Privy Council Appeal No. 68 *of* 1916.

Dame Alice Fraser and Others - - - - *Appellants,*

v.

The City of Fraserville - - - - - - *Respondent,*

Same - - - - - - - - - - - *Appellants,*

v.

Same - - - - - - - - - - - *Respondents,*

Consolidated Appeals

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JANUARY, 1917.

Present at the Hearing:

THE LORD CHANCELLOR (LORD BUCKMASTER).
VISCOUNT HALDANE.
LORD DUNEDIN.
LORD PARKER OF WADDINGTON.
SIR ARTHUR CHANNEL.

[*Delivered by* LORD BUCKMASTER.]

The appellants in this case are the plaintiffs in an action brought by them against the respondent and the defendants in an action brought by the respondent against them.

The object of the appellants' action was to enforce an award of arbitrators dated the 27th November, 1911, by which the sum of 75,700 dollars was fixed as the sum to be paid by the respondent to the appellants in full compensation for the expropriation of certain property.

The action by the respondent was to set the award aside. The cases were consolidated at the trial and the Superior Court by its judgment dated the 14th October, 1914, discharged the award with costs and dismissed the appellants' action. The Court of King's Bench for the Province of Quebec (Appeal Side) by two judgments confirmed the Superior Court. The appellants have appealed from these two judgments and these appeals, which have been consolidated, constitute the present appeal.

The substance of the dispute is connected with a subject which has not been unfruitful in litigation, namely, the determination of the exact principle upon which prospects and possibilities of future development ought to be taken into account in determining the price to be paid for property compulsorily acquired.

The appellants are the owners of the banks and lands adjacent to the waterfalls of the River du Loup, known as the Grandes Chutes. These falls are within the limits of the jurisdiction of the respondent city, by whom the water-power is required for the operation of a municipal system of electric lighting.

It appears that the value of these falls for industrial enterprise has long been recognised, and as far back as 1881 William Fraser, the predecessor in title of the present appellants, granted a lease of the falls and the adjacent lands to a paper pulp company for twenty years at the rate of 30 dollars per year. This lease was extended from time to time, and in 1896 a final extension was granted to the then holder of the original lease for a period of ten years.

In 1905, one year before the expiration of this lease, the then lessees, who had used the water to carry on a business of electric lighting, sold the lease and the business to the city for the sum of 60,000 dollars. Since that time the electric light system has been operated exclusively by the municipality, who have been in continuous possession of the Grandes Chutes for that purpose.

In 1906 an offer was made by the city to William Fraser for a new lease of twenty-five years, but, though this offer was accepted, no formal lease was executed, and William Fraser died in 1908 with the matter still in abeyance.

On the 10th July, 1907, the respondents adopted a by-law authorising them to construct a reservoir higher up the river in order to regulate the flow of water and also to expropriate all the necessary land for the purpose of this enterprise. At certain falls lower down the river there was at this time another mill established for the purpose of pulp manufacture, and the lease of the falls and adjacent land, which was of long duration, was held by a company known as the Rivière du Loup Pulp Company, Limited.

The Rivière du Loup is fed by four tributary streams, which run down through valleys whose natural construction readily permits of the waters being dammed in reservoirs. It is of course obvious that if such reservoirs were constructed it would be possible to regulate the flow of water over the falls of the river so as materially to increase the amount of horse-power available at each fall throughout the year. The respondents accordingly in March, 1909, entered into an agreement with the Pulp Company, providing that the dams that they proposed to erect in the valleys should be exclusively used for the purpose of the storage reservoirs, and should not be parted

with by the city without the express consent of the company, and for this consideration the company agreed to pay four-fifths of the total sum of 18,000 dollars, the proposed cost of expenditure, the future maintenance and repair of the reservoirs being divided between the city and the company in the ratio of one-third to two-thirds. These reservoirs were in course of erection, when on the 18th October 1909, the city passed a by-law authorising the town to acquire the ownership of the Grand Falls and of the adjacent property necessary for the electric light system, and it was thereby enacted that in default of agreement the property should be compulsorily acquired, and certain loans necessary for the acquisition were thereby authorised. A further by-law to the same effect was passed on the 20th June 1910, and a further loan provided for.

