1932
Nov. 21.
1933
Apr. 1.

BETWEEN:

AUTOGRAPHIC REGISTER SYSTEMS, LTD. ..... } PLAINTIFF;

AND

CANADIAN NATIONAL RAILWAY COMPANY ..... } DEFENDANT.

Expropriation Act—Canadian National Railways Act—Injurious Affection to Property—Compensation

Plaintiff owns lands in the city of Montreal and sought damages for injury to its property resulting from the construction of a subway by defendant company under its railway lines near plaintiff's property. No land belonging to plaintiff had been taken by defendant for its work. The Court found that plaintiff's property had been injuriously affected and awarded it compensation.

Held, that the Canadian National Railways Act (R.S.C., 1927, Ch. 172) does not deprive the owner of lands injuriously affected by the construction of a public work, of the compensation awarded by the Expropriation Act (R.S.C., 1927, Ch. 64).

2. That the damage must result from an act rendered lawful by statutory powers of the company.

3. That the damage must be such as would have been actionable under the common law, but for the statutory powers.

4. That the damage or loss must be to the property itself.

5. That personal injury, inconvenience, injury to trade or business are no grounds for compensation.
6. That the damage must be occasioned by the construction of the public work, not by its user.

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ACTION by plaintiff claiming compensation from defendant for injurious affection to plaintiff's property resulting from the construction of a public work.

The action was tried before the Honourable Mr. Justice Angers, at Montreal.

E. Masson, K.C., and *Auguste Boyer* for plaintiff.

Gregor Barclay, K.C., for defendant.

The facts of the case and questions of law raised are fully stated in the reasons for judgment.

ANGERS J., now (April 1, 1933), delivered the following judgment.

By its action the plaintiff seeks to recover from the defendant the sum of $50,000 for injury and damages to its property, resulting from the construction of a subway on St. Remi street, in the city of Montreal, by the defendant under its railway lines, with the object of doing away with a level crossing.

[The learned Judge here referred to the allegations set forth in the plaintiff's statement of claim and in the defendant's statement of defence.]

The material facts disclosed by the evidence are the following.

On August 30, 1928, the plaintiff bought from C. D. Turcotte lots 1674—42 to 64, containing an area of 67,622 square feet, as shown on plan exhibit C, for the price of $24,000, representing about 35 cents a foot; the emplacement was bounded to the southwest by St. Remi street, to the northwest by a lane (lot 1674—41), to the northeast by Walnut street and to the southeast by the right-of-way of the Canadian National Railways.

The plaintiff commenced the erection of its building in the spring of 1929 and moved into it in the latter part of December of the same year.

On March 10, 1930, an order was made by the Board of Railway Commissioners approving the plan submitted by the defendant showing the layout of the subway proposed

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to be constructed at St. Remi street; a copy of the order was filed as exhibit D.

The excavation work for the tunnel was started on April 12, 1930; the subway was opened to traffic on December 6, 1930.

On September 28, 1931, the plaintiff sold to Exide Batteries of Canada Limited lots 1674-48 to 51, pt. 52 and 57 to 64, containing a superficies of 44,042 square feet, for $28,627, representing approximately 65 cents a square foot.

The width of St. Remi street was 66 feet when plaintiff bought from Turcotte. When the defendant decided to build a subway under its tracks, it expropriated a strip of land on the west side of St. Remi street and widened the street to 90 feet.

The defendant did not construct its subway alongside the building of the plaintiff; it left between the inner side of the retaining wall and the wall of plaintiff's building a stretch of street 30·4 feet wide the roadway having a width of 21·4 feet and the sidewalk of 9 feet. The depth of the subway opposite the northwest wall of the plaintiff's building, i.e., the wall facing on the lane, is 3·9 feet and the depth opposite the southeast wall is 7·9 feet. From the entrance of the subway, on the north side, to the plaintiff's building, the distance is about 65 feet. On the retaining wall, there is a fence about 4¼ feet in height, as indicated on photographs exhibits 2 and 3.

No land, the property of plaintiff, was taken by the defendant; the claim is one for injurious affection resulting from the construction of a public work.

The case is governed by section 17 of the Canadian National Railways Act (R.S.C., 1927, chap. 172), as amended by 19-20 Geo. V, chap. 10, and by section 23 of the Expropriation Act; sections 47 and 50 of the Exchequer Court Act (R.S.C., 1927, chap. 34) also apply.

Section 23 of the Expropriation Act (R.S.C., 1927, chap. 64) reads as follows:

> 23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property.
> . . . .

