50, 1937

In the Privy Council.

No. 89 of 1936.

CASE FOR THE APPELLANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER of the Act 55 Vict. (Ont.) Chap. 96 and the Schedules thereto,

and

IN THE MATTER of an Arbitration thereunder

BETWEEN

INTERNATIONAL RAILWAY COMPANY - - - *Appellant*

AND

THE NIAGARA PARKS COMMISSION - - - - *Respondent.*

CASE FOR THE APPELLANT.

1. This is an appeal from the judgment of the Court of Appeal for Ontario (Mulock C.J.O., Masten, Middleton and Henderson JJ.A) dated 31st December, 1935, dismissing (subject to a variation) an appeal from an award of arbitrators appointed under an agreement dated 4th December, 1891, to determine the compensation to be paid to the Appellant for its electric railway (referred to in the agreement as the " high level railway ") along the top of the bank on the Canadian side of the Niagara River between Chippawa and Queenston which was taken over by the Respondent on 1st September, 1932, on the terms of said agreement. A proposed railway referred to in the agreement as the " low level railway " was not built, and did not enter into the arbitration. RECORD. p. 51. p. 1.

2. The award was signed by Hon. Robert Smith (Chairman) and Mr. G. W. Mason, K.C., two of the arbitrators. Mr. R. S. Robertson, K.C., the other arbitrator, did not join in the award though present at the making thereof. The majority gave written reasons for the award and the dissenting arbitrator gave written reasons for his dissent. The award was originally for $179,104 but it was amended by the Court of Appeal mainly to correct p. 4. p. 9. p. 26. p. 51.

RECORD. an error made by the arbitrators as hereafter mentioned. The dissenting arbitrator would have allowed $1,069,652.

p. 293, ll. 3–6. 3. An appeal lies from the award on any question of fact or law and the Court of Appeal may amend the award or refer it back to the arbitrators with such directions as to law or fact as may be deemed proper.

p. 52, l. 24. 4. The Respondent by leave of the Court of Appeal given at the hearing cross-appealed but the cross-appeal was dismissed and no question now arises with regard to it.

p. 9, l. 10. 5. The differences between the arbitrators were as to the method or principle to be applied to fixing compensation and as to the items of property to be included. The majority valued the various component parts taken p. 26, l. 36. separately and not as a railway while the dissenting arbitrator valued the property as an electric railway with its incidental equipment and works and applied reconstruction cost less depreciation. He also included items of property which were excluded by the arbitrators who signed the award. p. 25, l. 16. The arbitrators all agree that if the dissenting arbitrator applied the right principle and included the right properties his amount, $1,069,652, is p. 25, l. 25. substantially correct. The majority arbitrators fixed the reconstruction cost less depreciation of the items they included in the award at $967,592 p. 25, l. 30 to p. 26, l. 4. and of the items they excluded at $101,689, making together $1,069,281. Full details of their method of computing the value of omitted items were not available until they were supplied on the argument in the Court of p. 5. Appeal at the request of the Court and some error has crept into the figures which may be disregarded, the Appellant accepting the lower figure of $1,069,281 as correct.

p. 4, l. 20. 6. The award did not include any allowance for interest from 1st September, 1932, when possession was taken, to the date of the award because as stated in the award the arbitrators who signed it were of opinion that " this is a matter beyond our jurisdiction." The dissenting arbitrator in his reasons made no reference to interest.

p. 45, l. 21. p. 48, l. 21. p. 48, l. 5. 7. The Court of Appeal approved the scrap or salvage basis of valuation but they deducted $11,440 to correct an error made in the award; added $1,100 for certain lands (parcels 121(a) and 121(b)) and directed the inclusion of an amount to be fixed on the scrap basis by the arbitrators on a reference back for items relating to (1) Lewiston Bridge Line, and (2) Bridge Number 8. They suggested $500 might be allowed for each of these two items. It is obvious that the Court of Appeal treated the first item, the Lewiston Bridge Line, as referring to a bridge when in reality it referred to the grading, track, poles, fixtures and distribution system of a line leading to the bridge but not the bridge itself.

