26, 1935

No. 24 of 1934.

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ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER OF THE RAILWAY ACT, 1919;

— AND —

IN THE MATTER of Lot 31, Plan 5-A and Parcel 9-C, Plan 153-E, South of the Esplanade in the City of Toronto;

10 — AND —

IN THE MATTER OF AN ARBITRATION

BETWEEN:—

THE STANDARD FUEL COMPANY OF TORONTO, LIMITED (Claimant) *Appellant*

— AND —

THE TORONTO TERMINALS RAILWAY COMPANY - (Contestant) *Respondent*.

APPELLANT'S CASE.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal (p. 486.)
20 for Ontario dated the 24th April, 1933, allowing an appeal from an (p. 480.) award dated 30th September, 1932, of the Honourable Mr. Justice Fisher appointed by Order of the Chief Justice of Ontario, dated 20th October, 1930, to be Arbitrator to determine the compensation to be paid by the Respondent to one C. R. Boulton as owner (pp. 530-531.) and to the Appellant as tenant upon the expropriation of certain

lands in the City of Toronto, and reducing the amount awarded to the Appellant from the sum of $102,006.69 to the sum of $20,000.00.

2. The owner and the Appellant also appealed from the award of the learned Arbitrator on the ground that the compensation awarded in respect of the land alone was insufficient. The Court of Appeal dismissed this appeal and the value of the compensation to be awarded for the lands, apart from the compensation in respect of the use to which they were being put at the time of expropriation, i.e., disturbance to the business there carried on by the Appellant, and the value of the buildings, plant and equipment thereon, is not in question in this appeal. 10

3. The questions involved in this appeal are:—

(1) Whether the Appellant is entitled to be paid the value of its buildings upon the lands in question, and whether the award of the learned Arbitrator in respect thereof should have been interfered with by the Court of Appeal.

(2) What is the amount of the damage suffered by the Appellant from the disturbance of its business in consequence of the expropriation of the lands in question, and whether the amount awarded by the learned Arbitrator should have been interfered with by the Court of Appeal. 20

4. The Appellant was the Lessee of certain lands in the City of Toronto under a lease (Exhibit 10) dated 1st August, 1921, from one, C. R. Boulton, for a term of twenty-one (21) years from the 1st August, 1917, at a yearly rental of $6,000.00 in addition to the taxes on the demised premises.

pp. 515-521.

The said lease was made in accordance with the right of the Appellant to a renewal of a previously existing lease which had expired on the 1st August, 1917. There was provision for further renewals for the like terms of 21 years each at rentals to be determined in the manner provided by the lease and was "perpetually renewable at the end of each successive term". 30

p. 520, l. 12.

5. The demised premises were situate on the west side of Church Street in the City of Toronto and lay between the lands known as the Esplanade over which run the lines of the principal railways serving the City of Toronto on the north of the demised premises, and the Toronto harbour on the south. A wharf or dock was constructed on the demised premises for the purpose of facilitating the unloading of goods arriving by water. The demised premises also included certain rights to fill in the land covered by 40

water and to extend them into the Toronto harbour, thus assuring the owners and tenants right of access by water.

6. The first lease in question, of which the lease of the demised premises was a renewal, was made on the 1st August, 1875, had been renewed in 1896, and the Appellant had acquired it from the former tenants on the 21st May, 1912. p. 490. p. 495. p. 504.

From 1912, the Appellant had carried on a large coal distributing business in connection with which they had constructed buildings for storing coal with covered storage for 20,000 tons, and 10 machinery for unloading vessels by which a substantial part of its coal was transported across Lake Ontario from the United States where all the coal handled by it was mined. The cost of water transportation was substantially less than the cost of transportation by rail, and the location of the property was advantageous for the distribution of coal to the City of Toronto because it was situated near the centre of the waterfront in that part of the harbour which was close to what is referred to as the downtown area in the City, so that a very substantial part of the market would be conveniently served from the Appellant's premises. For some time prior to the 20 expropriation no other coal merchants had or could obtain premises so favourably situated with regard to the downtown area. pp. 83-87. p. 100. p. 118.

