Ontario History

The Court & the Cataracts

The Creation of the Queen Victoria Niagara Falls Park and the Ontario Court of Appeal

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Volume 106, numéro 1, spring 2014

URI : https://id.erudit.org/iderudit/1050723ar
DOI : https://doi.org/10.7202/1050723ar

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Éditeur(s)

The Ontario Historical Society

ISSN

0030-2953 (imprimé)
2371-4654 (numérique)

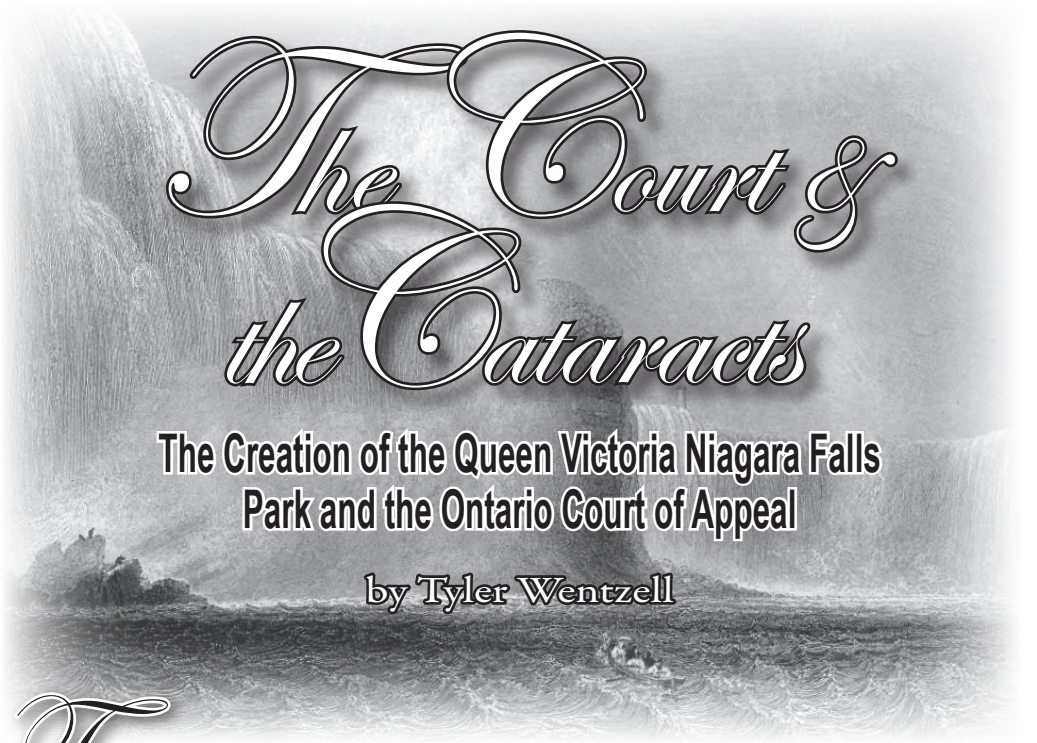
Découvrir la revue

Citer cet article

Wentzell, T. (2014). The Court & the Cataracts: The Creation of the Queen Victoria Niagara Falls Park and the Ontario Court of Appeal. *Ontario History*, *106*(1), 100–125. https://doi.org/10.7202/1050723ar

Résumé de l'article

La création du parc Queen Victoria à Niagara Falls poussa le gouvernement ontarien à des expropriations considérables. Certes, depuis quelques années l'opinion publique attachait une plus grande valeur sociale aux parcs, mais ce fut la première fois que des terrains privés étaient expropriés pour créer un parc. La majorité des propriétaires avait accepté l'arbitration, mais trois d'entre eux contestèrent les expropriations devant les tribunaux et même jusqu'à la cour d'appel de l'Ontario. La législation pertinente ainsi que les dossiers juridiques nous donnent un aperçu unique de la région des Chutes, du rôle de la cour d'appel de l'Ontario, de la nature de l'expropriation, et de l'établissement de parcs publics de cette province vers la fin du XIXe siècle.



The Court & the Cataracts

The Creation of the Queen Victoria Niagara Falls Park and the Ontario Court of Appeal

by Tyler Wentzell

The modern visitor to Niagara Falls would likely have trouble imagining the spectacle as it was for most of the nineteenth century. The falls were crowded with salesmen purveying "solidified mist" from the falls, rumoured to have magical healing properties; showmen charging a fee to see various human and animal oddities; and toll takers of all kinds. In the 1880s, it was not possible simply to stand at a vantage point and enjoy the view without paying a variety of fees and navigating the carnival that extended to the cliff's edge. The modern Niagara Falls offers its visitors no shortage of oddities to visit or kitsch to purchase, but thanks to the work of the modern Niagara Park Commission,[1] the vantage points of the falls and indeed the whole Niagara River are now a beautiful park, freely accessible to the public.

The transition from river front carnival to publicly-owned park was no small matter. There were few precedents to follow. While urban parks were becoming common, Canada did not have any national or provincial parks. In fact, there were only two national parks in the world, and only one state park in the United States: the Niagara Falls Reservation. The value of parks as a social good had only recently been recognized, but

[1] The modern Niagara Park Commission is the descendant of the original Niagara Falls Park Commission. The name was changed to reflect the growth of the park from the area immediately around the falls to the length of the Niagara River

Abstract

The establishment of the Queen Victoria Niagara Falls Park involved an extensive expropriation by the Government of Ontario. The perceived social value of parks had been increasing in recent years, but this was the first time in Canada that private land had been expropriated in order to create a park. The majority of the land owners engaged in arbitration, while three land owners took their objections as far as the Ontario Court of Appeal. The enacting legislation along with these proceedings provide unique insight into life around the falls, the role of the Ontario Court of Appeal, and the nature of expropriation and the establishment of parks in late nineteenth century Ontario.

Résumé: *La création du parc Queen Victoria à Niagara Falls poussa le gouvernement ontarien à des expropriations considérables. Certes, depuis quelques années l'opinion publique attachait une plus grande valeur sociale aux parcs, mais ce fut la première fois que des terrains privés étaient expropriés pour créer un parc. La majorité des propriétaires avait accepté l'arbitration, mais trois d'entre eux contestèrent les expropriations devant les tribunaux et même jusqu'à la cour d'appel de l'Ontario. La législation pertinente ainsi que les dossiers juridiques nous donnent un aperçu unique de la région des Chutes, du rôle de la cour d'appel de l'Ontario, de la nature de l'expropriation, et de l'établissement de parcs publics de cette province vers la fin du XIXe siècle.*

this value had not yet been deemed to be of sufficient weight to override an individual's right to private property. Whereas the first parks in Canada were created through purchase, donation, or re-purposing government-owned land, the Queen Victoria Niagara Falls Park was the first park in Canadian history created through any level of government's exercise of the power of expropriation—of converting private property into public property. In Part 1 of this article, the context of this development will be explored. Specifically, Part 1 will address the growing interest of parks as a social good in Canada and Ontario; the specific interest in a park about Niagara Falls, manifested through in the Free Niagara Movement; and the doctrine of expropriation as it existed in Ontario at the time. In Part 2 of this article, the events of the expropriation, including the legislative scheme, the arbitration, and the cases heard by the Ontario Court of Appeal will be explored.

Part I: Background: The Rise of Parks

The Industrial Revolution aroused a growing desire for open, public space for recreational use. The British elite had long enjoyed the respite afforded by strolling in their private gardens, or hunting stag or fox in the forest. Those so inclined—and possessing the funds to pay the admission fees—could enjoy the same leisure activities in privately owned pleasure gardens where they might also view zoo animals, enjoy a concert or a play, or witness the ascent of a hot-air balloon. The vast majority of the British population did not have the

resources—of property, time or money—to enjoy such pastimes. In the cities and industrial towns—the new home of the British working class as the result of the Industrial Revolution—public space was limited, and living conditions were often squalid. Public squares centred on intersections, and were hardly sanctuaries. They generally lacked greenery and served as forums for public communication, market places, thoroughfares, and military training grounds. They offered little respite from the noise and activity of city living. The perceived requirement to provide public recreation facilities to the growing urban working class, coupled with concerns regarding public health for the filthy, cramped conditions found in many industrial cities, lead to the creation of Britain's first public urban parks. The Crown purchased land for the creation of Victoria Park in the East End of London in 1842, and within twenty years publicly-owned urban parks were common in Great Britain.

