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In the Court of Appeal for Ontario

IN THE MATTER OF AN ARBITRATION

BETWEEN:

C. R. BOULTON AND STANDARD FUEL COMPANY
(Claimants),

AND

TORONTO TERMINALS RAILWAY COMPANY
(Respondents),

Memorandum on Behalf of Toronto Terminals Railway Company

JOHN D. SPENCE, K.C.,
Solicitor,
Toronto Terminals Railway Company

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An agreed historical sketch (Exhibit 3) as to the property and the proceedings in the arbitration is at page 1 of the ~~Exhibit~~ Book.

Boulton the landlord and Standard Fuel Co. the tenant, agreed between themselves that the land should be valued as though Boulton carried on the business and he is to divide the sum awarded for land with the tenant in the proportion agreed on, thus satisfying the tenant's claim except in so far as anything additional should be awarded for buildings or business disturbance. (Evidence p. 327, ll. 1 to 30). The Terminals Company was no party to this arrangement and it contends that no additional allowance should be made for either buildings (except scrap value) or disturbance. (Evidence p. 5, l. 10). The scrap value of the buildings is about $200.00. (Evidence p. 815, l. 20).

The Claims:

(1) Land		$402,743.00
(2) Buildings and machinery		92,951.25
(3) Business Disturbance		187,307.70

The Award:

(1) Land		$214,637.00
(2) Buildings	$62,006.29	
(3) Business Disturbance	40,000.00	
		$102,006.29
(4) Interest from Filing Plan		
(5) Two sets of Costs		

Appeals:

By the Terminals Company against allowances for buildings, $62,006.69; and for business disturbance, $40,000.00.

By each Claimant for increase in allowance for land, $214,637.00.

The Terminals Company groups its references to evidence under the following four main submissions made on the argument:

1. The Claimant's buildings, dockage, equipment and entire premises were obsolete because (a) prior to expropriation there was a vital change in the coal business; anthracite coal became an up town instead of a waterfront business, requiring deliveries from local yards with railway sidings whilst the demand for Bituminous coal for large down town buildings and for Coke greatly increased; and (b) from the time the deepening of the Welland Canal and the Western Channel into Toronto Bay was decided on it was obvious that old waterfront properties with short slips or docks and with shallow water above rock were doomed. The tenants, Standard Fuel Co., were in extremities, because they held by perpetual lease a property which could not accommodate large vessels except at enormous and unjustifiable expense. Necessary dock walls and usable land area could not be brought into proper relationship the one with the other so as to produce suitable dockage facilities for any business. The needs of a modern coal business could not be met at any price. Suitable coal docks could only be obtained by the intervention of a Government or other authority with powers of expropriation. The Terminals Company in conjunction with the Harbour Board under the agreements and Statutes referred to in the historical sketch (Exhibit 3) were to work out the scheme—not to the prejudice of the claimants as coal dock owners but to their great and permanent benefit. p 530

They are relieved from the expense of extensive alterations to a narrow dock with insufficient depth of water and from all disturbance of business consequent upon making the needed changes. When all was done they would not have adequate dockage facilities.

II. The buildings and equipment were not only useless for the purposes of a reconstructed dock but they were in themselves obsolete, dilapidated and dangerous. They did not add anything to the value of the land.

III. The claim for business disturbance is not only extravagant in amount but should be disallowed altogether for the reason, amongst others, that similar or greater disturbance would have occurred if the claimants had extended their dock or moved to a new site, and they had to adopt one course or the other if they were to bring Bituminous Coal or Coke to Toronto in competition with other dealers.

IV. The allowance for the land, $214,627.00, is ample, and should not be increased by any percentage for forcible taking or otherwise. To obtain

an adequate site for modern coal dockage the claimants had to move. They will be paid full value for the land and nothing should be added unless the claimants show by evidence that a prudent man acting reasonably would prefer to retain the property as a coal dock rather than accept the award. This is the principle on which Pastoral Finance v. Minister (1914) A.C. 1083 was decided. The burden of proving that a prudent man would prefer retention is certainly on the claimants.

I.

The Docks, Buildings and Premises were Obsolete

1. The Welland Ship Canal was begun in 1913 and was opened for traffic in 1931. It had a depth of water of 30 feet; great width; and long reaches between locks, enabling vessels of great length, width, draft and tonnage, carrying bituminous coal and coke, to reach Lake Ontario from Lake Erie. They carry up to 9,000 tons and are equipped with very rapid self-unloading machinery—up to 1,100 tons an hour; Cousins p. 742, ll. 20 to 28.

These conditions revolutionized the coal business in Toronto.

McBrien, p. 156, lines 6 to 18; Marshall's letter Exhibit 21, at p. 175 of Exhibit Book.

A dock with a width of 203 feet and only 14 feet of water could not operate under the new conditions.

