26, 1935

In the Privy Council.

No. 24 of 1934.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

IN THE MATTER of an Arbitration

BETWEEN

THE STANDARD FUEL COMPANY OF TORONTO LIMITED - - - - - - - - - *Appellant*

AND

THE TORONTO TERMINALS RAILWAY COMPANY - - - - - - - - - *Respondent*

CASE FOR THE RESPONDENT.

RESPONDENT'S CASE

Record.

1. This is an appeal, admitted by the Court of Appeal for Ontario, from that part of a judgment of the Court of Appeal dated the 24th April, 1933, which allowed the Respondent's appeal from an award dated the 30th of September, 1932, made by an Arbitrator in expropriation proceedings under the Railway Act (R.S.C. 1927, chap. 170) whereby the Appellant was awarded in respect of buildings, plant and equipment and business disturbance, disorganisation etc. the sum of $102,006.69 and in lieu thereof awarded the sum of $20,000 with interest in full of all compensation to the Appellant other than the share to which the Appellant was entitled of the sum awarded as compensation for the land expropriated.

pp. 488-9. p. 487, l. 19. p. 481, l. 1.

2. The Arbitrator had awarded: (1) for the land $214,637; (2) for the buildings, plant and equipment $62,006 and (3) for disturbance, disorganisation etc. $40,000. The allowance in respect of the land is not now in question.

p. 480, l. 7. p. 480, l. 40.

By arrangement between the Appellant as lessee of the land and his lessor named Boulton (who was a party to the arbitration proceedings, but is not a party to this appeal) the amount awarded as compensation for the land was to be divisible between the lessee and the lessor in proportions not disclosed. The compensation, if any, in respect of the Appellant's claims for buildings and disturbance was to be determined as if the land and the business belonged to a single owner.

p. 2, l. 7. p. 3. p. 160, l. 36. p. 3, l. 32.

S.L.S.S—WL3103B-8306B

Record.

3. The Respondent objected to the allowance of this appeal by the Court of Appeal on the ground that no appeal lies as of right under the Privy Council Appeals Act (R.S.O. 1927, cap. 86). Mr. Justice Masten, who heard the Appellant's motion to allow the appeal, dismissed the
p. 489, l. 1. application but he was reversed by the Court of Appeal. The Respondent will as a preliminary objection contend that Mr. Justice Masten was right and that the appeal should be quashed.

4. On the merits of the appeal the Respondent's submissions are that the judgment of the Court of Appeal should be affirmed; that the Appellant, having been awarded compensation for the tenant's interest in the land, is not entitled to additional compensation in respect of buildings, plant and equipment or for disturbance etc.; that the buildings, plant and equipment, besides being obsolete, were an impediment to any advantageous development of the land and added nothing to its value and that in any case the $20,000 awarded by the Court of Appeal is sufficient to cover such additional compensation.

pp. 530 to 533.

5. An agreed statement as to the facts leading up to the arbitration was filed with the Arbitrator as Exhibit 3.

p. 533, l. 11.

6. The Respondent was incorporated by Statute of Canada (6 Edw. VII. cap. 170) and by subsequent Statutes (3–4 Geo. V. cap. 11, 4-5 Geo. V. cap. 54 and 14–15 Geo. V. cap. 70) was empowered to expropriate lands for the construction of a Railway Viaduct on land reclaimed from Toronto Harbour on Lake Ontario.

pp. 524-5.
p. 527.

7. The property to which the expropriation proceedings relate consists of Lot 31, plan 5A on the old water front to the south of the City of Toronto and an extension of this lot being parcel 9C. This property adjoined Church Street and is referred to in the evidence as " the Church Street site " or " the old site."

pp. 515-521.

Lot 31 was the property of one Boulton and had been leased by him to the Appellant for a term of twenty-one years renewable from the 1st August, 1917, at a rent of $6,000 per annum for the purpose of carrying on a coal business.

