

ISAAC ARCHIBALD.....SUPPLIANT;

1893

AND

Jan. 23.

HER MAJESTY THE QUEEN .....RESPONDENT.

*Construction of public work—Interference with public rights—Damage to individual enjoyment thereof—Liability—50-51 Vic. c. 16 sec. 16 (c) —Construction of.*

Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the Exchequer Court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown.

2. The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (c) of the 16th section of *The Exchequer Court Act* (50-51 Vic. c. 16) which gives the Court jurisdiction in regard to claims arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

**PETITION OF RIGHT** to recover compensation for the injurious affection of property arising from the construction of a public work.

June 9th, 1891.

Pursuant to an order of this date, the facts in issue, having been agreed upon by counsel, were submitted to the court in the form of a special case under the provisions of rule 111 of the Exchequer Court rules. The arguments were also reduced to writing and filed in pursuance of an agreement between counsel.

The following are the facts stated in the special case:—

1. The suppliant is now and has been for the past eight years or more the owner of an estate for years in

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a certain saw-mill site and premises and the buildings thereon erected, situate on Barrachois Brook, District of Boisdale, in the County of Cape Breton, in the Province of Nova Scotia, about one mile above Barrachois Pond, and being part of a lot of land granted to one Donald McNeil, said property being known as the Archibald mill property.

2. That the suppliant purchased said mill site and erected saw-mills thereon largely by reason of the excellent facilities afforded by the Barrachois Pond for rafting and floating suppliant's timber and lumber to convenient places for shipping to market and the lumber to convenient temporary piling-grounds.

3. That in or about the month of October, in the year 1889, the Government of Canada, represented by the Minister of Railways and Canals, his engineers, superintendents, agents, workmen and servants, caused to be erected, in connection with the construction of the Cape Breton Railway, a public work authorized by statute of the Parliament of Canada, a bridge across the said Barrachois Pond about a mile and a-half below the suppliant's said saw-mill and premises, and the said bridge so erected impedes and obstructs the floating of rafts of timber or lumber on said Barrachois Pond and impairs the usefulness of the said Barrachois Pond for the purposes of rafting and floating timber and lumber on said Barrachois Pond. The said Barrachois Pond is an arm of the Bras D'or Lake, which said Bras D'or Lake is a navigable water, but said Barrachois Pond is shut off from the said Bras D'or Lake by a beach and the only connection between the said Barrachois Pond and the said Bras D'or Lake is by a small channel two and a-half feet deep and not of sufficient size for the passage of vessels. The area of said Barrachois Pond is about one-third of a square mile. The tide ebbs and flows in said Barrachois Pond and the water is

sufficiently deep for small vessels. The said bridge is constructed across the upper portion of said Barrachois Pond at a place seven hundred feet wide and the position of said Barrachois Pond and said mill and bridge and the surroundings is correctly shown on the plan filed herewith marked "A," and the distances as represented on said plan are correct.

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4. The suppliant does not own the land situate between the said saw-mill and said Barrachois Pond or any part thereof or the land covered by said Barrachois Pond or any part thereof.

5. The suppliant formerly conveyed his lumber from his said saw-mill on said plan marked "Isaac Archibald's saw-mill" to a shipping place by hauling same from said mill to the head of said Barrachois Pond, marked on said plan "old piling-ground," a distance of one mile and by rafting from said "old piling-ground" to a point on said plan marked "Sandy Beach," a distance of about one and a-quarter miles, and in consequence of the construction of said bridge the suppliant now conveys his lumber from his said mill to a shipping place by hauling from said mill to a point on said plan marked "new piling-ground," a distance of two and one-half miles, or to North Sydney or Grand Narrows, distant, respectively, eighteen miles and twenty miles. And in consequence of the construction of said bridge the suppliant has been hindered and obstructed in rafting his lumber to a shipping place as he formerly did and he has suffered loss and damage, and it is admitted by the Crown that if the suppliant has a right to raft his lumber down said Barrachois Pond that by the construction of said bridge the suppliant's said saw-mill and premises have been injured and decreased in value.

The question for the opinion of the court is whether the Crown is liable for said injury and decrease in

1893 value of suppliant's said-saw mill and premises and for  
 ARCHIBALD the said loss and damage.

v.  
 THE Code, for the suppliant, contended that the authori-  
 QUEEN. ties are conclusive on the question as to Barrachois  
 Argument Pond being a public navigable water, and thus, a  
 of Counsel. public highway. (He here cited *Angell on Water-  
 courses* (1); *Coulson & Forbes on Waters*) (2). The sup-  
 pliant as one of the public had a right of way for his  
 logs and lumber, even if the said pond could not be  
 termed a navigable water, inasmuch as it was capable  
 in its natural state and with its ordinary volume of  
 water of transporting the same. Then, having the  
 undoubted right to use the said pond for such a pur-  
 pose, he has suffered damage in being obliged to haul  
 his lumber a much greater distance than before the  
 bridge was built, and by reason of the consequent  
 diminution in value of his saw-mill and premises.  
 This is a damage peculiar to himself and such as is  
 contemplated in *Crandall v. Mooney* (3); *Iveson v.  
 Moore* (4); *Winterbottom v. Lord Derby*, (5); and *Hart  
 v. Bassett* (6).

