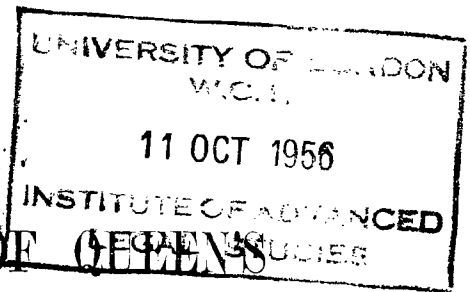


In the Privy Council.

No. 70 of 1893.

ON APPEAL FROM THE COURT OF QUEBENS
 BENCH FOR LOWER CANADA, PROVINCE
 OF QUEBEC. (APPEAL SIDE.)



Between THE ATLANTIC AND NORTH-WEST RAIL-
 WAY COMPANY

Appellants

AND

PETER WOOD *et al es qual*

Respondents

Case on behalf of the Appellants.

1. The appeal in this case is from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) reversing a judgment of the Superior Court of the Province of Quebec, district of Montreal, and restoring an award of arbitrators under the Canadian Railway Act, 51 Vict., chap. 29, rendered on the 14th of February 1890, whereby the majority of the arbitrators awarded the sum of Sixteen thousand three hundred and eight dollars (\$16,308) as compensation for damages caused to the Respondents by the exercise by the Company Appellants of certain powers hereinafter described in regard to the property of the Respondents. Rec. p. 18.

2. The proceedings were begun by a petition and writ of summons issued out of the Superior Court, whereby the Appellants appealed to the Superior Court from the award of the arbitrators. This appeal was taken under Section 161 of the Railway Act, paragraph 2, which reads as follows:—

“Whenever the award exceeds \$400 any party to the arbitration may within one month after receiving written notice from any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior court of the province in which such lands are situate and upon the hearing of the appeal the court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators as in a case of original jurisdiction.”

The Petition and Writ will be found at pages 14 to 17 of the Record.

3. A principal ground alleged against the award by this petition was that in estimating the compensation fixed by the award, the arbitrators took into consideration matters and things which they had no right by law to do, and which were outside the scope of the arbitration proceedings and put a speculative

and prospective and grossly exaggerated estimate on the damage done to the Respondents, and awarded damages which were illegal and not the subject of arbitration and award under the Railway Act, and also illegally awarded damages to property which was not taken for or affected by the railway, and illegally awarded remote, speculative and prospective damages to the proprietors. The Respondents answered this petition by denying its allegations and all the reasons assigned in the petition and by alleging that the proceedings before the arbitrators and the said award were in all respects legal and valid. This answer will be found at page 20 of the Record.

4. The facts which gave rise to the proceedings before the arbitrators, and the subsequent appeal from their award, may be shortly stated as follows :—

Rec. pp. 34-35.

On the 12th of February 1887, the Company Appellants deposited with the Clerk of the Peace for the City and District of Montreal a plan of their Railway as required by the Railway Act then in force, Chapter 109 of the Revised Statutes of Canada, Section 7, showing the line of the railway across the properties known on the official plan and book of reference of the Saint Antoine Ward of the City of Montreal, as lots 1604 and 1605. An extract from this plan showing the situation of the Railway with regard to the property of the Respondents has been sent over with the record and will be produced on the appeal. The Railway was intended to be and was, in fact, afterwards when constructed, carried over a lane which is shown upon the plan and known as lot No. 67 on this plan, by means of a bridge or trestle-work at a clear height of 12 feet above the surface of the land. This lane, which had a width of 10 feet, communicated from the rear of the Respondents property to another lane communicating with Richmond Avenue, thus giving the Respondents access to and egress from their property in rear. Section 8, paragraph 14 of the Railway Act, Chapter 109 of the Revised Statutes of Canada, provides that the deposit of a map or plan and book of reference and the notice of such deposit shall be deemed a general notice to all the parties of the lands which will be required for the Railway and works, and the date of such deposit shall be the date with reference to which the compensation or damages shall be ascertained. At the time of the deposit of this plan, the Respondents or their predecessors in office, as trustees of Calvary Church, were the owners of that part of lot number 1604, shown upon the plan forming a block of land bounded in front by Guy Street, in rear by the remainder of lot 1604, on the North-west side by lot number 1593 and on the South-east side by lot number 1605, containing 96 feet in width in front and in rear by 112 feet in depth or a total area of 10,752 square feet, together with the church buildings erected thereon, with a right of way over the lanes connecting with Richmond Square, including the lane in question passed over by the Railway Company. This property they acquired by deed of sale of date the 10th of April, 1879, passed before J. S. Hunter, Notary Public, and duly registered. A copy of this deed will be found at pages 38 to 41 of the Record. Mr. Cushing had previously purchased the whole of lot 1604 from the administrators of the estate of the late Robert Morton, by deed before J. S. Hunter, Notary Public, of date the 29th of July 1874, copy of which will be found at pages 35 to 38 of the Record. Mr. Cushing swears that in purchasing this property he was acting for the trustees of the Church, authorised by a resolution of the 22nd June 1874, a copy of which resolution will be found at pages 45 and 46 of the Record. According to the registered titles, the trustees of Calvary Church were not the proprietors