McBrien, p. 111, line 30 to p. 112, line 8; Mitchell, p. 453, line 25, to p. 456, line 4, particularly p. 456, line 3; The "Fitzgerald" drawing 18 feet, is 310 feet long: Hole, p. 636, line 10.

For present day methods see Exhibit Book, pages 142, 143, 144, 145, 146, 147.

Claimants' new site has 30 feet of water along face, to accommodate vessels with 30 feet draught; they already use vessels of 18 feet draught, whereas extreme depth to rock at old site was 17 feet 6 inches, and normal depth without dredging 14 feet or less; and the depth decreased as one went north.

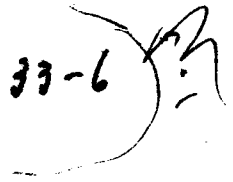
Marshall, p. 214, line 26, to p. 216, line 12; Cousins, p. 800: 17 ft. 6 ins. **at one point only** to rock; Plan at p. 103 of Exhibit Book Ex. 36 of Plans

2. Claimants admit that on account of the opening of the Canal they must have built out to increase their dockage to enable them to handle bituminous in competition with water-borne shipments of other dealers.

Marshall, p. 229, lines 15 to 20; p. 276, lines 11 to 15; p. 287, lines 17 to 27; p. 352, line 11.

Could not compete by rail.

Marshall, p. 182, lines 3 to 16.



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All Bituminous was previously brought by rail.
Marshall, p. 274, lines 6 and 7.

Bituminous and Anthracite could not both be handled at dock as it stood.
Marshall, p. 217, lines 27 to 30.

The dock front at the old site was for Anthracite only; Bituminous needs no shed.

Photo, Exhibit 17, at p. 85 of Exhibit Book. Plan attached to Exhibit 1, p. 8 (building right across front). Marshall, p. 218, lines 15 to 30.

Anthracite business down town was shrinking and being replaced by Bituminous and Coke.
Marshall, p. 205, lines 18 to 27; p. 250, lines 5 to 25.

Modern boats could not dock at the old place. Too narrow; average sized coal boats are now 450 feet long.
Cousins, p. 790, line 1, to p. 791, line 12.

No depth of water.
See depths indicated on Plan Exhibit 42, at p. 148 of Exhibit Book of Plans. See p. 3 of this Memorandum.

Boats at old site averaged only 1,000 tons cargo; extreme limit (unusual) 2,000 tons; no boat over 14 feet draft.
Marshall, p. 291, line 16; p. 292, lines 5 to 10.

Other companies had given up bringing anthracite by water and were carrying by rail to their local centres.
See Map at p. 93 of Exhibits, showing Claimants' local centres.
Conger Company had "retired from the water-front to await developments."
Marshall, p. 354, lines 23 to 28.
Rogers had also given up bringing in coal by water.
Marshall Evidence, p. 354, lines 1, 8 to 21; p. 355, lines 4 to 6. Hole, p. 543, lines 1 to 8; p. 559, lines 15 to 25.

Rogers is said to be **returning to the water front.** Marshall, p. 354, line 7; Cousins p. 747, line 20. This clinches the point we make. Waterborne coal traffic had become unprofitable under the old conditions; it is resumed under the new conditions and at the new cheap sites.

As a result of these changes in the coal business (quite unconnected with the expropriation) claimants were obliged to face a complete remodelling of their premises.

Schemes for development are shown at pages 102, 103, 104 of Exhibit Book. Mitchell's (claimants' expert) scheme for development of additional dock area is at p. 178 of Exhibit Book of Plans.

Note that this gives only 23 feet of depth of water as against Welland Canal depth of 30 feet.
Mitchell, p. 486, line 10.

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3. But, in fact, no scheme of development or remodelling was feasible. Cousins, p. 766, line 26 to p. 767, line 22.

The premises were of the wrong shape. Modern methods require long frontage. See plans attached to leases of premises taken by claimants in 1931, Exhibits 23 "A" and 23 "B", at pages 163 and 169 of Exhibit Book.

A long narrow lot with small water frontage is not suitable. To make this lot, as extended, usable for self-unloaders at all, a great part of the unfilled portion had to be left for a slip at the side, making the land area too small; and this still left the whole of the original filled lot inaccessible to self-unloaders. The development schemes now suggested were impossible by reason of their cost.

With a 54 ft. 4½ in. slip the cost of the reclaimed area created by the extension to line of Electric Light Dock as planned by Mitchell would be $116,000, or $2.285 per square foot.

Exhibit Book, pages 148 and 149 (Plan and Statement).

But a 54 foot slip would be altogether too narrow for use; at least 100 feet is desirable; Cousins, p. 759, lines 22 to 30, et seq.

The Welland Canal allows boats 80 feet wide; 46 feet wide is normal. Wilson, p. 518, lines 13 to 16.

Vessels could not pass: Wilson, p. 518, lines 1 to 1.

And could not enter safely: Cousins, p. 761, lines 2 to 25.

