

1889
 Oct. 24.

ETIENNE SAMSON, AND OTHERS, } APPELLANTS;
 (CLAIMANTS.)..

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Appeal from award of Official Arbitrators—Compensation for the taking of an unfinished wharf—Builder’s profit—Basis of value—Interference with Arbitrators’ award.

Where a wharf in course of construction, and materials to be used in completing it, had been taken by the Crown, the court allowed the claimants a sum representing the value of the wharf as it stood, together with that of the materials; and to this amount added a reasonable sum for the superintendence of the work by the builder, who was one of the claimants, for the use of money advanced, and for the risks incurred by him during the construction thereof, in other words a sum to cover a fair profit to the builder on the work so far as completed.

2. The court will not interfere with an award of the Official Arbitrators where there is evidence to support their finding, and such finding is not clearly erroneous.

APPEAL from an award of the Official Arbitrators.

This case came before the court at a previous date on a motion by way of appeal from an award of the Official Arbitrators, and by order of court dated 22nd October, 1888, was remitted to them by name as Official Referees of the court, which they had then become, for their re-consideration and re-determination.* A meeting of the four Official Referees, or of a majority of them, not being possible to be had, this order was discharged, and, by consent of parties, further evidence was ordered to be taken before the Registrar of the court.

May 6th, 1889.

The present appeal was argued upon the evidence

* REPORTER’S NOTE.—See the report of the case as it was then before the court at page 30.

taken by the Arbitrators and the additional evidence taken before the Registrar.

Belleau, Q.C., for appellants ;

Hogg for respondent

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BURBIDGE, J., now (October 24th, 1889) delivered judgment.

In this matter there is an appeal by the claimants and a cross-appeal by the Crown from an award made on the 26th day of February, 1886, by Messrs. Compton, Simard and Muma (Mr. Cowan dissenting) by which the claimants were adjudged to be entitled to the sum of twenty-nine thousand one hundred and fourteen dollars for property expropriated at Lévis, in the Province of Quebec, for the purposes of the St. Charles Branch of the Intercolonial Railway.

As the compensation was assessed in one sum, and no report accompanied the award, it was not possible to determine, as accurately as I desired to do, the principles upon which the award was made. I thought, too, when the case first came before me that the Arbitrators' attention had not been directed to the character of the title under which the claimants held the property ; and in addition it was not clear whether the amount awarded was intended or not as compensation to all persons who, at the time of the expropriation, had any interest in the property.

For these reasons I was of opinion to set aside the award and refer the matter back to the Official Arbitrators ; but as the Official Arbitrators had ceased to act as such and had become Official Referees of this court, I referred the whole matter to them by name for re-consideration and for a report to the court.

Subsequently it was found impracticable to secure a meeting of the four Official Referees, or even of a majority of them, and on the application of the claimants

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 THE QUEEN. and with the consent of the Crown I rescinded and discharged my previous order, and directed further evidence to be taken before the Registrar of the court.

The claim made is as follows :—

<p>Reasons for Judgment.</p>	<p>1. For a wharf in course of construction at the time of the taking of possession thereof by the Government, on 13th November, 1884, 13,832 cubic yards at \$1.79</p>	<p>\$23,514 40</p>
	<p>2. Amount of the beach lot upon which the wharf is constructed, 254 feet in length by 70 feet in width, containing 17,780 superficial feet, at \$1.30.....</p>	<p>23,114 00</p>
	<p>3. Amount of value of work to be done to complete the wharf, and claimed by the contractor.....</p>	<p>744 52</p>
	<p>4. Amount of materials on hand, and the whole of which the Government has taken in its possession.....</p>	<p>2,013 30</p>
		<p>\$49,386 22</p>

With reference to the 3rd item of this claim I was, when the case was first argued, of opinion that the claimants were not liable to the contractor in respect thereof; that it was not their act or fault that prevented him from continuing the construction of the wharf, but the expropriation under the Act of Parliament; and that the claimants were, therefore, excused, and, in consequence, not entitled in respect of this item to compensation from the Crown. On the second argument it was admitted that this view was correct, and no claim was made in respect of such item.

With reference to the first and fourth items of the claim, the sum of which amounts to twenty-five thousand five hundred and twenty-seven dollars and seventy cents, there is evidence that the wharf in course of

construction at the date of the expropriation, and the materials taken by the Crown, had cost the claimants the sum of nineteen thousand four hundred and forty-six dollars and seventy-two cents.

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This expenditure made under the circumstances indicated in the evidence affords, I think, a satisfactory means of arriving at the value of the wharf and materials. To such amount should be added a reasonable allowance for superintendence and for the use of money in the construction of the wharf, and for the risks incurred by the builder, in other words a reasonable sum to cover a fair profit to the builder.

