IN THE MATTER OF THE PETITION OF RIGHT OF

1917
Aug. 30.

EDWARD MAXWELL,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Harbours—B. N. A. Act—Provincial grant—Expropriation—Wharf—Compensation.

Bedford Basin, being a public harbour at the time of Confederation and the property of the Province of Nova Scotia, passed to the Dominion by virtue of the provisions of the *British North America Act*. A subsequent provincial grant of a water-lot thereon is therefore void and confers no title. *Fisheries Case* [1898], A.C. 700; *Attorney-General v. Ritchie* (*English Bay* case), 52 Can. S.C.R. 78, 26 D.L.R. 51, followed; *The King v. Bradburn*, 14 Can. Ex. 419, referred to.

2. Upon the facts established in evidence, there was no dispute that the suppliant was entitled to compensation for the expropriation of the wharf and for the deprivation of the right of way to and from the wharf over the railway tracks. *Held*, that under the circumstances of the case, the suppliant was entitled to compensation for such expropriation and for the deprivation of the right of way; but the loss of business not attributable to the taking of the wharf, or the loss of profits in connection with a business in anticipation but not actually embarked on, were not elements of compensation.

PETITION OF RIGHT claiming compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N. S., September 21, 22, 30, 1916.

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Lovett, K.C., and *Barnhill,* for suppliant.
T. S. Rogers, K.C., for respondent.

CASSELS, J. (August 30, 1917) delivered judgment.

This is a petition of right filed on behalf of Edward Maxwell claiming compensation for lands expropriated by the Crown for the construction of works at Halifax in connection with the Intercolonial Railway. The suppliant claims $150,000. His claim is of a three-fold character.

First, for land expropriated bounded by high water mark on Bedford Basin.

Second, for a water lot granted to him by the Crown represented by the Province of Nova Scotia dated 1st April, 1873.

Third, for damages to his property to the west of the railway used by him for manufacturing purposes and which, he alleges, is destroyed for such purposes by reason of his access to the water being cut off.

A further claim is put forward, namely, that even if his title to the water lot is void, he had title to the wharf and a right-of-way over the railway to reach the wharf.

By the defence the Crown admits the title of the suppliant to the land east of the railway bounded by the high water of Bedford Basin. As to the water lot, the contention of the Crown is that Bedford Basin was at the date of the *Confederation Act,* 29th March, 1867, a public harbour and became the property of the Dominion, and that the grant of the water lot by the Province of Nova Scotia after Confederation is void.

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The Crown offers the sum of $915.75 as full compensation.

While denying the title of the suppliant to the water lot, included in this tender of $915.75 is the value of the wharf as estimated by the Crown valuators.

It becomes necessary to consider the question whether what is termed Bedford Basin was or was not at the date of Confederation a public harbour. If the answer is in the affirmative, then this public harbour became the property of the Dominion by virtue of the provisions of the *British North America Act* and the grant of the water lot by the Province of Nova Scotia passed no title, and the suppliant would not be entitled to any compensation for the land comprised in this water lot except as to the wharf, title to which may have been acquired otherwise than by this grant. This question I will deal with later.

What constitutes a public harbour in contemplation of the *Confederation Act* is a question of difficulty. I had occasion to consider the question in the case of *The King v. Bradburn* (1). On appeal to the Supreme Court of Canada this case was affirmed. I do not think the judgment of the Supreme Court is reported. It was necessary to pass upon this point as it affected the question of compensation.

In a later case of *Attorney-General of Canada v. Ritchie Contracting and Supply Co* (2), the question has been elaborately discussed by the learned judges of the Supreme Court. This case is inscribed for hearing before the Board of the Privy Council, and possibly some more light may be thrown on the sub-

(1) 14 Can. Ex. 419 at p. 429.
(2) 52 Can. S.C.R. 78; 26 D.L.R. 51.

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ject. The decision of the Supreme Court, I think, makes two points clear. First, to be a public harbour under the provisions of the *Confederation Act* it must have been a public harbour at the time of the enactment, and second, that a potential harbour, not a harbour at the date of the *Confederation Act,* but subsequently becoming a public harbour, is not covered by the statute.

