

1889 BENONI GUAY (CLAIMANT).....APPELLANT ;

*Feby. 12.

AND

*April 30.

THE QUEEN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT.

*Expropriation for Government Railway purposes—Severance of Land—
Farm crossings—Compensation.*

Where land expropriated for Government railway purposes severed a farm, the owner although not at the time entitled to a farm crossing apart from contract was entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing.

Gwynne J. dissenting on the ground that the owner was entitled to a crossing as a matter of law. [See now 52 V. c. 38 s. 3.]

APPEAL from a judgment of the Exchequer Court of Canada, upon a claim for expropriation under the Government Railway Act.

The appellant was the owner of two lots situate in the Parish of St. Joseph, Levis. On the 8th June, 1882, the Intercolonial Railway authorities expropriated two parcels of these lots for the construction of what is generally known under the name of the St. Charles Branch.

The appellant thereupon filed the following claim, which was contested by the crown and referred to the Exchequer Court, to wit :

Plan Nos. 1 & 2—1st range.	
Land expropriated.....	\$ 200 00
Damages.....	1,200 00
	———— \$1,400 00

*PRESENT :—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

Plan No. 3—3rd Range.		1889
Land expropriated.....	\$120 00	GUAY
Damages.....	380 00	v.
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	500 00	
	<hr/>	
	\$1,900 00	

On the 30th day of June, 1888, the court awarded the claimant the sum of \$1,070 as follows, to wit :

Plan Nos. 1 and 2—1st Range.	
Land expropriated.....	\$200 00
Damages.....	500 00
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	\$ 700 00

Plan No. 3—2nd Range.	
Land expropriated.....	\$120 00
Damages.....	250 00
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	370 00
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	\$1,070 00

With this award the claimant was dissatisfied and hence the present appeal.

The court below having awarded the claimant the full amount he demanded for lands expropriated, and there being no cross appeal, this part of the award was not attacked.

The only question, therefore, that arose on this appeal was in relation to the amount of damages awarded on each of appellant's properties for depreciation of value caused by the construction of the railway.

Belleau for appellant contended that a subway which was constructed upon lot 1 on the side of a hill was impassable, and that having no crossing nor gate upon lot 2 appellant had not received full compensation for the future as well as for the past in consequence of the want of such a crossing.

Angers Q.C. for respondent contended that the hill is not steeper on lot 1 than it was before and that in

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assessing the damages on lot 2 the learned judge had included the cost of the crossing.

The judgment of the majority of the court was delivered by

PATTERSON J.—This appeal raises no question beyond the amount of damages for the depreciation of or inconvenience caused in respect of the claimant's land, by severance and by the effect of the railway upon the natural flow of water upon his land. The amount awarded for the land expropriated is not complained of.

It may be that we are as able to appreciate the evidence as was the learned judge in the court below, because the witnesses appear to have been examined before the registrar, but we are in no better position.

I do not see any good reason to suppose that my estimate of the value of the opinions of the witnesses, if it differed from that formed by the learned judge, would be more likely to be right than his estimate; on the contrary I must regard the award as that of the tribunal primarily charged with the adjustment of compensation in these cases, and not to be disturbed unless a wrong principle appears to have been acted on, or unless some error as to facts or some oversight is apparent.

The learned judge appears to have had before his attention all the considerations affecting the injury, and the only point on which I should criticise his decision is upon the question of farm crossings, particularly with reference to the property in the third range. As to that property, the learned judge remarks that the claimant was entitled to a crossing, and I understand him to attribute the depreciation of that portion of the property chiefly to the want of a crossing and to take that into account in estimating the damages (1). As explained in what I have said in *Vézina's Case*, I do not think the statutes give a right to a crossing over this

(1) See p. 21 et seq.

railway apart from contract. If the right existed it would be enforceable notwithstanding the award in question, but when no right is given by statute or reserved by contract, full compensation, covering the future as well as the past, should be given.

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It is not quite clear that the award is intended to give this full compensation, wherefore it will be proper for us to put it beyond question.

We therefore add one hundred dollars to the amount, which will still be less than the estimate of the witnesses for the claimant and not much above that of some of the witnesses for the crown.

The award is thus increased from \$1,070 to \$1,170 and the appeal is allowed with costs.

GWYNNE J.—The only point in which any objection could, with propriety, as it appears to me, be made to the award of the learned judge of the Exchequer Court, is with respect to the sum of \$250 allowed under the head of depreciation of the property in the 3rd range, if that sum was awarded upon the assumption that the owner was deprived of a right to cross the railway from one of the severed parts of his farm to the other. For the reasons given in *Vezina v. The Queen* (1), I am of opinion that a person whose property is severed by a railway into two or more parts, access between which across the railway is necessary to the full enjoyment of the severed parts, cannot against his will be deprived of his right to have such access by a suitable crossing under or over the railway and cannot be compelled to accept pecuniary recompense in lieu of such a crossing. The statute which authorizes the construction of a railway across a man's property is not, in my judgment, open to the imputation that it justifies any such autocratic interference with the property of a person across whose lands a railway is

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authorized to be constructed, whether it be constructed by a company or by the Government. Again, on the other hand, a land owner cannot in my judgment compel a railway to compensate him in money as in lieu of a crossing which can be supplied. In the present case the Government has not appealed or raised any objection to the amount awarded, but lest payment of this amount might hereafter present an obstacle to the owner of the land obtaining a suitable crossing which, it is apparent, can readily be given, and as an act has been passed during the present session of Parliament, which, I think, gives ample power to the Exchequer Court to make an order in the proceedings upon expropriation for the construction of a suitable crossing in cases like the present, I am of opinion that we should remit the case to the Exchequer Court to be dealt with under that act. As to the grounds of appeal taken by the appellant, I cannot see anything which would justify us as an appellate tribunal in pronouncing the judgment of the learned judge of the Court of Exchequer to be erroneous. I think that there should be no costs given on the appeal.

Appeal allowed with costs

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

Solicitors for respondent: *Casgrain, Angers & Hamel.*