Ontario's towns and cities were of substantially different character than their British equivalents. When the first British parks were being established in the 1840s and 1850s, Ontario's largest population centres—Toronto and Kingston—were small and sparsely populated compared to British cities. Private land was more obtainable, even to the working class, due to the use of land grants for settlement incentives, and public space was more easily accessible. In addition to purpose-built public squares and commons, generally larger than their British equivalents, many communities were initially settled as garrisons, and, as such, included a certain amount of open space for assembly and training. Other lands were reserved for potential use for fortifications or strategic routes, such as the chain reserve, a 66-foot wide strip of land running along the American frontier on the Niagara River from Fort Erie to Niagara-on-the-Lake. When not in use, as was often the case, these lands provided public space to the local citizenry. Furthermore, communities were sufficiently small that city-dwellers could reach the countryside upon a relatively short walk for activities like Sunday picnics.

The impetus for such parks in Ontario was therefore very different than in Great Britain. In *Urban Parks in Ontario,* J.R. Wright states that considering the prevailing conditions, "it is remarkable that Canada's first truly public parks came about at all."[2] He continues,

There was no profound social malaise or urgent urban crisis that precipitated the original public parks as in Britain. It was very simply an existing concept that was brought to the new country and applied under vastly different social conditions. The public park emerged in Ontario to satisfy a newly perceived need that was not satisfied by the existing public open spaces such as the square and marketplace, which remained as places for intense social interaction and commercial activity. The original public parks of Ontario satisfied a concept,

[2] J.R. Wright, *Urban Parks in Ontario. Part 1: Origins to 1860* (Ottawa: Media Productions, Ltd., 1983), 83.

rather than a reality, motivated by the altruism of the elite.[3]

The wealthy donated their own land, lobbied for the conversion of otherwise held government land into parks, and formed horticultural societies that were influential in the creation of green space in Ontario's cities. Land set aside for military purposes were converted to public parks in the cases of Simcoe Park in Niagara-on-the Lake in the 1840s, Macdonald Park and Confederation Park in Kingston in 1851 and 1876 respectively, and Victoria Park in London in 1874. Land set aside for the construction of the Rideau Canal became Major's Hill, the first park in Ottawa, in 1872. Private donations of land created Gore Park in Hamilton in 1852, and Victoria Park in Barrie in 1868. Toronto, as the largest and densest city in Ontario, experienced the most illustrative proliferation of parks as city decision makers struggled to balance the requirements for public space with industrial and commercial development.

Recognizing the growing importance of and interest in parks, the City of Toronto created a Committee on Public Walks and Gardens in 1851, the first of its kind in Canada. The future premier of Ontario, Oliver Mowat, served as the chairman during his term as a city alderman from 1857-1858. During this period, the committee began talks with the University of Toronto that led to a 999-year lease and the creation of Queen's Park in 1860.[4] That same year, George W. Allan donated five acres to the Toronto Horticultural Society for purposes of creating a public garden. The garden, now known as Allen Gardens in his honour, was not publicly owned, although it was publicly accessible. High Park was created in 1875 through the private donation of John Howard upon receipt of an honorarium. In spite of these notable successes, many attempts to create parks in Toronto were unsuccessful, or at least highly qualified. The City acquired the Garrison Reserve in 1847, a 287-acre patch of land running north and west from Fort York, and what are now the Toronto Islands in 1867, for purposes of creating parks. However, the Garrison Reserve was not effectively developed for park purposes. The Toronto Islands became a congested carnival, showing that government ownership was not a certain prophylaxis against overdevelopment. Public attempts to turn the Toronto Esplanade, the 350 feet of land reclaimed from Lake Ontario, into a park was similarly unsuccessful; the railroads ultimately succeeded in employing this strip of land for track.[5] The balancing act between economic development and public space was, and continues to be, a

[3] *Ibid.,* 84.

[4] See David Bain, "The Queen's Park and its Avenues: Canada's First Public Park," *Ontario History,* 95:2 (Autumn 2003), 193-215.

[5] For an analysis of the dialogue among the city, the public and the railroads, see Peter G. Goheen, "The Struggle for Urban Public Space: Disposing of the Toronto Waterfront in the Nineteenth Century," in *Cultural Encounters with the Environment: Enduring and Evolving Geographic Themes*, edited by Alexander B. Murphy and Douglas L. Johnson (New York: Rowman & Littlefield Publishers Inc., 2000), 59-78.

recurring theme in the establishment and preservation of parks.

Ontario's legislature formalized the process for creating parks in 1883 with the passage of *An Act To Provide For the Establishment And Maintenance of Public Parks in Cities and Towns*, known as the *Public Parks Act*.[6] It was the first act of its kind in Canada. The *Act* stated that upon passing a parks by-law, a municipality was to form a Board of Parks—composed of the mayor and six residents—who were to maintain and administer the community's parks. The boards could accept land in the form of gifts or devisements, or raise money to purchase lands by issuing municipal debentures or imposing a levy on its residents. The Act did not provide for the expropriation of private land for the creation of parks by the municipalities or their boards, nor was such a power granted to municipalities in other contemporary statutes.[7] Parks were increasingly viewed as valuable contributions to the urban landscape, a social good worthy of public funds, but were not yet perceived as holding sufficient value as to be worth depriving a citizen of their land.

By the 1880s, urban parks were a common feature in many Ontario communities. The concept of federal and provincial or state parks, on the other hand, was still evolving. At the time of the creation of the Niagara Falls Park Commission in 1885, Canada did not have any provincial or national parks. Canada's first national park, the Banff Hot Springs Reserve, was created just months later, in an isolated region where the federal government did not have to contend with title-holding land owners. The same was true in the case of the American Yellowstone National Park in 1872, and the New South Wales National Park in 1879. The respective governments did not have to acquire land through use of their powers of expropriation, but simply claimed the land and established a monopoly on development. These public spaces were deemed to require protection from private development, such that they could remain both pristine and accessible, unlike the overdeveloped Niagara Falls as it existed in the 1870s and 1880s. The words of Ferdinand Vandeveer Hayden's 1871 *Geological Report on the Yellowstone Valley* are telling:

> Persons are now waiting for the spring to open to enter in and take possession of these remarkable curiosities, to make merchandise of these beautiful specimens, to fence in these rare wonders, so as to charge visitors a fee, as is done now at Niagara Falls, for the sight of which of that which ought to be as free as the air or water.[8]

This idea, that beautiful public space should be as free as the air or water, man-

[6] 1883, c.188.

[7] Statutes that did delegate the power of expropriation will be discussed in greater detail in the following section.

[8] Ferdinand Vandeveer Hayden's 1871 Geological Report on the Yellowstone Valley, cited in Marlene Deahl Merrill, editor, *Yellowstone and the Great West: Journals, Letters, and Images from the 1871 Hayden Expedition* (Lincoln: University of Nebraska Press, 1999), 232.

ifested in the form of the Free Niagara Movement, the movement that lead to the creation of both the first state park in the United States and Ontario's Queen Victoria Niagara Falls Park: the first time in Canadian history that the powers of expropriation were applied in the creation of a public park.

The Free Niagara Movement

Canadian and American tourists alike had flocked to Niagara Falls since the 1820s. The completion of the Erie Canal in 1825, between Albany and Buffalo, and the Welland Canal in 1829, between Lake Erie and Lake Ontario, along with improving road and rail networks, made the trek from major population centres in New York and Ontario to Niagara Falls increasingly easy, comfortable, and affordable. But this popularity and accessibility had a downside. Private development around the falls consumed every vantage point on both the American and Canadian sides of the river. It was no longer possible see the falls without paying a fee to the private owner, and the overwhelming presence of what New York Governor Lucius Robinson called, "sharpers, hucksters and peddlers,"[9] left the area devoid of peace and quiet. Lord Dufferin, the Governor General of Canada, famously proposed an end to this private development in a speech to the Ontario Society of Artists in 1878. He advocated for the creation of an international public park that would return the falls to their original condition.