In the case of *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (supra) the courts were dealing with English Bay outside of Vancouver Harbour. There is no similarity between English Bay and Bedford Basin. At the time of the passing of the *Confederation Act,* according to the views of the Judges who gave reasons in that case, English Bay was in no sense a public harbour. It was nearly unknown and practically could at the outside be merely termed a haven or harbour of refuge. It had already been decided by the Supreme Court in *The King v. Bradburn* (supra) that a mere haven could not be considered a public harbour within the meaning of the statute.

The able argument of Mr. Newcombe, that potential harbours subsequently became public harbours and passed to the Dominion, was not given effect to. To anyone who personally knows Halifax and Bedford Basin, and I imagine most of those who may read these reasons are in that class,—if not the charts will explain—it is apparent that in no sense of the word could Bedford Basin be termed a haven or harbour of refuge. It is a completely land-locked bay—the only entrance thereto being through what is termed "The Narrows," a continuation of "Halifax Harbour." If Halifax Harbour were held not to include The Narrows or Bedford Basin, it would

seem rather an anomaly to have a harbour of refuge or haven into which vessels could take refuge from their anchorage in Halifax Harbour.

It is admitted by counsel for the Crown and for the suppliant, both of whom have devoted a great deal of time to investigation, that "no records are "in existence either before or after Confederation "shewing the geographical limits of the harbour as "such by statute or any other way, shape or form."

The distance from "The Narrows" to Bedford at the head of the Basin is said to be four miles. In considering the question I think too much stress must not be laid on the words used as denoting the name of the harbour. For instance, on a map to which I will refer the words "Halifax Harbour" are written and the words "North-West Arm," but there is no contention that the North-West Arm is not part of Halifax Harbour. Also in respect of Dartmouth. Why should Dartmouth not have its harbour termed Dartmouth Harbour? As stated, there is no delimitation of the boundaries of Halifax Harbour, but it is beyond question that Halifax Harbour includes Dartmouth Harbour. I mention these facts, as I think too much stress may be laid on the fact that in the maps the terms "Bedford Basin" or "Bedford Bay" are used. None the less, it may be the harbour of Halifax.

It is conceded by counsel for the suppliant that "this is a basin in which from the time it was first "settled the warships and other ships went in and "anchored, and to that extent I am perfectly satis-"fied," says counsel. There can be no question as to this. For over a century the warships of Great Britain used Bedford Basin as the inner harbour of

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Halifax. Navy Island, situate in the basin, was the property of the British Admiralty. The Duke of Kent's house was situated on the basin. The Admiral's flagship was usually anchored in the basin at Birch Cove. At the head of the basin was Sackville Fort, erected and garrisoned and armed by the British. At Bedford as far back and further than living memory was a wharf, grist mill and other industries, and vessels plied in and out. Along the west shore of the basin were numerous wharves, to which vessels would take cargoes, such as hemlock, etc. Boats would go for pleasure parties, and so on.

If each of these different factors were looked upon separately, possibly it would not amount to strong evidence of Bedford Basin being considered a public harbour within the definition of the Fisheries case, but they must be taken collectively and consideration be given to the fact that fifty years have elapsed.

Considering the importance of Halifax Harbour to the Imperial authorities, I think the DesBarres report throws a strong light on the question. A printed copy of this document was discovered by the officers of the Archives Department of Canada as a result of careful enquiry. By the consent of counsel for both parties it has been marked Exhibit "V" in this case. It is entitled:

> "Nautical Remarks and Observations on the Coasts and Harbours of Nova Scotia; Surveyed pursuant to Orders from the Right Honourable the Lords Commissioners of the Admiralty, for the use of the Royal Navy of Great Britain, by J. F. W. DesBarres, Esq., 1778."

