

IN THE MATTER of the Petition of Right of

1912
Nov. 4.

FRANK W. PICKELS SUPPLIANT;

AND

HIS MAJESTY THE KING RESPONDENT.

Public Work—Ice Piers to improve Navigation—Public Harbour—Works constructed on private property—Riparian Rights—Injurious affection—Compensation.

The Dominion Government erected a series of ice piers upon a portion of the bed of the Annapolis River, in Nova Scotia, for the purpose of improving navigation. These piers were built in front of the suppliant's land and premises, acquired by provincial Crown grant since Confederation, which were actually used for ship-building purposes in a small way, and had a potential value for a large shipbuilding industry and cognate business. Pier No. 1 was built on a part of the foreshore between high and low water mark, belonging to the suppliant.

Held, that as the property upon which Pier No. 1 was built formed no part of a public harbour, and belonged to the suppliant, he was entitled under the provisions of sec 19 and sec. 20, sub-sec. (b), of The *Exchequer Court Act* to compensation for so much of his land as was taken.

2. That in so far as the riparian rights of the suppliant were injuriously affected by the construction of the piers in question, he was entitled to compensation therefor on the basis that such rights were peculiar to him and distinct from those held in common by him with the rest of the public.

PETITION OF RIGHT for damages for land taken by the Dominion Government for a public work, and for the injurious affection of other lands belonging to the suppliant.

The facts are stated in the reasons for judgment.

The case came on for hearing at Annapolis Royal, before The Honourable Mr. Justice Audette on the 26th September, 1912.

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T. S. Rogers, K.C., for the suppliant, contended that the Court had undoubted jurisdiction, under the provisions of sec. 20 (b) of *The Exchequer Court Act*, to entertain a claim for injurious affection, such as put forward in this case. Jurisdiction is also given in such a case by *The Public Works Act* and by Section 35 of *The Expropriation Act*. The injury to the use of the property as a shipyard is established by the witnesses for the Crown; while the evidence as a whole shews that the prospective commercial capabilities of the property are rendered practically valueless by the existence of the ice piers in their present situation. He cited and relied on: *Lyon v. Fishmongers Case*(1); *The Queen v. Barry* (2); *Robinson v. The Queen* (3); *The Queen v. Moss* (4).

The measure of damages is the value of the lands having regard to their best practical adaptability and the value with that purpose eliminated by reason of the construction of the work. He cited here *The King v. Rogers* (5); *McQuade v. The King* (6); *Ripley v. Great Northern Ry. Co.* (7); *In re Tynmouth Corporation* (8); *In re Bailey and Isle of Thanet Light Ry. Co.* (9)

The locus in quo is no part of a public harbour. Whatever argument could have been imposed upon the decision in *Holman v. Green* (10) prior to 1898 would be of no force since the judgment of the Privy Council in the *Fisheries Case* (11). The Crown in respect of Dominion Government has no proprietary rights in the bed of the Annapolis River.

(1) (1876) L. R. 1 A. C. 662.

(2) (1876) 2 Ex. C. R. 338.

(3) (1895) 4 Ex. C. R. 439; 25 S. C. R. 692.

(4) (1895) 5 Ex. C. R. 30; 26 S. C. R. 322.

(5) (1907) 11 Ex. C. R. 132.

(6) (1902) 7 Ex. C. R. 318.

(7) (1875) L. R. 10 Chan. 435.

(8) (1904) 89 L. T. 557.

(9) (1900) 1 Q. B. 722.

(10) (1881) 6 S. C. R. 707.

(11) (1898) A. C. 700.

J. A. McLean, K.C., for the respondent, argued that the *Fisheries Case* relied on by the suppliant did not apply as the locus was part of a public harbour. Ships loaded and discharged cargo at wharves above the property of the suppliant. Their Lordships of the Privy Council in the *Fisheries Case* make this important observation as to the fore-shore forming part of the harbour: "If for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour."

The Crown has done that which is complained of by authority of an Act of Parliament, and no action for damages would lie at common law; and it is only when such an action would lie against the authority expropriating that compensation can be claimed under *The Expropriation Act*, and similar Acts. He cited *In re Stockport &c. Ry. Co.* (1); *Stebbing v. Metropolitan Board of Works* (2) *Caledonia Railway Co. v. Walker's Trustees* (3); *Attorney-General v. Metropolitan Ry. Co.* (4); *Hammersmith Ry. Co. v. Brand* (5); *City of Glasgow Union Ry. Co. v. Hunter* (6); *Hopkins v. Great Northern Ry. Co.* (7); *Ricket v. Metropolitan Ry. Co.* (8); *Beckett v. Midland Ry. Co.* (9); *Reg. v. Vaughan* (10); *Bigg v. Corporation of London* (11).

