

CASES

DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

CHARLES HENRI LETOURNEUX.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1900
Nov. 15.

Damages to land—Public work—50-51 Vict. c. 16 sec. 16 (c)—Liability.

It is the owner of the land at the time a public work is constructed that is entitled to damages for lands taken for, or injuriously affected by, such construction, and not his successor in title.

Held, in view of the opinions in *The City of Quebec v. The Queen* (24 S. C. R. 420) that where the injury to property does not occur on a public work the suppliant has no remedy under 50-51 Vict. c. 16 s. 16 (c), which provides that the Exchequer Court shall have jurisdiction in respect of: "Every claim against the Crown 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."

Where in the division of his land the owner dedicates a portion thereof to the public for a street or highway, a part of which is subsequently taken by the Crown for a public work, the owner is not entitled to compensation for the part so taken. *Stebbing v. The Metropolitan Board of Works* (L. R. 6. Q. B. 37), and *Paint v. The Queen* (2 Ex. C. R. 149; 18 S. C. R. 718) followed.

PETITION OF RIGHT for damages to lands alleged to have been caused by a public work through the negligence of the officers or servants of the Crown.

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 of Counsel.  
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The facts of the case are stated in the reasons for judgment.

May 29th, 30th and 31st, 1900.

The case came on for trial at Montreal.

*L. T. Maréchal and J. de Boucherville* for suppliants ;  
*H. Hutchinson Q.C. and A. Globensky* for respondent.

June 27th, 1900.

The case now came on for argument.

*L. T. Maréchal* for the suppliant :

We have brought our claim within the meaning of sub-sec. (c) of sec. 16 of *The Exchequer Court Act*, by showing that the public work has increased the volume of water of the annual floods. The collecting drain built by the officers of the Government is responsible for the increased flooding, and that shows that it is badly and inefficiently constructed. It has diverted the natural course of the surface water into the River St. Pierre. This is an injury for which an action will lie. *Kerr on Injunctions* (1) ; *Bertrand v The Queen* (2) *Audette's Exch. Prac.* (3). Arts. 1067, 1073 C.C.L.C.

Then, again, the Government officers have been guilty of negligence in not keeping the river and culvert free from obstruction. The suppliant is entitled to past and future damages.

*A. Globensky* for the respondent :

The suppliant is not entitled to past damages, because the *auteur* could claim for them at any time.

The petition would not lie in any event, because there was no expropriation of any land from the suppliant, and the damage does not arise from the construction of a public work. Nor does it arise from the negligence of any officer or servant of the Crown while

(1) P. 364.

(2) 2 Ex. C. R. 285.

(3) P. 103.

acting within the scope of his duties or employment on a public work. *City of Quebec v. The Queen* (1); *Larose v. The Queen* (2).

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*M. Hutchison Q.C.*, follows for the respondent :

The suppliant bought the property in 1892, and it was subject to being flooded then at certain seasons. Nothing was done by the Government since to increase the liability of the property to be flooded.

The injury did not arise 'on' a public work, and, therefore, it is not within the operation of 50-51 Vict. c. 16, sec. 16 (c). Then, there is no liability on the part of the Crown. *McFarlane v. The Queen* (3). There was no officer charged with the duty of keeping the culvert clear. *City of Quebec v. The Queen* (4). If there is negligence proved, not coming within sec. 16 of 50-51 Vict. c. 16, the Crown is not liable. *Burroughs v. The Queen* (5); *Kerr v. Atlantic and North-West Railway Co.* (6); *Martin v. The Queen.* (7).

THE JUDGE OF THE EXCHEQUER COURT now (November 15, 1900) delivered judgment.

The suppliant brings his petition to recover damages to lands at St. Henri, in the District of Montreal, of which he is seized. It is alleged that these damages, resulting from the flooding of the lands, have been occasioned "by the fault, guilt, negligence and wrongful deeds of the Government of Canada, and more especially of the Department of Railways and Canals, and of the employees of the said Department while acting within the scope of their duties and employment." The lands in question were purchased by the suppliant in 1891 and 1892 for the sum of \$18,-

(1) 24 S. C. R. 420.