The idea of such a park was generally well received in New York. In fact, affluent New Yorkers had been expressing a similar idea since 1869. The Niagara Falls Association, whose membership included affluent New Yorkers like J.P. Morgan, supported the ideas made famous by Dufferin's speech and maintained public pressure. The Governor, Lucius Robinson, publicly endorsed the idea of the park just four months after Dufferin's speech. Despite this support, the creation of the park would face several challenges. First, the construction of the park would come at considerable public expense. Initial estimates varied, but the *Niagara Appropriations Bill* of 1885 authorized the spending of $1.4 million dollars. The actual cost would end up being considerably more. Second, the Free Niagara Movement had to overcome "Gilded Age suspicions of government jobbery, new taxes, and the honored American tradition of upholding property rights and favoring private, market-driven initiatives."[10] There were no other state parks for comparison, no precedents to point to that would show that beautifying public space far from congested cities was a sufficient public good to overcome such property rights. Third, there was a lack of continuity in New York's governorship. There would be three different governors of New York between Robinson's endorsement and the opening of the park. The project

[9] Speech by Governor Lucius Robinson, 9 January 1879.

[10] William Irwin, *The New Niagara: Tourism, Technology and the Landscape of Niagara Falls 1776-1917* (University Park, PA: Pennsylvania State University Press, 1996), 75.

nearly died under Alonzo Cornell, only to be revived again under Grover Cleveland, the future president of the United States and avid Niagara River fisherman. Governor David Hill, although hardly an enthusiast of the project, finally signed the *Niagara Appropriations Bill* in 1885. The one-mile stretch of land along the river, including private homes, shops and attractions on Prospect Point and the paper mill on Bath Island, became government property and the first state park in the United States. The owners received their compensation, determined by appraisals conducted in 1884, and Frederick Law Olmsted, the designer of New York's Central Park and winner of the design competition, set about creating the green, landscaped park we know today. Meanwhile, the carnival on the Canadian side of the border continued unabated.

The obstacles to creating a park in Ontario were slightly different. There were no issues of political continuity; Premier Oliver Mowat and the Liberal party formed the Ontario government from 1872 until 1896. Concerns regarding infringing upon private property rights and restricting private development were presumably similar to those in New York, however, they are noticeably absent from the public dialogue. The real issue, the true obstacle standing in the way of creating the park, was the issue of cost. Following Governor General Dufferin's speech in 1878, Mowat discussed the idea of a park with New York Governor Robinson during his visit to New York in September 1879. A few months later, Mowat tabled *An Act respecting Niagara Falls and the Adjacent Territory.*[11] The Act is almost humorous in its artful sidestepping of any responsibility on the part of Ontario in creating the proposed park. The preamble states,

Whereas it has been proposed that the Governments of the Dominion of Canada and the state of New York should take steps to restore, to some extent, the scenery around the Falls of Niagara to its natural condition, and to preserve the same from further deterioration, as well as to afford to travellers and others facilities for observing the points of interest in the vicinity; and whereas it is desirable that any action that the Government and Parliament of Canada may desire to take for the purpose of acquiring the lands in the neighbourhood of the Falls with a view to the said objects should be aided in manner hereinafter appearing so far as relates to any matter within the authority of the Legislature of Ontario....[12]

The Act goes on to explain the ways in which the government of Ontario would facilitate—or, at least, not interfere with—federal efforts to create a Niagara Falls park. Considering Mowat's eagerness to challenge the federal government in court whenever he saw federal action as infringing on the province's rights, the clarity of this message was, no doubt, appreciated in Ottawa. However, any such appreciation did not override the fact that the federal government had no intention of paying for the park either.

[11] 1880, c. 13.

[12] *Ibid.,* from the preamble.

Representatives from the Maritimes argued that Ontario should fund the park in the same way that New York had; Maritimers should not have to bear the cost of a park that few constituents were likely to see.[13] Nonetheless, Prime Minister John A. Macdonald made overtures to Mowat for a cost-sharing arrangement, with the federal government footing half of the bill while the province paid the other half, but Mowat was uninterested. The issue of a public park laid dormant until 1885 when Mowat's government, literally faced with a successful park in New York and increasing public pressure, finally passed *An Act Respecting Niagara Falls and the Adjacent Territory* and undertook the project to create the Queen Victoria Niagara Falls Park.

Expropriation of Land

An Act respecting Niagara Falls and the Adjacent Territory specifically contemplates the creation of a future park through the government exercise of its power of expropriation. This signified a departure from the norm. No parks in Canada had yet been created through the exercise of this power by any level of government. Municipal and federal governments—there were no state or provincial parks, yet—established the first parks through reallocation, donation, and private lease or sale. In Kingston, both Confederation Park and Macdonald Park were lands reserved for the military. Victoria Park in London was a British garrison, Simcoe Park in Niagara-on-the-Lake was land reserved for a militia hospital, and Major's Hill in Ottawa was land set aside for construction of the Rideau Canal. Toronto's High Park was a donation—albeit with an honorarium—and Queen's Park was a long-term lease from the University of Toronto. The processes by which these parks were created had one thing in common: whatever the motivation, the land came from a willing donor. For examples of the expropriation of private land to create parks, it was necessary to look to American precedents.

The expropriation of private land for public use by the government has been a long-standing—although not necessarily popular—power of sovereign states. British subjects at the time—as well as British and Canadian citizens to this day—do not have a constitutionally protected right to property or to compensation when it is expropriated for public use. Called condemnation in the United States and compulsory purchase in Great Britain, in Canada it is known as expropriation: the power of the government to re-purpose private land for public use. The practice of compensating landowners is well established through various statutes and through the common law, but these are not entrenched documents. Citizens of the United States, however, have a constitutionally protected right to compensation where the government seizes their land for public use. Under the Fifth Amendment, no person may be "deprived of life, liberty, or property, without due process of law; nor shall

[13] Gerald Killan, *Protected Places: A History of Ontario's Provincial Parks System* (Toronto: Queen's Printer, 1993), 3.

private property be taken for public use, without just compensation."[14] The power of eminent domain, as it is known in the United States, was frequently exercised as the country rapidly industrialized over the course of the nineteenth century and for the creation of defence installations during the Civil War. However, it was not used in the context of parks until the creation of Central Park in New York City in 1857.

The New York State Legislature granted the power of eminent domain to New York City through the *Central Park Act* on 21 July 1853. The Act outlined the boundaries of the proposed park, and authorized the appointment of five commissioners of estimate and assessment to determine the value of the lands contained within. The Act was not without its detractors. New York Senator James Beekman wrote, "The great objection to be overcome is this: A park is not of sufficient public necessity to justify its being taken by the State in opposition to the wish of the owners by the violent exercise of eminent domain."[15] The park's 1,600 residents[16] would most certainly have agreed, especially the 1,000 or so squatters and tenants who held no right to just compensation. The commissioners completed their task by July 1855, identifying 561 property-owners within the park and evaluating their lands to a combined total of five million dollars. Many of the property owners protested the valuations and would have their day in court. The New York Supreme Court had to accept the report before the expropriation took effect, and those who could afford the representation had the opportunity to present their arguments before the court. However, on 5 February 1856, the New York Supreme Court accepted the report. The property-owners, without further legal recourse, accepted their compensation and quietly departed.[17]

The exercise of eminent domain in the United States for the creation of parks occurred only rarely in the decades that followed. In 1855, Philadelphia created Fairmount Park, making use of land that it previously owned, had purchased for purposes of creating the park, or had received as a donation. When the city began to look at expanding the park in 1867, the Pennsylvania State Legislature created the Fairmount Park Commission. The commission was granted authority to purchase land for expanding the park, and was also delegated the state's power of eminent domain as necessary.[18] The aforementioned *Niagara Appropriations Bill* of 1885 did not delegate the power of expropriation, but was simply an exercise of this power by the New York State Leg-

[14] U.S. Const. amend. V.

