Black v Canadian Copper Co, (1917),

Archives of Ontario, RG 80-6-0-22

Middleton J. —

[1] A large number of actions were brought, and many others threatened against the Canadian Copper Company, for damages supposed to have been sustained from vapours contained in metallurgical smoke issuing from the roast beds and smelter stacks of that company at Copper Cliff, near Sudbury. A motion was made to consolidate these actions resulting in the choice of four cases which were to proceed and to be regarded as test actions, the others remaining in abeyance in the meantime.

[2] The actions chosen were:

1. An action by J. F Black a florist having a greenhouse and number of small plots upon which market garden produce was grown
2. An action by Jos. Belanger, a farmer, upon a somewhat larger scale than usual for this district, who had claims for damage done to two farms.
3. An action by Mona Taillifer, a woman who worked also upon two farms not at all comparable to Belanger's farms, and in a much humbler way.
4. An action by the Sudbury Dairy Company, milk dealers, who have a farm upon which their dairy herd was pastured quite close to Copper Cliff.

[3] Two actions were also pending against the Mond Nickel Company and It was arranged that those should be dealt with at the same time.

[4] All evidence taken in the first four actions was to be available in any of them and so far as it might be of value in the actions against the Mond Company, but the parties to the actions against that Company were to give such further evidence as they might desire. Subsequently it was arranged that certain evidence taken in the Mond cases should be used in the Copper Company cases. The actions against the Mond Company are:

1. An action by Mr. Clary, a member of the bar, who practises at Sudbury and who owns a farm in the Township of Dill, some 12 miles away.
2. An action by a man named Ostroski and his wife who own a small farm near the town of Coniston, where the Mond smelter Is situated. Ostroski and his wife kept a boarding house for men employed at the Mond works and this farm was originally intended mainly to supply vegetables for use at their boarding house.

[5] In all these actions claims were originally made for an injunction but at different times this claim has been abandoned and now the cases resolve themselves mainly, if not altogether, into assessments of damages. The difficulty is

to ascertain what damage, if any, has been done by the omission of the smoke vapours from the roast beds and smelter stacks. While the admission of counsel makes my task easy so far as the granting of an injunction is concerned, I may say that in view of all that has occurred, I should not have granted an injunction interfering with the carrying on of the works in question.

[6] Smelter smoke may, no doubt, be a nuisance, and in addition to being disagreeable it may cause injury to vegetation and in some circumstances I have no doubt an injunction ought to be granted. For reasons which will appear later, I am of the opinion that the mines cannot be operated without the production of smoke from the roast yards and smelters which contains very large quantities of sulphur dioxide.

[7] In each case it ultimately becomes a question of degree and in a much modified sense a question of the greatest good to the greatest number. I do not mean by this as I shall show that for the mere purpose of early producing metal of value the owner of a mine may sacrifice his neighbours, but I think there are circumstances in which it is impossible for the individual to so assert his individual rights as to inflict a substantial injury upon the whole community.

[8] The individual right must be tenderly consigned but if pressed too far, if the Courts are found impotent, the Legislature must intervene and the right of eminent domain must be asserted for the weal of the community as a whole.

[9] The nickel region at Sudbury is an area some 26 miles from south west to north east, 16 miles wide. The ore deposits are situated at the edge of this huge basin where the edges of a great eruptive sheet appear. The inside of the basin is filled with sedimentary rocks and it is surrounded by the ordinary archaean rocks of the district.

[10] The whole district (I speak of this mining region, not of the vastly larger judicial district concerning which evidence has been given in a way that might mislead) has been burned over many times and while originally there were, no doubt white pines of considerable size these have long since disappeared and the only forest growth Is that usually found in northern Ontario small jack pines, birch and poplar. Repeated fires have denuded this “second growth” time and again and the entire soil has disappeared from most of the rocky hills either by being burned by fires in the dry season or by the operation of wind and rain. So the country now consists of the bare rocks, “mountains,” in local parlance, upon which a few trees of little value maintain a stunted existence and valleys between, some very narrow, which are level and more or less fertile. Many, if not most of these valleys are swamp or muskeg, and beaver meadow, few only are adapted for farming without drainage.

[11] In some of these valleys the soil found is remarkably fertile in others it is sour and hard to cultivate; much depends upon the natural drainage.

[12] Until minerals were found, this whole country remained a wilderness but when mines were opened up towns and villages sprang up around the mines and

farms began to be cultivated to supply the needs of the community.

[13] If the mines should be prevented from operating the community could not exist at all once close the mines the mining community would be at an end and farming would not long continue. Any capable farmer would find farms easier to operate and nearer general markets if the local market ceased.

[14] It is the consideration of this situation that induced the plaintiffs' counsel to abandon the claim originally made for an injunction.

[15] All this appealed to me, but there is also a further consideration that seemed to me even more important. Nickel is essential for many of the world's greatest industries; the metal is only found in a few places; it cannot be mined and placed upon the market without producing a nuisance and affecting, at most, a comparatively small area; those going into that area to farm have (in almost all cases) gone there with their eyes open, seeking to avail themselves of a market in which abnormally high prices rule because of the demands created by those mines and their great distance from ordinary sources of supply.

[16] Some cases of hardship may exist but according to the statement of counsel the mining companies have always stood ready to purchase the holdings of any individual at a price far in excess of the value.

[17] In my view the Court ought not to destroy the mining industry even if a few farms are damaged or destroyed, but in all such cases compensation liberally ought to be awarded.

[18] The Court has now by statute discretion to refuse an injunction and to award damages in lieu thereof. In *Shelfer v. City of London* (1895) 1 Ch. 287, working rules for the exercise of this discretion are laid down perhaps none apply to the case in hand but no such situation as that which exists here has been considered in any reported decision.

[19] Although the mines have been in operation for many years this is the first time in which actions have come to trial. The explanation given is that some arrangement for compensation has heretofore been made, but now claims have been made and adjustment seems impossible and the Courts have been resorted to and much evidence has been given with the view of having it ascertained how far the mines are answerable for the crop failures. The Company sets up that many of the things complained of are not the result of the smoke but are to be attributed to entirely other causes, and that the claims are grossly exaggerated.

[20] Much time and money has been expended in preparing for the defence of these actions and I have had throughout to be on my guard lest the plaintiffs should be found waging an unequal warfare, but the plaintiffs represent a large constituency and their case has been well looked after. The admission by the defendants of certain evidence has saved the expense incident to expert evidence and has brought before the Court the result of proceedings in other jurisdictions where similar situations have been faced.

[21] In addition to claims for damage to crops claims were made for permanent injury to the soil.

[22] As will be seen when the individual cases are discussed the amounts claimed in these test cases are large, but the totals claimed in all the suits must be a very large sum.

[23] In the fall of 1915, the Government took action and by an order in council reciting that lands in the vicinity of the roast beds of the Mond Company "cannot be considered fit for agriculture purposes" withdrew them from location or sale. Shortly thereafter another order in council was passed withdrawing all unpatented lands near the Canadian Copper Company's works. About the same time the Canadian Copper Company, obtained a new location some 15 miles from Copper Cliff, for its roast beds and all roasting since June of 1916 has been done upon the new beds.

[24] In 1916 the Mond Company adopted a new system by which all the heap roasting was done upon the beds in the winter season and only reduction of fine ore took place in their sintering machines during the season when crops were growing.

[25] The Copper Company does not use the sintering machine and with its much larger output cannot arrange to do the roasting during the winter months only.

[26] Both companies use blast furnaces for the further reduction of ore and production of matte and the Canadian Copper Company, also use reverberatory furnaces for the treatment of fine ore, these are not complained of.

[. . .]