7. On the 5th November, 1926, the Respondent served notice of expropriation (Exhibit 1) under its statutory powers taking the lands comprised in the demised premises including the water lot, together with all the right, title and interest then vested in or enjoyed by the owners and tenants of the said lands, and offering to pay certain sums to the Appellant as tenant and to the said C. R. Boulton as owner, respectively. p. 524.

8. The proceedings for the determination of the compensation 30 payable by the Respondent upon the taking of the lands in question are provided for by The Railway Act (1919) 9-10 Geo. V. Chapter 68, Sections 162 to 243 inclusive. It is provided by Section 164 that the Company, (i.e., the Respondent) shall make *full compensation to all persons interested for all damage by them sustained by reason of the exercise* of the powers of the Company under the General Act or under its Special Act.

If the land owner does not within a limited time accept the sum offered by the Company, an arbitrator may be appointed (Section 219).

40 An appeal may be had from the award (Section 232).

9. The amounts offered by the Respondent being insufficient, proceedings were taken to determine the amount of compensation to be paid by the Respondent to the owner and the tenant. The Honourable Mr. Justice Fisher, one of the judges of the Court of Appeal for Ontario, was appointed Arbitrator under the provisions of The Railway Act (1919) 9-10 Geo. V., Chapter 68.

p. 529.

10. The claims of the owner and tenant, respectively, were dealt with in one proceeding, but as the owner was not carrying on any business upon the lands, and, there being no default under the lease, had no right to the Appellant's buildings, plant and equipment thereon, the learned Arbitrator was asked to determine separately:—

10 p. 474, l. 10.

1. The value of the lands, apart from the value of the buildings, plant and equipment, and the disturbance of the business conducted by the Appellant thereon;
2. The value of the buildings, and
3. The compensation for the disturbance of the Appellant's business resulting from the expropriation.

p. 480. 20 pp. 480-481.

11. The learned Arbitrator made his award on the 30th September, 1932, and for the reasons stated by him he awarded the sum of $214,637.00 in respect of the lands apart from the value of the buildings, plant and equipment and the disturbance of the Appellant's business; and $102,006.69 for the disturbance of the Appellant's business ($40,000) and for the value of its buildings, plant and equipment ($62,006.69).

p. 487. pp. 483-486. 30

12. The Respondent appealed to the Court of Appeal for Ontario. That Court, by a majority (Mulock, C. J. O., and Middleton, J. A.) disallowed the amount awarded by the learned Arbitrator for the buildings, plant and equipment and the amount awarded for business disturbance, but allowed the sum of $20,000.00 for the forcible taking of the lands and for the expense cast upon the Appellant by the change it had to make.

p. 483.

Magee, J. A., dissented, and would have allowed the sum of $50,000.00 to the tenant, apparently including both buildings, plant and equipment and business disturbance.

THE VALUE OF THE APPELLANT'S BUILDINGS, PLANT AND EQUIPMENT.

13. The Appellant, at the date of expropriation, was carrying on a long established and prosperous coal business at a location on the water-front which was close to the central downtown area of the

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City of Toronto, the largest city in the Province of Ontario, with the advantage of water transportation for its coal at a substantially lower cost as compared with rail transportation. The average turnover of this business was approximately 300,000 tons a year of a value of between $2,600,000 and $3,000,000. The Appellant brought in by boat—varying from year to year—but on an average of about 20,000 tons of anthracite coal in the summer months and stored it in the main shed on the demised premises. Most of the buildings were of wood and repairs and replacements had been made from time to time. They had been thoroughly overhauled in 1922 or 1923, but after that, as early expropriation appeared to be certain, repairs had been limited to such as were sufficient to keep the plant in operation.

pp. 83-87, 100, 118.

pp. 87, 88.

p. 113, l. 5.

There was no indication of any rot or decay in the timbers throughout the buildings.

p. 198, ll. 28-33.
p. 199, l. 6.
p. 270, l. 7.
p. 272, ll. 8-11.