Parcel 9C was at the date of the expropriation covered by water and was in effect an extension southerly of Lot 31 to a new water front established by the City of Toronto. The extension accrued to the owner
p. 531, l. 1. p. 57, l. 44. of Lot 31 by virtue of the Windmill Line Agreement dated 15th March,
p. 532, l. 1. p. 527. 1888. Lot 31 and its extension were separated by a strip of land about 66 feet in width reserved by the Crown for a street known as Lake Street.

8. Notice of expropriation was given to the Appellant on the 5th November, 1926, but the Appellant remained in possession until 1st April, 1927, or later. By arrangement the Appellant continued to use a small part of Lot 31 for the delivery of coal by rail until it acquired a much larger and better site in July 1931. Record. p. 524. p. 112, l. 44. p. 88, l. 22. p. 169, l. 14.

9. Pursuant to Statutory authority the Respondent has constructed a Railway Viaduct across parts of the two lots in question, including Lake Street, and extending from east to west upon lands in part reclaimed from the harbour. Plan Ex. 11.

10. Lot 31 had an area of about 2·11 acres and afforded dock accommodation for coal boats not more than 200 feet in length and not drawing more than 14 feet of water. The lot and the buildings, plant and equipment were used by the Appellant almost entirely for the landing and delivery to the main business part of Toronto adjoining the water front of anthracite coal which had been brought by coal boats from United States ports on the south side of Lake Ontario. The Appellant had a number of other depots in different parts of the City of Toronto where bituminous as well as anthracite coal was received by rail and delivered to customers. p. 55, l. 21. p. 84, l. 30. p. 106, l. 38. Plan Ex. 20. p. 106, l. 15.

11. At the time the lands in question were expropriated the whole water front of Toronto was undergoing great changes. The Toronto Harbour Commissioners, a public body acting under statutory authority, were acquiring and reclaiming lands covered with water, constructing walls, making available industrial sites and providing extensive dockage facilities with greatly increased depth of water at the dock walls. Prior to the expropriation these operations had to some extent interfered with the access to the Appellant's dock by water. p. 523, l. 10. Plan Ex. 12. p. 533, l. 28. p. 37, ll. 1-7. p. 98, l. 34. p. 116, l. 46, to p. 117.

12. At the time of the expropriation the Welland Canal was being enlarged to provide a wider and deeper waterway between the upper lakes, including Lake Erie, and Lake Ontario permitting the passage of modern coal and other boats of greatly increased tonnage. The locks of the enlarged Welland Canal admit boats up to 30 feet in draft, a beam of 80 feet and a length of 800 feet. The work was commenced in 1913 and completed in 1931. p. 76, l. 27. p.352, l. 8.

13. Prior to expropriation important changes had been taking place in the coal business in Toronto. Formerly in the central or business part of the City there had been a large demand for anthracite coal for the heating of large buildings. Some time before the expropriation, owing to a change of the system for heating large buildings, bituminous coal and coke were largely superseding anthracite coal while the delivery of anthracite coal p. 100, l. 40. p. 101, l. 7. p. 561 p. 554, l. 23.

Record.

p. 173, l. 46. p. 174, l. 13. p. 363, l. 25. in the up town part of the City some distance from the water front was increasing. As a result of the decreasing demand for anthracite coal in the down town area some coal companies had by 1926 retired from the water front.

14. Bituminous coal came from mines in the United States and was shipped to Toronto almost entirely by rail. Anthracite coal intended for use in the central part of the City was usually delivered by water from United States ports on the South side of Lake Ontario. The Appellant's Church Street site was used almost exclusively for the importation of anthracite coal in small coal boats having a capacity of about 1,000 tons each.

p. 107, l. 3. p. 143, l. 13 p. 554, l. 23.