Even with an 80 foot slip the cost of the reclaimed area to the Electric Light Company's Line would be $2.67 a square foot. Exhibit Book, pages 156 and 157 (Plan and Statement).

With an 80 foot slip the cost of extension to New Windmill Line would be $3.04 per square foot of added area. Exhibit Book, pages 160 and 161 (Plan and Statement).

Hole's estimate is $3.75: Evidence, p. 553, lines 19 to 26.

At 5% these schemes mean **eleven to fifteen cents a square foot rent** for the added area as against land at **less than four cents available elsewhere.** Adding $214,637.00 (allowed for the land) to $222,000.00 (cost of extension) we get $436,000.00 as the cost of the land if this development scheme were carried out.

This would leave a land area quite too narrow for economical or convenient use; Hole, p. 553, lines 27-8; the booms of self-unloading boats are 150 to 200 feet long.

No private owner could have undertaken any such development scheme.

Cousins, p. 768, line 18 to p. 769, line 25.

Poucher, p. 898, lines 5 to 10.

The tenants could have got more suitable premises in 1926 at $1.41 a square foot (see p. 12 of this memorandum) and did, in fact, get their present premises, in all ways suitable as to shape, frontage, dockage,

Ex 42 & Ex. 43 p. 592
appeal Book

of Plans. Ex 45 & Ex 46
p 593 Appeal Book
of Plans Ex 49 & Ex 50
p. 595 Appeal Book

depth of water and accessibility, at a rental equal to five per cent. of a valuation of $1.00 a square foot for a depth of 150 feet and fifty cents a square foot for additional area.

Exhibits 23 "A" and 23 "B" at pages 162 and 168 of Exhibit Book: 7.117 acres (310,016 square feet) at a rental of $11,702.24, equivalent to five per cent. on $234,045, an average valuation of about 75½ cents a square foot and an average rent per foot of 3¾ cents. Exhibit 40 (large plan) shows sites available in successive years from 1926 on.

The expropriation which enabled the claimants to remove, instead of extending (even if extension had been feasible) was their salvation from the disastrous competition of better placed rivals in business, who chose to take advantage of the cheap sites, provided by the Harbour Development.

II.

The Buildings and Equipment were Obsolete, Dilapidated and Dangerous.

They were of unknown age; very old.
Marshall, p. 230, lines 9 to 15.

The equipment, for the most part, was old and worn out.
Hole, p. 529, line 20, to p. 580, line 16.
Engine and boilers very old but had to be kept in fair condition.
King, p. 664, lines 1 to 15.
Unloading equipment obsolete since self-unloaders: Hole, p. 537, line 20.
Old and inefficient: King, p. 675, lines 11 to 20.

The buildings were dilapidated; the roof sagged and the poles which supported it pushed through it.
Photos in Exhibit Book at pages 109, 110, 112, 113, 114.
King, p. 676, lines 22 to 25; p. 677, line 10; line 20.
The witness King, claimants' engineer, describes the buildings at pages 670 to 679:

> Tower had broken back; leaning out over lake; had to be held back by guy wires; swayed in wind and shook with hoist; cars terribly old; posts rotted and pushing through roof; roof had bad area; unsafe.

Also at pages 705, 707, 713, 715, 716.

They had had no proper repairs for four or five years before expropriation: Marshall, p. 179, lines 6 to 16.
Main Building merely a roof supported by poles; flimsy and dislocated: Hole, p. 526, lines 10 to 25.
They were dangerous to operate.
Hole, p. 528, lines 13 to 27; p. 589, lines 16 to 20.

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Just ready to collapse.
Hole, p. 561, lines 15 to 30.

Estimated cost of repairs to shed, $36,000: Hole, p. 586, lines 18 to 21; p. 588, lines 4 to 10.

They were obsolete because coal dealers were ceasing to use buildings for anthracite; they were never used for bituminous:
Hole, p. 537, lines 2 to 29; Marshall, p. 344, lines 21 to 26.

Not one coal shed now on water front:
Cousins, p. 739, line 7, to p. 740, line 27.

They extended right across the front of the dock and were obviously in the way if the dock were extended and used for bituminous, which, in that case, would all have to be carried through them for delivery.
See plan at p. ~~3 of Exhibit Book~~.

They were inaccessible for self-unloaders, which even on Mitchell's plan could only get to the south side of Lake Street; and alterations and new conveying machinery would have been necessary.
Marshall, p. 352, lines 21 to 28.

The claimants could not carry machinery across Lake Street without City's permission; and if this not permitted, expensive additional trucking necessary.
Marshall, p. 362, lines 20 to 28.
McBrien, p. 117, lines 18 to 19.
Mitchell, p. 492, lines 4 to 20.

It is submitted that the suggested scheme of development is **entirely illusory;** it was never feasible or seriously planned.
Cousins, p. 766, line 26; p. 767, line 22.

The like of Mitchell's dock has never been constructed.
Cousins, p. 751, line 21 to p. 752, line 1; p. 757, lines 21 to 26.
Mitchell, p. 496, line 10.
Wilson, p. 518, line 21.