14. Before the hearing by the learned Arbitrator the witness Mitchell, representing the Appellant, and the witness Hole, representing the Respondent agreed on a detailed inventory of the buildings, plant and equipment, and the replacement value of each item.

p. 567.

The replacement value attributed by them to the buildings was	$61,074.83	p. 567. p. 572.
To the machinery and equipment	$41,876.42	
Making a total of	$102,951.25	

The witness Mitchell considered that as replacements can be made from time to time of any parts requiring replacement in wooden buildings such as those in question, and as this had apparently been done, the depreciation was small and that the fair value at the time of expropriation was $92,000.00.

p. 199, l. 46 to p. 202, l. 10.
p. 257, l. 35.

The witness Hole, after making deductions for depreciation, amounting in all to $38,638.27, from the replacement value of the buildings valued them as they stood at	$22,436.56	p. 585.
After making deductions for depreciation, amounting in all to $22,306.29, from the replacement value of the plant and equipment, he valued that at	$19,570.13	p. 586.
Making his total valuation, after allowance for depreciation of	$42,006.69	

Hole's valuation is Exhibit 35.

pp. 585-586.

On cross-examination, however, Mr. Hole made certain admissions:—

p. 255, l. 43;
p. 256, l. 1.
p. 275, l. 16.

(a) That the office building "A", which he described as in pretty fair shape, was in serviceable condition, yet he deducted 60% for depreciation.

p. 257, ll. 12-18.

(b) That there was no rot in the main coal shed; that the posts were sound and had been renewed at intervals, but he deducted 66% for depreciation.

p. 287, l. 43;
p. 288, ll. 1-10.
p. 311. ll. 10-25.

(c) He had deducted in his calculation of depreciation certain items which had not formed part of the agreed replacement cost from which he purported to deduct them, e.g., he had made a deduction of $10,000.00 for the cost of a new cement floor, though the floor was included in the agreed replacement value (new) at only $1,000.00. 10

(d) He had deducted 50% for depreciation from an electrically driven drum hoist which was in serviceable condition and in actual use, because he understood it had been in use for 13 years, and "25 years is the book given life of that "type of machinery".

p. 297, ll. 9-15.

And there were other items which shewed that his estimate of depreciation was greatly exaggerated. 20

15. The learned Arbitrator thought Mr. Hole was too low in his calculation and too high in his estimates of depreciation. He thought that Mr. Mitchell was too high in his valuation, and after considering all the evidence, concluded that $62,006.69 was a fair sum to award.

p. 477, ll. 33-37.

16. Middleton, J.A., after considering the appeal of the owner, and concurring with the award so far as the value of the land alone was concerned, said:—

p. 485, l. 35.

"The value attributed to the land is as a potential site for a factory or "some other industry. It far exceeds any possible value as a coal yard. "That factory site value cannot be realized unless and until the owner of the "land is in a position to deliver it to such a purchaser as would use it for the "erection of a factory building or other factory purposes. This implies the "demolition of all the existing buildings and structures now upon the land "and reducing it to a vacant building lot. In other words, the existing "business and the buildings in connection with the existing business are "such a detriment to the value of the lot that unless and until they are "removed its full value as a potential factory site cannot be realized." 30

He thought that the buildings must be treated as scrap. 40

Mulock, C. J. O., concurred in the judgment of Middleton, J. A. p. 486.

Magee, J. A., after saying that he could see no reason for increasing the valuation of the land said:—

> "At the same time I cannot say that the tenant should not receive "compensation for his buildings, plant and equipment and on the evidence "it cannot be said that they were only fit to be destroyed and had only "scrap value. Notwithstanding changes in the coal business, there are no "indications that the tenant could not have continued to use them for its "business for many years without much outlay for repairs or renewals, and "without having to pay any rent for its own property." p. 483, l. 6.

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17. The Appellant submits that in treating the buildings as of no value, the learned Judges of the Court of Appeal have considered the value of the lands and buildings to the expropriating authority instead of the value of the lands to the owner and tenant, and that in this respect they were wrong.

