

IN THE MATTER OF THE PETITION OF RIGHT OF

1918

March 25.

JEAN BAPTISTE POISSON,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Expropriation—Riparian rights—Flooding—Dam—Public work.

Where there has been no expropriation by the Crown of any easement to flood the land of a riparian owner, the injury or damage suffered by the latter from flooding, as a result of the construction of a dam by the Crown, is not actionable under the provisions of the *Expropriation Act*, nor is it actionable under secs. 19 or 20 of the *Exchequer Court Act*. The land being situate over 50 miles from the dam cannot be regarded as "on a public work" and no evidence being adduced that the injury resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

PETITION OF RIGHT to recover damages for flooding suppliant's land.

Tried before the Honourable Mr. Justice Audette, at Three Rivers, March 5, 6, 1918.

M. L. Duplessis, for suppliant.

Auguste Désilets, for respondent.

AUDETTE, J. (March 25, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of \$4,999 for the flooding of his land and injury to his mill and loss of business.

In 1909, the Government of Canada started works at the foot of Lake Temiscamingue, which were com-

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pleted in April, 1912. These works consisted in building two dams,—one on the Quebec side and one on the Ontario side, of the lake, with the object of making a reservoir of the lake in order to control the debit of the waters and regulate thereby the water power at the Chaudiere Falls, Ottawa. The dam, it must be well borne in mind, was not built with the object and did not have the effect of raising the level of the lake to any new height; but only and especially to retain such waters, for a longer period, on a high known level in the past.

The effect of such dam, in the result, was not to raise the waters to any new high level, but to maintain a high level for a much longer period. The damage or injury suffered by the riparian owners would therefore be one of degree as compared with the past. That is, if the waters in the past attained a given maximum height, it only maintained that state of things for hours, and perhaps two or three days, while at present a high level, without being the maximum of the past, is maintained for months.

Under deed of March 6th, 1908, Jean Baptiste Poisson, the suppliant, and Joseph Poisson, both merchants of Gentilly, carrying on business under the name and firm of "Poisson & Poisson," acquired the land in question herein with the second-hand saw mill thereon erected, and its appurtenances, including also, with covenant, a timber license, etc.

Subsequently thereto on November 9th, 1909, Joseph Poisson, after the dissolution of the above mentioned partnership, as mentioned in the deed, assigned and transferred to the suppliant all his rights in the property in question. Nothing is said in that deed of the transfer of the timber limits, in respect of which there is not a tittle of evidence and which

was not brought to my attention at the trial—a matter which may have no direct effect in the present case, but which might have had in the adjustment of accounts at the time of the dissolution of partnership.

Joseph Poisson was not heard as a witness. Jean Baptiste Poisson, the suppliant, states the mill was bought with the object of establishing Joseph Poisson's sons, who worked the mill for some time. The suppliant says the sons were to pay for the mill out of the revenues derived from the operation of the same; but they had so many repairs to attend to that they never paid him anything, and Joseph Poisson asked the suppliant to purchase the mill, thereby relieving Joseph Poisson of any liability in respect of the same, which he did, as appears from the deed of November 9th, 1909.

A book of account was filed at trial to show the revenues of the mill, when operated by the two Poisson boys; but that book has proved unreliable, and the least said about it perhaps the better. In it is found one of the elements of exaggeration which is found in almost all expropriation cases, and cases of compensation. And, in the present case, that element may be coupled with the further exaggeration in respect of the capacity of the mill as stated by the suppliant,—the topography of the land adjoining Simard Street, the line of flooding shown on plan Exhibit No. 4, and finally the allegation in paragraphs 9 and 10 and following, of the petition of right, where it is alleged that since March, 1913, the mill, its accessories and the lands are of no more use and have lost four-fifths of the value,—yet the mill was rented to Parent and operated by him in 1915. In respect of this plan No. 4 it may be said

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at once, so as to avoid misconception, that it is unreliable, as the different lines of flooding were not ascertained *de visu* or in any satisfactory manner. From observation on the premises, witness Cross says lines "E," "F" should be at "X," "Z." Were even these lines of flooding accurate, the witness Barrette could not establish whether the lines on his plan Exhibit No. 4 would be in respect of the period before or after the construction of the dam.