The sum of twenty-five hundred dollars which, in round numbers, is $12\frac{1}{2}$ per cent. on the amount expended, would, I think, be such a reasonable allowance. This would bring the value of the wharf and materials up to twenty-one thousand nine hundred and forty-six dollars and seventy-two cents, leaving of the total award of \$29,114 the sum of \$7,167.28 to represent the value of the land expropriated.

The claim is made (2nd item) for 17,780 superficial feet of a beach lot, but William B. McKenzie, who was called for the claimants and who measured it, puts it at 17,500 superficial feet. The difference, however, is not very material, as in either case the sum of \$7,167.28 would represent a small excess over 40 cents per superficial foot.

Now I take it that I ought not to disturb the finding of the Official Arbitrators, if, under the evidence, they may with reason have come to the conclusion that forty cents a superficial foot was the fair value of the beach lot in question.

In the case of *The Heirs Young v. The Queen* I have given my reasons for coming to the conclusion, on evidence similar to that given in this case, that, looking to any use or purpose to which the claimants could

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have put them, the value of beach lots adjoining that in question was less than forty cents per superficial foot. That case, however, came before me in a form which not only left me free, but made it incumbent on me to find upon my own judgment. In this case the parties are, I think, entitled to the judgment of the tribunal of first instance unless that judgment is clearly erroneous.

Many witnesses have been examined, and there is much evidence that would have supported an assessment of value for the beach lot in question at sums very considerably lower or higher than 40 cents per superficial foot, according to the weight given to the testimony of witnesses for the Crown or for the claimants, respectively. And here I may add that I do not see that the additional evidence that was taken under my order, in the taking of which the attention of the witnesses was directed to the character of title, differs very materially from that which was given before the Arbitrators.

The expropriation which gave rise to this claim was made on the 31st of October, 1884, and there were, as will be seen by the evidence of Edouard Demers, the Crown's agent, two actual transactions in the year 1884 between the parties in respect of other portions of the property of which that expropriated had formed part.

Demers, speaking generally, says that for beach lots for the right of way the Crown paid 40 cents per foot including all damages to the pieces left (that is all the damages occasioned by the severance), but that where such lots were covered by wharves or level filling the Crown paid one dollar per foot.

Referring to the first transaction between the parties in the year 1884 he says:—

The Government bought another lot indicated in red on the plan

annexed to the title deed filed in this case as exhibit No. 30 (dated July 22nd, 1884). This lot contains seven thousand five hundred and seventy three feet and a half. This part, apart from the portion on which the rails lay, was covered with a small wharf and filled in with earth and levelled to the track,—close to the crib-work for the track. The lot was levelled to the height of fourteen to fifteen feet, and on the south side about seven to eight feet. The whole lot was bought for seven thousand dollars including the right of way. I calculated the beach lots for the right of way at forty cents and the level ground at one dollar, and I came to an agreement with the claimants to pay for the whole lot seven thousand dollars.

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With reference to the second purchase by the Crown from the claimants, the deed giving effect to which bears date of the 2nd December, 1884, Demers says:—

The Government bought from the claimants two thousand four hundred and sixty-six feet (2466) of beach lots situate opposite the wharf in question, and behind the station, as shown by plan marked in red and annexed to the title deed filed as exhibit 29. This lot was levelled with earth to the height of seven or eight feet towards deep water, and three or four feet in height towards the public road. For this lot was paid one dollar per foot.

It is to be observed also that this portion of the property, adjoining as it did the public highway, would not be so injuriously affected by the severance occasioned by the first purchase as would be the portion of the water lot north of the railway track and abutting on the harbor, even with as good a crossing as could under the circumstances be given.

Now I cannot say that the Arbitrators in assessing the damages valued the beach lot in question at forty cents per superficial foot, but if they did the evidence to which I have referred, relating as it does to actual transactions, taken in connection with the other evidence adduced, would, I think, have amply justified their finding. And when it appears that the total award is sufficient, and not more than sufficient, to compensate the claimants for other property, the value of, which is satisfactorily determined, and for such beach lot at a rate, which, in my opinion, the Arbitrators

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were under the evidence justified in allowing, it becomes, I think, my duty to sustain the award, and dismiss both the appeal and the cross-appeal.

Under the award the claimants were, on the 31st day of October, 1884, entitled to receive from the Crown in full satisfaction of their claim the sum of twenty-nine thousand one hundred and fourteen dollars, to which should be added interest from that date until the present.

This amount is intended as compensation to all persons who at the date of the expropriation had any interest or estate in the property mentioned, and is, according to the agreement made on the second argument, to be paid to the claimants upon their giving to the Crown a good discharge from all such persons.

The claimants are entitled also to the costs before the Arbitrators and of the cross-appeal, and the respondent to the costs of the appeal. The latter may be set off against the former.

Leave is reserved to any person interested to apply for further directions.

Appeal and cross-appeal dismissed with costs.

Solicitors for appellants : *Belleau, Stafford & Belleau.*

Solicitors for respondent : *Casgrain, Angers & Hamel.*