8. The Appellant raises the following questions on this appeal: (1) Did the majority of the arbitrators adopt the right principle in fixing compensation? (2) Did they exclude items of property that should have

been included? (3) Should they have included interest at the legal rate of 5% from the date possession was taken? (4) Should the Court of Appeal have amended the award in manner hereafter mentioned as to costs?

9. The Respondent controls for the Government of Ontario a large area of lands along the Niagara River above and below Niagara Falls which was selected for and was developed as a public park under 48 Vic. (1885) cap. 21 and 50 Vic. (1887) cap. 13. The Respondent soon realized that if the Park was not to become very largely a charge on the revenues of the Province projects to raise revenue must be pushed forward and they had protracted negotiations for the disposal of a franchise to construct an electric railway along the bank of the river and on December 4th, 1891, it entered into the agreement with Mr. E. B. Osler and others under which the railway was established. In 1892 the Legislature by 55 Vic. cap. 96 confirmed the agreement and incorporated the Niagara Falls Park and River Railway Company to take over the agreement and to construct and operate the railway.

p. 189, l. 30 to p. 192, l. 15.

p. 287.

p. 277.

10. By the agreement of 4th December, 1891, the Company, of which the Appellant is the successor, was licensed to construct an electric railway on lands of the Commissioners and other lands to be acquired by it, and it agreed to construct, equip and operate a railway between Chippawa and Queenston with sufficient sidings and equipment to meet the development of traffic. By clause 3 the structures were to be of materials and according to plans and specifications approved by the Commissioners and the Commissioner of Public Works of Ontario. By clause 8 the Company was to pay the Commissioners $10,000 for the right of way over a Chain Reserve along the bank and for the benefit of certain contracts made by the Commissioners with various land owners. By clause 10 the Company was to acquire certain inclined railways and lifts already constructed paying what might be fixed by agreement or by arbitration. By clause 15 the Company was to have the railway ready for traffic by 1st September, 1892. By clause 16 construction was to commence when the location was decided on and the plans and specifications were approved; and the right to operate was to continue for 40 years from 1st September, 1892, subject to a renewal at the request of the Company for a further 20 years. By clause 17 if the Commissioners demanded an increased rental for the period of 20 years, the amount to be paid was to be ascertained by arbitration but was not to be less than the rental for the first period, which by clause 19 was $10,000 a year. By clause 26 at the end of the franchise, the Company, if unwilling to renew, was to be "duly compensated by the Commissioners for their railways, equipment, machinery and other works.....but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement or in case of difference by arbitration." The Commissioners were to be entitled to possession at the end of the term though the compensation was not fixed, but the railway was to be subject to liens and charges not in excess of the compensation in favour of bondholders and also in favour of the Company for the compensation. By

p. 289, l. 13.

p. 289, l. 32.

p. 290, l. 14.

p. 290, l. 44.

p. 292, l. 16.

p. 292, l. 23.

p. 292, l. 33.

p. 295, l. 14.

p. 295, l. 27.

RECORD. clause 29 the railway, equipment and works, though on property of the
p. 296, l. 5. Commissioners, were to be vested in and to be the property of the Company, the whole at the end of the franchise to become the property of the
p. 296, l. 43. Commissioners, subject to payment of the compensation. By clause 32 the Company's passenger fares were to be subject to approval by the Commissioners who could not insist on a tariff that would prevent the Company operating at a fair profit.