Section 17 of the Canadian National Railways Act (R.S.C., 1927, chap. 172), as amended by 19-20 Geo. V, chap. 10, contains the following provision:

(2) (*a*) All the provisions of the Expropriation Act, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company.

Paragraph (*d*) of subsection 2 of section 17, amended as aforesaid, says:

(*d*) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the Expropriation Act as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the Expropriation Act, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof: Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the Railway Act, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.

Paragraph (*c*) of subsection (2) of section 17, before the amendment, reads as follows:

(*c*) The compensation payable in respect of the taking of any lands so vested in the Company, or of interests therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with notice of expropriation to the opposite party.

As one may see paragraph (*d*) of subsection (2) of section 17, as amended, does not mention the compensation payable in respect to land injuriously affected. Does it mean that the legislators intended to deprive the owner of land injuriously affected by the construction of a public work of the compensation awarded by the Expropriation Act? I do not think so for the reasons set forth in the case of *Renaud* v. *Canadian National Railway Company* (No. 13,952, October 31, 1932), which it is unnecessary to repeat here.

Four conditions are required to give rise to a claim for compensation for injurious affection to a property, when no land is taken:

(*a*) the damage must result from an act rendered lawful by statutory powers of the company;

(*b*) the damage must be such as would have been actionable under the common law, but for the statutory powers;

(*c*) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

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(*d*) the damage must be occasioned by the construction of the public work, not by its user.

See: *Leblanc* v. *The King* (1); *The King* v. *Richards* (2); *The Queen* v. *Barry* (3); *McQuade* v. *The King* (4); *McPherson* v. *The Queen* (5); *Metropolitan Board of Works* v. *McCarthy* (6); *Caledonian Railway Co.* v. *Walker's Trustees* (7); *Beckett* v. *Midland Railway Co.* (8); *Chamberlain* v. *West end of London & Crystal Palace Railway Co.* (9); *Moore* v. *Great Southern & Western Railway* (10); *The King* v. *McArthur* (11); Nichols on Eminent Domain, p. 818, No. 308; Cripps on Compensation, 7th Ed., pp. 206 et seq.

There is no material difference, on the question of damage to lands resulting from the construction of a public work, between the various acts under which the decisions hereinabove cited were rendered: *McPherson* v. *The Queen* (12); *The King* v. *McArthur* (13); *Paradis* v. *The Queen* (14).

The first and second of the four conditions above mentioned are fulfilled: under its statutory powers the defendant had the right to construct a subway on St. Remi street, in accordance with the order issued by the Board of Railway Commissioners; on the other hand, supposing that the construction of this subway had been unauthorized by statute and caused damage to plaintiff, an action would have lain under the common law.

As Nichols says (op. cit., 281), while common law liability is essential to establish a claim for compensation, the converse is not true; an injury that would be actionable at common law is not ground for compensation unless it complies with the third and fourth requirements. . . .

I must therefore endeavour now to determine whether the construction of the subway caused an injury to the property itself of the plaintiff, independently of whatever personal damage or damage to business or trade it may have have occasioned. If I arrive at a negative conclusion, the action must be dismissed; if, on the contrary, I find that

(1) (1917) 16 Ex. C.R., 219.
(2) (1912) 14 Ex. C.R., 365.
(3) (1891) 2 Ex. C.R., 333.
(4) (1902) 7 Ex. C.R., 318.
(5) (1882) 1 Ex. C.R., 53.
(6) (1874) L.R., 7 H.L., 243.
(7) (1882) L.R., 7 App. Cas., 259
(8) (1867) L.R., 3 C.P., 82.
(9) (1863) 2 B. & S., 617.
(10) (1858) 10 Irish Com. Law. Rep., 46.
(11) (1904) 34 S.C.R., 570.
(12) (1882) 1 Ex. C.R., 53, at 61, in fine.
(13) (1904) 34 S.C.R., 570, at 577.
(14) (1887) 1 Ex. C.R., 191.

the property has been injuriously affected, there will remain for me to fix the amount of the compensation.

The damage or loss must be to the property itself; its value must have been affected by the construction of the public work, whoever the owner might be and to whatever use the owner might think advisable to put it.