He describes Halifax Harbour, otherwise called Chebucto. He gives directions how to approach the

harbour from the east. He described Bedford Basin "at the head of Halifax Harbour" and "Sackville River" *at the head of Bedford Basin in the Harbour of Halifax.*

This report differs from a mere statement of someone who may have described it as suitable for a harbour. *It is official.*

If the views of Robinson and Rispin—two visitors from England in 1774—are of any importance, they will be found in Exhibit "T," in which it is stated that Fort Sackville is distant from Halifax about 12 (sic) miles, situate upon a navigable river that empties itself into Halifax Bay. This document, as well as the following extracts from "A brief de-"scription of Nova Scotia, etc., by Anthony Lock-"wood, Professor of Hydrography, Assistant Sur-"veyor-General of the Province of Nova Scotia and "Cape Breton—London, 1818," were furnished by the Archives Department. He describes the Harbour of Halifax as about sixteen miles in length, "terminating in a beautiful sheet of water called Bedford Basin, within which are ten square miles of safe anchorage."

In his "*directions for the harbour*" he states:

"From Georges Island to the confluence of Sack-"ville River with Bedford Basin a distance of seven "miles, there is not a single obstruction."

The sailing directions published by James Imray & Son, 1855, treats Bedford Basin as part of Halifax Harbour.

Thomas C. Haliburton (Sam Slick), in his history of Nova Scotia, 1829, treats Bedford Basin as part of Halifax Harbour.

It has to be kept in mind that in dealing with this question of whether Bedford Basin was a public

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harbour at the time of Confederation the Court has no records of an official kind delimiting the boundaries of the harbour and must arrive at the result from the best evidence obtainable.

I have no hesitation in coming to the conclusion, bearing in view the reasons in the *Fisheries* case (1) and the *English Bay* case (2) that at the time of Confederation, Bedford Basin was a public harbour, the property of the Province of Nova Scotia and passed to the Dominion by the provisions of the *British North America Act.*

I think the grant of the Crown, as representing the Province of Nova Scotia, of the water lot was void and gave no title.

The next question to be determined is the right to the wharf.

It is not an important question so far as the actual value of this wharf is concerned, as the Crown has offered what I consider the full value. Mr. Clarke in his evidence shews that $800 and ten per centum added was allowed for the wharf. Mr. Clarke and his associates, however, did not take into account any damages that the suppliant might suffer in respect to his property and business, which property has not been expropriated, and having regard to this branch of the suppliant's claim, it becomes important to consider his legal right to the wharf and the approach thereto across the railway tracks.

The evidence and documents show that as far back as 1819 the property had been in use as a tannery. The wharf in question, although possibly not as long a wharf as at the time of the expropriation, was then in existence and a road went down to

(1) [1898] A.C. 700. (2) 52 Can. S.C.R. 78; 26 D.L.R. 51.

the wharf. The wharf was used for the unloading of hemlock logs, the bark from which was used for tanning.

Apparently from time to time the wharf would be partially destroyed and repaired. In 1850, according to the witness Geiser, who worked on the railway, the Nova Scotia Railway, now the Intercolonial Railway, was constructed. Counsel place the date as of 1854, probably the date of completion of the railway. It is not material. Access to the wharf would have been cut off by the railway.

Mr. Rogers argues and the defence sets up that at this time any damage by reason of severance was compensated for by the railway. I do not think this contention well founded. While perhaps not legally compellable, the railway did in fact give a crossing over their tracks so as to provide access to the wharf. This crossing was planked between the rails during the summer months, the planks being removed during the winter, the wharf not being then used. The crossing was guarded by a gate. According to Geiser, the tannery ceased to be operated twenty-five or thirty years from 1916, about 1891 or 1886. According to Geiser, a siding was put in for the use of the tannery. The plan Exhibit 4, tracing of Nova Scotia Railway, 29th April, 1854, shews Henry Stetson's land and apparently the wharf and road across the railway tracks. Exhibit No. 8, a grant from the Crown of the water lot, 19th August, 1881, shows the wharf and apparently the crossing over the railway. Exhibit No. 10, a plan from the Department of Crown Lands, 28th September, 1906, also shows the wharf. According to the evidence of the witness Renner, an addition of

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twenty to twenty-five feet in length was added to the wharf about thirty years ago. The evidence is very indefinite, probably necessarily so from the lapse of time. It might be material if the question of sixty years' title arises, but immaterial practically in this case, as the Crown has tendered compensation for the whole wharf.