No figures as to cost of extension were ever considered till after expropriation; evidently they were for arbitration purposes only.
Marshall, p. 229, lines 7 to 12.

The Buildings and Equipment did not add anything to the Value of the Land fixed at $214,637.00.

The railway company does not dispute the statement of law, as in Pastoral Finance v. Minister (1914) A.C. 1083, that if the buildings were of value to the claimants **over and above the value allowed for the land,** the claimants are entitled to be paid something extra for them.

But that extra value must be shown, as part of the claimants' case.

Under the agreement between the claimants above referred to, the tenant is fully compensated for his interest in the land as such, for which

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with all its potentialities the full value has been given. What evidence has the tenant given that the buildings added to the value of the property to him?

There is not a jot of evidence in support of such a claim. There is positive, competent and uncontradicted evidence against it.

McBrien, Claimants' witness, says he is not in a position to say the buildings added anything to the value of the land.

Evidence, p. 169, lines 14 to 21.

Poucher, railway company's witness, says distinctly the buildings added nothing—the property would sell for just as much with buildings off as with them on.

Evidence, p. 903, lines 10 to 20.

No man could afford to take that property at valuation of $200,000.00 and continue for any business with that type of buildings.

Evidence, p. 913, lines 22 to 27.

Before expropriation, they might have a value for carrying purposes only; but not a value over and above the value placed on the land alone.

Evidence, p. 814, line 29 to p. 815, line 16.

Buildings had to disappear if property was to be developed.

As pointed out above, the buildings were inconsistent with development suggested; they were inaccessible for anthracite; and in case of large bituminous business, as planned, would have been in the way, as all bituminous must go through them to reach the front.

See plan at page 3 of Exhibit Book. Note that buildings cover whole width at dock front. These were for anthracite only.

In view of the above, evidence as to reconstruction cost is irrelevant. The Railway Company agreed to determine reconstruction cost, but without admitting its relevancy. Unless the buildings are shown by evidence to add something to the value of land as awarded, nothing can be allowed for them. They may be an encumbrance, rather than an asset. At the utmost they are worth their scrap or salvage value, $200.00 or $300.00.

Poucher, p. 813, line 20.

Ontario Jockey Club v. Toronto (1932) O.R. 637.

Mr. Osler argues that because Mr. Poucher took coal business into consideration as one use to which the property could be put, therefore, value of buildings suitable for coal business must be added to land value. But neither Mr. Poucher nor any one else says that the value of $214,637.00 is the value for a coal business; or that any one would pay that amount for the land alone for that business; it is its maximum value for its most lucrative use.

That the premises were not of any such value for a coal business is shown conclusively by a comparison of the valuation of $234,045 for over seven acres

at the claimants' present site with $214,637 for 2.11 acres (filled land) at their old site. Such a difference precludes competition.

See page 6 of this Memorandum.

III.

No Allowance for Business Disturbance can be Justified

The claims for business disturbance, $64,322.79, for extra cost of rail carriage (Exhibit Book, page 127) and $5,717.61 for extra cost of delivery (Exhibit Book, p. 132) are not only extravagant but should be disallowed altogether, as there was no business disturbance which would not have occurred if no expropriation had taken place; and the net result to the claimants was extremely favourable. There is no pretence that any business was actually lost.

1. The claim for $64,322.79 is fantastic in amount. It depends on the allegation that deprivation of the water frontage obliged the tenants to bring in anthracite by rail at greater cost.

(a) It is based on excessive tonnage.

There was a persistent decline in anthracite tonnage in the seven years 1921 to 1927. (See claimants' own table, page 126 of Exhibit Book.)

Bituminous and coke were replacing it; and neither of these was brought in by water.

Nash's evidence, p. 929, line 18, to p. 931, line 10.
Marshall, p. 218, lines 26 to 29.

It is therefore quite wrong to base calculations on a seven year average assumed at 21,829 tons. At highest the 1927 tonnage 15,315, should be taken. Even this is much too high, in view of progressive shrinkage. But even on this basis the item is at once reduced by..... $16,370.00

(b) Then there is an admitted clerical error in rail costs of 8.43 cents per ton, which on 15,315 tons for 4⅓ years gives..... 5,594.00

Nash's evidence, p. 930, line 20, to p. 931, line 21, particularly at p. 931, lines 4 and 5.

(c) And the claimants make no allowance for extra degradation of coal by water as against rail carriage. This is an extra 3.16 per cent. on all tonnage carried, amounting on 15,315 tons to 484 extra tons a year of coal degraded

to screenings on which there was a loss of $10.00 a ton. This for 4⅓ years gives $20,973.00

Nash, p. 935, line 20 to p. 937, line 5.
King, p. 689, lines 2 to 13.
Hole, p. 539 to 543 shows degradation to smaller sizes and screenings much greater in water carriage; Rogers gave up water carriage of anthracite for this reason.
Marshall, p. 221, lines 3 to 5, claimed that this water degradation was eliminated by screening at Oswego, but he admitted later on cross-examination, p. 235, line 20; p. 479, lines 19 to 24, that this screening took place **before** the handling by water, which is the cause of the degradation, took place at all: **before** the coal was dumped into the boat.