15. As a result of the changes in the demand and the widening of the Welland Canal it became advantageous to bring bituminous coal from United States ports on Lake Erie to Toronto by water. For this purpose as well as for anthracite coal, the large self unloading boats previously in use on the upper lakes, were more advantageous and economical than the smaller boats previously in use on Lake Ontario and the St. Lawrence canals. Some of these larger boats are capable of carrying 9,000 tons of coal, have a beam of 54 feet, a loaded draft of 20 feet or over and are about 450 feet in length. They are equipped with self unloading machinery and are capable of discharging coal at the rate of from 400 to over 1,000 tons per hour. This compares with about 60 tons an hour by the old method.

p. 134, ll. 21-41. p. 136, l. 13. p. 359, l. 40. p. 551, l. 18. p. 221, l. 36. p. 384, l. 10. p. 361, l. 30. p. 385, l. 17.

16. The method of operating the self unloading machinery is shown in the photographs Exhibit 41. The booms by which the coal is transferred from the boats to the shore have a length of 150 to 200 feet. The Appellant's yard on Lot 31 was not large enough to accommodate both bituminous and anthracite and the dock was not suitable for use by the self unloading boats. It could not accommodate boats of more than 200 feet in length or having a draft loaded of more than 14 feet. The small boats which could discharge at the Appellant's dock carried on the average little more than 1,000 tons of coal each and had to be unloaded from the dock. Owing to the rock bottom at the dock it was impracticable to obtain a sufficient depth of water by dredging.

pp. 615-619. p. 362, l. 1. p. 261, l. 24. p. 106, l. 38. p. 107, l. 6. p. 107, l. 28. p. 55, l. 21. p. 527. p. 143, l. 13. p. 389, l. 13. Plan, Ex. 36.

17. The Appellant admitted that, if it had retained the Church Street site it would have been necessary to make extensive alterations in order to adapt the premises to meet the changed conditions and to provide accommodation for bituminous coal.

p. 112, l. 29. p. 135, l. 44. p. 141, l. 17. p. 173, l. 1.

The plan produced by the Appellant, which had been prepared for the purpose of the arbitration, involved filling in the water lot 9C, and also, if necessary, Lake Street, but leaving on the eastern side of the lot an unfilled

Plan Ex. 29. pp. 581-5. p. 252, l. 1.

slip or dock having a width of 54 feet for the accommodation of self unloading coal boats. The proposed method of construction by means of a series of concrete caissons with intermediate cribbing was criticised by the Respondent's experts who considered that to carry out the plan in a proper manner would have involved an expense out of all proportion to the value of the area reclaimed. It was pointed out that land reclamation can only be effected economically when done on a large scale.

Record.
p. 373, l. 42.
p. 369, l. 3.
p. 266, l. 38.
pp. 592-5.
Plans Exs. 42, 45, 47, 49.
p. 373, ll. 19-38.
p. 374, l. 10.
p. 434, l. 41.

18. The depth of water at the proposed new dock would still have been insufficient for the largest boats and the proposed width of 54 feet is not sufficient for the safe handling of even medium sized boats. A minimum width of at least 80 feet would have been necessary. With a 54 feet slip the land area would have consisted of a narrow strip of about 150 feet in width while with an 80 feet slip the land area would not have been more than 125 feet wide. On this narrow site the booms of self unloading boats 150 to 200 feet in length would not have operated to advantage.

p. 369, l. 25.
p. 369, l. 41.
p. 370, l. 21.
p. 373, l. 12.
p. 309, l. 21.
p. 269, l. 4.
pp. 615-19.

The old main coal shed, which occupied the whole southerly front of Lot 31, would not have been accessible to the self unloading boats. The plan also involved the setting up of overhead conveying apparatus for carrying the coal from one lot to the other across Lake Street. This could only have been done with the permission of the City authorities and if this were refused the alternative was to carry the coal across the street in trucks.

p. 587.
p. 240, l. 8.
p. 173, l. 10.
p. 239, l. 41, p. 240, l. 3.

