

Coram TASCHEREAU, J.

1883

May 15.

JOHN C. BURTON, DOUGLAS B. } (SUPPLIANTS)  
WOODWORTH AND JOSEPH E. } APPELLANTS;  
WOODWORTH.....

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Expropriation of land for purposes of a railway gravel pit—31 Vic., c. 12, secs. 25-40—Basis of valuation.*

B. & Co. were owners of a lot of uncleared land in the Parish of St. Paul, Province of Manitoba, upon which certain agents of the Dominion Government had entered at different times, under the provisions of sec. 25 of 31 Vic., c. 12, and taken therefrom large quantities of sand and gravel for the purposes of the Canadian Pacific Railway, amounting in all to some 82,000 cubic yards. For the sand and gravel so taken the Government offered B. & Co. \$72.50, which they refused to accept. The claim was then referred to the Official Arbitrators, who valued the property as farm land and awarded B. & Co. \$100 in full compensation and satisfaction of their claim.

On appeal from this award,

*Held:*—That the Official Arbitrators were wrong in assessing the damages in respect of the agricultural value of the land; and that such assessment should have been made in respect of its value as a sand and gravel pit.

*Semble*—Where lands are taken which possess capabilities rendering them available for more than one purpose, under sec. 40 of the Public Works Act (31 Vic., c. 12), compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value.

**APPEAL** from an award of the Official Arbitrators.

The appeal was heard before Mr. Justice Taschereau.

*Ferguson* for the appellants;

*Hogg* for the Crown.

The facts of the case are fully set out in the judgment.

1885  
 BURTON  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

TASCHEREAU, J. now (May 15th, 1888) delivered judgment.

Section 25 of 31 Vic. c. 12, an act respecting the public works of Canada, enacts in substance that the Minister of Public Works and his agents may enter upon any uncleared or wild land, and take therefrom all timber, stones, gravel, sand, clay or other materials necessary for the Public Works of the country, for which compensation shall be made at the rate agreed on, or appraised and awarded, as provided for in the subsequent sections of that statute. The provisions of this statute are extended by 33 Vic., c. 23 to any claim against the Government of Canada, or against any of the departments of state.

The Government, by its agents, in the exercise of the powers thus conferred upon them, entered upon lot 93 in the parish of St. Paul, Manitoba, at different times before the year 1881, and took away from the said lot of land a large quantity of sand and gravel required for the construction of the Canadian Pacific Railway.

This, as well as the claimant's property in the sand and gravel so taken, is admitted. The quantity of said sand and gravel so taken away is also now admitted on both sides to have been 82,000 cubic yards.

The Government offered the claimants \$72.50 in all for the 82,000 yards of material taken. Upon the claimants refusal to accept that sum, a reference to the Official Arbitrators was made by the Minister of Railways, under the statute, and upon that reference the Official Arbitrators awarded the claimants the sum of \$100 as full compensation for their claim. The claimants, dissatisfied with the award, then appealed to this court from the decision of the Arbitrators, under the act 42 Vic. c. 8, which gives them the right to such appeal.

The only question to be now determined is the amount

of compensation to be paid to the claimants for the sand and gravel so taken. Fifteen witnesses were examined before the Arbitrators. Woodworth, the first witness, proves nothing as to the value of the gravel. John C. Burton, the second witness, and one of the claimants, swears that since 1880 he has sold over 46,000 yards of gravel at twenty-five cents per yard.