Personal injury, inconvenience, injury to trade or business are no grounds for a claim for compensation: *The King* v. *Richards* (1); *McPherson* v. *The King* (2); *Leblanc* v. *The King* (3); *The King* v. *London Docks Co.* (4); *Ricket* v. *Metropolitan Railway Co.* (5); *Beckett* v. *Midland Railway Co.* (6); *Martin* v. *London County Council* (7); *Bigg* v. *Corporation of London* (8); *The Queen* v. *Metropolitan Board of Works* (9); *Caledonian Railway Co.* v. *Ogilvy* (10); *Cowper Essex* v. *Local Board of Acton* (11); *Wood* v. *Stourbridge Railway Co.* (12); Cripps on Compensation, 7th Ed., pp. 217 and 218.

As stated by Cripps (p. 218), the principle is fully explained by Willes, J., *in re Beckett* v. *Midland Railway Co.* (*ubi supra,* at pp. 94, in fine, and 95):

> The damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put; in other words, it must, as I read that judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that of course is to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the judgment in *Ricket* v. *Metropolitan Rail Co.* to an absurd extent. The property is to be taken in statu quo, and to be considered with reference to the use to which any owner might put it, in its then condition, that is, as a house.

The whole case narrows down to a question of depreciation: has the plaintiff's property lost any value as the result of the construction of the subway?

As already stated, the plaintiff bought lots 1674-42 to 64 on August 30, 1928, for $24,000; the superficies of the em-

(1) (1912) 14 Ex. C.R., 365, at 373.
(2) (1882) 1 Ex. C.R., 53, at 66 and 67.
(3) (1917) 16 Ex. C.R., 219, at 221.
(4) (1836) 5 Ad. & E., 163.
(5) (1867) L.R., 2 H.L., 175.
(6) (1867) L.R., 3 C.P., 82, at 92.
(7) (1899) 80 L.T., 866.
(8) (1873) L.R. 15 Eq., 376.
(9) (1869) L.R., 4 Q.B., 358.
(10) (1856) 2 Macq. H.L. (Sc.) 229.
(11) (1889) 14 A.C., 153.
(12) (1864) 16 C.B. (N.S.), 222.

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placement was 67,622 square feet and the price per foot 35 cents and a fraction.

The excavation work for the subway was commenced on April 12, 1930, and the subway was opened to traffic on December 6, 1930.

On September 28, 1931, over nine months after the opening of the subway, the plaintiff sold to Exide Batteries of Canada Limited lots 1674-48 to 51, pt. 52 and 57 to 64, containing an area of 44,042 square feet, for $28,627, which represents a price of about 65 cents a foot.

Within three years from its purchase, the plaintiff succeeded in selling 44,042 square feet out of the 67,622 square feet it had bought, to wit nearly two-thirds of its property, at a profit of approximately 30 cents a foot, notwithstanding the general depression existing in 1931 and the existence of the subway.

The purchaser, Exide Batteries of Canada Limited, erected a factory on the emplacement for the purposes of its business, and put the façade of the building on Walnut street: see plan exhibit C.

With a profit of 30 cents a foot, equivalent to about 86 per cent, within three years, at a time when the real estate market was, like everything else, at a standstill, it is hard to believe that the property of the plaintiff was depreciated to a great extent, let alone a depreciation of 60 per cent as mentioned by Julien who was heard as expert on behalf of the plaintiff.

It was agreed at trial that the deposition on discovery of Hillenbrand, vice-president and managing-director of Autographic Register Systems Limited, would form part of the evidence.

Hillenbrand swore that, at the time his company bought the land, it was unaware of the intention of the defendant to construct a subway at St. Remi street (dep. Hillenbrand, on discovery, p. 2). After some hesitation he admitted that he knew about it when the company commenced the erection of its plant (dep. Hillenbrand, on discovery, pp. 9 and 10): . . .

Later on however (p. 12) Hillenbrand declared that he understood the mouth of the tunnel would be approximately opposite the present dividing line between the Exide

Batteries' property and plaintiff's property; perhaps I had better quote the testimony verbatim:

Q. But actually at the time you put your building up and decided to put the front entrance on St. Remi street, you knew exactly what was going to happen there to St. Remi street?—A. We did, yes—I might modify that. Together with the engineer I travelled down to the Canadian National Railway office and inquired. When we first entered the office the engineer in the department—we were somewhat coolly received because he did not know what we were looking for but after we made him acquainted with what information we wanted to obtain, he warmed up nicely and told us I remember the plan or whatever it was he showed us indicated that the mouth or the entrance of that tunnel would be shall I say south of our building. In other words we were to be free of the tunnel directly where our building stands at the present time—we were given to understand that the mouth of the tunnel would be on St. Remi street approximately opposite the present dividing line between the Exide Battery property and our own property, instead of which the mouth is in the neighbourhood of sixty feet to the north of the building.