19. It is submitted that the Church Street site, owing to its limited area, its narrowness, its insufficient depth of water and its division into two parts by Lake Street and because of the necessity for reconstruction, was no longer suitable for the purposes of a coal business. To adapt the site to other and more advantageous uses the existing buildings, plant and equipment would have to be scrapped.

Plan Ex. 36.
p. 389, l. 13.
p. 269, l. 4.
p. 373, l. 35.
p. 442, l. 23.

20. Although other sites on the water front for the Appellant's coal business were in 1926 and subsequently available at prices which, having regard to the areas, were appreciably less than the value awarded for the expropriated land, the Appellant continued for some years to carry on its business at its up town depots and, by arrangement with the Respondent, on the northern part of lot 31.

Ex. 40.
p. 357, l. 40.
p. 358, l. 6.
p. 88, l. 29.

21. In 1931 the Appellant took a lease from the Harbour Commissioners of a new site on the Harbour rather more than a mile east of the expropriated property. The new site, which is shown on the plans exhibits 23A and 23B, provided a dock frontage of 1,537 feet to a water channel having a depth of 30 feet of water and a width of 200 feet and had a depth of 200 feet and an area of slightly over seven acres.

p. 536.
p. 543.
pp. 541, 549.
p. 105, l. 12.

Record.

p. 141, l. 6. p. 141, l. 30. p. 554, l. 24. **22.** As a result of the change to the new site the Appellant's President anticipated taking delivery of 75,000 to 100,000 tons of coal annually. Over 50,000 tons of water-borne coal were in fact delivered at the new dock during the first year of its operation. This was considerably more than had ever been delivered at the old site.

The disturbance which enabled the Appellant to remove from premises which changed conditions rendered unsuitable and to acquire an adequate and satisfactory site was a benefit and not, it is submitted, a matter for compensation.

23. In reference to the value of the buildings, plant and equipment, the Arbitrator said :

p. 477, l. 10.

> " The buildings and machinery served the purposes of the Fuel Company for many years and in November, 1926, constituted an asset belonging to them and by the expropriation taken away, and as the claimants must be compensated for all damages sustained, I do not understand why the Fuel Company is not entitled to whatever sum they were reasonably worth in November 1926. If in October, 1926, the Fuel Company applied to a Bank for credit or a loan, would not these buildings and machinery have been a real asset to pledge at whatever value they then had ? "

24. The amount awarded by the Arbitrator as the value of the buildings, plant and equipment was $62,006.69. This value appears to be based on cost of replacement and it is submitted that this is not, in the circumstances, a proper basis.

p. 477, l. 19.

There is, it is submitted, no evidence that the buildings added anything to the value of the property. There is evidence to the contrary. McBrien, the Appellant's valuer, said that his valuation did not include anything for buildings, and he declined to say that they added anything to the value.

p. 83, ll. 13-18

p. 476, l. 43. p. 395, l. 29. p. 396, l. 14. p. 437, ll. 15-27. The Respondent's valuer, whose valuation of the land at $214,637 was accepted by the Arbitrator, did not consider that the buildings added anything to the value of the land except a wreckage or salvage value of $200 to $300. He thought that if the land were used to the best advantage the buildings would have to be demolished and he could not believe that anyone who had paid the amount of his valuation for the land could use the buildings to advantage. The property would in his opinion " sell for just as much with the buildings off as with them on." He expressed the view that " no man could afford to take that property at my valuation and continue on for any business with the type of buildings on that property when I value it over $200,000."

p. 442, ll. 18-26.

25. The buildings, plant and machinery, apart from their unsuitability for modern conditions, were old, dilapidated and unsafe.

pp. 603-13.

Record.