Having said so much as a prelude, let us consider the construction of the building of the mill. Apart from the machinery, its construction was of the cheapest. The building, except on the land side, rested on posts, and some of the witnesses even said they were not braced. A mill on such foundation did not assert permanency of construction. It should have been on a proper foundation. These posts standing without protection were greatly affected by the frost, and as a result the building was continually out of plumb, hence calling for so many repairs, as claimed by Joseph Poisson's sons, and as said by some of the witnesses, it could hardly be called a permanent building. Frost had more to do with undermining the solidity of the mill than any erosion mentioned in the evidence. Witness Verhelst said it was difficult to maintain a mill upon such foundation. It had the appearance of being affected by frost,—it was sloping upon one side or another, involving considerable repairs every spring. The posts under the mill were upset or taken away by the beating of the logs. The suppliant has suffered injury to this property from the operation and maintenance of the dam. While he might assert a reasonable claim he could not expect the Crown to step in at this juncture and help him out of an unsuccessful

undertaking,—the unremunerative operation of this mill, which like so many others in that locality had to be closed down.

The waters of Lake Temiscamingue have not been raised by the dam. The dam has maintained a level reached by the lake before, but maintained this high level for a longer period than formerly. A level of 588 could be maintained all the time by using the stop logs.

The present space, at the dam, through which the water runs out of the lake, is larger than before the erection of the dam. The dam is never completely closed, and there is a 45 foot opening down to the bottom, which is kept open all the time.

Dealing with the question of the level of the waters of the lake, taking the sea as datum, 585 was a very ordinary high level obtaining on the lake before the construction of the dam. Here follows the ascertained levels prevailing from 1906 to 1914, inclusively, viz.:

1906	..... 1st July	..... 583
1907	..... June	..... 587
1908	..... June	..... 589
	That is 47 consecutive days above.....	585
1909	..... End of May—highest during 5 days.	592
	And above 585 for 45 days from 15th May to the end of June.	
1910	..... On 10th May, highest, ...	585
	Duration at that elevation,—20 days. Did not go any higher that year.	
1911	..... On 5th May, highest, for one day	590
	Above 585 for 35 days from beginning of May to beginning of June.	
1912 Last days of May, for 5 or 6 days.	587

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Above 585 for 35 days, from middle of
 May to end of June.

Dam completed in April, 1912, and put in
 operation from that time.

1913 Highest on 1st May..... 589

Duration above 585 for 95 days, from the
 end of April to the end of July, and,
 moreover, for 40 additional days in
 the Autumn, November and December.

1914 Highest from 12th to 15th June.. 586

The dam broke on the 14th June, and the
 repairs were completed in January,
 1915.

Most of the damages claimed to have been suffered by the suppliant have been done by the logs, held within the boom in front of the mill, beating against the land and the unprotected posts of the mill. The flimsy construction of the mill was also in no small degree the cause of some of the injury. Good size posts run into the ground and properly braced would perhaps have stood the knocking of the logs. The frost had also a deal to do with the keeping of the building plumb.

The engineer heard on behalf of the Crown has suggested, in his testimony, a very rational remedy for stopping any further damage, a remedy which is most practical and has the advantage of economy.

There can be no doubt that the mill was exposed to similar damages before the dam, but in a lesser degree, during a shorter period; but a deal of havoc might have been done to the property if a strong wind, combined with waves, had been beating in the direction of the property.

Small cribwork at the southern and western sides of the mill would stop all damages. The loose rock

bank of the size and dimensions mentioned by Mr. Coutlee would also have the same effect. It would stop erosion, the waves would break upon the stone and the turbulation of the water would not reach the ground or soil.

The amount offered by the Crown would obviously, under the testimony of witnesses Coutlee and Cross, cover the necessary expenditure for such work. Would it cover the damage to the land, for the deprivation for a long period of a certain area of land which, but for the dam, the suppliant would have had the possession and enjoyment and also for the damage to the two piers?

Witness Parent rented the mill in 1915 for one year and operated it. He says it was in a bad state when he took it. The shingle machine was outside, between the two buildings, unfit to be used. The mill was off level, not plumb. He added from 10 to 12 posts under the mill and braced them. The roof was leaking over the planers, etc.

The prospect of such small saw-mills at Ville Marie is not very bright,—a number of them, according to the evidence, have already gone under.