of the property in the lane in question at the time of the deposit of the plan, but merely had a right of way over it in common with others to whom Mr. Cushing had given rights of way, namely, Messrs. Hannah & Lawson, to whom Mr. Cushing had sold two lots on the North side of the lane, forming the remaining portion of lot 1604, and Messrs. Allen, Tolmie, Bell and others to whom Mr. Cushing had sold lots forming part of lot 1605, on the South side of the lane, he having purchased lot 1605 on his own account on the 8th of June 1876, from Michael C. Mullarky, by deed before J. S. Hunter, Notary Public, bearing that date, a copy of which will be found at pages 73 to 75 of the record, and having resold this property in lots to the parties above named, giving them rights of way in this lane, as will be seen by the copies of the deeds at pages 49 and 52 of the record, and as appears by the evidence of Mr. Cushing at pages 100 to 103 and pages 115 and 116. Subsequently, after the Railway Company had filed their plan and the attention of the trustee of the Church had been called to the fact that the Railway was going to be constructed over this lane, Mr. Cushing executed a deed of sale to the trustees of the Church, the present Respondents, of date the 18th of March 1887, passed before H. S. Hunter, Notary Public, and registered on the 30th March 1887, by which he conveyed the property in this lane to the Respondents and their successors in office, a copy of which deed will be found at pages 43 to 45 of the Record. In this deed it is stated that the sale was made in accordance with the resolution of the trustees of the 22nd June 1874, already referred to, and Mr. Cushing thereby declared that the said lane formed part of the property which he acquired on the 29th of July 1874, and that he had bought that property for the purposes of the Church and for no other purpose; and Mr. Cushing swears in his evidence that though the trustees of the Church were not at the time of the deposit of the plan the owners of the property in the lane according to the deeds registered, yet it really belonged to them, and that they were entitled to it. His evidence upon this point will be found at pages 111 and 112 of the Record.

5. The Railway Company in the year 1887 acquired by deeds of sale from John Hannah, William McCrudden, Dame Helen Low and William J. Cook the portions of their respective properties abutting on this lane, together with their rights of way in the lane, as will appear by the copies of the deeds of sale which will be found respectively at pages 48, 56, 60, 62 and 67 of the Record, and thereby acquired the rights of all the parties in the lane with the exception of Mr. Lawson and the Trustees of the Calvary Church. On the 2nd of October 1888 the Company Appellants served a notice of expropriation with a plan annexed upon the Respondents, whereby they notified them of the Company's intention to exercise the powers therein described with regard to that portion of lot 1604., being the lane in question, described as lot No. 67 on the map or plan and book of reference of the said railway, the lane being therein described as follows:—

“ A tract or parcel of land being part of a lane in common and forming the Southern corner of the said property number 1604 of said ward, bounded on the North-east end and on the North-west side by the property known as official No. 1605 of said award, and on the South-west end by a lane leading to Richmond Avenue, the said tract of land being more particularly described as follows, viz.:—Commencing at the Southern corner of the said property No. 1604 and continuing from thence in a North-westerly direction along the South-western side of the last-mentioned Rec. p. 33, l. 16.

property a distance of 10 feet, thence in a North-easterly direction along the North-western side of said lane in common a distance of 23 feet, thence in an Easterly direction diagonally across the lane a distance of 29 feet and 1 inch to the South-eastern side of said lane in common, thence along said South-eastern side a distance of 50 feet 4 inches to the point of commencement, the said tract of land containing a superficies of 367 feet, the whole English measure.”