p. 277, l. 33. 11. By the Statute of 1892, 55 Vic. cap. 96, the agreement, which was Schedule " B " thereto, was confirmed and the Company, which was
p. 280, l. 25. to construct the railway, was incorporated with authority (sec. 8) to issue $1,000,000 capital stock, the proceeds to be applied in payment of the expenses of procuring the Act, making the surveys, plans and estimates
p. 283, l. 4. and in constructing and maintaining the railway. Section 18 authorized the issue of bonds to raise money for prosecuting the undertaking, the amount of the issue not to exceed $45,000 for each mile of railway and the " actual cash value of the wharves, piers, docks, steamers, vessels and other water craft, incline railways, elevators and hotels of the Company and the equipment thereof respectively." The bonds were to be limited so as not to interfere with section 26 of the agreement and the amount
p. 283, l. 14. of compensation under that section was not to " include the value of hotels, steamers or the value of any other equipment or works than such as may be incidental to the use of electric power, nor any excess of the value of the class of work prescribed by the plans and specifications which shall have been approved by the Commissioner of Public Works, nor the cost or value of elevators or incline railways, except the elevators or incline railways expressly authorized to be built or acquired under the agreement, nor of any other works not expressly and specifically provided for by the
p. 279, l. 45. said agreement." Section 5 incorporated the provisions, with certain exceptions, of the general Railway Act of Ontario (R.S.O. 1887, cap. 170
p. 280, l. 21. now R.S.O. 1927, cap. 224). By section 7 the railway was to be operated by electric power only and by section 21 the plans and maps with profiles and cross-sections and specifications of the railway and detailed drawings of carriages and coaches were to be approved by the Commissioner of Public Works.

12. The railway was first constructed as a single track line of approximately 11 miles. Under agreement dated 27th March, 1894, the Railway
p. 178, l. 35. Company agreed to double track the line in accordance with a memorandum annexed to the agreement, the work to be performed in the manner required by the memorandum and the plans and drawings referring thereto and to the complete satisfaction of the Commissioner of Public Works for Ontario. No alterations from the works described were to be permitted unless approved by the Commissioners by a resolution of the Board communicated to the Railway Company in writing signed by the Chairman.

p. 194, l. 21. 13. The double track railway as constructed and operated included the necessary switches, turn-outs, culverts and overhead distribution

system along the River between Queenston and Chippawa with connections with the Gorge Route on the American side. The works were constructed partly on lands owned by the Appellant, partly on the Chain Reserve on the west bank of the Niagara River, partly along the streets of the City of Niagara Falls and a portion through the property of the Respondent known as the Park proper. There was a power house in the Park proper with necessary intake, wheel pits, machinery to generate power for operating the railway and the equipment necessary to such an undertaking, and the incline railways at the west bank of the River. RECORD.

14. In the reasons for the award, after discussing various clauses of the agreement and sections of the statute and various authorities cited, the arbitrators say:

> "We are of opinion therefore that these cases have no application to the question involved in this arbitration because by the terms of the agreement here consideration of profits is not excluded as an element in fixing the value." p. 22, l. 34.

and further:

> "The railway, therefore, at the time that it was handed over to the Parks Commission was of no value for operation as a railway to the Railway Company or the Parks Commission or to anyone else. p. 23, l. 14.
>
> We have therefore concluded that the compensation to be paid by the Parks Commission to the Railway Company for its railway, equipment, machinery and other works is not to be arrived at on the basis of reconstruction cost less depreciation, but by applying various considerations to the various component parts of the property of the Railway Company in an endeavour to arrive at the full value to be attached to each." p. 23, l. 18.

15. The majority arbitrators value the component parts applying various considerations to these parts as follows:

> "(1) With respect to such items as track, distribution system, machinery and rolling stock, the value is the amount that could be realized from the disposal thereof. p. 23, l. 24.
>
> (2) With respect to the incline railways which the Commission continued to operate after August 31st, 1932, we have taken into consideration the reproduction cost less depreciation, their earning power and other circumstances affecting their value. p. 23, l. 26.
>
> (3) With respect to items such as paving, retaining walls and culverts, we have regarded them as adding value to the property of the Commission and have allowed for them on the basis of reconstruction cost less depreciation. p. 23, l. 29.
>
> (4) As to certain other items, including the power house building and a portion of the grading, we have regarded them as adding value to the property of the Commission and have allowed what we think is their full value on this basis. p. 23, l. 32.

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p. 23, l. 36.

(5) With respect to the lands, we have allowed what we consider to be the full value thereof as of the 31st day of August, 1932, but not on a reconstruction basis."

p. 23, l. 39.

Applying all these various considerations to the property in respect to which compensation is to be allowed, they arrive at the amount of their award, namely, $179,104.00.