(d) Substantial deduction must also be made for cost of transfers of anthracite (one-third of total brought in by water) from Church Street to other yards under old system. Taking 1.5 miles as average distance (Mitchell, Exhibit Book p. 131, last line) at 10c. per ton mile (Marshall, p. 291, lines 1 to 9) this works out on claimants' own basis of computation of haulage cost at $3,300.00

Marshall, p. 303, lines 16 to 19.
Nash, p. 931, line 27, to p. 932, line 16.
Mitchell, p. 448, lines 20 to 30.
On these four items **alone** the claim of $64,322 is **reduced** at once by 46,237.00

2. The claim for extra cost of delivery is without foundation.

(a) The claim for $5,717.61 for extra cost of delivery is also on a wrong basis. The suggestion is that less anthracite was delivered from Church Street after expropriation than before and that the difference, assumed at 10,294 tons per annum, represents coal which would have come in by water and been delivered from Church Street but was in fact brought by rail to other yards and delivered from there. But to support this suggestion claimants assume that an average annual tonnage of 21,803 tons would normally have been delivered from Church Street but for expropriation. This assumption is quite unjustifiable. The claimants' own table at p. 129 and its graph at p. 135 of the Exhibit Book show its fallacy. The claimants' use of the premises was not interfered with till April 1, 1927. (Exhibit Book, p. 128, last line; Marshall evidence, p. 230, lines 3 to 8). In the year immediately preceding that date deliveries of anthracite and coke from the Church Street site dropped from 24,045 tons to 16,629 tons, as compared with the year

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ending April 1, 1926. In the following year ending April, 1928, the first after expropriation, the decrease was only 3,100 tons—less than one-half of the decrease in the previous year. So that clearly some other cause than the expropriation (no doubt the increasing use of bituminous down town) brought it about. There is no reason at all to suppose that deliveries from Church Street would have been one ton greater in 1927-8 and following years than the average of 11,509 tons per annum admitted to have been delivered in those years. On this ground alone the claim fails.

(b) But further, the calculation on which the claim of $5,717.61 is built up is clearly unsound. It is got by multiplying 10,294 tons (improperly assumed as above explained) by a factor which is calculated from arbitrary assumptions as to speed of trucks, extra mileage in deliveries and length of life of trucks, and includes wages of drivers and helpers, depreciation of trucks, repairs and overhead, including truck licenses, insurance, Workmen's Compensation, garage, and a proportion of total yard wages and expenses. (Exhibit 19, pages ~~130~~, ~~131~~, ~~132~~ of ~~Exhibit~~ Book). This is obviously fallacious. Except a possible small extra cost in gasoline and oil and wear and tear on tires, there is not the slightest extra cost which can be proved or can even be reasonably inferred; not the least evidence that one extra dollar was paid in wages, insurance or any other of the items taken into account. The claim is purely theoretical, suggested by the ingenuity of an accountant and has no basis in actual loss to the claimants.

That distance was negligible as a factor in delivery is shown by the fact that before and after expropriation the same flat rate per ton was charged for such deliveries by contractors regardless of distance; even from the new site, a much longer haul, the same rate was charged as at Church Street until the beginning of 1932, and it was then **reduced.** Marshall, p. ~~2~~85, lines ~~1~~ to ~~2~~7.

3. But on three other grounds these two items should be disallowed altogether.

(a) They depend on the location of the site and represent merely convenience of receipt and delivery of goods. This is an element in the value of the site itself for any use to which it could be put, coal business or other, and is therefore to be regarded as allowed for in the award of $214,637 for the land. Mitchell, claimants' expert to prove these items, admits this: (Evidence, p. ~~4~~27, line ~~2~~4, to p. ~~4~~28, line ~~1~~8. It is by reason of the **water facilities** of the site and its **nearness** to the business district that so high a value is placed on it; a special further allowance on these grounds is a duplication.

McBrien values on this basis: Evidence, p. ~~4~~6, line ~~2~~8 (water facilities); p. ~~110~~, line ~~18~~ (short haul). So does Poucher: Evidence, p. ~~9~~07, line ~~7~~ (access to water);

Note. If $1462.37 and $5717.62 be deducted from the claims for business disturbance it leaves only $18085.79 as against the $40000 allowed by the arbitrator on these items and the $20000 allowed by the Court of appeal as a general allowance in addition to the amount allowed by the arbitrator for the land

(b) They are offset by similar items which must have arisen if the claimants had either remodelled their plant and premises (involving the same disuse of the water frontage) or removed to new premises, one or other of which was inevitable in view of changing conditions. Much greater disturbance would have been caused by remodelling, as, if Mitchell's plan had been followed and all filling and other material brought in from the north, all this traffic must pass through the buildings and other premises, disorganizing business. The arbitrator has failed entirely to consider this. But in addition the claimants were saved the very great outlay for reconstruction and the interest on that outlay while reconstruction was in progress. Instead, they draw interest on the value of their share in the property from the moment of possession by the railway.