The powers to be exercised were described in the said notice as follows :—

“ The building and maintaining above and over the said lane of a structure on which is to be carried two railway tracks, the supports of the structure being erected not on said lane but on adjoining land and no part of said structure being nearer the present surface of such land than 12 feet, leaving the said lane free and clear with an opening to its full width of 10 feet up to the said height.”

6. The Railway Company offered a sum of \$25 as compensation for all damages caused by the exercise of the said powers in regard to the said land, and named Mr. R. D. McGibbon, advocate, as their arbitrator. This notice was accompanied by a certificate of Mr. Joseph Rielle, provincial land surveyor, as required by the Act, in which he stated that the sum offered was a fair compensation for all damages, which he considered to be merely nominal. This notice, with certificate attached, will be found at pages 33 and 34 of the Record, and a copy of the plan has been sent over with the Record and will be produced on the Appeal. The Respondents refused to accept this offer and appointed John L. Brodie as their arbitrator, and the two arbitrators named Mr. Charles James Fleet as third arbitrator. The arbitrators then proceeded to view the property, take evidence in writing, hear the parties and render their award as required by Sections 152 to 155 of the Railway Act then in force, 51 Vic., chap. 29. The arbitrators, under reserve of objections by the Appellants, took a large mass of testimony offered by the Respondents to establish that the property upon which the church was built was injured and depreciated in value as a church property, owing to the situation of the railway rendering it unsuitable for church purposes by reason of the noise, dust, smoke and vibration of passing trains. The evidence thus taken suggested that the church might be abandoned with the view of building a new church in a more suitable locality, although there was no evidence adduced to show that any resolution had been passed by the trustees or any definite action taken by the congregation to that effect, nor was it shown that any member of the congregation had seceded from the church on this account up to the close of the arbitration proceedings in the month of May 1889 when the railway had been for some time in full operation, and although it appeared that the members of the congregation were resident at such points in relation to the location of the church that no new location could be found suitable for more than half of them or that a change would mean a break up of the congregation. It was proved further that the homologated line of Guy Street, as shown upon the homologated plan of the city, would pass through the church building whenever the street should be widened in accordance with the homologated plan, which would involve the destruction of the church, as shown by the evidence of Charles Dodwell, civil engineer, and Henry Irwin, provincial land surveyor, at pages 241 and 258 of the Record ; and these same gentlemen proved that the railway

as constructed did not touch or encroach upon any part of the church property or the lane in question, the supports of the trestle being placed upon the property acquired by the railway from the abutting proprietors, and the trestle itself crossing the lane at a minimum height of 12 feet and leaving a clear passage-way of 10 feet wide and 12 feet high.

7. The Arbitrators, after hearing the evidence and the parties, made their award on the 14th of February 1890, whereby Messrs. Brodie and Fleet, two of the Arbitrators, awarded the sum of \$16,308 to the Respondents, Mr. McGibbon dissenting from the award. A copy of the award will be found at pages 18 and 19 of the Record. The Railway Company Appellants appealed from this award to the Superior Court by the proceedings already set forth, and that Court, by judgment rendered on the 17th of November 1891, reduced the award to the sum of \$1,367, this amount being made up by allowing \$367 for the value of the ownership in the lane and as compensation for the interference with that part of the property, and one thousand dollars for damages resulting from the deprivation of air and light and from obstruction to the communication with the public street. The learned Judge held that the Respondents were not entitled to any damages caused to the rest of their property by reason of the noise, smoke, vibration and other inconveniences resulting from the operation of the railway. The formal judgment of the Court will be found at pages 12 and 13 of the Record. The Respondents appealed from this Judgment to the Court of Queen's Bench, Appeal side, and that Court, by Judgment rendered on the 26th of April 1893, reversed the Judgment of the Superior Court, and dismissed the appeal of the Railway Company to the Superior Court from the said award, and restored the award. This Judgment will be found at pages 304 and 305 of the Record, and the reasons of His Honor Mr. Justice Hall, who delivered the Judgment of the Court, will be found in the Appendix, Judge's Reasons. The Appellants are aggrieved by this Judgment, and hence the present Appeal.

pp. 304-305.

