

BETWEEN

1904  
 May 13.  
 —

THE KING ON THE INFORMATION  
 OF THE ATTORNEY-GENERAL FOR  
 THE DOMINION OF CANADA..... } PLAINTIFF;

AND

KILGOUR SHIVES AND JOHN H. }  
 MOORES..... } DEFENDANTS.

*Expropriation—Public work—Damages—Reference back to Referees under Rule 19.*

Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th rule of court of the 12th December, 1889, an order was made therefor, in which the following directions were given to the referees :

1. To find what in September, 1902, was the value of the wharf, land and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken ; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation or prospects.
2. With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance.

THESE were two motions, made under the provisions of the nineteenth rule of court of 12th December, 1899, one by way of appeal from the report of special referees appointed herein, the other to confirm such report.

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 of Facts.

May 26th, 1903.

Upon motion of counsel for suppliants, counsel for respondent consenting, an order was made referring this case to Messieurs George McLeod, William H. Thorne and George McKean, all of St. John, N.B., for the purpose of enquiry and report as special referees under the rules of this court.

January 6th, 1904.

The special referees now made their report, finding that "the defendant Shives is entitled to be allowed thirty-five thousand dollars as compensation in full by reason of the expropriation by the Crown of his wharf, wharf property and land, and for all damages occasioned to other lands and to his access as riparian proprietor to the river, or in any other way occasioned by the taking of said wharf, lands and property."

February 27th, 1904.

The motions came on for hearing at Ottawa.

*H. F. McClatchey*, for the motion by way of appeal from the referees' report, argued that the valuation placed upon the property by the referees was excessive, and not warranted by the evidence. It is the market value of the property at the time it was taken, not its value at a forced sale, but at a fair public sale, that should govern the case. (Cites 10 *Am. & Eng. Ency. of Law* (1); *Stebbing v. Metropolitan Board of Works*; (2) *Paint v. The Queen* (3). The evidence shows that

(1) 2nd ed. pp. 1151 et seq.

(2) L. R. 6 Q. B. 37.

(3) 2 Ex. C. R. 149.

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although the town of Campbellton is a growing one, the revenue of this property is not increasing but remains stationary. The prospective capabilities of the property were not evident at the time of the expropriation so far as milling purposes are concerned; and the wharf could not be used by steamers but only by sailing vessels. The suppliant Shives could not lay a large vessel at this wharf without trespassing upon the government property. Yet the referees considered the use of the wharf for ships as a feature in their valuation. The whole carrying trade is now going to be done by steamers, sailing vessels are going out of use. The property is not enhanced in value by reason of any prospective use of the wharf for sailing vessels.

The suppliants have no title to the wharf. It is on government property. They have not had undisputed possession of it for sixty years. (Cites *Humphreys v. Helmes* (1); *Eagles v. Merritt* (2); *Brown v. Reed* (3).

*W. Pugsley, K. C.*, contra, contended that there had been user by the suppliant Shives and his predecessors of the Crown property for wharf purposes for over sixty years. At any rate the title in the soil would not be in the Crown in right of the Dominion, but in right of the Province of New Brunswick; the *locus in quo* was not a public harbour within the meaning of *The British North America Act*. Moreover, the Ferguson estate was paid a rental for this wharf by the Intercolonial Railway. The referees find that it has been in the uninterrupted possession of the suppliant and his predecessors for over sixty years.

The suppliant would be intitled to "side-wharfage" from the Government, although he would have to pay for it. The Government would have to depend upon

(1) 5 Allen N.B. 59.

(2) 2 Allen N. B. 550.

(3) 2 Pugs. 206.

Mr. Shives for the same privilege; and, besides, in order to get access to the Government property you have to go over that of Mr. Shives.

Mr. Pugsley also moved for judgment on the referees' report.

THE JUDGE OF THE EXCHEQUER COURT now (May 13th 1904) delivered judgment.

This matter now comes before the court on motion on behalf of the defendants for judgment upon the report of the special referees appointed herein, and by way of appeal on behalf of the plaintiff against that report.