(4) 24 S. C. R. at p. 434.

(2) 6 Ex. C. R. 425

(5) 2 Ex. C. R. 293.

(3) 7 S. C. R. 216.

(6) 25 S. C. R. 197.

(7) 20 S. C. R. 240; Art. 2188 C. C. L. C.

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209.19. Omitting a claim of \$544 for the value of land alleged to have been taken by the Government for works upon the River St. Pierre, to which it will be necessary to refer again, he claims for past damages a sum of \$16,055.96, made up of interest upon capital invested, taxes paid, and damages to a house. For future damages he claims a sum of \$51,542.90.

The lands are bounded on the south by the River St. Pierre, and are situated near the Lachine Canal, a public work of Canada. In their natural state they were low or bottom lands, liable to be wet, and at times to be flooded. Their condition has been affected from time to time by the construction of the canal and works done on it, and in improving the River St. Pierre. The canal was built a great many years ago, and the principal works of which the suppliant complains were constructed prior to the time when he acquired the property. On the whole it appears, I think, that its condition has been made better rather than worse by these works, though that is not a material issue in the case. If, in the time of some predecessor in title it may have been injuriously affected by the construction of some public work, such predecessor, and not the suppliant, would be entitled to the damages. Since 1891, the earliest date of the latter's title, a drain has been constructed along the canal to collect the leakage therefrom. This drain also carries some water from the neighbourhood of Lachine. Besides this the River St. Pierre has been deepened in part, and the work of deepening is proceeding. This deepening of the river does not injure, but benefits the suppliant's lands. As to the drain there is no doubt that to some extent, when there is a heavy rainfall, it enables the water to reach the part of the river adjacent to the suppliant's land more quickly than it otherwise would; but on the other hand it tends to keep the

lands higher up the river dry, and in consequence in condition to absorb more of the rainfall. On the whole I agree with the witnesses who think that there is nothing in this collecting drain in itself to occasion or increase the flooding of the suppliant's lands. The real cause, apart from natural causes, and the liability of land situated as this is to be occasionally flooded, is the siphon-culvert by which the River St. Pierre at a point below the suppliant's lands is carried under the canal. This siphon-culvert as it now exists was constructed in 1878 or 1879. The expert witnesses, the engineers called by the suppliant on the one side, and those called for the Crown on the other, differ as to its sufficiency for the purposes for which it was intended; but that as has already been observed is not a material issue now. The present owner has no claim to the damages, if any, occasioned to the lands in question by the construction of this culvert, in 1878 or 1879. So it seems to me that this is not a case in which the suppliant can recover for damages to property injuriously affected by the construction of a public work. (*The Exchequer Court Act*, s. 16 (b)).

Is it a claim arising out of any injury to property on a public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment? (*Ibid.* s. 16 (c)). I think it is a fair inference from the evidence, and I find that between January, 1897, when the diver Fitzpatrick examined it, and the 23rd of July, 1899, when this petition was brought, this culvert was allowed to fill up to some extent. In April, 1900, it was found to be badly choked, and it would, I think, take some time to get into the condition in which it was then found. But for Fitzpatrick's evidence I should have thought that perhaps the filling up had been going on from a time prior to 1897. The exami-

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nation he then made is, I think, sufficient to rebut any case of negligence to keep the culvert clear prior to that time, that otherwise might arise. It was the duty of the superintending officer of the Crown in charge of this work to see that this culvert was kept clear. The necessary money was voted, and so far as I can see there was no excuse for the failure to keep it in good order and condition. The result was that the suppliant's lands were flooded more than they otherwise would have been, and for this he is, I think, entitled to damages if his case is within the statute, giving the court jurisdiction, but not otherwise. (*The Exchequer Court Act*, s. 16 (c).)