(c) The long delay, November, 1926, to July, 1931, before taking new premises, was voluntary. The tenants remained of their own accord after the order for possession was made. They cannot be allowed to remain indefinitely and charge the railway company for inconveniences said to have been suffered while waiting for an ideal site. A suitable site at a much lower cost per square foot was available for them in 1926. They deliberately remained where they were, not because they could not get new premises, but because conditions in the coal business were uncertain and they preferred to wait. Even in March, 1932, conditions in coal business were uncertain. (Marshall's letters, ~~Exhibit~~ Book, pages ~~175~~ and ~~176~~). The delay of 4⅓ years is unreasonable; and the inconvenience, if any, suffered during that time cannot be charged to the railway company.

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They had eight months (October, 1926, to July, 1927) to remove after expropriation began and before any physical interference by the railway company; they could then have got more suitable premises than the Church Street site; but they chose to wait for something still better.

Sites available: National Iron available for purchase 1926 to 1931. (Cousins, p. 726, line 26, to p. 727, line 30 (works out at 53c. a square foot, 85% filled; completely filled with dockage, $1.41 per square foot, p. 773, line 25).

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Mr. Osler complained that this site would have cost claimants over half a million dollars. Granted: if we assume that (a) they must acquire the whole block of 11.3 acres: (b) they must buy instead of leasing and (c) must develop with the splendid facilities of their present premises. But the proper comparison is with their old site at Church Street. 2.11 acres (their old land area) even at $1.41 per square foot comes to less than two-thirds of what is awarded for the old site.

Cherry Street site available, 1926, for lease on a rental basis of 20c. a ton for coal handled plus taxes; afterwards fixed at 5% on a valuation of $1.00 a square foot for front 150 feet, and 50c. a foot for balance: (Cousins, p. 729, line 30, to p. 732, line 2).

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Other coal companies found locations in 1926, Giles, Milnes, Canada Coal (Cousins, p. 734, line 26, to p. 735, line 6). See Exhibit 40 for sites available 1926.

Compare old premises with those now occupied.

Greater area, permitting great expansion of business.

Expect 100,000 tons as compared with possible 41,000 at old site: Marshall, p. 287, lines 7 to 18.

50,000 tons in first year: Marshall, p. 288, lines 7 and 8.

Dockage: 1,738 feet as compared with 206:

Plans: ~~Exhibit~~ Book, pages ~~163, 169.~~

Wide channel 200 feet. Depth of water 30 feet as compared with 14: (McBrien, p. 111, line 30, to p. 112, line 8) with all water privileges free, whereas at old site all water frontage, except 206 feet along south boundary, had to be provided at expense of land area.

Proper shape for new unloading conditions; large self-unloading boats.

No outlay for improvements; no loss of interest on such outlay during construction.

No maintenance of buildings.

Much less interference by use of channel by boats as compared with constant delay by railway traffic at front of old site.

Greatly reduced rent in proportion to area; five cents per square foot.

All these things the arbitrator should have considered. In view of them it is idle to say that on balance the claimants have suffered any business disturbance for which they should be paid.

IV.

The allowance for the land is generous and should not be increased by percentage for forcible taking or otherwise.

1. In Ruddy v. Toronto Eastern Ry. Co. 21 C.R.C., 377; (followed in Noble v. Campbellford Ry. Co. 21 C.R.C. 380) the Privy Council said that an Appeal Court will not interfere with the award of an arbitrator unless there is some good and **special reason** to throw doubt on the soundness of his conclusions; the award being in a position similar to that of the judgment of a trial judge. Per Buckmaster, L.C., at pages 378, 379.

It is submitted that this applies to all questions of mere quantum, including a claim for ten per cent. for forcible taking, and disposes completely of the appeal to increase the award as to the land.

The claimants have not pointed out any consideration improperly admitted or excluded by the arbitrator in making his valuation of the land.

2. The reasons for award make it evident that the arbitrator did not accept blindly the valuation made by Poucher, though an arbitrator must act on evidence adduced, and there is nothing to preclude him from accepting the evidence of one witness **in toto** if on sight and hearing of two opposed witnesses he thinks it right to do so. He states expressly that his conclusion that Poucher was right was come to after "seriously considering Mr. McBrien's **reasons** and the evidence" of Mr. Poucher. (Appeal Book, p. 15, lines 9, 10, 13): and "after careful consideration and weighing **all the evidence**": and he went on to the further observation that based on the rental the Poucher estimate was more than ample: Appeal Book, p. 16, lines 9 to 15.