Unfortunately no witness was heard on behalf of the defendant on this point. It is very difficult for me to believe that the witness was told by an engineer in the office of the Canadian National Railway Company that the mouth of the subway would be opposite a point, which has since become the dividing line between the property of the Exide Batteries and that of plaintiff; the sale to Exide Batteries was only made on September 28, 1931, so that in the spring of 1929, when plaintiff started to build, there was no indication as to where that division line would be. Putting the mouth of the subway opposite what is now the division line between the two properties would have reduced the length of the slope of the subway on the north side by approximately 165 feet, viz., 100 feet the width of plaintiff's emplacement and 65 feet the distance between the northwest wall of the building and the entrance to the tunnel; this would have meant a much steeper declivity, a declivity such as an engineer would likely not have recommended.

In my opinion, the building was not depreciated to a very great extent, by the opening of the subway; it surely did not suffer a depreciation of 50 per cent, as claimed by Julien and Doyon in their report (exhibit 5).

Jenkins Bros. Limited have a plant situated in a similar position as that of plaintiff, on the same side of St. Remi street, but to the south of the railway tracks, with the difference however that the northwest wall of the Jenkins plant is somewhat nearer to the tracks than the southeast

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wall of plaintiff's building and that the Jenkins' property is bounded on the southeast side by a street, Acorn street as it is called, whilst plaintiff's property is bounded on the northwest side by a lane: see plan exhibit C.

J. H. Webb, vice-president and managing-director of Jenkins Bros. Limited, was called as witness by the defendant. He stated that the roadway in front of his company's building was practically the same as in front of plaintiff's building. Asked as to what the effect of the opening of the subway was on the value of the company's property, he answered as follows (dep. Webb, p. 20):

A. From my point of view it has not depreciated it at all. If anything, it has appreciated it on account of the lack of delays at that particular crossing.

The witness gave his reasons for adopting this view (pp. 19 and 20, questions 185 to 197). . . .

The evidence of Mr. Webb, an entirely disinterested witness, carries, in my opinion, considerable weight.

Desaulniers, called as expert on behalf of defendant, shares the same opinion as Webb regarding the appreciation of the property as a result of the facilitation of the traffic: see his report filed as exhibit E.

The report prepared by the witness Jones filed as exhibit F shows that the gates at the St. Remi street railway crossing were closed 40 per cent of the time; it is obvious that the opening of the subway must have brought considerable relief to traffic in the vicinity.

Neither party saw fit to call a director or officer of Exide Batteries of Canada Limited to explain to the Court why the company had in September, 1931, notwithstanding the existence of the tunnel, bought at 65 cents a foot an emplacement which its vendor had purchased in August, 1928, for 35 cents a foot and which had suffered, as a result of the construction of the tunnel, according to plaintiff's experts, Julien and Doyon, a depreciation of 60 per cent. This evidence might have been of considerable interest.

The sale by plaintiff of a large portion of its land, after the opening of the subway, at a profit of about 86 per cent and the evidence of the vice-president and managing-director of Jenkins Bros. Limited go a long way to show that the depreciation of the plaintiff's property does not by any means reach the fantastic figures stated by plaintiff's experts.

On the other side, apart from the testimonies of Julien and Doyon, there is the deposition of Hillenbrand, to which I have already referred and to which I shall revert briefly.

Examined as to how the amount of $50,000 claimed is made up, Hillenbrand says that "it is just a guess" (dep. p. 13) and then explains that it is founded on loss of publicity and inconvenience (pp. 13, 14 and 15). . . .

To further questions put to him by counsel for defendant Hillenbrand persists in saying that there is no other cause of damage than the loss of publicity and the inconvenience (dep. p. 17): . . .

The want of publicity and the inconvenience may appear very serious to the witness, but I am afraid he is inclined to over-estimate both.

As regards the loss of publicity, I must say that the evidence on this point does not impress me very much. Hillenbrand, the only witness heard on this particular aspect of the case, says that the loss of publicity is due to the fact that passersby travelling through the tunnel in a northerly direction cannot see a sign on the plaintiff's building; at pp. 11 (in fine) and 12, . . .