The Toronto Harbour Commissioners in whom the administration of the lands on the harbour front (including, *after expropriation*, the lands in question) was vested, had adopted the policy of refusing to permit the use of any lands in or near the 20 location of the lands in question for a coal business, and in these circumstances, the buildings and plant became of no value after expropriation, but, until expropriation, the Appellant as lessee under a lease, renewable in perpetuity. had a right to continue to conduct its coal business (for which the buildings and plant were suitable) on the demised premises, and the value placed upon the lands by the witnesses called at the hearing before the learned Arbitrator was not, in fact, based upon the necessity of discontinuing the use thereof for a coal business.

18. The witness Poucher, called by the Respondent, and on 30 whose opinion the learned Arbitrator based his award, said that in considering the value which he had placed upon the land he had considered the coal business as one of the businesses for which it could suitably be used. p. 442, ll. 30-34. p. 443, l. 5.

Mr. Poucher also said that he did not consider the buildings in his valuation because he did not think they had any rental value. He said that he did not believe anybody would consider using the land with those buildings to get a fair return out of the land because he put the rental on the basis of his valuation at $9,658.00 and taxes $6,000.00, making a total of over $15.000.00. The buildings and 40 machinery were in serviceable condition and were in actual use by p. 396, ll. 3-26.

p. 118, l. 28.

the Appellant up to the date of expropriation. The Appellant had, from 1921 to 1926, been paying an annual rental, of $6,000.00 besides taxes, making a total of $12,000.00, and their business had been very profitable.

p. 24, ll. 1-20.

McBrien, a witness called by the owner as to the value of the land, also said that the coal business was one of the businesses for which the land could suitably be used.

19. When the Toronto Harbour Commissioners adopted the policy of refusing to permit the lands to be used for a coal business after the Respondent had acquired them, the buildings would then, 10 no doubt, cease to have any substantial value, but at the time of expropriation the lands could suitably be used and were being profitably used for a coal business, and for that business the buildings, plant and equipment had a substantial value which could fairly be assessed at their cost less reasonable depreciation, and it is submitted that there was no sound reason for interfering with the conclusion of the learned Arbitrator as to the amount of this value.

20. The compensation to be paid by the Respondent on taking the lands is the value to the owner and tenant, not the value to the 20 expropriating authority.

The judgment appealed from erroneously limits the compensation to the actual value of the land exclusive of the buildings.

pp. 24, 442, 443, 477, l. 1.

The value of the buildings, plant and equipment had not been taken into account by the witnesses in expressing their opinions as to the value of the lands as such, and this was clearly the learned Arbitrator's understanding of their evidence.

21. By the judgment of the Court of Appeal, the tenant has been deprived of buildings, plant and equipment which were actually and profitably used in its business, without any compensation in respect thereof whatever, notwithstanding its statutory right to 30 compensation for all damages sustained by reason of the expropriation, and it is submitted that the opinions of the majority of the Court of Appeal in this respect were wrong, and that the award of the learned Arbitrator should be restored.

BUSINESS DISTURBANCE.

pp. 83-87, 100, 118.

22. It has already been observed that at the date of the expropriation of the lands in question the Appellant was carrying on a long-established and profitable coal business for which the lands

in question were very advantageously situated and with the advantage of water transportation for its coal at a substantially lower cost as compared with rail transportation.

After expropriation of the lands in question, the Toronto Harbour Commissioners, the authority in control of the water-front of the City, would not permit a coal business to be carried on at or near the lands in question. But for this, the Appellant could have continued to carry on its business on the lands as it desired to do, and the substantial damage suffered by the Appellant as a result of its expulsion and the necessity of moving its business, was sustained by reason of the expropriation, and the Appellant is entitled to compensation therefor under The Railway Act, (1919) 9-10, Geo. V., Chap. 68, Sec. 164.

pp. 89, ll. 10-20; p. 95, l. 42; p. 96, ll. 1-8. p. 377, ll. 9-30. p. 34. ll. 5-23.