AUDETTE, J. now (November 4, 1912) delivered judgment.

The suppliant brought this petition of right to recover from the respondent the sum of \$20,000 as compensation for land taken and for damages to his

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(1) (1864) 33 L. J. Q. B. 251.

(2) (1870) L. R. 6 Q. B.

(3) (1882) 7 A. C. 259.

(4) (1894) 1 Q. B. 384.

(5) (1869) L. R. 4 H. L. 171.

(6) (1870) L. R. 2 H. L. 78.

(7) (1877) 2 Q. B. D. 224.

(8) (1894) 70 L. T. 547.

(9) (1867) L. R. 3 C. P. 82.

(10) (1868) L. R. 4 C. P. 190.

(11) (1873) L. R. 15 Eq. 376.

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property, resulting from the erection of certain ice piers on and opposite his land and premises.

He alleges in his petition that he was, since the 12th December, 1908, the owner and occupier of a certain lot of land and premises situate in the town of Annapolis Royal, fronting upon the Annapolis river and including the shore between high and low water marks; that he has established and built a shipbuilding plant on the said premises, and carried on there the business of building ships; and further that when he acquired the land he contemplated constructing a wharf on a portion thereof, and using a portion as a lumber yard, shipping lumber therefrom over and from this wharf, and carrying on a general wharf and shipping business. The said lands, he alleges, by reason of their nature, situation and location, are only and solely, or chiefly, adapted and suitable as a site for a shipbuilding plant, lumber yard and wharf, and a business to be carried on in connection therewith.

He further states that between the 1st June, 1910 and the 31st December, 1910, a public work, within the meaning of *The Exchequer Court Act*, consisting of three ice piers, was constructed and erected by the Crown upon the bed and shore of the said Annapolis River in front of his land, fronting on the said river,—one of the piers being so constructed and erected upon his land between high and low water mark, and two others in front of and in close proximity to his land and premises.

And he further alleges that by reason of the construction of the said piers he has subsequently been unable to make use of his shipbuilding plant, or to build or launch vessels there; or to carry on business of a lumber yard, or shipping business, or to erect a wharf on his land which has become and is rendered

wholly unsuitable for many purposes for which it would be adapted, and otherwise used, if the said piers had not been constructed, including the purposes of the various businesses already mentioned. He concludes by alleging that his land has become and is very injuriously affected and greatly reduced in value by reason of the construction of the piers.

The Crown, by its plea, denies that the suppliant has suffered any loss or damage, and adds if he has suffered any such loss or damage, no action lies in respect of the same as against the Crown. And the Attorney-General further says that, if any ice piers were constructed by the Crown, one of the said piers was already erected and the location of the others clearly indicated at the time the suppliant became the purchaser of the land mentioned in his petition of right and that the land occupied by the said piers had been so taken or expropriated by the Crown in the interest and for the improvement of navigation; and the suppliant's title, if any, was and is subject to the construction and maintenance upon the said land of the said ice piers. And the Attorney-General further says that the petition of right discloses no cause of action against the Crown.

The suppliant bought the property in question in this case on the 12th December, 1908, for the admitted sum of \$1,050. The boundary of his property as appears by his deed, runs down to low water mark on the Annapolis River, and this boundary also appears on the Crown grant given, by the Nova Scotia Government, to his predecessor in title on the 1st March, 1873.

The suppliant claims that, as Pier No. 1 is built on the foreshore between high and low water mark; and as both his purchase deed and the provincial

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Crown grant (made, since Confederation, in the year 1873, to his predecessors in title) give him a fee simple in the said foreshore, he is entitled to compensation for the value of the land or locus upon which the said Pier No. 1 is erected. The suppliant's counsel, at the close of his case moved to amend the petition of right by claiming the value of this land,—undertaking, at the same time, that if the sum of \$25 be paid for this parcel of land he would waive expropriation proceedings, convey the land and give title to the Crown for the same upon the said compensation money of \$25 being paid over to the suppliant. In the view the Court takes of the petition of right as drawn, such amendment is unnecessary, as by the recital of the same, especially by paragraphs 3 and 6, the suppliant claims both for the value of this land and for damages. The prayer of the petition is very short and general, only asking that the suppliant “be paid \$20,000 “or such other sum as to this Honourable Court shall seem just, with costs.” The application for this amendment is refused as unnecessary under the circumstances, and the question as to whether or not the suppliant has good title in the said locus will be considered hereafter.

It is common ground at Bar and clearly established that Pier No. 1 has been erected between high and low water marks, to which suppliant's title extends and which is derived from a Crown grant of the Nova Scotia Provincial authorities since Confederation. It is contended by the Crown that the locus is in a “public harbour,” and therefore the property of the Dominion Government under the B. N. A. Act, 1867.

