidence which might vitiate the result. But as a general rule the Court does not set aside a verdict or an award merely on the ground that it is against the weight of evidence. Of course, a verdict or an award may also be set aside on the ground of misconduct, in the popular sense of the word, on the part of the jury or the arbitrator. but nothing of this kind is alleged in the present case.

In the present case it appears on the face of the awards that the arbitrators had in mind and intended to apply the two main principles laid down in the previous judgment of this Board. The paragraphs following the references to these principles, except so far as they are findings of fact, are all founded on judicial utterances as to the application of those principles to be found either in the judgment of the Board or in those of the L.C.J. in In *re Lucas and Chesterfield Gas and Water Board*, 1909, 1 K.B. 16. or in other reported cases. No one has suggested that any of these paragraphs discloses a manifest error either of fact or of law on the part of the arbitrators; in fact, they are accepted as correct by those Judges in the Court of King's Bench who were in favour of the respondents. The good faith of the arbitrators is not impugned. Moreover, it is not now disputed that the subjects in question in fact possessed special advantages proper to be taken into consideration in assessing the amount of compensation.

The question of amount is one peculiarly for the arbitrators.

The main ground of attack on the awards is expressed in the contention that the same vice as was apparent in the case of the previous award is apparent in these also, viz., that there is no evidence on which arbitrators acting in accordance with correct principles could have fixed the amount they in fact fixed.

In their Lordships' opinion this contention fails. From the numerous citations from the evidence made by counsel for the appellants, it appears that there was an abundance of estimates formed on a correct view of the question to be determined. Counsel for the respondents have pointed to a number of passages which appear to be founded on the fallacious notion already condemned. In other words, the arbitrators had before them evidence both good and bad. They were at liberty to accept and act upon the good and reject the bad. It is impossible to believe that they accepted and acted upon evidence violating principles acknowledged by them as those which ought to guide them in making their estimates.

It is true that as a mere matter of figures the arbitrators did not accept any of the estimates given in evidence. But the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture. It is the price likely to be obtained at an imaginary sale, the bidders at which are assumed to ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying into it effect.

On such a question as this the arbitrators were entitled to form their own opinion and were not bound to accept any of the figures put before them in evidence.

As to the conduct of the arbitration, the arbitrators were severely criticised by counsel for the respondents for having rejected questions in cross-examination of some of the appellants' witnesses the answer to which might have shown that the witnesses could not name any persons who would have been competitors in

the imaginary auction. Whether such questions were improperly rejected or not, their Lordships cannot believe that an answer to them would have materially affected the result. Considering the nature of the circumstances and particularly that the auction in question was purely imaginary, the answer would almost certainly have been in the negative, and it was left open to the respondents to contend, as they in fact did, that there was no evidence of the existence of any named persons who might be expected to compete and to make the most of such a position.

Their Lordships are of opinion that there was no ground on which the awards could properly be set aside and that the appeal should be allowed and the cross appeal dismissed. The order of the Court of King's Bench of the Province of Quebec should be discharged and the respondents should be ordered to pay the costs here and below. It is unnecessary to say anything about the costs of the arbitration as they are provided for by statute. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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