On the 27th September 1910, the respondents passed a resolution expressing their willingness to pay to the proprietors of the lands and the water-power the sum of 20,000 dollars, and this was served on the parties.

It is quite unnecessary to examine the authority under which this notice was given. There is no question in this appeal but that the city had full power to take the steps they did, and for the purpose of determining the value of the property they intended to acquire, the 30th September, 1910, the date on which the resolution was served, is accepted by both parties as being the critical date. On that date there were four persons who together owned the interest in the property of the falls and lands originally held by William Fraser. One was the Mayor of the town, and he expressed his willingness to sell his share for 5,000 dollars. The remaining three proprietors, who are the present appellants, refused, and it therefore became necessary to determine the sum to be paid. The procedure that regulates the fixing of this compensation is to be found in articles 5790 to 5800 of the Revised Statutes of Quebec. Section 5795 is in these terms :—

"If there be no agreement between the parties the value of the immoveable in question together with whatever goes in compensation of the value of such immoveable shall be estimated by arbitrators, named as follows: one by Council, one by the owner or on his behalf, and a third by the two former, or, if they cannot agree, by a Judge of the Superior Court on demand of any of the interested parties."

Section 5798 is as follows :—

"In any award rendered by them, the arbitrators shall mention the lot whereof the immoveable taken forms part, the name of the owner of such immoveable, and also the by-law or order of the Council under which such immoveable is taken, and shall fix the amount of the indemnity, if they grant one, and if they do not, a statement to that effect shall be entered in such award establishing their refusal."

While by Section 5797 the award is made final and without appeal.

Under Section 5795 the City Council appointed Mr. Bertrand as their arbitrator, and the proprietors having failed to appoint one on their behalf, a petition was presented to the Judge of the Superior Court in a case No. 4573, requesting the appointment of an arbitrator on behalf of the other parties.

On the 21st July, 1911, the Court by consent appointed Mr. St. George on behalf of the appellants, and the two arbitrators appointed Mr. St. Laurent as the third arbitrator in accordance with the code. The arbitrators proceeded with their work, and on the 27th November, 1911, made the award which is in question in these proceedings. It is in these terms :—

"To His Honour the Mayor and Council,

"City of Fraserville, County of Temiscouata, P.Q.

"We the undersigned, the arbitrators appointed in this case, No. 4573, after having examined and valued the property, heard the parties and their witnesses, under oath, administered by one of us, do hereby certify that we award to the respondents the sum of seventy-five thousand seven hundred (75,700) dollars, to be paid by the petitioner in full compensation for the expropriation of the property expropriated by the said petitioner.

"ARTHUR ST. LAURENT.
"PERCIVAL W. ST. GEORGE.

"I cannot agree with above award.
"J. T. BERTRAND."

Except so far as the No. 4573 introduces into this award the details of the process to which it is a reference, it is plain that the award does not comply with the provisions of article 5798 of the Revised Statutes in several material respects, and this was made one of the grounds of objection to the award on the part of the city; but it is not material to consider the effect of the omissions, for, even if this objection were maintained, the award could be remitted to the arbitrators to supply the necessary statements, and the substance of the award would remain. The real ground upon which the award is challenged is far more serious, and it is that the arbitrators have exceeded their jurisdiction and assessed the valuation on a totally wrong basis. There is nothing to support this contention on the face of the award; but in the course of the proceedings Mr. St. Laurent was called as a witness, and he produced a long and very elaborate system of notes of the evidence that he had taken and the calculations that he had made in order to arrive at his figures. He divided the subject-matter into two heads: the value of the lands and the water power in the physical condition in which they were found at the date of the valuation, and the value of the possibilities of development of those waterfalls by storing and regulating the waters through the medium of reservoirs. In doing this, their Lordships were of opinion that he was clearly right. The possibility of an added utility for any expropriated property due to existing possibilities of development is, subject to limits, to which their

Lordships will refer, a right and proper subject for consideration, in ascertaining the compensation to be paid on expropriation. But, in the method which was adopted by Mr. St. Laurent for arriving at what he regarded as the measure of this compensation he did not, in their Lordships' opinion, fix, as he was bound to do, the value of the immoveable he was appointed to determine, but the value of another thing which was altogether outside his powers.