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23. Interference with water shipments of coal began in the summer of 1926 due to the operation of filling-in part of the harbour in connection with the general scheme of harbour improvement.

p. 116. l. 42; p. 117. ll. 1-5.

By February, 1927, the water in front of the Appellant's building and unloading plant had been substantially filled in.

p. 603.

The Appellant was, by arrangement, allowed to retain possession of the premises until April, 1927, in order to move its stock of coal, and thereafter, until June, 1931, it occupied, under arrangement with the Respondent, a small part of the north end of the property (but without the storage buildings) adjacent to the railway tracks by which it could bring in coal by rail. It had, however, no storage facilities, no water facilities, and no unloading plant, so that it was necessary to handle coal by hand, bringing in a few carloads at a time, dumping it on the ground and carting it off, thus incurring also the greater cost of rail as compared with water transportation.

p. 88. ll. 22-47. p. 138, l. 25.

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24. Until June, 1931, the Appellant could not obtain a suitable site with water transportation.

p. 95, l. 42; p. 96, l. 39; p. 110, l. 39; p. 165, l. 41.

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The Appellant's claim, as presented to the learned Arbitrator, was based:—

First: On the period of disorganization from 1927 to July, 1931, when it first became possible to secure an alternative site with water accommodation, and,

Second: On the disadvantage of the new location ultimately secured in 1931, as compared with the site on the land in question during the remainder of the term of the existing lease, i.e., until 1938, when an increased rental would become payable on the renewal of the lease.

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The learned Arbitrator found against the Appellant with regard to the second head of its claim and allowed nothing for that, but he held that the Appellant should be paid a fair and reasonable sum for the extra costs of conducting its business at the old site from November, 1926, until it took possession of the new site in July, 1931. p. 478, ll. 40-45.

The Appellant did not cross appeal, and the only question involved in this appeal is whether the learned Arbitrator's award in respect of the first head of its claim should be restored.

IMPOSSIBILITY OF OBTAINING NEW LOCATION UNTIL 1931.

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p. 351, l. 32. The witness, Cousins, who was the Consulting Engineer of the Toronto Harbour Commissioners, had the responsibility of planning and designing the improvements on the whole waterfront.

p. 21, l. 35. The witness, McBrien, was one of the Harbour Commissioners for three years from the early part of 1927.

p. 377, ll. 9-30. Mr. Cousins admitted that no alternative permanent sites were available or could have been obtained by the Appellant west of Parliament Street, which is near the east end of the harbour, and is upwards of three-quarters of a mile east of the Appellant's land; that the policy of the Harbour Commissioners was to lay out the coal terminals on the *south* side of what is known as the Ship Channel, upwards of $1\frac{1}{2}$ miles from the Appellant's land. p. 379.

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p. 34, ll. 28-32. The witness, McBrien, who refers to this location as Ashbridge's Bay, which was the name of that part of the locality before the harbour work was commenced, gave evidence to the same effect.

By reference to Exhibit 40 comprising several plans showing the progress of the work at the east end of the harbour in each of the years from 1926 to 1932 inclusive, it will be observed that the proposed Ship Channel is shown on each plan leading to a turning basin. The intended access to the land lying *south* of the Ship Channel was by a bridge extending Cherry Street (which affords access to the City) in a southerly direction across the Ship Channel. In the plans for the years 1926 to 1928 inclusive, there is no indication of any work in connection with the bridge extending Cherry Street. In the plans for the years 1929 and 1930, it is shown as "Bridge under construction", and in the plan for the year 1931, for the first time it is shown as a completed structure and Cherry Street

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is then shown extended through the lands lying *south* of the Ship Channel.

The new site ultimately obtained by the Appellant is shown on the plan for the year 1931, part of Exhibit 40, on the south side of the Ship Channel lying west of Cherry Street with access by the bridge across the Ship Channel.

The witness, Cousins, admits that until 1931, when the bridge was opened for traffic, the Ship Channel could not be crossed. p. 358, ll. 25-35. p. 379, ll. 5-12.