[15] James Beekman, "Points for Mr. Hogg," 1853, 10:2, JWB Mss, cited in Roy Rosenzweig and Elizabeth Blackmar, *The Park and the People: A History of Central Park* (Ithaca: Cornell University Press, 1992), 59.

[16] *Ibid.*, 64.

[17] Morrison Hecksher, *Creating Central Park* (New York: Metropolitan Museum of Art, 2008), 16.

[18] Richardson Dilworth, *Social Capital in the City: Community and Civic Life in Philadelphia* (Philadelphia: Temple University Press, 2006), 57.

islature. These actions did not lead to any litigation of note. The first case did not occur until the creation of Rock Creek Park in 1890 where the original landowners protested the constitutionality of Congress' exercise of eminent domain.[19] The United States Supreme Court ruled that the taking of the land was constitutionally valid.

Although the province of Ontario had not yet exercised its power of expropriation for purposes of creating parks, it did have rules established at the common law and three important statutes to govern most expropriations. The *Municipal Act*[20] delegated the province's authority to expropriate land to the municipalities, the *Railway Act*[21] gave the same to railway companies, and the *Public Works Act*[22] regulated the province's takings as they pertained to public works. The province did not yet have a general expropriation act. The first two acts granted a limited power of expropriation; the railroads and the municipalities could only expropriate lands of particular dimensions for particular uses. The *Public Works Act* granted much broader powers; there was no limitation on the amount or type of land, and there was no meaningful restriction on the purpose of the expropriation. The three statutes also articulated the recourses available to the parties. With some variation, in the event of a disagreement, the landowner could enter into arbitration. Following arbitration, either party could appeal to the Superior Courts on questions of law or fact, although this occurred very rarely.

Municipal powers were restricted in general. The *Municipal Act* required that the majority of ratepayers that benefited from any given public work had to assent to the applicable by-law. The applicable sections regarding expropriation further narrowed the scope of the power. The municipal council could only pass by-laws to that effect for the construction and expansion of roads, and could only take strips of land that were one hundred feet wide or less. Once the council identified which lands it was going to take, it was required to give notice and make an offer to the landowner. If the landowner found the offer unacceptable, they could enter into arbitration. The Board of Arbitrators was composed of one appointee for the landowner, one appointee for the city councilmen, and one appointee mutually determined by the other two arbitrators. No special qualifications were required to serve as an arbitrator. This board was required to make a determination within one month of the appointment of the third arbitrator, and the decision had to bear the signatures of at least two of the arbitrators.

Interestingly, the 1887 *Municipal Act* added public parks to the list of purposes for which the municipality could expropriate land. The municipal park boards permitted by Ontario's *Public Parks Act*

[19] *Shoemaker v. United States*, 147 U.S. 282 (1893)

[20] RSO 1877, Chapt. 174.

[21] RSO 1877, Chapt. 165.

[22] RSO 1877, Chapt. 30.

of 1883 now held the right to expropriate necessary lands in accordance with the *Municipal Act.* These changes reflected a growing interest in public parks at the time. In a few years, the process of establishing a municipal park had evolved from an ad hoc endeavour by municipal councils, to a regulated process that specifically held the weight of the right to expropriate a citizen's real property.

The *Railway Act* was similar in form and substance to the *Municipal Act.* The *Railway Act* was strict. It only authorized the expropriation of certain dimensions of land for one specific purpose—the establishment of a railroad. For the tracks themselves, the companies were limited to expropriating 30-yard wide strips of land. The company could take more in locations where the railway was raised five feet higher or cut five feet deeper than the surface line, presumably to accommodate the necessary bridging or earthworks. The company could also take larger areas where it found it necessary to establish fixtures like stations or areas for the delivery of goods. Even within these exceptions, however, the railway could not take parcels of land any bigger than 200 x 500 yards.[23]

The process by which a railway company expropriated land was essentially the same as the municipalities. The railway company had to issue the landowner with notice of the expropriation. A landowner dissatisfied with the amount offered could enter into arbitration. The Board of Arbitrators, as in the case of the *Municipal Act,* was composed of one arbitrator selected by the landowner, the second selected by the railway company, and the third selected by the first two. These individuals did not require any special qualifications. If the company could not find the landowner or the landowner did not respond to the notice, the County Judge appointed a Sworn Surveyor of Ontario to act as the sole arbitrator. Interestingly, the statute instructs the arbitrators to disregard a common law rule regarding land evaluation. Contrary to the rule that land must be evaluated based on its value at the time of expropriation, the arbitrators were instructed to consider the increase in the land's value resulting from the construction of the railroad.[24]

The *Public Works Act* granted the Commissioner of Public Works considerably greater authority than that given to railway companies or municipal councils under the *Railway Act* or the *Municipal Act.* The *Public Works Act* granted the Commissioner for Public Works the authority to expropriate lands as necessary for the construction of "any Public Work or building," the enlargement or improvement to public works, the provision of drainage or better access to public works, or for "any other public purposes authorized by the Legislature or the Lieutenant-Governor."[25] This was an extremely broad category, and it did not amount at all to a purposive restriction as found in the two preceding acts. The *Public Works Act* also

[23] RSO 1877, Chapt. 165, at s.1.

[24] *Railway Act, supra,* at s.8.

[25] *Public Works Act, supra,* at s.29.

lacked any restriction as to how much land the Commissioner may expropriate; effectively, the Commissioner could expropriate as much land as he saw fit for virtually any purpose.

Arbitration under the *Public Works Act* was a very different matter than under the *Railway Act* or the *Municipal Act*. The *Public Works Act* stated that, "the Commissioner may, if he thinks fit, in any case where any person is entitled to an arbitration under this Act, take such steps as may be necessary in order to have the amount of compensation determined by the Board of Official Arbitrators."[26] Arbitration was not a right; the individual who made the offer in the first place had the discretion to permit or refuse it. Additionally, the Board of Official Arbitrators was composed of three men appointed by the provincial government, as opposed to the relatively neutral nature of the boards outlined under the *Railway Act* and the *Municipal Act*. During the time period in question, the board was formed by Theophilus H.A. Begue, a solicitor in the town of Dundas; Henry Taylor, a former deputy reeve, justice of the peace, and a lieutenant colonel in the militia in the township of Brant;[27] and Edmund J. Senkler, a sitting judge for Lincoln County. The individuals were certainly well suited to the task of evaluating land and behaving in a judicial manner, but a landowner might have reasonably felt that this arrangement served the province's interests more than his own.

A landowner with sufficiently deep pockets could appeal the decisions of the arbitrators. The *Act Respecting the Court of Appeal* specifically states that the court has jurisdiction over, "any case stated by an Arbitrator, or upon any appeal authorized by law from the decision of any arbitrator or referee, or upon any motion to set aside or refer back an award."[28] The *Municipal Act* and the *Railway Act* contained specific provisions regarding the appeal process. The *Municipal Act* stated that the decisions of the arbitrators "shall be subject of the jurisdiction of the High Court. The Court shall consider not only the legality of the award but the merits as they appear from the proceedings so filed... and may call for additional evidence, to be taken in any manner the court directs."[29] The *Railway Act* similarly stated that any party to the arbitration could appeal the decision on any question of fact or law to a judge of either of the superior courts. The appeals were to be treated the same as a regular appeal against a decision made by a county judge, with two important differences. First, the party had to make their appeal within one month of the arbitrators' decision. Second, when the appeal was based on a question of fact, the court "shall find the same upon the evidence."[30] Effectively, the statute instructs the court

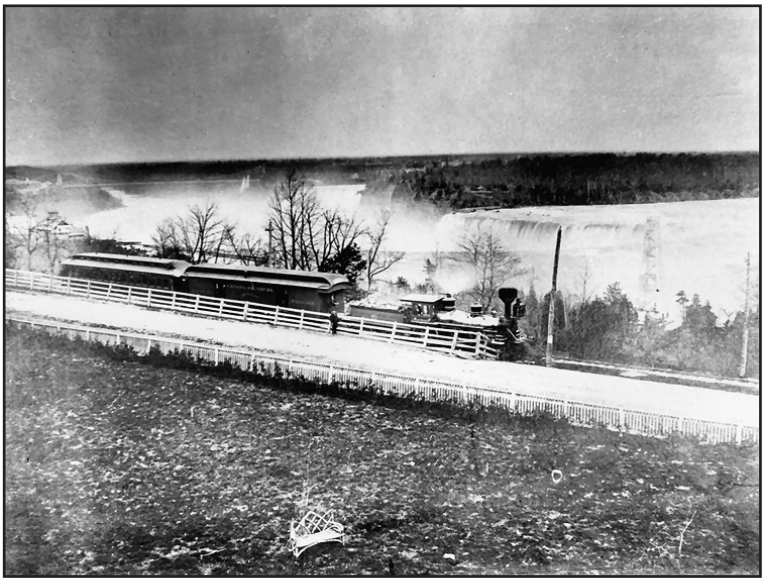
[26] Ibid., at s.36

[27] R. Cuthbertson Muir, *The Early Political and Military History of Burford* (Manuscript held by Brantford Public Library, 1913), 90.