16. Having discarded reconstruction cost less depreciation as a basis for fixing compensation they say :

p. 25, l. 16.

" Having concluded that the proper basis of fixing the compensation is not by ascertaining the reconstruction cost of the railway in 1932 as a whole less depreciation, we think it is a question of law as to whether or not this conclusion is right and we have thought it advisable, in order to prevent unnecessary expense to the parties, to fix the amount of the reconstruction cost and the depreciated value, should it later be determined that that basis should have been adopted. We find that the reconstruction cost of the railway as of August 31, 1932, on the basis urged on behalf of the Railway Company is the sum of $1,414,684, and that the depreciated value thereof as of the said date was $967,592.00."

p. 25, l. 30.

17. In fixing this amount they exclude the disputed items to which reference will be made but they fixed the reproduction cost of them at $141,683 and the depreciated value at $101,689, making the total depreciated value on that basis of both included and excluded items $1,069,281 being $371 less than the sum found by the dissenting arbitrator to be proper compensation for the railway, its equipment and works.

p. 28, l. 30 to p. 29, l. 14.

18. The dissenting arbitrator gave reasons for his dissent as to the method of fixing compensation and as to his reason for including the items excluded from the award. On the question of principle he said :

" The undertaking provided for in the Agreement of December, 1891, was in the nature of a joint venture from which each party expected certain benefits, and in which each of them assumed definite obligations. So far as the Park Commissioners were concerned the railway was part of a larger scheme of development. The Commissioners needed more revenue and hoped to get it by establishing at various points along the railway, restaurants and other places where visitors would be likely to spend money. The railway would bring the people who would become the Commissioners' customers. The Commissioners invested a great deal of money in these various enterprises and, as expected, the revenue from them became substantial. The continued operation of the railway was vital to these other ventures of the Commissioners and they accordingly stipulated that the Company should operate the railway during the term agreed upon and that the railway should vest in the Commissioners at the end of the term—original or renewed. As this

bound the Company to maintain and operate the railway for 40 years, whether it was profitable or not, it was important that the Company should be assured that at the end of that period it would be paid for the railway on turning it over to the Commissioners. The title of the Company to the railway was always subject to the terms of the agreement (see Paragraph 29) so that it was never the absolute owner and the Commissioners had from the first a real title in the nature of a revisionary interest in the railway. These co-relative rights, therefore, on the part of the Commissioners to the continued maintenance and operation of the railway and then to its ownership, and on the part of the Company to receive compensation for the railway as a railway constructed and maintained by it under the agreement, have their origin in the Agreement of 1901 and are to be understood and to be enforced as the parties then intended. The later fortunes of the venture do not impair nor alter the rights and obligations of either party."

19. At the request of the Court of Appeal the arbitrators who signed the award supplied the three Schedules to the award, Schedule "A" showing how $179,104.00 was reached. Schedules "B" and "C" giving itemized statements of reconstruction cost ($1,414,684) and the depreciated value on that basis $967,592, also additional memoranda showing why certain properties were omitted from the award. pp. 5, 6, 7, 8 and 9.

20. Hon. Mr. Justice Masten who delivered the unanimous judgment of the Court of Appeal, while stating that—

> "It is not in controversy that what passed to the Respondent Commissioners from the Appellant claimant was the 'railway with its equipment, machinery and other works' *in situ* capable of operation as a going concern." p. 42, l. 1.

proceeded to discuss the following outstanding features to be considered in fixing compensation in this case. First, that the taking is not compulsory because the franchise of the Appellant ended in compliance with the terms of the original agreement; p. 41, l. 24. Second, the right of the arbitrators to consider losses in operation during the forty year period, not being expressly excluded by the agreement or by the statute; p. 41, l. 27. Third, that the railway, by reason of changed conditions in transportation had become obsolescent and incapable of earning the cost of operation or of competing satisfactorily with other modes of transportation; p. 41, l. 32. Fourth, that the Statute (55 Vic. cap. 96) incorporating the railway, relates exclusively to the incorporation of the railway its powers and limitations, and has no bearing on the question of compensation. The principle that should govern the fixing of compensation is stated as follows: p. 41, l. 36.

