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 Oct. 22.     ETIENNE SAMSON, AND OTHERS } APPELLANTS;  
                   (CLAIMANTS)..... }

AND

HER MAJESTY THE QUEEN } RESPONDENT.  
 (DEFENDANT)..... }

*Appeal from award of Official Arbitrators—Expropriation of land for Government railway—Title to beach lots granted by Crown prior to Confederation—Valuation—Contract, breach of.*

Claimants' title to a water-lot at Levis, in the harbor of Quebec, was based on a grant from the Lieutenant-Governor of Quebec prior to Confederation. The grant contained, *inter alia*, a provision that, upon giving the grantee twelve months' notice, and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water-lot for the purpose of public improvement.

*Held*: The property being situated in a public harbor, this power of resuming possession for the purpose of public improvement, would be exercisable by the Crown as represented by the Government of Canada. *Holman v. Green* (6 Can. S. C. R. 707) referred to.

2. Inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of *The Government Railways Act*, the claimants were entitled to recover the fair value of the lot at the date of expropriation. That value, however, should be determined with reference to the nature of the title.

The claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them.

*Held*: That as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract, and could not maintain any claim against the Crown in that behalf.

APPEAL and cross-appeal from an award of the Official Arbitrators.

The facts of the case are recited in the judgment.

April 23rd, 1888.

*Belleau*, Q. C. for appellants.*Hogg*, for respondent.

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BURBIDGE, J. now (October 22nd, 1888) delivered judgment.

In this matter there is an appeal and a cross-appeal from an award made on the 26th day of February, 1886, by Messrs. Compton, Simard and Muma,—Mr. Cowan dissenting.

On November 12th, 1884, the Chief Engineer of the Intercolonial Railway for the Government of Canada took possession of a water lot at Lévis, in the Province of Quebec, then in the possession of the claimant and others, and upon which they were at that date constructing a wharf.

Prior to that date a tender of \$13,600. had been made to the claimant for the lot and wharf in question, and a plan and description thereof had been filed in the office of the Registrar of Deeds for the County of Lévis. The tender appears to have been made on the 31st day of October, 1884, but the exact date of the filing of the plan and description is not, I think, disclosed by the evidence.

The statement of claim made is as follows:—

1. For a wharf in course of construction at the time of the taking of possession thereof by the Government on 13th November, 1884, 13,832 cubic yards at \$1.79....	\$23,514.40
2. Amount of the Beach Lot upon which the wharf is constructed 254 ft. in length by 70 ft. in width, containing 17,780 superficial feet, at \$1.30.....	23,114.00
3. Amount of value of work to be done to complete the wharf, and claimed by the contractor.....	744.52
4. Amount of materials on hand, and the whole of which the Government has taken in its possession.....	2,013.30
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	\$49,386.22

With reference to the 1st and 4th items of this claim,

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the only question that arises is one of value. In any view of the case the owners are entitled to the full value of the wharf at the date of the expropriation, and of the lumber and materials taken and used by the Government. If the statement of the amount actually expended by the claimant is accepted as correct, and as affording the best available evidence of such value, there should, I think, be added thereto a reasonable sum for superintendence and for the use of, or interest upon, the moneys expended during construction.

With reference to the lots upon which the wharf is constructed, it appears from the letters-patent by which the same were granted, and which were filed by direction of the court subsequent to the argument of the appeal, that the owner's title is subject to a number of conditions and reservations and among others to the following :—