1883  
 BURTON  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

James G. McDonald, the next witness is a building contractor at Winnipeg, and, as such, uses a large quantity of sand, and also deals in sand and gravel. He sells sand and gravel at a pit situated four miles further from Winnipeg than the claimants' pit, at \$5 a carload of ten yards. He swears that if he owned the claimants' pit, he would not sell the gravel for less than ten cents a yard, but that if there were no railway and no city in its neighborhood, the pit would be worth nothing at all. Elijah Griffith, the next witness, is a manufacturer of artificial stones at Winnipeg, and, as such, uses a great quantity of sand and gravel. He knows the claimants' pit, and would not sell the gravel and sand for less than twelve or fifteen cents per yard, if he owned it. Good sand and gravel, he says, are scarce in Winnipeg. Alex. T. McLean is the next witness, and a very important one from the fact that he was the Government's engineer in charge of the pit in question when the gravel was taken, and is, moreover, said by Mr. Schreiber, the Government Chief Engineer, (who was examined in this case), to be a reliable man and a good engineer; by Joseph Kavanah, of Ottawa, merchant, he is also said to be a faithful, honest and respectable man. McLean swears that ten cents a yard for the sand and gravel taken from that pit, is a very reasonable charge. Being examined before the court, *de novo*, he says, on the question of value:

The sand and gravel there is of a superior quality. Supposing that no railway had been built there, that gravel and sand in the years

1883  
 BURTON  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

1879, 1880, 1881 and 1882 would have been worth, lying there in its natural state, not less than eleven cents per cubic yard. I would not have taken that price for it had I owned the land. I was eight years in Manitoba. I would have valued that gravel at fourteen cents per cubic yard. It is the finest quality I ever saw. There is considerable gravel in the vicinity there, but of inferior quality than that on lot No. 93. There is not an inexhaustible quantity. The Bird's Hill ballast pit in question is situate and lying at about seven and three-quarters miles east of Winnipeg. There is no sand or gravel to be easily got for the Pembina Branch of the Canadian Pacific Railway in the vicinity of said line of railway.

I know that for different purposes gravel was sold at twenty-five cents per cubic yard to private parties for building purposes, and for cement pipes in the city of Winnipeg.

Q. How do you arrive at the calculation that the sand and gravel was worth eleven cents a yard in its natural state in the bed without the railway? Ans.—As Winnipeg required it, it would have built a tramway to get sand at that pit. I mean the persons interested to get the sand.

Without a railway at all there, that sand would have been of an additional value to the land, but I cannot say to what extent. I do not consider that the value of the land was considerably increased by the building of the railway. On lot 92 there is a good deal of sand and gravel, but not lot 91. I do not know how far the Bird's Hill ranges, but it is not all good quality. I have seen test pits made for the purpose of ascertaining the quality of gravel at different places in that hill. If I owned that pit I would have taken, for a very large quantity of sand, perhaps a little less than fourteen cents a yard."

Joseph Kavanagh, who was the next witness examined, is a merchant in Ottawa, and has often been in Manitoba, says :—

Know the gravel pit in question, its location and value. I am not interested there. Owing to the proximity of that gravel pit to the city of Winnipeg, and the fact that it is the only good gravel pit in the vicinity of Winnipeg, I consider that it is worth a good price. Taking the sand and gravel in its natural state, I should average its value in the pit at 15c. per cubic yard; but without a road there I should value it at 10 cents a yard, at least.

That gravel was necessary for Winnipeg. It was of a superior quality. The running of the road has increased the value of the land in that neighborhood, and it has also increased the value of that sand and gravel from 10 to 15 cents a yard.

And on cross-examination he says :—

Q. What was the land worth prior to the opening of that ballast pit? A. I cannot say, the gravel is more valuable there than it is here. That is my reason to value it at ten cents per yard without a railway.

G. C. Brophy, who is a civil engineer in the employ of the Government, and who, Mr. Fleming, another witness in the case, says is a good man, was the engineer of that part of the road where this very gravel was used, and when it was used, says :—

I was in Winnipeg in 1879 employed by the Government. I know Bird's Hill Gravel Pit. Without any railway there at all, in my opinion gravel and sand at that pit would be worth from ten to twelve cents per cubic yard; it is of a superior quality, one of the finest gravels I have ever seen; well located for different purposes. That gravel was worth more in 1879, 1880, 1881 and 1882, than ten or twelve cents a cubic yard. I was the engineer in charge of the construction of the Pembina Branch, and the ballast taken at Bird's Hill was used on the road under my direction. Bird's Hill is about six or seven miles from Winnipeg. I have lived in Winnipeg. With the road now constructed and in operation, I value the gravel at Bird's Hill at fifteen or sixteen cents a cubic yard at least. For the railway purposes we cannot get elsewhere as good gravel as that at Bird's Hill; and this pit is of easy access. That gravel is also very convenient for Winnipeg.