Exhibit No. 10 referred to is a plan from the Department of Crown Lands, Halifax, 28th September, 1906. This plan shews the property as used for the crushing of rock and as it was when Maxwell purchased. I will have to refer to it later. The title, as admitted, is a continuous title from 1819. While at times the wharf was not used when the property was idle, it was held and owned (if there was title) by the legal owners of what was called the tannery property. There was no actual interference with navigation, nor was any objection to the wharf being erected on the foreshore and beyond low water mark ever made by the Crown, and the very object of the present proceeding is to expropriate for the purpose of filling up the place where the wharf was.

Tweedie v. The King (1) and *Booth v. Ratté* (2), the citation from which in the reasons of Sir Louis Davies, at page 205 of the *Tweedie* case, may be referred to. Also *Hamilton v. The King* (3). *Attorney-General of Southern Nigeria v. Holt & Co.* (4), may be referred to, in which case an irrevocable license from the Crown was presumed.

After the best consideration I can give to the case I am of the opinion that in considering the question of the compensation payable to the suppliant, he

(1) 52 Can. S.C.R. 197, 27 D.L.R. 53.
(2) 15 App. Cas. 188.
(3) 54 Can. S.C.R. 331, 35 D.L.R. 226.
(4) [1915] A.C. 599.

should be considered as the owner of the wharf, with the right-of-way over the railway for access to and from his premises west of the railway and from and to the wharf. I do not agree with Mr. Lovett's contention that the wharf and right-of-way could be leased or sold to McCormack for the use of his company.

The right-of-way across the railway is, I think, limited to the owners of what was known as the tannery property.

The question of the amount of compensation is difficult to arrive at. The suppliant has put forward a ridiculous claim by his petition, in which he claims $150,000. I am informed that this claim was subsequently modified, to what extent I do not know. As far as his business of selling crushed stone is concerned, he is not damnified at all. Exhibit No. 10, the map of 28th September, 1906, shows the two quarries—stone crushers, etc., and a loading platform. The suppliant admits that the crushed stone was all marketed by rail and teams and the taking of the wharf in no way affects this business. He has since the expropriation rented the property to one Henninger at a rental of $1,000 a year for two years with a right of renewal.

In regard to his claim for anticipated loss of profits by reason of his being prevented from prosecuting a business of making cement and chimney moulds, the method adopted by the suppliant in presenting this claim is in my opinion entirely erroneous. He had not embarked in this business. He endeavours to show that by a certain expenditure of money a business could be built up which would yield him an annual return of so many thousands

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of dollars per annum, and from this hypothetical conjecture of profits to be realized from the operation of this conjectural business he deduces this absurd value of $150,000. This method of arriving at the value is expressly negatived in the judgment of the Lords of the Privy Council in *Pastoral Finance Association v. The Minister* (1), and by the judgment of the Supreme Court in *Lake Erie & Northern Railway Co. v. Schooley* (2).

On the evidence before me it is very difficult to arrive at any satisfactory result. The claim put forward is one not in my opinion meritorious. The Crown valuators allowed nothing for this claim, not taking into account any damage the suppliant might be entitled to by reason of the depreciation of the value to the suppliant of the property as a whole. Some damage has no doubt resulted.

I think if in addition to the sum allowed two thousand dollars is added, the suppliant will be fairly compensated.

Judgment will issue for $2,915.75 and interest from the date of the expropriation. As both parties have succeeded on different issues and considering the claim put forward, no costs should be awarded to either party.

Judgment accordingly.

Solicitor for suppliant: *J. S. Roper.*

Solicitors for respondent: *Henry, Rogers, Harris & Stewart.*

(1) [1914] A.C. 1083.
(2) 53 Can. S.C.R. 416, 30 D.L.R. 289.