By their report the special referees have expressed their opinion that the defendants are entitled to be allowed thirty-five thousand dollars, as compensation in full by reason of the expropriation by the Crown of a certain wharf, wharf property and land, belonging to the defendant Kilgour Shives, and subject to a mortgage in favour of the other defendant John H. Moores, and for all damages occasioned to other lands of the defendant Shives, and to his access as riparian proprietor to the River Restigouche, or in any other way occasioned by the taking of said wharf, lands and property.

By the nineteenth rule of court, of the 12th of December, 1899, it is provided that on an appeal from the report of referees the court may confirm, vary or reverse the findings of the report and direct judgment to be entered accordingly, or refer the matter back to the referees for further consideration and report. In this case it seems to me expedient to adopt the course last mentioned.

The proceedings in this case and the report will therefore be referred back to the special referees for further consideration and report, that the value of the property taken and the damages mentioned may be

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 THE KING separately assessed, and that answers may be given to  
 the following questions :

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 SHIVES. 1. What in September, 1902, was the value of the  
 wharf, land and premises taken by the Crown as men-  
 tioned in the information herein ?

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2. In finding that value the special referees will ex-  
 clude from their consideration the value of the same  
 to the Crown, in the way of saving expense in the  
 construction of the public work or otherwise, and  
 determine its value at that time to the owner, or any  
 other person, for any purpose to which in the ordinary  
 course of events it could be put.

3. In finding that value the special referees should  
 take into account the condition, situation and pros-  
 pects of the property taken, but such value should be  
 one that the property had at the time it was taken  
 and not one that the special referees may think that  
 it might have at some future time, by reason of its  
 condition, situation or prospects.

4. Then with regard to the remainder of the pro-  
 perty, of which that taken formed part, what is the  
 amount of damages, if any, that has been occasioned to  
 the portion not expropriated by the taking of the part  
 mentioned, and the construction of the public work ?

5. If the construction of the public work benefits and  
 increases the value of the portion of the property not  
 expropriated, that is to be taken into account and set  
 off against the damages occasioned by the severance.

*Order accordingly. (\*)*

\*REPORTER'S NOTE.—Conformably to this order the special referees filed a supplementary report, in which they declared that they found that the value of the wharf, land and premises at the time of the expropriation was thirty-four thousand five hundred dollars, excluding from such valuation the considera-  
 tion of any value such property might have to the Crown in the way of saving expense in the construction of the public work or otherwise, and basing such valuation wholly on the value of the property at the time of the expropriation to the owner, or any other person, for any purpose to which in the ordi-

nary course of events it could be put, also excluding from such valuation any consideration of future value the property might have in the estimation of the special referees by reason of its condition, situation or prospects.

The special referees also found that the damages to the remaining portion of the suppliant Shives' property arising from the severance and the construction of the public work, amounted to five hundred dollars. They also found that the construction of the public work did not benefit or increase the value of the portion of the property not expropriated, and, therefore, there was nothing to set off against the damages occasioned by the severance.

On the 8th June, 1904, counsel for the respective parties filed an agreement that the case might be disposed of by the court on the return of the supplementary report, without further argument.

On the 9th June, 1904, the supplementary report of the special referees was confirmed by the JUDGE

## OF THE EXCHEQUER COURT.

The following memorandum of judgment being filed with the Registrar:—

“There will be a declaration that the property mentioned in the information is vested in the Crown.”

“With reference to the amount of compensation, there will be judgment for the defendants for thirty-five thousand dollars in accordance with the reports of the special referees filed herein. Of these defendants one is mortgagor and the other mortgagee of the property in question. The amount of the compensation money may be distributed in accordance with the interests of the parties entitled to the property in question, or the whole amount may be paid to the defendant Kilgour Shives, the mortgagor, upon his obtaining and delivering to the Crown a satisfactory acquittance from any person having any interest in the property.”

“The defendants are entitled to their costs.”

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*Judgment accordingly.*