Mr. Marshall, the President of the Appellant, said that a dock p. 89, l. 22.
10 is essential for a company engaged in the downtown coal business of Toronto, and that the Appellant found that there was no site with pp. 89, 95. facilities for water transportation available for the establishment of its business until 1931.

Even when the evidence was taken before the learned Arbitrator in April 1932, the plans of the Harbour Commissioners were still unsettled. The Appellant had taken a one-year lease and had applied for a renewal, with certain options, which it was understood would be granted, but it had asked for a short-term lease with options because it could not get a long-term lease until the Harbour p. 165, l. 41.
20 Commissioners should decide how they were going to deal with the development of their lands, and they were still contemplating altering the property by putting in a slip.

All coal company tenants (except one which held under a lease made in 1917) had, at the time of the hearing, only one-year leases, pp. 358-359. because the location of coal businesses was still in an experimental p. 34, l. 28. stage.

McBrien, who was a member of the Harbour Commissioners during most of the material time, said that it was the intention of the Harbour Commissioners to confine the coal business to the area
30 known as Fishermen's Island, that is, south of the Ship Channel, and that owing to this policy, all of the leases, except the one above pp. 36-37. mentioned, which had been in existence before the policy of the Harbour Commissioners was adopted, were for terms of one year only.

Mr. Cousins admitted the policy of short-term leases. p. 358, l. 45.

It was suggested that part of the delay was due to the failure of the Appellant to settle its own plans, but Mr. Marshall, the

p. 105, ll. 1-5; p. 95, l. 42; p. 98, l. 7.
President of the Appellant, said that the Appellant could not settle its plans until the Harbour Commissioners had decided on how the property should be laid out.

p. 379.
Mr. Cousins explained that the Commissioner's plan involved an agreement between all of the coal companies, and that the difficulty was that he could not get all of the coal companies together for any one site. It was not a matter within the control of the Appellant.

p. 105, l. 4.
The Appellant could not lay out its property for its operation until it knew from the Harbour Commissioners what would be the breadth and depth of the filled-in land available. 10

p. 358, l. 30.
The bridge across the Ship Channel was not open for traffic until June 1931, and until then there was no access.

p. 109, l. 38. p. 110, ll. 1-30.
It was suggested that a site could have been obtained by the purchase of lands formerly occupied by a company known as the National Iron Works. It was only in 1929 that the Appellant knew this was available, but it was very expensive, and there was a good deal of filling to be done.

p. 355, l. 27.
Mr. Cousins at first said this was available in 1926, but subsequently admitted that he did not know this. 20

p. 355, l. 25. p. 385, l. 40.
It was purchased by the Harbour Commissioners in 1930 for $260,000.00 but there was no dock on it, and Cousins estimated that the cost of the necessary work to develop it would have been $373,000.00.

p. 356, ll. 1-5. p. 377, l. 19.
Cousins mentioned another site, subsequently acquired by the McColl-Frontenac Oil Company Limited which had been used by a company known as the Canada Coal Company in 1926 *temporarily*, but he subsequently admits that the Harbour Commissioners would not have granted permanent sites.

No evidence can be found in the record to suggest that a suitable site for the permanent establishment of a coal business on 30 which dockage was available for water transportation could have been had earlier than 1931. All of the suitable land, except that formerly owned by the National Iron Works, was owned or controlled by the Harbour Commissioners, and the National Iron Works property would have involved an expenditure of more than $600,000.00 in the purchase and subsequent development of it.

In these circumstances, it is submitted that the learned Arbitrator was right in finding that, having been expelled from the lands in question by the expropriation, and having been unable to obtain a suitable alternative site until 1931, it was proper that he should consider this as an element in ascertaining the damage sustained by the Appellant by reason of the expropriation.

THE DAMAGES SUSTAINED.

Mr. Marshall, the President of the Appellant, gave evidence as to the increased expense of operating under the conditions under which the Appellant was compelled to operate during the period from 1927 to 1931 pending the location at the new site, and Mr. Mitchell, an engineer employed by the Appellant, made a detailed calculation of the specific additional costs involved which he summarized in Exhibit 19. p. 100. p. 553.