On cross-examination he says :—

“Q.—What was the sand or gravel worth in large quantities in its natural state in the ground, without any railway; the same having to be removed by carts or vehicles, about 1879? Ans.—From ten to twelve cents per cubic yard. The Red River runs between Winnipeg and the Bird's Hill. There was no bridge on that river in 1879.

Q.—Did the building of this railroad and the construction of the bridge across the Red River increase the value of that gravel at Bird's Hill, and to what extent? Ans.—Yes; and in my opinion from four to five cents per cubic yard. No doubt the opening of the gravel pit and the running of a spur would have enhanced its value. In reference to the scarcity of gravel I speak of my own experience in 1879, and I know nothing of my own personal knowledge of any other pits being open since I left Manitoba.

Q.—Do you base your opinion of the value of the sand and gravel, in its natural bed, at from ten to twelve cents per cubic yard on account of its scarcity and proximity to the city of Winnipeg in 1879?

1883

BURTON  
v.  
THE QUEEN.  
Reasons  
for  
Judgment.

1883  
 BURTON  
 v.  
 THE QUEEN.  
 Reasons  
 for  
 Judgment.

Ans.—Yes ; and this irrespective of any railway running there, and also on account of its quality.

Q.—In speaking of the value of gravel and sand at ten to twelve cents at Bird's Hill, do you apply that rate or price to the large quantities, say, 80,000 cubic yards taken away in 1879 and 1880?

Ans.—Yes ; if that quantity was taken for any other purpose than than that of ballasting I would still consider that it would be worth ten or twelve cents. For the purpose of ballasting I consider that it was worth more. By this I mean that as compared with any other gravel used for ballasting purposes, either on the Pembina Branch or Section 14 adjoining, up to the fall of 1879, at the time of the closing of the ballasting in that year, it was worth at least twenty cents per cubic yard in its natural state in the pit. I saw the gravel used and taken from the pits on the line of Section 14.

Hugh Sutherland who is member of the House of Commons for Selkirk County, Manitoba, says :—

Have lived in Winnipeg since ten years. Knew the ballast pit in question, it is of a very good quality of gravel and sand. Without any railway at all running there it would be a valuable gravel pit on account of the quantity of gravel and its proximity to the city of Winnipeg.

Cross-examined :—

The building of the railway has increased the value of gravel and sand at Bird's Hill ; it has materially added to the value of all gravel and sand there. From the first time I heard of the pit in question, I have always attached a great value to it ; more so on account of its proximity to the city.

A. W. Ross, member of the House of Commons for Lisgar, Manitoba, corroborates Mr. Sutherland's evidence. Without a railway running there at all, he says, the claimants' pit would be a very valuable property.

H. S. Westbrook, of Winnipeg, testifies to the same effect, and corroborates Sutherland's and Ross' testimony, which he heard.

This closes the evidence adduced by the claimants.

Thomas Nixon, was the first witness examined on the part of the Crown. He merely testified that about 1876 he bought some of the land for a gravel pit from the neighboring lots for five dollars an acre.

William Crawford, the next witness for the Crown, says that in 1876 the value of this land was from two to five dollars an acre.

On cross-examination he says :—

In this valuation I do not take into account the value of the gravel. My valuation was based on its value for agricultural land. I know the gravel pit in question ; I would consider from the look of it that the gravel and sand there is of a very good quality, but I do not know the price of such gravel per cubic yard.

The pit at Bird's Hill and the pit at Little Stony Mountain are the only gravel pits near Winnipeg that I know of.

To Mr. Simard :

If there were no railway I do not think that gravel would have been of much value."

James Rowan, the next witness, says nothing as to the value of the gravel.