> "The basis of compensation applicable under this agreement is analogous to that which is applied as between landlord and tenant where buildings are erected by a tenant and at the conclusion of the p. 45, ll. 2 to 37.

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tenancy are taken over by the landlord, that is at their value to the landlord. Here the lands on which the railway was constructed remained at all times the property of the Park Commissioners, all that the railway had was an easement to build and operate its railway for which it paid a rental of $10,000 per annum. The railway and its equipment passed to the Parks Commission at the expiry of the franchise with the right to the railway of compensation like the right of the tenant to compensation for his improvements. For these reasons I think that this case falls outside the well established law that compensation is to be measured by the value to the owner and not the value to the taker and that under the terms of this agreement compensation is here to be awarded on the footing adopted by the arbitrators, that is, the value to the Respondent Commissioners of the component parts when broken up."

21. The arbitrators in their award excluded the following items. They have not given the value of them on a scrap basis but they have furnished the estimated reproduction cost of them and the depreciated value on that basis, the latter as follows :

p. 25, l. 30.

Land		Reproduction Cost less Depreciation
1. Parcels 121(a) - - - 121(b) - - -		$1,100·00
2. Items relating to the Lewiston bridge line - - - - -		9,375·00
3. Items relating to C.N.E. turn-out in the City of Niagara Falls - - - - -		405·00
4. Bridges Nos. 1 to 7, additional amount if concrete not substituted for masonry - -		17,886·00
Railway bridge No. 8,		
5. Substructure - - - -	3,055·00	14,577·00
6. Superstructure - - -	11,522·00	
Highway bridge No. 8a,		
7. Substructure - - - -	6,587·00	11,440·00
p. 26, l. 1. 8. Superstructure - - -	4,853·00	
9. Power House if concrete not substituted for certain portions of masonry - - -		24,044·00
10. Intake - - - - - -		22,862·00
	Total	$101,689·00

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22. The Court of Appeal held that items 1, 2, 5 and 6 should be included p. 48, l. 5.
in the award but only on a scrap basis. The value of item 1, relating to the land, on that basis is admitted by the Respondent to be $1,100, the same as the depreciated reproduction cost. The remaining items 3, 4, 7, 8, 9 and 10 were disallowed by the Court of Appeal on the ground that they could have no value to the Respondent as scrap but the Court suggested that on a reconstruction basis the conclusion reached might well have been different. Items 4 and 5 do not in reality relate to excluded items. They merely exclude the difference between what would be the reproduction cost if concrete were used instead of masonry. The Appellant submits there is no justification for excluding this difference in value and further submits that all the above items should be included in the award. The dissenting arbitrator gives adequate reasons for including them.

23. In Ontario interest is regulated by Section 34 of The Judicature Act, R.S.O. 1927, cap. 88, which reads :

> Interest shall be payable in all cases in which it is now payable by law and in which it has been usual for a jury to allow it.

This section is a reproduction of a proviso contained in a pre-Confederation Statute of Upper Canada, 7 Will. 4 cap. 3, sec. 20. In *Re City of Toronto and Toronto Railway Company*, 54 O.L.R., page 561, a case in which arbitrators had included interest in the award, Hodgins, J. A., who delivered the main judgment said (p. 567) :

> " Interest. In view of the fact that possession was taken of all the property of the railway company, and that the city has received whatever profits accrued by the operation of the railway, it would seem equitable that interest should be paid from the time of taking possession. See *Rhys* v. *Dare Valley Railway Co.* (1874), L.R. 19 Eq. 93; In *re Piggot and Great Western Railway Co.* (1881), 18 Ch. D. 146, followed in Ontario in *Toronto General Trusts Corporation* v. *White* (1902) 5 O.L.R. 21. See also *Re White and City of Toronto* (1917), 38 O.L.R. 337. But there is no warrant for including it in the award of the arbitrators. The Interest Act of Ontario and the practice established here permits the Court to adjudge payment of interest in certain cases, and to the Court they must apply. This provision should be struck out."