It is unnecessary to examine the evidence upon this point in close detail, because the statement of Belleau, J., in the Superior Court in these words :—

"Ils ont, comme dans la cause citée plus haut, commis l'erreur de faire participer l'expropriée aux bénéfices de la plus-value, donnée à la propriété, par la réalisation de l'objet pour lequel acquisition en était faite. Ils font payer à la ville, non pas la valeur d'un pouvoir d'eau pouvant développer 300 h.p., qui est ce que les propriétaires vendent, mais moitié de la valeur d'un pouvoir additionnel de 1,200 h.p., qui est ce que la ville doit réaliser par l'exécution des travaux qu'elle a en vue ou en voie d'exécution. Ce n'est plus la valeur pour le propriétaire qui vend, mais la valeur pour celui qui achète, calculée sur le bénéfice qu'il doit retirer de l'exploitation à laquelle il destine la propriété expropriée. Le vendeur reçoit plus qu'il ne donne, il partage dans ce que la propriété vaut pour l'acheteur. Voilà ce qu'est l'indemnité que la ville est appelée à payer. Je répète que le principe est faux et qu'il vicie les procédés des arbitres."

and that of the Chief Justice—

"On voit par les notes du tiers arbitre, Arthur St. Laurent, de quelle manière il a procédé. Il a commencé par calculer le revenu annuel que donneront les 1,200 forces nouvelles du pouvoir des Grandes Chutes, et il est arrivé à la conclusion que ce revenu serait de 25,850·00 dollars; puis il a retranché de ce montant une somme de 23,875·00 dollars pour frais d'exploitation, intérêt sur montant déboursé par la cité, fonds d'amortissement et part raisonnable de la cité dans les profits; ce qui laissait une balance de 1,975·00 dollars. Il a accordé cette balance de revenu aux expropriés comme étant la part qui devait leur revenir dans les profits, et il a capitalisé ce revenu à 5 pour cent, ce qui forme un capital de 39,500·00 dollars. C'est ce dernier montant que les arbitres ont accordé aux expropriés comme indemnité pour la valeur potentielle des Grandes Chutes."

are in effect concurrent findings of fact which there is abundant evidence to support, that in truth the value which Mr. St. Laurent fixed was the value of the property to the person who was buying, and not to the person who was selling, and it was not this value that he was appointed to determine.

The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Lucas* v. *Chesterfield Gas and Water Board* (1909, 1 K.B. 16), *Cedars Rapids Manufacturing Company* v. *Lacoste* (1914, A.C. 569), and *Sidney* v. *The North-Eastern Railway Company* (1914, 3 K.B. 629). The principles of those cases are carefully and correctly considered in the judgments, the subject of appeal, and the substance of them is this: that the value to be

ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported.

Their Lordships desire to add that it is plain, from the language of the statute making the award of arbitrators final and without appeal, that apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed. Their findings of fact and their findings of value, unless it be shown that the value is not that which they were appointed to determine, are free from challenge.

The appellants have urged that in the present case if the award is found to be bad, the matter should be sent back to the arbitrators to be reheard. It is quite possible that this is the proper course to pursue. It may be that the arbitrators are not deprived of their office by what has occurred, that they have merely done an informal and an invalid act, but this is essentially a question which ought primarily to be considered in the Courts of Quebec, and it does not appear to have been the subject of any close examination in any of the judgments which have been passed in these proceedings. It may well be that there is a recognised and established method of dealing with such cases acted on in those Courts, and without knowledge on this point their Lordships do not think it right to express any opinion at all upon the question as to whether the arbitrators can now proceed to make a new award, or whether they have no longer any authority to act. Their Lordships will accordingly humbly advise His Majesty that these appeals fail and must be dismissed with costs.

In the Privy Council.

DAME ALICE FRASER AND OTHERS

v.

THE CITY OF FRASERVILLE,

SAME

v.

SAME.

DELIVERED BY LORD BUCKMASTER.

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1917.