The buildings are referred to by different witnesses as very old and dilapidated ; the main building, which was used for the storage of anthracite was a shed over a pile of coal ; the roof sagged and the poles which supported it had pushed through it. Some of the posts had been shifted by the weight of coal. The cost of repairing the shed was estimated at $36,000. p. 113, l. 2. p. 271, l. 29. p. 272, l. 40. p. 273, l. 5. p. 256, l. 19. pp. 326-330. p. 329, l. 17–p. 330, l. 3. p. 285, l. 4.

Bituminous coal had always been stored in the open and sheds for the storage of anthracite are no longer considered necessary. There are none on the Toronto water front. p. 169, l. 1. p. 261, l. 13. p. 360, l. 4.

The unloading tower at the south end of the building was in bad condition ; it had a broken back and was unsafe ; it leant towards the water about three feet ; it was held back by guy wires which had been renewed ; it swayed in the wind and also when the hoist was operated. The other unloading equipment on the dock was old and inefficient. The use of boats with self-unloading equipment rendered unloading apparatus on the dock superfluous. p. 326, l. 12. p. 327, l. 37. p. 257, l. 19. p. 326, l. 26. p. 328, l. 9. p. 258, l. 25. p. 286, l. 22. p. 261, l. 24.

The plant and equipment were very old. Much of it was worn out. The two boilers were old, the smaller being in poor condition, and the brickwork ought to have been replaced. p. 257, l. 43. p. 323.

Other equipment was practically worn out. The steam engine was so old that spare parts were unobtainable. p. 258, l. 9.

There had been no substantial repairs to the buildings or plant for four or five years prior to expropriation. p. 88, l. 10.

26. In respect of business disturbance the Appellant claimed (A) for extra cost of carriage by rail over carriage by water $64,322 and (B) for extra cost of delivery $5,717. p. 553, l. 5.

The Arbitrator said :

> " My conclusion is, that the Fuel Company has suffered no substantial damage in locating at the new site but nevertheless must be paid a fair and reasonable sum for the extra costs of conducting their business at the old site from November, 1926, until they took possession of the new site in July 1931. p. 478, l. 40.
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> * * * * * *
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> " I find it difficult to determine with any certainty what sum for damages for business disturbance and disorganisation should be allowed, but after careful consideration I think a fair and reasonable sum would be $40,000.00." p. 479, l. 14.

27. The availability of the old site for water transport, its nearness to the business part of the City and the consequent short haul were

Record. p 208, l. 18– p. 209 l. 4. p. 439, l. 11.

elements taken into account by the valuers in fixing the value of the site itself and, it is submitted, that the loss of these advantages must be taken to be compensated for in the price payable for the land itself.

p. 112, l. 29. p. 135, l. 44. p. 173, l. 1.

Apart from the expropriation it would have been necessary for the Appellant, owing to the change of conditions in the coal business, either to remodel its plant and premises or to move to a new site. Either course would have involved a disturbance to the business.

pp. 554-5.

28. The Appellant's claim of $64,322 for extra cost of rail carriage was based on erroneous assumptions as to the quantity of coal which would have been imported by water at the Church Street site and the alleged advantage in cost of water carriage over land carriage. Among other errors, it assumed an importation of 21,289 tons per annum, whereas Appellant's own figures showed that it had shrunk to 12,300 or 15,300 tons per annum before expropriation. It involved a serious clerical error (8.42 cents per ton) in cost of carriage and failed to take account of extra degradation in transit and handling and other important elements of cost and loss incidental to the handling of water-borne coal brought to Church Street and the carriage of part of it from Church Street to other yards.

p. 554, l. 38, p. 449, l. 36– p. 450, l. 46. p. 453, ll. 3-23 p. 335, l. 38. p. 262, l. 9. p. 451, l. 4. p. 218, l. 22.

p. 559.

29. Similarly the claim for $5,717 for extra cost of delivery of anthracite coal and coke from outside yards to the down town area was based on erroneous computations and assumptions both as to the quantity of coal involved and the elements which should enter into a calculation of extra cost. Evidence as to charges for delivery by outside parties who contracted at different times to make deliveries for the Appellant showed that any difference in cost was negligible.

p. 139, l. 44– p. 140, l. 21.

pp. 486-7.