The additional cost due to rail as compared with water transport amounted to ... ... $64,322.79 p. 555.

and the additional cost of delivering coal from other yards to the downtown area which had formerly been served from the Church Street yard, i.e., the lands in question, amounted to ... ... 5,717.61 p. 559.

Mr. Mitchell also calculated the additional cost of delivery from the new site (Ashbridge's Bay yard) to the downtown area after July 1931, but this claim is not now in question in this appeal.

The statements of fact in this Exhibit were verified by Mr. Marshall, and the figures taken from the Appellant's books were verified by the witness Fielden one of the Appellant's auditors. p. 254, ll. 1-20.

Mr. Mitchell verified from the Appellant's books the cost of transportation by water during the year ending March 31st, 1927, giving the details, and ascertained the current Railway freight rates during the same period, and found that transportation by rail from the mines to the Appellant's premises in Toronto was ·68c. per ton more than by water. He ascertained the average annual tonnage imported by the Appellant by water in the period 1921 to 1927 and found that on this basis the additional cost per year from 1927-1931 due to the loss of facilities for water transportation amounted to $14,843.72, or a total for the period of $64,322.79. p. 181, l. 5. p. 131. p. 555. p. 555.

By a similar calculation shown in detail in Exhibit 19, Mr. Mitchell calculated the additional cost of delivery from the pp. 556-559.

Appellant's outlying yards to the downtown area, formerly served from the Appellant's Church Street Yard, which involved an annual increased cost to the Appellant of $1,345.32, or a total for the period of $5,717.61.

p. 559.

In reading these statements, it is important to bear in mind that they relate to fiscal years ending on the 31st March, so that each figure relates to nine months of the previous calendar year and three months of the calendar year in which the fiscal year ends.

When these calculations were submitted to the criticism of Mr. Nash, an accountant who investigated the Appellant's books for the Respondent, he calculated that there was an error of ·8c. in the excess costs of rail over waterborne transportation.

p. 450, l. 27.

This would reduce the excess cost from .68c. to .60c., and if Mr. Nash is right, the difference would be $1,600.00 a year, which would reduce the total increased cost from $64,322.79 to about $57,000.00.

p. 454, ll. 15-25.

Mr. Nash also suggested that there might have been some extra handling and that the claim set up was on the basis of one-third of a year for the three months' period to the 30th June, 1931, instead of one-quarter as it should have been.

p. 454, l. 24.

He admitted that the effect of this on the whole figure was trifling.

p. 454, l. 24.

In these circumstances, it is submitted that the award of $40,000 by the learned Arbitrator on this claim was a moderate one The Appellant was expelled from an advantageous site, where it had for many years conducted a profitable business, in closer proximity to its customers in an important area of the City than any of its competitors and with facilities for water transportation, thus avoiding a very substantial difference in the cost of rail as compared with water shipments.

Owing to the policy of the Harbour Commissioners and their control over the waterfront, it was not until access was afforded to the site to which the Appellant moved in July, 1931, that it could get even temporary premises where it would have had the advantage of water transportation.

In addition to the specific losses which have been shewn from its books and verified, subject to the relatively small reduction suggested by Mr. Nash and no doubt considered and given effect to

by the learned Arbitrator, it had, in the meantime, to handle its coal without equipment or machinery, necessarily involving greater expense.

The learned Arbitrator considered that the Appellant had suffered no substantial damage in locating at its new site, but that it must be paid a fair and reasonable sum for the extra costs of conducting its business at the old site from November, 1926, until July, 1931, and that consideration must also be given to the fact that for the period mentioned there was a serious disruption of the Appellant's business and also the expense and trouble incidental to changing from one site to another. He found it difficult to determine with any certainty what sum for damages for the business disturbance and disorganization should be allowed, but after careful consideration thought a fair and reasonable sum would be $40,000.

pp. 478, 479.

He stated that he had considered amongst other factors the following:—

p. 479.

A. The importance of the location of the lots and water-borne coal traffic and the different uses the lots could be put to, apart from a coal business, and the riparian rights.