What is a public harbour within the meaning of section 108 of the B. N. A. Act 1867? The defini-

tion, if definition it can be called as the definition must be clearer than the thing defined, is now to be found in the judgment of the Judicial Committee of the Privy Council, in the case now known as *The Fisheries Case* (1) from which the following excerpt is taken, viz.:—

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“With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term ‘harbour’ on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so.

“Their Lordships are unable to adopt this view. The Supreme Court in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in the case of *Holman v. Green* (6 Sup. Can. Rep. 707) where it was held that the foreshore between high and low water mark on the margin of the harbour became the property of the Dominion as part of the harbour.

“Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description ‘public harbour?’ They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend to some extent, at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite

(1) (1898) A. C. p. 701.

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“issues which have been raised. It appears to have
 “been thought by the Supreme Court in the case of
 “*Holman v. Green* that if more than the public works
 “connected with the harbour passed under that word,
 “and if it included any part of the bed of the sea,
 “it followed that the foreshore between the high and
 “low water-mark, being also Crown property, like-
 “wise passed to the Dominion.

“Their Lordships are of opinion that it does not
 “follow that, because the foreshore on the margin
 “of a harbour is Crown property, it necessarily forms
 “part of the harbour. It may or may not do so,
 “according to circumstances. If, for example, it
 “had actually been used for harbour purposes, such
 “as anchoring ships or landing goods, it would, no
 “doubt, form part of the harbour; but there are other
 “cases in which, in their Lordships’ opinion, it would
 “be equally clear that it did not form part of it.”

From the perusal of the above, it will be found that if the suppliant’s property was situate in a public harbour at the time of Confederation, it passed to the Dominion Government under the B. N. A. Act, 1867, and that the provincial Crown grant would therefore be *ultra vires*. Under the facts of the present case can it be found that the land in question formed part of a public harbour at Confederation? The question must be answered in the negative, and the Provincial Crown grant must stand, under the circumstances of this case, the evidence adduced being insufficient to rebut it. No reliable evidence to that effect has been adduced. Public moneys were expended at Annapolis by the Dominion Government since Confederation and subsequent to the date of the Pro-

vincial Grant, but that would not make it a public harbour at Confederation (1).

The Act to provide for the appointment of harbour Masters for certain Ports in the Provinces of Nova Scotia and New Brunswick (36 Vict. Ch. 9) was, in 1873, made applicable to the Port of Annapolis, by a proclamation which appears in the Canada Gazette, Vol. 8, p. 1107.

It is true Annapolis Royal, which was visited by De Monts as far back as 1604, is the oldest settlement on that part of the coast; but can it be said that there was then at Confederation a public harbour, extending from Digby Gut to Bridgetown, a point about 18 miles up the river from Annapolis, comprising both the Annapolis Basin and the river? It is true that there are four Government wharves erected since Confederation between the Narrows and Bridgetown; but the fact of any wharf being erected would not make the place a public harbour,—not any more than all the wharves on the coast from Belle Isle to Quebec would make that part of the St. Lawrence a public harbour. Some of the witnesses contended that Annapolis Harbour extended to the head of the narrows at the west end of French Basin,—others that the harbour ended at the Acadia Wharf.

From the nature of the narrows, the topography of the surroundings, and the facts in evidence in the present case, this court finds that if there is a public harbour proper at Annapolis, it does not extend any further east than to the western boundary of the suppliant's property, or to the eastern end of the Acadia Wharf property. Indeed, the river narrows down to a very small width opposite the suppliant's property with a rise and fall of tide of 27 feet in the Spring;

(1) See General Report of Minister of Public Works, from 30th June, 1867 to 1st July, 1882, p. 214.

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the current is very swift and strong, and the river is very deep, making it undesirable for anchoring,—although physically possible. There were no wharves before Confederation on either side of the river opposite the narrows, and this court fails to find from the evidence adduced any element that would tend to make the suppliant's property part of a public harbour, under the decision in the *Fisheries Case* above cited.

Coming to the question of injurious affection or damage to the suppliant's property, the court finds that if any damage is proved he is entitled to recover under sub-sec. (b) of sec. 20 of *The Exchequer Court Act*, which reads as follows: "Every claim against the Crown for damage to property injuriously affected "by the construction of any public work"—There can be no doubt that the piers in question are public works, within the statutory definition—and the decisions of the courts. The suppliant would further be entitled to recover under section 19 of the same Act which gives the court jurisdiction where "the land of the subject is in the possession of the Crown".