8. The Appellants complain of the Judgment of the Court of Queen's Bench first upon the ground that the Court did not, as it is submitted they were bound to do, either decide such questions of fact as they held to be relevant in point of law upon the evidence taken before the Arbitrators as in a case of original jurisdiction, or remit the same to be so decided by the Superior Court, but refused so to do, and declared that they would not substitute their discretion for that of the Arbitrators, unless the award could be said to be unreasonable or manifestly incorrect, which it did not appear to them it was. In the formal Judgment of the Court, there is no reference to the evidence, further than the *considérant* that in the present case the maintenance of the train service would cause direct damage, loss and inconvenience to the trustees and greatly injure the use and enjoyment of their remaining property for church purposes, to which use it had been applied and dedicated for many years prior to the date of the expropriation notice. And the Court held that the Arbitrators acted within their legal powers and functions in taking into consideration not only the value of the expropriated premises, but the direct damages caused and to be caused to the remainder of the property by the intended use of such expropriated real right by the Railway Company. Mr. Justice Hall, who delivered the Judgment, stated the opinion of the Court in the following form:—

“Is that estimate which the present Arbitrators have made, judicious and suitable? In the face of the evidence adduced it cannot be said to be

unreasonable or manifestly incorrect, and we do not feel warranted, therefore, by substituting our discretion for theirs, to adopt an estimate of damage which might be open to equal criticism, and even less defensible according to the evidence by which both they and we are bound."

Mr. Justice Bossé dissented from the Judgment.

9. The Appellants are willing to admit for the purposes of the present Appeal that the construction of the railway over the lane in question constituted such an expropriation of a real right belonging to the Respondents as to entitle the proprietors to recover under the Act such direct damages, contemplated by the Act, as are caused and to be caused to the remainder of the property by the intended use of such expropriated real right by the Railway Company; but they submit that the Court of Queen's Bench was under the Act bound either (1) itself to examine and weigh the evidence and decide upon it as in a case of original jurisdiction, not whether the award of the Arbitrators was manifestly incorrect and unreasonable, but what upon the evidence taken before the Arbitrators was the just amount of damages or (2) to remit that question to the Superior Court for its decision. Paragraph 2 of Section 161 of the Railway Act is express that upon the hearing of the Appeal, the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the Arbitrators as in a case of original jurisdiction. This, it is submitted, has not been done; but on the contrary, the Court appears to have laid down the principle that the Arbitrators had a discretion which was not to be interfered with unless exercised in a manner unreasonable or manifestly incorrect. It is submitted that the Arbitrators allowed an excessive and unreasonable amount of compensation, based upon exaggerated estimates of the value of the property and of its depreciation by the near presence of the railway, and upon the mere hypothesis, inadequately supported by evidence, that the church must and would be removed and a new one built in another place. It will be seen from the memorandum made by Mr. Brodie of his estimate of the amount of the Award, which will be found at page 93 of the Record, that the Arbitrators allowed for a depreciation of the whole of the property, including the lane, making an area of 11,232 feet, the cost of building a similar church and the cost of removing the church fixings and organ; Mr. Brodie's estimate of the compensation seems to have been accepted by the third Arbitrator, with a slight diminution of the total. It is submitted that the Court was bound to examine and weigh the evidence on these various grounds of estimated damage, and to decide the case upon and in accordance with their own appreciation of that evidence and not the appreciation of the Arbitrators, or to remit the case for such action by the Superior Court.