30. On the 24th of April, 1933, the Court of Appeal (Mulock, C.J.O., Magee and Middleton, JJ.A.) delivered judgment allowing the appeal of the Respondent and reducing the award in respect of buildings, plant and machinery and disturbance from $102,006 to $20,000. Mr. Justice Magee, while thinking the $102,006 awarded was on the evidence too liberal, considered that an allowance of $50,000 would be proper.

p. 483, l. 12.

Mr. Justice Middleton who delivered the judgment of the majority observed :—

p. 486, l. 10.

> " As a coal yard this property was not worth two-thirds of the price awarded. The additional sum is by reason of its possible use for business or building purposes involving the removal of the business and the destruction of the buildings, and so I think the award made to the tenant cannot be sustained. The tenant however should, I think, be allowed something for the forcible taking and for the expense cast upon him at this present time by the change he has had to make, and I would allow to the tenant in addition

to that which he will receive as his due share of the sum given for the land which includes its potential value, the sum of $20,000. In this I feel I am erring considerably on the side of liberality, but there are factors in the case which I think make it reasonable that this sum should be paid."

31. The Respondent submits, as a preliminary objection, that the appeal should be dismissed or quashed, on the ground that there is no appeal as of right, the Privy Council Appeals Act of Ontario having no application because the appeal to the Court of Appeal was under the Dominion Railway Act (R.S.C. cap. 170, sec. 232) and submits in the alternative, that the appeal should be dismissed on the merits for the following amongst other

REASONS.

(1) BECAUSE the $20,000 awarded by the Court of Appeal amply covered all compensation to which the Appellant was entitled in addition to the amount awarded for the land.

(2) BECAUSE the buildings, plant and machinery added nothing to the value of the land.

(3) BECAUSE the buildings, plant and machinery had no value for use on the site, and if detached therefrom had only a value as scrap.

(4) BECAUSE no scheme for extension or improvement of the premises could adapt the buildings and machinery to modern conditions even at a prohibitive cost.

(5) BECAUSE owing to the changed conditions in the coal trade the old site was unsuitable for, and, on its value as fixed by the arbitrator, was too expensive to be used in a coal business.

(6) BECAUSE the buildings, plant and machinery were an impediment to the improvement of the site.

(7) BECAUSE no purchaser of the land at the price fixed by the award could have afforded to retain the buildings, plant and machinery.

(8) BECAUSE evidence as to physical value or reproduction cost was in the circumstances irrelevant.

(9) BECAUSE the Appellant's claim for disturbance etc. is in reality a claim for the loss of advantages due to the

central situation of the land expropriated and its water transport, which advantages were important elements in determining the value of the land itself, and the Appellant is not entitled to receive, in addition to compensation for the loss of the land, compensation for the loss of its advantageous situation.

(10) BECAUSE the extra costs of rail carriage and delivery resulting from the expropriation, if any, were trifling and do not entitle the Appellant to compensation for disturbance.

(11) BECAUSE deprivation of access by water was occasioned before and independently of the expropriation.

(12) BECAUSE it does not appear that the Appellant lost any business by reason of the expropriation.

(13) BECAUSE the judgment of the majority of the Court of Appeal was right for the reasons stated in the Judgment of Middleton J.A.

W. N. TILLEY.

JOHN D. SPENCE.

In the Privy Council.

No. 24 of 1934.

On Appeal from the Court of Appeal for Ontario.

IN THE MATTER of an Arbitration.

BETWEEN

THE STANDARD COMPANY FUEL OF TORONTO LIMITED - - - *Appellant*

AND

THE TORONTO TERMINALS RAILWAY COMPANY - *Respondent.*

CASE FOR THE RESPONDENT.

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