The only business plaintiff carries on is printing for the retail trade. The plaintiff has no show rooms nor show windows; all its business is done by travellers (dep. Hillenbrand, p. 6). However I must consider this alleged loss of publicity in respect of any kind of trade or business for which the property might be used. The district where plaintiff's factory is situated is industrial. Advertising by means of signs and show windows is not so essential for industry as it is for trade, particularly a retail store, if it is at all necessary, nay even useful. There is no doubt that visibility of the defendant's premises is not quite as good as it was, previous to the construction of the subway for people coming from the south; on the other hand, it is somewhat better for people coming from the north; the one very likely compensates the other. Having had the opportunity of seeing the property and its surroundings, on the suggestion of counsel for both parties, I must say that I do not believe that this is such a serious disadvantage as to lessen to a great extent the value of plaintiff's property.

I shall now deal with what witness Hillenbrand has referred to as inconvenience and which is and can only be

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the lack of facilities of access to the plaintiff's property resulting from the construction of the tunnel.

The plaintiff's front door is exclusively an office entrance; it is not used for loading or unloading merchandise; all the goods are received and shipped by the side door opening on the lane. In the case of Jenkins Bros.' factory, the front door is used for truck shipping; yet Webb declares that they experience no inconvenience. Notwithstanding Webb's testimony, I am inclined to believe that there is a certain amount of inconvenience in having a business establishment fronting on a street only some twenty feet wide; it is difficult to turn automobiles in a street as narrow as the one lying opposite the plaintiff's property; this difficulty inevitably causes a loss of time. What is a mere inconvenience to-day may be to-morrow a real hardship for the owner of the premises who might wish to increase its shipping facilities and use the front of his building for that purpose. As I have said in respect to loss of publicity, one must not stop to look solely at the purpose for which the premises are presently used, but one must consider the different uses to which the property may be put by any owner. Mere inconvenience alone is no ground for a claim for compensation, especially so if the inconvenience is common to the public in general. On the other hand, if the access from a property to a public highway, on which the lands immediately abut, as in the case herein, is rendered less convenient and if as a result the value of the property is thereby decreased, the owner is entitled to compensation: Cripps on Compensation, p. 213, last paragraph and note (*u*) at foot of page. In view of the narrowness of the stretch of street on which its property is now fronting and in view of the turn which one has to make in order to proceed towards the south, the plaintiff is not only confronted with an inconvenience but it has not the same full enjoyment of its property, more particularly of its front entrance and it may not have the same facility in selling or even renting its premises, if it ever wishes to do so. This, in my opinion, constitutes a depreciation of the property for which the plaintiff ought to be compensated.

There is no doubt that the opening of the subway has considerably facilitated traffic on St. Remi street. The level crossing which existed prior to the construction of the subway, necessitating the closing of the gates during an aver-

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age of 40 per cent of the time every day was a very serious disadvantage. The subway is of a great benefit to the public in general and the plaintiff's property will have its share of it. This compensates in a large degree the inconvenience suffered by the plaintiff or by whoever may eventually become the owner of the property. This advantage must be taken into account when it comes to assessing the compensation to which the plaintiff may be entitled. I may add that the defendant has reduced to a minimum the injury to plaintiff's property by giving it an access by the stretch of street, however narrow it may be, which it has left open opposite said property.

Taking all the circumstances of the case into consideration, the inconvenience of access and the partial loss of advertising facilities on the one side and the advantage of the subway for the facilitation of the traffic on the other side, I believe I will render justice to the parties in assessing at $1,200 the compensation which the plaintiff is entitled to recover from the defendant.

Although there is no specific demand for interest, I believe that, under the general conclusion relating to further and other relief, I am entitled to allow interest on the sum of $1,200; the interest will run from the 20th January, 1932, date on which the proceedings were instituted.

There remains the question of costs. The amount of the claim is grossly extravagant and has in all likelihood shut out the possibility of a settlement. This might justify me in depriving the plaintiff of its costs: *McLeod* v. *The Queen* (1); *The King* v. *McLaughlin* (2). On the other hand, the defendant has denied all liability and made no offer. I think that justice will be done if I allow the plaintiff costs to the extent of $250.

There will be judgment in favour of plaintiff against defendant for $1,200, with interest from the 20th of January, 1932, and costs fixed at $250.

Judgment accordingly.

NOTE: The unreported cases of *Renaud* v. *C.N.R.*, tried at Montreal and *C.N.R.* v. *Latour*, tried at Quebec, raised questions of law similar to those dealt with in the case of *Autographic Register Systems Limited v. Canadian National Railway Company.*

(1) (1889) 2 Ex. C.R., 106. (2) (1915) 15 Ex. C.R., 417.