[28] RSO 1877, Chapt. 38, at s.18(a).

[29] *Municipal Act, supra,* at s.490.

[30] *Ibid*.



The Canada Southern Railroad passing through Niagara in 1879, the falls visible in the background. (Niagara Falls Public Library)

to defer to the findings of fact made by an administrative tribunal, an unusual requirement considering the Board of Arbitrators required by the *Railway Act* did not necessarily possess any specialized knowledge. The *Public Works Act* was silent on the matter. It did not expressly refuse any right of appeal, but it also did not specifically forbid it.

When the provincial government enacted *An Act respecting Niagara Falls and the adjacent territory* in 1880, there were few precedents to follow with regards to expropriating lands for the creation of parks. There were some American precedents, but there were none in Canada. Parks were increasingly popular in Canada, enjoyed by both the working class and the affluent alike, but did they offer a social good of sufficient weight to justify their expense and the moral cost of exercising the government's power of expropriation? This was a political question. If it was to be answered in the affirmative, the province already had three important statutes to provide models for the necessary expropriation and the resolution of any conflicts: the *Public Works Act*, the *Railway Act*, and the *Municipal Act*.

Part II: Expropriation of Land for the Queen Victoria Niagara Falls Park

The Legislative Scheme

On 30 March 1885, the Ontario Legislature enacted *An Act for the Preservation of the Natural Scenery About Niagara Falls* (the *Niagara Falls Park Act* or the *Act).*[31] The idea of a park around the falls had received a great deal of discussion for several years, but had taken on greater urgency with the creation of the New York park and the Canada Southern Railway announcement of its intentions to open a large rail yard between the town of Clifton and the falls.[32] Through

[31] *An Act for the Preservation of the Natural Scenery About Niagara Falls,* 1885, c.21.

[32] R. Welch, "The Early Years of the Niagara Falls Park Commission" (MA Thesis, Queen's University, 1977), 49.

the Act, the province had formally declared its intention to take responsibility for the preservation of the land around the falls. The park, not yet with defined dimensions or boundaries, was to be open and free to the public and maintained by a Board of Commissioners. The Act tasked the Commissioners—Casimir Gzowski, John Langmuir and John MacDonald—with determining the size and scope of the park, and gave them the same powers as the Commissioner for Public Works as outlined in the *Public Works Act*. They were to determine the boundaries for the park, and submit this information on a map to the lieutenant governor for approval. Once approved, the commissioners were to employ evaluators to determine the value of the land and expropriate it. The Act made use of the framework for expropriation as laid out in Ontario's *Public Works Act*.[33]

The commissioners' preliminary report identified 118 acres for the park.[34] Beginning at Clifton House, a prominent hotel, the 300-yard-wide strip of land stretched to the Cynthia Islands. From the vantage points afforded by this strip, a visitor would have clear, unobstructed views of both the American and Canadian sides of the falls, from points above or below on the Niagara River. The Legislative Assembly authorized the dimensions of the park in an order-in-council on 14 December 1885,[35] and the commissioners set about hiring experts to evaluate the land and the buildings so that the Commission could expropriate it in due course. The preliminary report identified 16 affected landowners and 11 tenants and leaseholders,[36] although this number would later

The original Clifton House hotel as it existed prior to its loss to fire in 1898. (Niagara Falls Public Library)

[33] *An Act respecting the Public Works of Ontario,* RSO 1877, c. 30,

[34] "Report of the Commissioners, 18 September, 1885," in *Official Documents – Statutes, Annual Reports, etc. of the Ontario Niagara Parks Commission*. Undated bound collection of documents held at the Niagara Falls Public Library.

[35] Order in Council approved by the Lieutenant Governor of Ontario, 14 December 1885.

[36] "Report of the Commissioners, 18 September, 1885," in *Official Documents – Statutes, Annual Reports, etc. of the Ontario Niagara Parks Commission*. Undated bound collection of documents held at the Niagara Falls Public Library.

drop to 23. John McAree, the surveyor appointed by the commissioners, quickly evaluated the lands in question, and the appraisals were complete by the end of January 1886. Very few of the landowners—only two—were satisfied with the sums offered.[37] The remaining 21 went to arbitration.

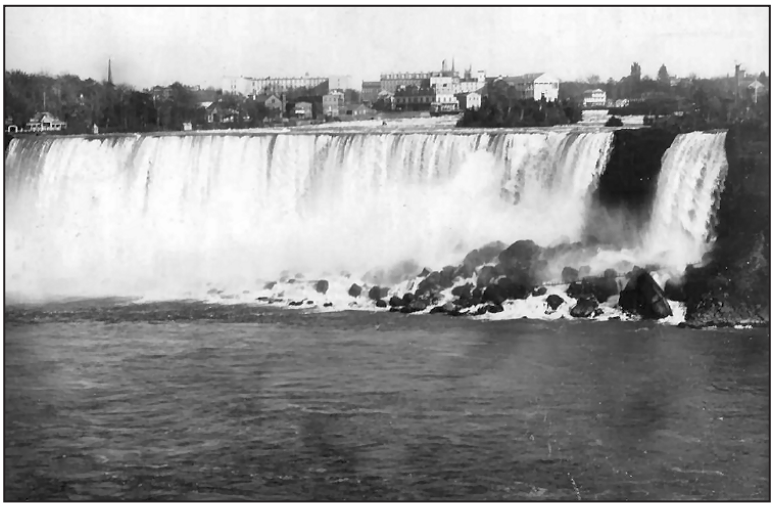
The Official Board of Arbitrators began arbitration in January 1886. We are fortunate that upon completing their duties under the *Niagara Falls Park Act,* the arbitrators recorded the principles through which they determined the sums of compensation.[38] Their report referred to three important contemporary texts: Cripps on *Compensation*, Wood on *Railway Law*, and Mills on *Eminent Domain*. The main principles employed were as follows. The arbitrators determined the value of the expropriated land by establishing the market value of the land at the time of expropriation. The value was determined based on what "men of ordinary prudence and business sagacity would devote it if it was their own." Specifically, "no prospective value can be considered as to what the land would be worth if buildings of a certain class were erected upon it (and a portion upon lands adjoining it)."[39] Where the land was subject to improvements by the owner, the cost of the improvements was to have no bearing on the compensation. Improvements may be wise or unwise, and be necessary or unnecessary. The fact that a property owner has spent a considerable sum on improving his property was of no weight. The report stated that only the determined value at the time of expropriation matters. Additionally, when only part of a property was expropriated, compensation must include any injurious effects brought upon the land that was not expropriated.

The arbitrators did not explain how they determined the monetary value of the properties. Their report and arbitration files only shed light on how they distinguished the lands from those that the landowners and the commissioners wanted them to use for comparison. The landowners generally pointed to very expensive properties on the American side of the border. However, the arbitrators described the New York properties as being of considerably greater value than their Ontario equivalents. Niagara Falls, New York, was much more industrialized than the Ontario side, and the American town additionally served as the second home to wealthy businessmen from Buffalo. On the other hand, the commissioners and their witnesses based their estimates on the value of the properties in their potential as farmland, using farms away from the falls for comparison. This was also not a good measure, as it ignored the value added by the falls themselves. The values determined by the arbitrators presumably fell somewhere in the middle, but they did not state what, if any,

[37] Ronald L. Way, *Ontario's Niagara Parks: A History* (Fort Erie, ON: Niagara Parks Commission, 1946), 36.