The suppliant has made a claim for loss of business in 1913 and 1914, but has not supported it by any satisfactory evidence. Indeed, both from his books and the evidence of record in respect of the general operations of small mills in the neighbourhood at the time, coupled with what we know of the operation of this mill by the suppliant himself for a short period, it would appear that the mill was closed down to avoid further financial complications. However, there is not a tittle of evidence on record upon which a compensation for such element of dam-

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ages could be substantiated or reckoned upon and the *onus* of such evidence was upon the suppliant.

The Crown, by its plea, has not set up any legal objection to the claim; but, if I have no jurisdiction to hear the claim, and if it is not well founded in law, I cannot but dismiss it. The Crown, by its plea, admits the suppliant has suffered damages, and rightly so.

As between subject and subject there can be no doubt that a right of action would exist in a case like the present one, but the law is different as between the subject and the Crown.

The Crown, in the present case, has not expropriated (the *Expropriation Act*, R.S.C., 1906, ch. 143, sec. 2, sub-sec. f, sec. 3), the easement to flood the suppliant's land, therefore the court has no jurisdiction to entertain the claim under the *Expropriation Act*.

This case is in its very essence in tort, and apart from special statutory authority, no such action will lie against the Crown. The case does not come under sec. 19 of the *Exchequer Court Act*. Can it be said that it comes within the ambit of sec. 20 of that Act?

If the suppliant seeks to rest his case under sub-sec. (b) of sec. 20,—to which the attention of counsel at Bar was called by me at the trial,—I must answer that contention by the decision of the Supreme Court of Canada in *Piggott v. The King*,¹ where His Lordship the Chief Justice says: "Paragraphs (a) and (b) of sec. 20 are dealing with questions of "compensation, not of damages."

"Compensation is the indemnity which the statute "provides to the owner of lands which are com-

¹ 32 D.L.R. 461, 53 Can. S.C.R. 626.

“pulsorily taken in, or injuriously affected by, “the exercise of statutory powers.”

Therefore, it obviously follows that the present case does not come under sub-secs. (a) and (b) of sec. 20.

Does the case come under sub-sec. (c) of sec. 20, repeatedly passed upon by this Court and the Supreme Court of Canada, before its amendment in 1917, by 7-8 Geo. V., ch. 23?

To bring this case within the provisions of sub-sec. (c) of sec. 20, before the last mentioned amendment, the injury to property must be: 1st. On a public work. 2ndly. There must be some negligence of an officer or servant of the Crown while acting within the scope of his duties or employment; and 3rdly. The injury must be the result of such negligence.

The suppliant's property is situate a good deal over 50 miles from the dam, which undoubtedly, under sec. 108 of the *B. N. A. Act* and the third schedule thereof, is the property of Canada.

Under the circumstances and under the decisions in *MacDonald v. The King*;¹ *Hamburg American Packet Co. v. The King*;² *Paul v. The King*;³ *Olmstead v. The King*⁴ and *Piggott v. The King* (*ubi supra*), it is impossible to find that the suppliant's lands, so situate at over 50 miles from the dam, are on the *public work*.

Were even this question of *on a public work* answered in favour of the suppliant, there would still be wanting, missing from the case, the evidence that

¹ 10 Can. Ex. 394.

² 7 Can. Ex. 150, 175; 33 Can. S.C.R. 252.

³ 38 Can. S.C.R. 126.

⁴ 30 D.L.R. 345, 53 Can. S.C.R. 450.

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an officer or servant of the Crown, while acting within the scope of his duties and employment, had been guilty of such negligence that would have caused the damages complained of. There is not a tittle of evidence in this respect in this case.

In the result it must be found, following the decisions in *Chamberlin v. The King*;¹ *Paul v. The King (ubi supra)*; *The Hamburg American Packet Co. v. The King (ubi supra)*; *MacDonald v. The King (ubi supra)*; and especially *Olmstead v. The King (ubi supra)*, that the injury complained of did not happen on a public work, and moreover, that it did not result from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment. The action will not lie.

There will be judgment dismissing the petition of right and declaring that the suppliant is not entitled to the relief sought by the same.

Action dismissed.

Solicitors for suppliant: *Duplessis, Langlois & Durand.*

Solicitors for respondent: *Désilets, Désilets & Ladouceur.*

¹ 42 Can. S.C.R. 350.