The respondent on the facts admitted has been  
 guilty of a breach of duty under the provisions of *The  
 Government Railways Act* (7). Having obstructed  
 the stream, the Crown, under this statute, was under an  
 obligation to restore its former state of usefulness.  
 The bridge could have been so constructed as to ob-  
 viate the injury to the pond in the manner mentioned.  
 That being so, a case of negligence is established  
 against the servants of the Crown employed in the  
 construction of this bridge, and the liability attaches  
 to the Crown under sub-section (c) of section 16 of 50-

(1) 7th ed. p. 691, 697, 702.

(2) P. 58.

(3) 23 L. R. C. P. 212.

(4) 1 Ld. Raym. 496.

(5) L. R. 2 Ex. 316.

(6) Sir T. Jones' Rep. 156.

(7) R.S.C. c. 38 sec. 5 sub.-sec.

(h) and sec. 7.

51 Vic. ch 16. (He here cited *The City of Quebec v. The Queen* (1); and *Brady v. The Queen* (2).

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There has been in this case a physical interference with a public right which the suppliant was entitled to make use of in connection with his property, and which right gave such property an additional market value. (He here cited *The Metropolitan Board of Works v. McCarthy* (3).

*Ritchie*, for the respondent, argued that no right to float property on rivers except in the way of navigation is given by the law of England, but on the American continent the usefulness of streams for conveying logs has led to legislation giving such rights. This is the case in several of the American States, and also in the Province of Ontario. In Nova Scotia also the subject has been dealt with by the legislature. Section 8 of c. 69 of the *Revised Statutes of Nova Scotia* (4), deals with the subject as follows: "The Municipal Council shall when necessary make regulations respecting the bringing down of logs, timber and lumber on rivers, and the seasons of the year at which the same shall be brought down, and the removal of obstructions thereto." Section 9 of the same statute enacts that "persons may bring logs, timber and lumber down rivers in reference to which such regulations have been made, provided they shall in all respects conform to the regulations and do as little damage as possible to the owners of the soil adjoining." It is submitted that this statute impliedly enacts that rivers cannot be used for the floating of logs and lumber unless regulations have been made by the municipal council, and it does not appear that any such regulations have been made in regard to the Barrachois Pond.

(1) 2 Ex. C.R. 252.

(3) L. R. 7 H.L. 243.

(2) 2 Ex. C.R. 273.

(4) 5th. series.

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The injury to the suppliant is only in respect of a public right and as one of the public. The right is not so connected with his property as to render the Crown liable for injurious affection. (Here he cited *Archibald v. The Queen* (1); *Ricket v. The Metropolitan Ry. Co.* (2); *The Queen v. The Metropolitan Board of Works* (3).

There is no remedy in such a case as this provided for by sec. 5 (h) of *The Government Railways Act*. The argument for the suppliant on this point goes to show that building the bridge was an unlawful act, and if this is so the Crown would not be liable on a petition of right in this court brought under sec. 16 (c) of 50-51 Vic. c. 16.

It is clear that the injury complained of is not an injury to "property" in respect of which the authorities say compensation should be made, nor does the injury arise from the negligence of any officer or servant of the Crown while acting within the scope of his duty or employment on a public work.

BURBIDGE, J. now (January 23rd, 1893) delivered judgment.

The petition of right in this case is brought to recover compensation for the injurious affection, by the construction of the Cape Breton Railway, of the suppliant's property consisting of a saw-mill site and premises and buildings thereon erected, situate at Barrachois Brook, in the District of Boisdale, and County of Cape Breton.

The case came on for hearing at Sydney, in June, 1891, and it appearing to me at the time that the petition could not be maintained the hearing was deferred until the questions of law were settled upon a

(1) 2 Ex.C.R. 374.

(2) L.R. 2 H.L. 175.

(3) L.R. 4 Q. B. 358.

case to be stated. That case has since been filed, and the matter now comes before the court thereon and upon written arguments submitted by counsel for the suppliant and for the Crown.

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On the question of injurious affection I see no reason to change the opinion I expressed at the hearing. Assuming that Barrachois Pond was navigable and that the suppliant had a right to use the same for rafting and floating his timber or lumber thereon, the right was common to the public, and the interference therewith of which he complains, though it may have differed in degree did not differ in kind from that to which others of Her Majesty's subjects were exposed. There was no injury to the suppliant's land as such, nor to any right or interest therein. I had occasion to discuss this question in *The Queen v. Barry, et al* (1) and to refer to the cases at some length, and to the principles deducible therefrom, and I am satisfied that under the facts of this case the suppliant's claim for compensation for the injurious affection of his property cannot be sustained.

I am also of opinion that he cannot succeed on the other ground now put forward for the first time, that his case falls within clause (c) of the 16th section of *The Exchequer Court Act* (2), which gives the court jurisdiction in respect of claims against the Crown arising out of any injury to property on a public work resulting from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

*Judgment for the respondent with costs.*

Solicitor for suppliant: *G. H. Murray.*

Solicitor for respondent: *J. A. Chisholm.*

(1) 2 Ex. C.R. 354.

(2) 50-51 Vic. c. 16.