3. **Forcible Taking.** This leaves nothing in the appeal except the claim for ten per cent. for forcible taking; as to which also the principle of the Ruddy case applies: This is not a matter of law or of principle; it is a matter of quantum for the arbitrator, unless some real inadequacy can be shown; and where the arbitrator has made an award which, as in this case, produces a revenue far beyond what the land itself would yield (Appeal Book, p. 16, lines 9 to 15), no addition should be made.

There is no express authority for adding ten per cent. The Judges of the Supreme Court in King v. Hunting, 32 D.L.R. 331, agreed that there was no legal rule requiring such an allowance. It is a matter of practice only, and even Fitzpatrick, C.J., limited his rather sweeping remarks to "ordinary cases like the present." There is nothing in the case to override the principle laid down in Symonds v. The King 8 Can. Ex. 319, that where the price allowed is liberal and generous, the ten per cent. is not to be added. The Court in the Hunting case declined to interfere with an award which gave it. But it is submitted that except for special reason assigned, an award not giving it will not be interfered with on that ground, unless there is plain evidence of inadequacy. In National Trust v. C.P.R., 29 O.L.R. 462, the Appellate Division of the Supreme Court of Ontario unanimously allowed an appeal from an arbitrator who added ten per cent. to the selling or market value for compulsory taking.

In the present case no such allowance should be made. The interest on $214,637 at 5% is $10,732, which is **seventy-one** per cent. higher than the rent, $6,000, fixed for the property in August, 1921, just five years before, surely a most generous allowance, giving ample compensation for compulsory taking and all other elements. The witness Poucher says it is a "maximum valuation" (Evidence, p. 813, line 2) and the learned arbitrator points out that the allowance is liberal and largely exceeds the revenue which could be obtained from the property in the future, for any possible use to which it could be put.

But, if allowance for forcible taking is to be added at all, the following considerations apply:

Anglin, J. (now Chief Justice) points out in the Hunting case, 32 D.L.R., pages 334, 335, that a landlord who has given a long lease is not disturbed in

possession and should not get 10%. As in this case the landlord, Boulton, was not disturbed in possession and could invest his funds immediately in Government bonds to yield much more than his interest in the property could produce, the ten per cent., if allowed at all, should be on the tenant's interest only.

Value of land	$214,637
Lessor's interest, $6,000 rent, capitalized at 4½%	133,333
Tenant's interest	$81,304

Ten per cent. of which is $8,130, and as this, if allowed, is said in the Hunting case to cover everything (disturbance in occupation, inconvenience of finding other premises, and all other expenses, damage and inconvenience entailed by the taking) it precludes any additional allowance for the sort of business disturbance claimed by Standard Fuel.

4. Remarks on reasons for Appeals of Lessor and Lessee against amount awarded for Land.

(a) Rent of $6,000 as a Criterion

Mr. Osler says that under the Windmill Line Agreement his clients, as lessees of the filled land to Lake Street, were entitled also to a perpetual lease of the water lot right out to the New Windmill Line without extra rent, and that therefore the rent, $6,000, and taxes, hitherto payable, is no criterion of the value of the whole property.

No such case is made in the evidence. The railway company were prevented from enquiring into the relations between lessor and lessee. But, on the face of it, the contention is ill-founded, for it was only **at the option** of the lessees at the expiration of existing leases that the water lots in front were to be included in their future leases; and the leases since 1888 (including the lease in force in 1926) show that the option was not exercised.

Exhibit 6, description p. 32 goes to Old Windmill Line only.
Exhibit 8, p. 65 of Exhibit Book, last paragraph.
Exhibit 3, p. 7, of Exhibit Book, last paragraph.

Mr. Osler says further that tenants had a special interest by reason of ownership of fill.

But, in fact, the rent was to be fixed on the basis of valuation of "that part of said premises lying to the south of the Esplanade at such rate as the same would then be worth if duly filled in and protected in accordance with the terms of the said recited lease from John Boulton to the said Stephen Nairn." (Lease to Dickson & Eddy, Exhibit 6, p. 34, last paragraph). The Boulton-Nairn lease (Exhibit 5 at p. 18 (foot of page) to p. 19, first paragraph) provided for filling the whole, part by obligation and part optionally, but it is submitted that the true meaning

of the passage quoted above from the Dickson & Eddy lease, p. 34 (above) is clearly that the rent was to be based on the value of **the lot fully filled** to Esplanade level. This lease was one of the documents on which **without oral evidence** the arbitrators were to fix the rent for the term 1917-1938; and there were no instructions to the arbitrators to except the value of any fill from their valuation of the property.

Exhibit 8, Agreement for Arbitration.