Mr. Schreiber, the Government Chief Engineer, is next examined for the Crown. He does not say if he ever has seen the locality in question, or if he has a personal knowledge of the facts he speaks of. In the Dominion City ballast pit, he says, the Government had paid from forty to sixty dollars an acre for ballasting purposes. He was aware that a part of Bird's Hill ballast pit could have been purchased at five dollars an acre. He says that ten cents a yard for that gravel is a very large price, and that he considers the value given to claimant's property by the construction of the railway far in excess of any possible damages to the property by reason of the removal of gravel by the Government.

Mr. Fleming is the fifth and last witness called for the Crown. Ten cents per yard for that gravel, he says, is absurd ; and that the value Bird's Hill possesses over and above ordinary farming lands there is due to the railway. The rest of his evidence seems to me immaterial. This closed the evidence.

I must say that after reading these depositions it is, it seems to me, impossible to say that the claimants have not overwhelmingly established that

1883

BURTON

v.

THE QUEEN.

Reasons  
for  
Judgment.

1883  
 BURTON  
 v.  
 THE QUEEN.  
 Reasons  
 for  
 Judgment.

the sum of ten cents claimed by them for the gravel is a very moderate price indeed; in fact, all the witnesses, leaving aside Mr. Schreiber and Mr. Fleming, are one way on this point. The two last named witnesses are honorable men, certainly, and their evidence is entitled to consideration. They, no doubt, have said what they sincerely think of the claim; but they have not the personal knowledge of the value of this gravel that the witnesses examined on the part of the claimants have. Their opinions are formed from reports of measurements by their officers, or inferences that they draw from facts to them more or less personally known. But such witnesses as McLean, Brophy, Griffith, McDonald, Kavanagh, Sutherland, Ross and Westbrook speak of actual facts, and of facts they have personal knowledge of. Some of them personally deal in gravel and sand in the Province of Manitoba; others were the Government engineers employed on the railroad when this gravel was taken, and actually saw it used. Brophy is still in the Government employ; and Sutherland, Ross and Westbrook live in Manitoba, and are in a position to actually know whether this gravel pit is valuable or not.

They all swear that the gravel and sand taken by the Government from lot 93 in question was very valuable, and all of them who fix a price upon it, that is to say: McDonald, McLean, Brophy, Griffith and Kavanagh, swear that it was worth in 1880 more than, or at least as much as, ten cents per yard; whilst Burton, one of the claimants, proves that he has sold such materials from the land, since, at 25 cents per yard.

The Official Arbitrators, in this case, have evidently acted under a wrong impression and upon a false basis. They have taken it for granted that only  $2\frac{1}{2}$  acres of the claimants' land had been taken by the Government; and taking \$40 per acre as the highest price



proved for such land, they have allowed the claimants \$100.

The evidence given of the value of this lot as agricultural land does not militate against the conclusion I have arrived at that such value does not constitute the proper basis of compensation in this case. It is just because the land is nothing but gravel and sand that its value as such is far above any value it may have as agricultural land, from the very fact that in that locality the gravel and sand required for building purposes are not easily available.

But, first, there is no proof whatever that this gravel has been taken from  $2\frac{1}{2}$  acres only of claimants' land. Then, it is not the land that the Government took. They might have expropriated the land itself, but they did not do so. The claim in this case is not for land, but for so many yards of sand and gravel. The reference to the Official Arbitrators by the Minister of Railways is, in its very terms, a reference of a claim in respect of certain sand and gravel taken; and the award of the arbitrators itself, though the fact seems to have been lost sight of in the amount awarded, professes to be an award not for so many acres of land but in compensation for this claim for sand and gravel. The Arbitrators evidently were misled in this matter, and I have no doubt did not intend to report that these 82,000 yards of sand and gravel were worth only \$100, when the evidence establishes so clearly that, even without the railway, they were worth at least ten cents a yard.