10. The Appellants do not press that their Lordships' Board should, unless they think fit themselves, go into the evidence and fix the amount of compensation which should be allowed to the Respondents, but they submit that the Appeal should be allowed on the ground that neither of the Courts below has decided the facts according to the law now laid down upon the evidence as in a case of original jurisdiction, and that the Appellants are entitled to such decision, and they submit that the case should be remitted for such decision to the proper Court, or that it should be so decided here, or that such other relief be granted to them as their Lordships may deem just.

11. It is submitted that the greater part of the compensation given by the Arbitrators was not for the direct damage caused to the property by the exercise

of the powers of the Railway Company, but for indirect, remote, conjectural and hypothetical damages based upon the opinions expressed by the proprietors' witnesses that the operation of the railway interfered with the use of the property for church purposes, and that it might be necessary eventually to remove the church to another place. The damages awarded by the Arbitrators on this head are in the nature of compensation for loss or injury to the business carried on by the proprietors of the lands affected by the railway, and are it is submitted, too remote, indirect, conjectural and hypothetical to be the subject of compensation.

12. The Appellants also submit that the arbitrators erred in allowing compensation to the Respondents for depreciation in the value of the property in the lane as though they had been the owners of it at the date of the deposit of the plan. It is evident that the arbitrators, as well as the judge in the Superior Court, treated the case as though the Trustees of the Calvary Church had been the owners of the property in the lane from the time of the deposit of the plan, whereas they obtained no title thereto until more than a month afterwards; and had at the time of the deposit of the plan merely rights of passage over it; and it is proved by the evidence of Mr. Cushing already referred to that the conveyance by him to the Trustees of the ownership of the lane was made in consequence of the deposit of the plan. Section 145 of the Railway Act prescribes that the date of the deposit shall be the date with reference to which the compensation or damages shall be ascertained. It is submitted that it follows from this that the Trustees of the church were only entitled to recover such compensation as Mr. Cushing would have been entitled to recover had he remained the owner of the lane; and it is evident that the property in the lane would be of much less value to him than to the Trustees, inasmuch as he owned no land abutting on the lane, while the Trustees, according to the evidence of Mr. Cushing, claimed the right to build over the lane from their adjoining property; and this right was recognised, erroneously it is submitted by the judge in the Superior Court. It is not shown precisely what amount the arbitrators awarded in this connection, though it would appear from Mr. Brodie's memorandum already referred to that they fixed the same ratio of value and of depreciation for the lane as for the principal property. But whatever the amount of compensation awarded, it is evident that they proceeded upon a wrong principle in connection with the property in this lane, and therefore it is submitted that the case should be so remitted that the Court or the arbitrators may proceed to assess the compensation upon a proper basis with regard to the property comprised in this lane, as well as with regard to the indirect damages resulting to the remainder of the property by reason of the operation of the railway.

13. The Appellants submit that their appeal ought to be allowed for the following amongst other

REASONS.

(1) Because the Court of Queen's Bench should have decided the case or remitted it to the Superior Court for decision upon the evidence taken before the arbitrators as in a case of original jurisdiction.

(2) Because the arbitrators in estimating the compensation fixed by their award put a speculative, prospective and exaggerated estimate on the damages caused by the exercise of the Railway Company's powers with regard to the Respondent's property, and illegally and improperly awarded remote, speculative and hypothetical damages to the Respondents.

(3) Because the arbitrators in estimating the compensation fixed by their award proceeded upon a wrong principle in treating the Trustees of the Calvary Church as though they had been the owners of the property in the lane in question at the time of the deposit of the Railway Company's plan.

(4) Because the Court of Queen's Bench erred in confirming the award of the said arbitrators.

(5) Because the judgment of the Court of Queen's Bench is wrong and erroneous.

EDWARD BLAKE.

HARRY ABBOTT.

In the Privy Council.

No. 70 of 1893.

ON APPEAL from the Court of Queen's Bench
for Lower Canada.

Between

THE ATLANTIC AND NORTH WEST
RAILWAY COMPANY - - *Appellants,*

AND

PETER WOOD, et al es qual - *Respondents.*

Case

ON BEHALF OF THE APPELLANTS.

BOMPAS, BISCHOFF, DODGSON, COXE & BOMPAS,

4, GREAT WINCHESTER STREET, E.C.