B. The lessened expense of bringing in anthracite coal by water as contrasted with rail and also of coke and what the storage facilities for these were: also that all the bituminous coal came in by rail and was handled without storage.

C. The proposed extension had the Fuel Company continued and were not disturbed, of the business out to the new pier and the expense thereof including the cost and expense of the "fill" and the passage over or under Lake Street and the rights of closing that street, etc.

D. The difficulties, delays and loss of time connected with the entrance to and from the Esplanade over the railway tracks to the Fuel Company's property caused by the frequent passing and repassing and the stoppage of trains on the streets.

E. The changed and changing conditions of the down-town area and the increased consumption of soft coal

as against anthracite in heating, especially of large buildings.

F. The new site with an up-to-date dock, deeper water, larger boats and the new and less expensive method of unloading and the doing away with buildings for storage, etc.

G. The increased cost to the claimants connected with the haulage and delivery of coal from the new site to the claimant's customers in different sections of the City.

H. The probability of new customers arising in the area of the new site. 10

I. The evidence of the experts called by the claimants and contestants having reference to the value of the lot to the owners in 1926 and the comparisons in values of different properties situate here and there as outlined by the different witnesses and of the evidence given in connection with the values—having regard to the age and state of repair and their usefulness to the owners—of the buildings and machinery, plant and equipment. 20

pp. 485, 486.

In the Court of Appeal, Middleton, J. A., with whose judgment the Chief Justice of Ontario agreed, was of opinion that the value attributed to the land was as a potential site for a factory or some other industry and that it far exceeded any possible value as a coal yard, and that to allow the increased factory site price and then to allow a price for the detrimental building and business removal is in effect to make the purchaser pay twice; that the buildings should be treated as scrap; that as a coal yard the property was not worth two-thirds of the price awarded; that the tenant should be allowed something for the forcible taking and for the expense cast upon him 30 at the present time by the change he has had to make and allowed the sum of $20,000, feeling that he was erring considerably on the side of liberality; that the amounts allowed both for buildings and business injury and disturbance were much larger than the evidence warrants.

p. 483.

Magee, J. A. did not refer to business disturbance except that after expressing the opinion that the tenant should receive some compensation for his buildings thought that the amount awarded on the evidence was too liberal and considered that an allowance of

$50,000 to the tenant to include business disturbance would be a proper and more just amount to be paid by the Expropriator.

The Appellant submits that the appeal should be allowed and the award of the learned Arbitrator restored for the following, among other

REASONS.

1. Because the compensation awarded should have been based on the value of the lands and premises to the owner and tenant but the Court of Appeal's judgment is, in effect, based on the value to the expropriating authority.

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2. Because the Court of Appeal was wrong in awarding no compensation for the buildings of the Appellant which were in serviceable condition and in actual use at the time of the expropriation.

3. Because the Court of Appeal was wrong in refusing to allow the Appellant the damages for the disturbance and removal of its business caused by the expropriation of the lands which it was occupying.

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4. Because the majority of the learned Judges in the Court of Appeal were wrong in thinking that the value attributed to the site was only as a potential site for a factory or some industry other than the coal business because the use of the lands in question for a coal industry was one of the possible uses to which the lands could be put and on which the valuations of the witnesses were based.

5. Because there was no evidence on which the learned Judges could find that as a coal yard the property was not worth two-thirds of the price awarded.

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6. Because the Court of Appeal was wrong in reversing the considered award of the learned Arbitrator who had had the advantage of examining the old site and the new site and hearing the witnesses.

GLYN OSLER.

No. 24 of 1934

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER OF THE RAILWAY ACT, 1919;

AND IN THE MATTER of Lot 31, Plan 5-A and Parcel 9-C, Plan 153-E, South of the Esplanade in the City of Toronto;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN :

THE STANDARD FUEL COMPANY OF TORONTO LIMITED (Claimant) *Appellant*

— AND —

THE TORONTO TERMINALS RAILWAY COMPANY - (Contestant) *Respondent.*

APPELLANT'S CASE.

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