[38] Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files, 1885-1886

[39] *Ibid*.



A view of the American side, as it existed in 1884 prior to the creation of the park. Nearly all of the buildings seen along the shoreline were expropriated and dismantled within a year. (Niagara Falls Public Library)

objective criteria they used in making these determinations.

By March 1886, the official arbitrators had only closed eight of the 21 cases.[40] The Niagara Falls Park project was months behind schedule and quickly going over budget. The provincial government took an unusual step, and passed *An Act Respecting Awards Under the Niagara Falls Park Act* (*Act Respecting Awards*). The Act gave dissatisfied landowners the opportunity to appeal the decisions of the official arbitrators directly to the Ontario Court of Appeal within certain restrictions. This was an unusual piece of legislation. Although the *Public Works Act* did not declare a specific right to appeal a decision made by the official arbitrators, it also did not forbid it, and the *Court of Appeal Act* granted the court inherent jurisdiction over the decisions made by arbitrators in general. The *Act Respecting Awards* was effectively declaring a right that already existed, although landowners had rarely exercised this right. The Act also specified certain restrictions to this right, which was more than likely the primary purpose of the statute.

The *Act Respecting Awards* laid out a series of restrictions regarding the right to appeal the decisions of the official arbitrators to the Court of Appeal. These restrictions had the effect of hurrying the process along, a desire likely brought about because of the park already being behind schedule, but also because of the ongoing matter of *Corporation of Dover v. Corporation of Chatham.*[41] Although this case did not deal with expropriation, it was an appeal from a decision made by arbitrators under the *Municipal Act*. The arbitrators' decision was appealed to the Court of Queen's Bench, and then to the Court of Appeal. The Court of Appeal heard *Dover* only a few weeks before Mowat, acting in his capacity as the attorney general, tabled the *Act Respecting Awards*.

[40] "Report of the Commissioners, 16 March, 1886," in *Official Documents – Statutes, Annual Reports, etc. of the Ontario Niagara Parks Commission*. Undated bound collection of documents held at the Niagara Falls Public Library.

[41] (1885) 11 OAR 18.

The Court was split, and they dismissed the appeal. The matter then went before the Supreme Court who made their decision more than a year later. *Dover* was a warning of the delays that could follow appeals from arbitrators' decisions, and it seems more likely than not that Mowat, as both the premier and the attorney general, was aware of the case and sought to avoid such a delay in opening the park. The *Act Respecting Awards* reduced the potential delay in three ways. First, the dissenting landowner only had seven days from the publication of the official arbitrator's decision in the *Ontario Gazette* to request the appeal.[42] Second, the court was required to give priority to cases regarding the *Niagara Falls Park Act* over all other appeals.[43] Third, the rulings by the court on these matters were to be final.[44] All of these caveats ensured that the appellants requested their appeal almost immediately, that the court would hear them almost immediately, and that there would be no lengthy appeals to the Supreme Court of Canada or the Judicial Committee of the Privy Council.

The Official Board of Arbitrators completed its task in mid-August 1886. It determined the value of the 21 properties, and made the necessary offers to the landowners. In three of the 21 cases, the arbitrators did not adjust the sums awarded by the commissioners. In one case, they actually decreased the amount awarded by the commissioners. For the most part, however, they awarded considerably greater sums than those estimated by the commissioners. For example, they increased Ellen Davis' compensation from $25,000 to $35,000. Following arbitration, E.A. Tench's compensation grew from $5,500 to $8,000.[45] Most dramatically of all, the evaluation of Sutherland Macklem's land grew from $26,175 to $100,000.[46] These increases were significant and drove up the costs of establishing the park considerably. Nonetheless, three landowners remained unsatisfied: Sutherland Macklem, J.T. Bush, and the owners of the St. Catharines, Thorold and Niagara Falls Road Company. They made their application for appeal within the seven days, as required by the *Act Respecting Awards.* The Court of Appeal, as required by the same statute, gave priority to the three cases, hearing the first two on 6-7 December 1887,[47] and the third on 7-8 December.[48]

The Contested Cases

Although some visitors to Niagara Falls arrived from somewhere south

[42] *An Act Respecting Awards Under the Niagara Falls Park Act*, 1886, c. 9, at s.4.

[43] *Ibid.*, at s.6.

[44] *Ibid*., at s.9.

[45] "Report of the Commissioners, 5 March 1887," in *Official Documents – Statutes, Annual Reports, etc. of the Ontario Niagara Parks Commission*. Undated bound collection of documents held at the Niagara Falls Public Library.

[46] Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files (Macklem File), 1885-1886.

[47] *In Re Macklem and the Commissioners of the Niagara Falls Park* (1885) 14 OAR 20 and *Re Bush and the Commissionrs of the Niagara Falls Park* (1885) 14 OAR 73.

[48] *Re: Niagara Falls Park—Fuller's Case* (1886) 14 OAR 65.

of the falls on the Niagara Peninsula, the overwhelming majority came from the north. Visitors from the United States, normally travelling by canal or railroad as far as Buffalo, would make their way to Niagara Falls, New York, where they would cross to the Canadian side via the suspension bridge. Visitors from Canada would make their way to the falls by road or by rail from St. Catharines. Therefore, the vast majority of visitors had to make use of the St. Catharines, Thorold and Niagara Falls Road,[49] which ran from St. Catharines to Clifton, where it followed the Niagara River's edge to the outcropping—and single most popular vantage point overlooking the falls—of Table Rock. Through a vesting order, the Court of Chancery had given the 14-mile road, as well as its franchises and rents, to the antecedents in title of the St. Catharines, Thorold and Niagara Falls Road Company in June 1862.[50] However, in October 1882, the company sold most of the road. They retained the first and last five miles of the road, which was "much out of repair" by 1885, on which they continued to collect tolls.[51] Approximately 7/8ths of a mile of the road, along with a tollbooth, fell within the boundaries of the new park. The Commissioners offered $2,500 for these properties.

Having paid the tolls to appreciate the majesty of the falls from the great vantage point of Table Rock, a visitor would often take advantage of the other attractions. A boat ride on the *Maid of the Mist* was *de rigueur*, as was the Walk Behind the Falls. Other common excursions included a visit to the Burning Spring and the Cynthia Islands,[52] both on the property of the industrious Sutherland Macklem. The Burning Spring, a natural gas spring, was a tourist draw as early as the 1830s. The property owners at the time, Samuel Street and Thomas Clark, constructed a wooden building around the spring where, for a fee, visitors could see a colourless liquid, drawn from the earth, set aflame. In 1860, they also constructed an 80-foot tall "pagoda." From the observation deck, visitors could see the falls, although just barely. Sutherland Macklem inherited the island from his childless uncle in 1872, along with an annuity for its upkeep. Macklem continued the practice of charging a fee to visit the Burning Spring and in 1877 added the islands to the appeal of his property. He built toll bridges from the islands to the mainland and charged a fee to climb the pagoda. Visitors, already drawn to the immediate area by the Burning Spring, visited the lush and green islands. The islands also

[49] Note that the Ontario Court of Appeal case refers to the St. Catharines, Thorold and Suspension Bridge Road, but the same road is referred to as the St. Catharines, Thorold and Niagara Falls Road in most other sources.

[50] *Fuller's Case, supra,* at 65.

[51] Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files (St. Catharines, Thorold and Niagara Falls Road Company File), 1885-1886.

[52] Details of the tourist attractions are included in the form of pamphlets and notes presented as exhibits in the arbitration proceedings (Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files (Macklem file), 1885-1886).