Provided always, nevertheless, and we do hereby reserve unto us, our heirs, and successors full power and authority to erect and build one or more battery or batteries or any other works of military defence upon the said lot or piece of land hereby granted, or any part thereof, when our or their service may require the same ; provided further, and we do also hereby expressly reserve unto us, our heirs, and successors, full power and authority upon giving twelve months previous notice to our said grantee, her heirs or assigns, to resume for the purpose of public improvement, the possession of the said lot or piece of land hereby granted or any part thereof, upon payment or tender of payment to her or them of a reasonable sum as indemnity for the ameliorations and improvements which may or shall have been made on the said lot or piece of land, or on such part thereof as may be so required for public improvements, and upon reimbursement to our said grantee, her heirs or assigns, of such sum as shall have been by her or them paid to our Commissioner of Crown Lands for such lot or piece of land or such part thereof so required for public improvements ; and in default of the acceptance by our said grantee, her heirs or assigns, of such sum so as aforesaid tendered, the amount of indemnity, whether before or after the resumption of possession by us, our heirs or successors, shall be ascertained by two experts, one of whom shall be nominated and appointed by our Governor, Lieutenant Governor or person administering the Government of our said Pro-

vince for the time being, and the other by our said grantee, her heirs or assigns, or in the event of a difference of opinion arising between the said experts, by either of them the said experts and a *Tiers-Expert* or Umpire chosen by them.

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The property being situated in a public harbor, and the grant having been made with a view to the construction thereon of a wharf, this power of resuming possession for the purpose of public improvement would be exerciseable by the Crown as represented by the Government of Canada (1).

The Crown has not, however, seen fit to exercise this power, but has proceeded under the expropriation clauses of *The Government Railways Act*, and is, I think, liable to the owners for the fair value to them of the water lot at the date of expropriation. That value must, however, be ascertained with reference to the nature of their title. No one, it is clear, would give as much for a lot the title to which might be defeated by a year's notice, or which was burdened by conditions, as he would if it was not subject to any such defeasance or burden. Neither would it in the one case be of the same value to the owners as in the other. At most in this case the owners were never at any one time sure of more than a year's occupation of the lots in question, and of being paid a reasonable sum for the ameliorations and improvements thereon.

With reference to the 3rd item of the claim, I am of opinion that the claimants are not liable to the contractor. It was not by their act or fault that he was prevented from continuing the construction of the wharf, but by the expropriation under the Act of Parliament. The claimants are, therefore, excused, and consequently are not entitled in this respect to compensation from the Crown.

(1) *Holman v. Green* 6 Can. S. C. R. p. 707.

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The claim referred to the Arbitrators was that of Marie Archange Labadie, wife of Etienne Samson, Hélène Poiré, wife of George Guenette, and the said Etienne Samson, while the award is in favor of Etienne Samson only. I apprehend, however, that this is a mistake, as Mr. Samson himself in his evidence states that the claimants are himself, his wife, and his step-daughter.

The amount of the award \$29,114 is, I fancy, given as an indemnity to all persons who, at the date of expropriation, had any interest in the property, and if there was nothing but this in the case I should content myself with varying the award in respect thereof.

It is difficult to determine with any certainty the principles upon which the Arbitrators have made their award, as they have assessed the compensation in one sum, and have not made any report. It is clear, however, I think, from the evidence and the way in which the case was presented to them, that, in assessing the value of the lots on which the wharf was being constructed, the Arbitrators were not afforded an opportunity of considering, and did not consider, the nature of the owners' title; but that they have valued the property as though the owners had a title free from any such conditions as exist in the present case (1).

I therefore set the award aside, and remit the whole matter to the said Arbitrators, Messrs. Cowan, Compton, Simard and Muma, now Official Referees of the court, for their re-consideration and re-determination, and for a report to the court; for which purpose they have leave to hear further evidence and the parties as they shall see fit.

It is, I think, desirable that such a report should show:—

(1) *Cripps on Compensation* p. 100.

(1). The date of the expropriation, from which date the claimants should be allowed interest.

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(2). The persons entitled to the compensation money at that date, or if they cannot fully ascertain this from the evidence, whether or not the assessment is made to cover the interests of all such persons.

(3) The amount allowed in respect of each item of the claim.

(4). Any other matter tending to show the principles upon which the assessment is made.

*Case remitted to Official Referees  
for re-consideration and re-deter-  
mination ; the question of costs  
reserved.*

Solicitors for appellants: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *O'Connor & Hogg.*