

JAMES BENNING *et al.*, *ès-qualité* } APPELLANTS;  
 (PLAINTIFFS) ..... }

AND

THE ATLANTIC & NORTH-WEST } RESPONDENTS.  
 RAILWAY CO. (DEFENDANTS)..... }

1891  
 \*May 21.  
 \*Nov. 17.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR  
 LOWER CANADA (APPEAL SIDE).

*Expropriation under Railway Act—R.S.C. ch. 109 sec. 8 subsecs. 20-21  
 —Discretion of arbitrators—Award—Inadequate compensation.*

In a case of an award in expropriation proceeding under the Railway Act, R.S.C. ch. 109, it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed; and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice.

On appeal to the Supreme Court of Canada:

*Held*,—that the judgment should not be interfered with.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), at Montreal, confirming a judgment of the Hon. Mr. Justice Wurtele, rendered the 22nd of June, 1889, dismissing the plaintiffs' action to set aside an award of arbitrators under the Railway Act (2).

The plaintiffs are the executors of the late William Moody, of Côte St. Antoine. The railway company located their line across the property of his estate at Côte St. Antoine and gave the executors notice of expropriation in ordinary form in March, 1887, offering in compensation \$3,701, and appointing Mr. Norman

\* PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Patterson JJ.

(1) M.L.R. 6 Q.B. 385.

(2) M.L.R. 5 S.C. 136.

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T. Rielle, advocate, to be their arbitrator, and the plaintiffs named as their arbitrator Joseph Barsalou of Montreal, auctioneer, and the two arbitrators chose as third arbitrator John M. M. Duff, Esq., of Montreal, accountant.

The arbitrators having proceeded to hold meetings and hear witnesses by a decision of a majority, awarded \$5,000 to the appellants, their arbitrator dissenting. The action was brought to set aside the award on the ground *inter alia* of the gross inadequacy and unfairness of the award, amounting to a fraud on appellants' rights, and secondly, but mainly, on the ground that the arbitrators had taken into consideration, to determine the amount of their award, matters which they had no right to take into account. The evidence given at the trial is reviewed at length in the judgment of Mr. Justice Wurtele, reported in M. L. R. 5 S. C. 137.

*Laflamme* Q.C. and *Trenholme* Q.C. for appellants, contended on the evidence that the two arbitrators had awarded appellants less than they would have done but for the unwarrantable assumption of the existence of a depot in the vicinity affording access by rail to appellants' property.

*The Duke of Buccleuch v. The Metropolitan Board of Works* (1); *Brown v. Providence Railroad Co.* (2); *Re Credit Valley Railway Co. and Spragge* (3); *James v. Ontario & Quebec R.W. Co.* (4); were cited and on the evidence that the award was grossly unfair and inadequate. *Dalloz Rep. Gén.* (5); *Re Taylor & Ontario & Quebec Ry. Co.* (6).

*Geoffrion* Q.C. and *Abbott* Q.C. for respondents, cited and relied on arts. 1353, 1354 C.C. *La Compagnie*

(1) L. R. 5 H. L. 418.

(2) 5 Gray (Mass.) 35.

(3) 24 Gr. 231.

(4) 15 Ont. App. R. 1.

(5) Vo. Expropriation No. 588.

(6) 6 O. R. 338.

*du chemin de fer de Montreal v. Bourgoïn* (1); R.S.C. ch. 109 secs. 20 and 21. *Re Taylor & Quebec & Ont. Ry. Co.* (2); *Benning v. Rielle* (3); *Charland v. The Queen* (4), and R.S.C. ch. 109 sec. 8 subsecs. 20-21.

The judgment of the court was delivered by

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TASCHEREAU J.—The plaintiffs, appellants, seek to have an award made on the twenty-sixth of July, eighteen hundred and eighty-seven, establishing the compensation to be paid to them by the company defendant for the land to be taken from their property for its railway, declared illegal, fraudulent and void, and to get it set aside and annulled for various reasons, which on this appeal were reduced to three.

1st. Because the said award is so grossly and scandalously inadequate as to be a fraud on the plaintiffs, and the result of partiality on the part of the two arbitrators who made the same.

2nd. Because the said two arbitrators in making their award assumed as a fact that the company defendants were going to erect and maintain a station at or near the plaintiff's property, and that the company defendants would permit the plaintiffs to place pipes through the land to be expropriated for water and drainage; and

3rd. Because the said two arbitrators took into consideration the increased value alleged to be given to the remainder of the plaintiff's property by the construction of the railway, and set it off not only against the inconvenience, loss and damages to be suffered by the plaintiffs using the land to be expropriated, but also in deduction of the value of the land and buildings to be taken.

(1) 23 L. C. Jur. 96; 5 App. (2) 6 O. R. 338.

Cas. 381.

(3) M.L.R. 6 Q.B. 365.

(4) 1 Can. Ex. R. 291.

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The action was dismissed in the two courts below, and I am of opinion that these judgments cannot be impugned. No ground has been shown which would justify the maintaining of the plaintiffs' action. The arbitrators were the sovereign judges of the amount the plaintiffs were entitled to, and there is no foundation for the allegation that they ever took into consideration matters which they were not entitled to consider. They seem to have considered the whole matter with utmost fairness, taking the value of the property before the railway passed, then its value after the railway passed, and deducting the one from the other awarded the difference to the plaintiffs.

I would dismiss the appeal.

*Appeal dismissed with costs.*

Solicitors for appellants : *Taylor & Buchan.*

Solicitors for respondents : *Abbotts, Campbell & Meredith.*

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