The toll bridge to Sutherland Macklem's island attractions in 1880. (Niagara Falls Public Library)

offered a view of the roaring rapids above the falls, and the more daring visitors could walk right to the edge of the white water. For fifty cents, a visitor could visit all of Macklem's attractions. This business, not surprisingly, was immensely popular for tourists and earned Macklem an average annual income of $56,378.79 dollars over a seven-year period.[53] The boundaries of the new park included 70 acres of the 100-acre estate, including the most lucrative parts, for which the Commissioners offered $26,173.

After a busy day of seeing the sights and paying the tolls, a visitor of means could stay at the famous Clifton House hotel. Located at the base of Clifton Hill, the hotel was a fixture in the tourist town from its construction in 1833 until its destruction by fire in 1898. In 1857, New York Senator John T. Bush purchased the hotel and 33 acres of land around it. When the Commission decided on the boundaries for the park, Clifton House fell within it. Although the Commission had expropriated businesses of all kinds within the park—such as the famous museum—they decided that Bush could retain much of his property. Bush retained the hotel itself, the land on which the hotel was built, and the land that fell outside of the new park's boundaries. However, the Commission expropriated 14 acres of his property for the new park with $34,000 offered for compensation. Bush was especially concerned because the land on which the hotel drew its water supply was on the 14 acres that he no longer owned. To make the matter slightly more complicated, the hotel accessed the water through pipes that ran beneath a public road. This water was critical to the functioning of the hotel.[54]

The Issues

The appellants asked the Court of Appeal to review several issues. All three appellants disputed the sums awarded by the official arbitrators. The

[53] *Ibid*.

[54] *Re Bush and the Commissioners of the Niagara Falls Park* (1885) 14 OAR 73 at 75.

court also had to address injuries to land, rights to annuities, and whether the Act entitled the government to expropriate land use rights. With the exception of the last issue, the court chose not to interfere with the decisions taken by the arbitrators.

With regards to the amount awarded, the court agreed with the evaluations made by the arbitrators in all three cases. The court described how the arbitrators are in an excellent position to make informed decisions, and were "gentlemen of great respectability"[55] and "perfect integrity."[56] However, it would be a mistake to view this as deference to the expertise of a specialized administrative tribunal. In *Macklem*, the court provides a useful statement as to its view of its role:

Thomas Barnett's Niagara Falls Museum at left, with mist from the falls visible in the background. (Niagara Falls Public Library)

> A most important part of the function of an Appellate Court must be always to see that what was done below, was not so done under an erroneous view of law. In the case before us, it would appear that the referees rightly appreciated the principles which should govern their decision, and appear in good faith to have striven properly to apply them. Our decision therefore has to turn wholly on our acceptance or refusal of the estimate formed by the referees.[57]

This statement indicates that the court would review the decisions of the arbitrators in light of the application of principles of law. However, it becomes clear in reading the text of the decisions that the court was also assessing the decisions made by the arbitrators in terms of their evaluation of facts.

The Court of Appeal's holdings in

[55] *Macklem, supra,* 25.

[56] *Ibid*., 26.

[57] *Ibid*.

the three cases devoted some space to discussing the validity of the evaluations made by the arbitrators. The court discussed the nature of the land and the widely varying estimates of its value given by various witnesses during arbitration. It stated that although the land was special by virtue of its location, "the demand for residential property in the vicinity of the falls, and along the river above and below has been most languid if not wholly non-existent."[58] Justice Hagarty called Bush's claim that he could carve up his property into hugely profitable lots for curiosity shops and restaurants "very shadowy."[59] The court met Macklem's claim that he could sell his land to a millionaire as a great manor with similar suspicion.

Although the court accepted the amounts determined by the arbitrators, it did not indicate that it was under any obligation to do so. Although Justice Hagarty stated in *Macklem* that if he was to assign a value to the land himself, he "would have the very unpleasant idea in my mind that I was interfering, to the prejudice, with the opinion of those who had far better opportunities of ascertaining the truth than I enjoy,"[60] he makes no indication that he could not or should not.

The Court of Appeal did not directly address one of the issues of mistake raised by Macklem's claim: the issue of evaluating land as separate parcels. When the commissioners initially evaluated Macklem's land, they did so in fourteen parcels.[61] They determined the cost of each of these parcels separately. Macklem argued that the parcels were worth less when evaluated on their own than when evaluated together. Determining the value of the parcels separately also had the effect of disregarding the cost of certain fixtures, such as the bridges that Macklem had constructed, at considerable expense, to his islands. Since these bridges did not fall within the parcels, the commissioners assigned them no value. The arbitrators recognized this as being unfair, and instead evaluated Macklem's land as two parcels. These parcels were, generally, the islands, with the bridges, and the mainland. Macklem still took issue with this subdivision. He wanted the land's value assessed based on the entirety of the property, not the component parts, and brought the matter before the Court of Appeal. The court recognized this as an issue, stating it at the beginning of the decision, but provided no further discussion. The court accepted the arbitrators' evaluations, and made no statements against the practice. We are left to assume that it simply fell within the scope of the decisions made by the arbitrators and that the court accepted it.

The Court of Appeal only saw one case regarding lands injuriously affected by the expropriation: the matter of Clifton House's water supply in *Re Bush*. J.T.

[58] *Macklem, supra,* 27.

[59] *Bush, supra,* 75.

[60] *Macklem, supra,* 29.

[61] Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files (Macklem File), 1885-1886.

Bush leased the Clifton House property, and owned the land nearby from which the hotel received its water supply. The commissioners expropriated the land on which the water supply rested, but permitted Bush to retain the hotel. Bush protested the matter and insisted on greater compensation for the loss. There is no mention of water in the arbitration record. However, the arbitrators state that Bush was not entitled to compensation because of injurious effects resulting from the expropriation of the property with the water supply. Although the *Niagara Falls Park Act* does not specifically refer to compensation for lands injuriously affected by an expropriation, we know from the report by the official arbitrators that it was in their contemplation. The arbitrators reasoned that no compensation was due because the two properties were not the same property at all, but two separate properties. They reasoned that because a public road separated the two properties, and therefore no compensation was due. When the Court of Appeal heard the matter, Bush presented the loss of the water as the primary issue. Bush stated that losing the water supply would be an immense hindrance on his business, and that he would rather pay four to five thousand dollars than to suffer the loss. Fortunately for him, the court framed the matter as an easement. The Clifton House was the dominant tenement, and the water source was the servient tenement. Under normal conditions, if Bush sold the servient tenement, the easement would remain. The court reasoned that it should be no different in the case of an expropriation. Bush could continue to have access to the water supply. However, the court stated that if Bush was not the owner and tenant of both properties, and it was instead a tenant who paid an amount for access to the water, then the arbitrators should consider that fee in their calculation of the value of the property with the water supply. They referred the matter back to the arbitrators for consideration. The arbitrators did not adjust the award.[62]

In *Macklem*, the appellant asked the court to determine the status of his annuity. Macklem's aunt left him an annuity of $2,000 to "keep up, decorate, and beautify" the property, with the condition subsequent that Macklem remain the owner and occupier of the land.[63] There is no indication that anyone was contesting Macklem's annuity. He may have been simply seeking a declaration to avoid any future contests. It is also possible that Macklem preferred a lump sum payment to an annuity. If the court found that the expropriation severed the annuity, Macklem would have been entitled to a lump sum in compensation. An annuity of

[62] J.T. Bush continued to run Clifton House, with full access to the water supply. Water was again an issue in 1898 when the hotel burnt down. Bush rebuilt, calling it the Clifton Hotel this time. In 1932, it burnt down again. Bush chose not to rebuild, and instead sold the property to Sir Harry Oakes, a sitting commissioner of the Niagara Falls Park, who promptly donated it to the park. Oakes converted the property into a garden and amphitheatre named in his honour: the Oakes Garden Theatre. The fountains now get their water from the city water supply.

[63] *Macklem, supra,* 22.