The lease to Standard Fuel, August 1, 1921, contains the clause as to filling quoted above from the Dickson & Eddy lease, p. 34. See Exhibit book, p. 80, 3rd paragraph, providing that **the premises** are to be valued as if duly filled in and protected, etc., etc., as above quoted. No provision is made either in the lease to Dickson & Eddy, 1896, or in the Standard Fuel lease, 1921, for preserving to the lessees the right to any extra fill (which may or may not have been put in by them: no evidence) although the lease, in the next paragraph, is careful to protect their right to erections "above the surface level of the Esplanade."

Clearly since 1896 at least (Dickson & Eddy lease of that year) all the fill on the property is treated as belonging to the lessors. The terms of the original lease to Nairn were varied in some respects by the arbitration agreement of 1918, Exhibit 8, at p. 62, line 7.

The $6,000 rent therefore is based on the value of the property, as filled, and could only be realized if the lease of the filled portion carried with it, as an indispensable appurtenance, the right to use the unfilled portion as a means of approach by water.

(b) Claimant's Criticism of Mr. Poucher as an Expert

Mr. Hellmuth says Mr. Poucher's evidence should not be accepted because he is the Company's expert; that the expropriating party always chooses the expert who will give the lowest valuation; and allowance should be made in the award for that. This might suggest a comment on the claimants' choice of Mr. McBrien in substitution for Mr. Ponton. In Mr. Poucher's case the argument fails. He was chosen because he was obviously the one man who could give satisfactory evidence, from most exact and comprehensive knowledge, as to water front values. He had been familiar with properties in this district for years: Mr. McBrien knew nothing at all about them till **after** the expropriation had taken place.

McBrien had been a small builder; then a suburban real estate dealer; no knowledge of any properties south of Queen Street before 1926; and then only one transaction (a valuation for Hallam at Jarvis and Front Streets).

Evidence, p. 77, lines 22 to 24; p. 78, line 7, to p. 79, line 22.

He had never considered the value of the Boulton property till within

three months before giving his evidence (April, 1932) though he assumed to value it as of October, 1926.

Evidence, p. 76, lines 13 to 20.

Mr. Poucher's bias, if any was upward, as he had acted just before the expropriation in valuing many water front properties for the Harbour Commissioners, who were vendors and interested in getting the best price. He is valuator for them; and his professional interest therefore tends towards maximum figures. Mr. McBrien's subsequent valuation of the Harbour Commissioners' properties, which has been compared with Mr. Poucher's, was deliberately undertaken with a view to increasing the figures, in order to improve the Harbour Commissioners' financial status. McBrien, p. 51, line 5 to p. 52, line 15; p. 118, line 4 to p. 119, line 10. Any increase in sale prices over Mr. Poucher's figures took place west of Yonge Street and is amply accounted for:

(a) by lapse of time,

(b) by the enormous improvement west of Yonge Street in appearance, accessibility and paving and other facilities by the Harbour Commissioners' intensive development scheme, at very great expense; and by the artificial rising market. As a matter of fact, only very few increases were noted; and these under quite special circumstances, which are in every case developed on cross-examination. Many sales were made at figures lower than either McBrien's or Poucher's. Exhibit 52, p. 118 of Exhibit Book.

Evidence that Poucher is not a partisan valuer is found in the fact that in the Hydro transaction all parties, buyers and sellers alike, agreed to accept his valuation and transactions were completed at his figures.

Mr. Poucher's valuations are consistent. He says values decrease as you go east from Yonge Street, but he also says (a matter of common experience and knowledge) that there is first a sudden drop in value when (about Scott Street) you leave property which is in effect Yonge Street property with all its advantages of immediate vicinity to the main artery; there is then a more gradual, but not necessarily uniform (or percentage) decrease. He has given effect to this decrease as between the Boulton property and the Ewart property just across the street from it by valuing the Boulton property, which is 4 feet wider but about 40 feet shallower, at $14,637 more than the Ewart property.

(c) General Considerations Affecting Land Value

The District had been dead—"blighted"—for many years.

McBrien, Evidence, p. 81, lines 4 to 16.

Poucher, Evidence, p. 840, line 27, to p. 841, line 18.

It was devoted to businesses requiring large areas of cheap land, including "Nuisance" businesses.

It could not be developed piecemeal by individual owners as cost prohibitive. Poucher Evidence, p. 898, lines 4 to 9.

It could not compete with the cheap land developed by the Harbour Commissioners.

Ingress and egress at the front was constantly blocked by railroad traffic.

See evidence of A. J. Mitchell and T. J. McClay, pages 643 to 662, as to continual train movements across the front.

In view of the opening of the new Welland Canal, the site could not be sold or profitably utilized for any **water front business** without some scheme of development involving deepening of the water, e.g., grain elevator. McBrien's evidence, p. 112, lines 3 to 8.

THE RAILWAY COMPANY SUBMITS:

That claimants' appeal should be dismissed.

That the allowances for buildings and for disturbance are wrong in principle and at variance with the facts; and the award should be varied by striking out these items.

That the learned arbitrator erred in allowing two sets of costs.

That interest, if allowed, should be from date of possession only and not from date of filing plan.

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