The evidence is clear that, notwithstanding the fact that the railway has greatly increased the value of the gravel and made it worth much more now than it was at the time of the taking, it was, in 1880, worth at least the value of ten cents a yard as put upon it by the claimants; and would have been worth that without a

1883

BURTON

v.

THE QUEEN.

Reasons

for

Judgment.

1883  
 BURTON  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

railway ; and, consequently, I am relieved from considering at length the effect of sections 25 and 40 of 31 Vic., c. 12, upon claims of this nature.

These sections read as follows :

25. The Minister and his agents may enter upon any uncleared or wild land, and take therefrom all timber, stones, gravel, sand, clay or other materials, which he or they may find necessary for the construction, maintenance and repair of Public Works or buildings under his management, or may lay any materials or things upon any such land, for which compensation shall be made at the rate agreed on or appraised and awarded as herein provided ; and the Minister may make and use all such temporary roads to and from such timber, stones, clay, gravel, sand or gravel pits, required by him for the convenient passing to and from the works during their construction and repair, and may enter upon any land for the purpose of making proper drains to carry off the water from any public work, or for keeping such drains in repair, making compensation as aforesaid.

40. The Arbitrators in estimating and awarding the amount to be paid to any claimant for injury done to any land or property, and is estimating the amount to be paid for lands taken by the Minister, under this Act, or taken by the proper authority under any former act shall estimate or assess the value thereof at the time when the injury complained of was occasioned, and not the value of the adjoining lands at the time of making their award.

I will merely say that these enactments do not, in my opinion, mean that if, for instance, a man has 100 acres of land worth one dollar which, by a railway built by the Government, rise in value to two dollars an acre, the Government would therefore have the right to take fifty acres of that man's property without paying for them. The disadvantage that this man would suffer from the fact that the Government requires his property is evident, since his neighbour, whose property the Government does not require, but which has received the same increased value by reason of the construction of the railway, would get the full benefit of it.

That, clearly, is not what the statute intended. Upon that construction of the statute the Government could

have got one-half at least of all the conceded lots in the North-west Territories without paying for them. They could have got for nothing all the Hudson's Bay lands required for public works or railways.

These statutes are all based on the assumption that full compensation will be paid to the parties whose property the Government, in the public interest, is authorized to appropriate and expropriate. Anything so monstrous as the proposition that the Government could say to a man—"Your land is wanted; we take it whether you are pleased or not, and, as you would not have found another purchaser, we will not pay you a cent for it," was never intended. These enactments of 31 Vic., c. 12, are nothing but a continuation of similar enactments in c. 28, Consol. Stats. Can., and under the provisions of the said c. 28 it has never been contended that the Crown could take the property of any person without fully compensating him for the same. The intention of these statutes, obviously, is that the real value at the time of the expropriation should be paid for property taken by the Crown. Here, for instance, though it has been proved that the claimants could now get at least fifteen cents a yard for their gravel, yet they are not entitled to get more than ten cents, the value of it when so taken by the Crown.

I do not lose sight of the fact that the claimants have paid only \$1,920 for the lot: but in view of the evidence on the record, I can only infer from it that they have made a pretty good speculation on a small scale; a speculation, however, in which I can see nothing in the least reprehensible.

I have referred to the case *In re The Canada Southern Railway Company and Norvall, et al* (1), and other cases cited by Mr. Hogg for the Crown, and whatever appli-

(1) 41 U. C. Q. B. 195.

1883  
 BURTON  
 v.  
 THE QUEEN.  
 —  
 Reasons  
 for  
 Judgment.  
 —

1883  
 BURTON  
 v.  
 THE QUEEN.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

cation can be made of them to the present case, they do not lead me to any other conclusions than those I have arrived at and expressed at length herein. Judgment will go against the Crown for \$8,200., with costs. The Arbitrators have allowed claimants interest on the \$100 they awarded from the 12th Nov. 1881, the date of their purchase of this claim, but I cannot see how I can maintain such allowance.

*Appeal allowed with costs.*

Solicitor for claimants : *A. Ferguson.*

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

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