On an appeal to His Majesty in His Privy Council in the same case (1925 A.C. 177) Viscount Cave said (p. 193) :

> " The Company claimed that the award of the arbitrators, so far as it allowed interest on the value of the property taken over from the date when possession was taken to the date of the award, should be restored. Upon this point their Lordships agree with the view taken by the Supreme Court. The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established, and has on many occasions been applied to compulsory purchases;

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and their Lordships are not aware of any circumstances which would prevent that principle from applying in the present case. But the duty of the arbitrators in this case was not to determine all the rights of the company, but only to ascertain the actual value of certain property at a certain time; and it is a truism to say that such value cannot include interest upon it. The liability for interest depending upon the principle stated lies outside of the arbitration for its enforcement."

The arbitrators in the present case adopted the view that they had no jurisdiction with regard to interest and that payment of interest must be enforced in a separate proceeding. Interest is an important item and it is not clear that the judgment delivered by Viscount Cave would have applied where the arbitrators were to fix compensation. The Respondent submits that the judgments in the *Toronto Railway* case are not conclusive on a like question raised in the present proceedings for the arbitrators here were to fix compensation and the Respondent submits that it should include interest from the date possession was taken. The matter is of importance in the view that if it is not included an objection might be taken later in another proceeding to collect it, that the sum mentioned in the award as compensation must be taken to include everything payable as of the date of the award. The effect of the above section was considered in *Toronto Railway Company* v. *City of Toronto* (1906 A.C. 117).

p. 4, l. 31. 24. The award directed that the Respondent should pay to the Appellant its " taxable costs " of this arbitration excluding therefrom such p. 52, l. 19. costs as have been the subject of agreement between the parties. The Court of Appeal amended this provision by directing payment of the Appellant's costs of the arbitration " incurred with relation to matters upon which it had succeeded excluding therefrom such costs as have been the subject of agreement between the parties." The Arbitration Act of Ontario R.S.O., 1927, cap. 97, which governed the arbitration, except as its provisions were modified by the agreement and statute, provides in Schedule " A " clause (1) as follows :

> The costs of the reference and the award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid.

The Appellant submits that the Court of Appeal erred in interfering with the discretion exercised by the arbitrators.

25. The Appellant submits that the appeal should be allowed and the award should be amended or remitted for the following among other

REASONS.

(1) Because the arbitrators who signed the award and the Court below were not in agreement in fixing compensation on scrap value.

(2) Because the railway, its equipment and works should have been valued as plant *in situ* ready for immediate operation.

(3) Because reproduction cost less depreciation was the proper basis to apply.

(4) Because the Respondent agreed to take over and to pay compensation for a railway with its equipment and works located and built in accordance with the Respondent's requirements.

(5) Because the railway was in good operating condition and entirely suitable to perform the services for which it was designed and constructed.

(6) Because by the agreement the Appellant could be required to operate for 40 years on a tariff of tolls yielding a fair profit only and for a return of capital depended entirely on its right to be duly compensated for the railway.

(7) Because the method adopted to fix compensation is at variance not only with the agreement but also with section 18 of the statute confirming it.

(8) Because the dissenting arbitrator was right in the conclusion he reached for the reasons he assigned.

(9) Because the items excluded from the award were part of the assets for which compensation was to be paid.

(10) Because the award should include interest from the date possession was taken at the legal rate of 5% per annum.

(11) Because compensation should be fixed at $1,069,281 representing reconstruction cost less depreciation and $146,623 . 32 for interest at 5% from 1st September, 1932, to the date of the award, making together $1,215,904 . 32.

(12) Because the disposition made of costs by the award should not have been altered by the Court below.

W. N. TILLEY.

D. L. McCARTHY.

In the Privy Council.

No. 89 of 1936.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

In the MATTER of the Act 55 Vict. (Ont.) Chap. 96 and the Schedules thereto,
and
In the MATTER of an Arbitration thereunder

BETWEEN

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Appellant

AND

THE NIAGARA PARKS COMMISSION
Respondent.

CASE FOR THE APPELLANT.

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