A somewhat similar question arose in the case of *The City of Quebec v. The Queen* (1). In the view taken of the statute by the learned Chief Justice Sir Henry Strong and Mr. Justice Fournier in that case, the suppliant might, I think, in a case such as this, recover under the clause that gives the court jurisdiction arising under any law of Canada (s. 15 (d)). But that view does not appear to have had the support of the majority of the court. Then as to clause (c) which gives the court jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of the Crown's officer while acting within the scope of his duty or employment, Mr. Justice Gwynne and Mr. Justice King were of opinion that it did not apply in a case of injury to property not occurring upon a public work, and the Chief Justice and Mr. Justice Fournier, for reasons not stated, thought that the provision was not applicable to the case then before the court. Mr. Justice Taschereau concurred in the judgment dismissing the appeal, because in his opinion the rock upon which the citadel

(1) 24 S.C.R. 420.

at Quebec rests is not a public work or a work at all, within the meaning of the statute, and the suppliant had failed to prove negligence. With regard to the place where the injury to property on a public work occurs, I have always been inclined to think—I express my view with great deference to the opinions of the learned judges who think otherwise—that it is sufficient to bring the case within the statute if the cause of the injury is or arises on the public work. It would, I think, be no answer to those entitled to bring an action for the death of any one on a public work to say that the death did not occur there, if the injury causing death was received on the work; and so it seems to me that the intention of the statute was to give a remedy to persons whose property is injured by the negligence of the Crown's officers in the discharge of their duties on public works, whether such property is actually on the public work, or being near enough thereto to be injured by such negligence is actually injured thereby. But in view of the concurrence of opinion of four of the learned judges who took part in *The City of Quebec case* (1) that clause (c) of section 16 of *The Exchequer Court Act* conferred no jurisdiction in the case therein set up, I am, I think, constrained to hold that it is not applicable to the case now under consideration.

Then with reference to the claim made by the suppliant for land taken for a public purpose, there is no evidence of any taking in the manner set out in the statute. (*The Expropriation Act* (2)). It appears, however, that in widening the River St. Pierre where it is adjacent to the suppliant's land, part of the bank was dug up and thrown back. There is nothing to show whether this was authorized or not; whether it was in fact a trespass or an expropriation of land. But

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(1) 24 S. C. R. 420.

(2) 52 Vict. c. 13, s. 8.

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assuming for the moment that it was an act of expropriation, it is clear, I think, that the suppliant cannot recover. For it appears that the portion of the bank so dug up and thrown back was part of a street or highway that the suppliant in 1892 dedicated to the public by registering the plan and subdivision of his property. For the taking by the Crown of a portion of this street, even if taken according to law, the suppliant would have no valid claim. *Stebbing v. The Metropolitan Board of Works* (1); *Paint v. The Queen* (2)

In conclusion, I may perhaps be permitted to say that I think the siphon-culvert that has been referred to ought to have been kept clean, and because it was not, the suppliant has, in respect of his property near thereto, suffered some loss and damage. Not that I think his damages from that cause to have been very considerable. The land affected was useful only for the purpose of selling it off for building lots; and there has been very little demand for them apart altogether from any additional flooding to which they were liable while the culvert was choked up. On that question the evidence of Mr. Mainwaring, a real estate agent called by the suppliant, is conclusive. He says that from the end of 1894 to 1899 there was no demand for real estate of this class. The market was practically dead. But it is possible that during the years 1897, 1898 and 1899 the sales may to some extent have been affected by the additional flooding to which the lands were liable because of the condition in which the siphon-culvert then was, and for any loss thereby suffered I should have awarded damages had I thought that I had jurisdiction. There will be judgment for the respondent.

Judgment accordingly.

Solicitor for suppliant:—*L. T. Maréchal.*

Solicitor for respondent:—*A. Globensky.*

(1) L. R. 6 Q. B. 37.

(2) 2 Ex. C.R. 149.; 18 S.C.R. 71₈.