$2,000 at four percent interest was valued at $31,986 according to Macklem's insurers, the Canada Life Assurance Company in Hamilton.[64] The arbitrators implied in their decision that it was unclear how much money remained in the trust that paid the annuity. It is therefore conceivable that there were limited funds feeding the annuity, and this whole affair was simply an attempt by Macklem to have the government pay him for money he would not have otherwise received. This, however, proved to be a non-issue as the court found, as did the arbitrators, that the expropriation did not sever Macklem's annuity. Justice Hagarty cited several cases with the effect of showing that the court must strictly interpret conditions subsequent. Most analogous was the case of *Sutcliffe v. Richardson*, discussed in *Theobald on Wills*, an 1885 textbook.[65] In *Sutcliffe,* an annuity was granted with the condition subsequent that the mother and son live together. When the son died, the court held that the death was a natural accident. It did not run against the intention of the annuity—that the mother should not leave the son—and did not divest her of the annuity. Similarly, the fact that the government had expropriated part of Macklem's land, Justice Hagarty said, was the unavoidable consequence of a binding statute. It had the same effect on the annuity as if part of the property had fallen into the Niagara River.[66] The circumstances were beyond Macklem's control, and the annuity would still contribute to the cost of maintaining the land, as the devisor intended.[67]

Fuller's Case, named for the owners of the road in question,[68] was legally more complicated. The arbitrators saw the matter as a simple issue of evaluating the properties owned by the road company, including the gravel road and the toll booth inside the new park, and set about their normal procedure. They considered the revenue producing nature of a toll road, and the considerable loss of revenue the expropriation would force upon the business. They therefore gave the owners "the benefit of the doubt in assessing such amounts," even though the road was in need of expensive repairs and

[4] Entered as an exhibit at Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files (Macklem File), 1885-1886.

[65] L.R. 13 Eq. 606, cited in *Macklem* supra at 25.

[66] *Macklem, supra,* at 23.

[67] Macklem saw many changes to his property before his death in 1898. The Cynthia Islands were renamed the Dufferin Islands, in honour of Lord Dufferin, the Canadian Governor General credited with the idea of a creating a Niagara Falls Park. The Commission demolished the pagoda and replaced it with a home for William Whistler, one of the park's gatekeepers. The Commission decided not to maintain the Burning Spring attraction, but Macklem received permission to pump the natural gas and continue an off-site version of the spectacle. The Burning Spring continued to entertain tourists, in various forms, until as late as 1969. Today, Dufferin Island is no longer an island at all due to the efforts of the Canadian Niagara Power Company. Macklem's home now served as the administrative headquarters for the Commission, renamed Oak Hall in honour of Sir Harry Oakes, who lived there for six years.

[68] The owners of the road were Henry H. Fuller, Cynthia Fuller, Valancey E. Fuller, John B. Smyth and Eliza Smyth.

the opening of Murray Street near Clifton House would likely soon detract from their revenue.[69] The commissioners originally offered $2,500, and the arbitrators increased the amount to $2,900.

The road owners brought five issues before the Court of Appeal. Only two received any discussion. First, the appellants claimed that the compensation was inadequate. Second, the appellants claimed that the commissioners did not have the right to expropriate the appellants' rights in the road. The thrust of their appeal was that the Act specifically authorized the taking of "any parcel of land, stream, park, water-course, fence, and wall, and any easement in any land."[70] The Act was therefore an authorization to expropriate the lands of the road company, but not their right to collect tolls on the road. The statute only addressed rights to property in one line,[71] but the reference is made with regards to a point of procedure, and the court found that it did not grant the ability to expropriate rights. The court granted the appeal and denied the commissioners the right to make this expropriation.

Not surprisingly, the matter did not end there. As Justice Patterson stated at the conclusion of his holding, "if rights like those in question are intended to be the subject of expropriation, the Legislature can remove all doubts."[72] The matter returned to the arbitrators so that they could ascertain the value of the land, taking into account the expropriation of rights and not just property. The arbitrators more than doubled the original award, arriving at a sum of $7,500.[73] Then the matter of the commissioners' right to expropriate rights had to be dealt with through the only option available: a declaration by the Legislature in the form of a statute. On 23 March, 1888, the Legislature passed *An Act to Give Certain Powers to the Commissioners of the Queen Victoria Niagara Falls Park*.[74] Upon payment of the $7,500, the right to collect tolls along the stretch of road within the park transferred from the road company to the commissioners of the Queen Victoria Niagara Falls Park.[75] With the passage of this act and the transfer of the road to the commissioners, they had overcome the final hurdle with regards to the expropriation of land. All of the lands in the original plan for the Queen Victoria Niagara Falls Park were finally in the possession of the commissioners.

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[69] Archives of Ontario, RG 15-51, Niagara Parks Commission Arbitration Files (St. Catharines, Thorold and Niagara Falls Road Company File), 1885-1886.

[70] *Niagara Falls Park Act, supra*, at s.2

[71] *Ibid.*, at s.10.

[72] *Fuller's Case, supra,* 72.

[73] *An Act to Give Certain Powers to the Commissioners of the Queen Victoria, Niagara Falls Park,* 1888, 51 Victoria, Chapter 7.

[74] *Ibid*.

[75] The St. Catharines, Thorold and Niagara Falls Road Company continued to operate on the St. Catharines end of their road. However, the days of the private toll roads were numbered and only a few years later, this toll road and its contemporaries in southern Ontario were all gone.

Conclusion

The creation of the Queen Victoria Niagara Falls Park provides us with insight into the Ontario Court of Appeal's treatment of property law and administrative law in the late nineteenth century. The legal principles employed by the arbitrators and the court to determine the value of the expropriated land are similar to those used today. More interesting is the court's treatment of the decisions made by the arbitrators. Appealing an arbitrator's decision directly to the Court of Appeal had been permissible since the creation of the court, but it had not happened in Ontario until the Niagara Falls cases. These cases provide us with the first glimpse of how this court viewed such bodies and appeals from their decisions. While the Court of Appeal accepted the awards determined by the arbitrators, the decisions do not indicate that the court saw any obligation to show deference to their expertise. The court saw fit to review the decisions made by the arbitrators within their area of technical expertise—the evaluation of land—and not just the legal issues at play.

The creation of the park also raises some broader historical questions about the nature of the court in this period. For example, the context of the *Act Respecting Awards,* the Act that permitted appeals from the arbitrators directly to the Court of Appeal within certain restrictions, raises interesting questions regarding the Legislature's view of the court. Why did the Legislature specify that appeals could be made to the Court of Appeal, instead of maintaining the status of quo of being able to appeal to either of the Superior Courts as offered in both the *Railway Act* and the *Municipal Act?* Additionally, how common in this time was it for the court to state outright that it required clarification on a statute? In *Fuller's Case,* the court stated that it required clarification, and the Legislature provided it in short order through a new statute. Was this common, and if so, what does it tell us about the relationship between the Court of Appeal and the Legislature at this time?

Finally, the creation of the original Queen Victoria Niagara Falls Park offers us a glimpse into changing attitudes towards parks and property. The creation of the park was not an effort to maintain a pristine landscape, to maintain the status quo, as in Banff or Yellowstone. It was instead an effort to "turn back the clock," to undo the effect of private development and return a piece of land to its original condition. The park in question was not in a densely populated city, where it might provide more tangible benefits such as alleviating cramped conditions that lead to social malaise and public health concerns. Instead, it was a park that was only accessible upon a specific journey away from these cramped conditions. It did not relieve a problem; it conferred a benefit, and for the first time in Canadian history, this benefit was determined to be of sufficient weight to override individual property owners' rights. Nonetheless, this override did not go unchecked. The property owners had access to arbitration and to the Ontario Court of Appeal, an option exercised in the three aforementioned cases.

The Queen Victoria Niagara Falls

Park officially opened to the public on Victoria Day, 24 May 1888. The vantage points from which guests surveyed the mighty falls were freely accessible. There were no tolls or fees—except to get to the Cynthia Islands—and tourists only had to brave their fellow-onlookers. The park had already grown to 154 acres, from the 118 originally proposed by the commissioners, and would grow much more in the coming years. Today, the Niagara Park Commission, the descendant of the Niagara Falls Park Commission, oversees the administration of roughly 4,000 acres of parkland. The modern visitor likely gives little thought to the original landowners, and even less to the court's role in creating the park. Nonetheless, the Court of Appeal was an instrumental component in the process of converting a riverside carnival to a beautiful park.