Has the suppliant suffered any damages by the erection of these piers? Has his property decreased in value from the same? The suppliant tells us in his testimony that when he bought in December 1908, he contemplated using the property as a ship-yard, lumber-yard with a wharf, and also constructing a marine slip. He said he thought of expending \$8,000 to \$10,000 on the wharf and \$35,000 on the marine slip.

Since the erection of the piers the suppliant launched two vessels of 600 and 300 tons respectively. The first vessel was launched successfully, and the second although a smaller one, being delayed in the launching, went off only at the ebb tide and, collided with one of

the piers and thereby suffered damage. It is contended by some experienced witnesses that a vessel should never be launched with the ebb tide, and the court inclines much in sharing that view. Indeed if a vessel launched with the ebb tide were going aground, it might be a serious matter to haul her off the ground with a falling tide. Then, at this very place, with the ebb tide, the vessel is taken down to the piers by the tide itself. However, it was contended and rightly so that with an eastern wind it would not be safe to launch a vessel there, as the wind would carry the vessel to the piers. The result of the evidence would go to show that while the use of this property as a ship-yard is still quite available and good, yet more care will have to be exercised in launching vessels, and that is the conclusion arrived at by the court.

It is also in evidence from the testimony of the witnesses adduced on both sides that the piers would interfere in docking vessels at a wharf constructed on the suppliant's property.

With respect to the marine slip, a deal of conflicting evidence has been adduced as to whether or not it would be advisable to build a marine slip on this property and as to whether there would be any justification in expending the sum of \$35,000, named by suppliant, upon such works at Annapolis. The court has read the petition of right, with care, and has intentionally recited at the opening the several grounds upon which the suppliant rests his claim for damages; but has failed to find any mention of a marine slip in his petition of right. Forsooth, the suppliant alleges therein that "the said lands and premises "by reason of their nature, situation and location, "are *only* and *solely* or *chiefly* adapted and suitable "as a site for shipbuilding plant, lumber yard and

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“wharf, as aforesaid, and businesses to be carried on “in connection therewith.” Was not the idea of this marine slip an afterthought coming to the suppliant’s mind since the institution of this action? If so, in view of his evidence, it would only go to the weight of the evidence, because if a marine slip is a practicable and advisable business undertaking at Annapolis, it would perhaps form an element for consideration. However, in the view this court takes of the question of damages, it becomes in a certain degree unnecessary to consider this matter any further. It must, however, be said that the evidence goes to show that the piers would interfere with a marine slip, if one were constructed on the suppliant’s property.

Indeed, under the *Fishmongers Case*, and the cases therein referred to, it clearly follows that a riparian owner enjoys rights, *ex jure naturae*, which are quite distinct from those held in common with the rest of the public. Besides the use of the water for domestic purposes, which in a case of salt water is however obviously less valuable, the riparian owner has over and above the rights enjoyed by the public, the right of access to and from the river from his property or wharves erected thereon. And if any piers have been erected on or about his property, that takes away, or at all events alters and abridges the riparian owner’s right to the free and lawful application of his property to any business purposes he sees fit, and he is therefore entitled to compensation for this injurious affection. (1)

At all events, having found the Crown has taken the piece of land upon which Pier No. 1 is erected,

(1) *Fishmongers Case*, 1 App. Cas., 622; *Pion v. North Shore Ry. Co.*, 14 App. Cas. p. 612; *Bigouette v. North Shore Ry. Co.*, 17 S. C. R. p. 363; *Merritt v. City of Toronto*, 27 Ont. R. 1; *Ratte v. Booth et al.*, 11 O. R. 494; 14 Ont. App. Rep. 419; 15 A. C. 188.

the case comes within sec. 20, sub-sec. (b) and sec. 19 of *The Exchequer Court Act*; and as a parcel of land is taken would it not also follow that under *The Expropriation Act* damages should be paid for injurious affection to the balance of the property owned by the claimant? This property has been injuriously affected and the suppliant is entitled to recover both under the statutory law and the case law above cited.

Coming to the question of *quantum* of damages, we must bear in mind that the property was bought by the suppliant in December, 1908, for \$1,050. The suppliant, and witness Whitman, contend it was sold at that price in view of the above mentioned prospective improvements which the suppliant was to put upon the property, thus increasing the value of the adjoining property which belonged to the vendor. But there is no such covenant in the deed of sale whereby the purchaser was to improve the property in any manner whatsoever. The suppliant paid the market value of the land at the time. George E. Corbett, an old resident of Annapolis, and a person well versed in commercial undertakings, thinks \$1,050 in 1908 for this property was a pretty good price. Another witness Clarence W. Mills, says \$1,050 in 1908, is "a fairly good price for the property." The suppliant himself at page 35 of his evidence would appear to admit as much. There is also the witness Edward F. Neville who placed a valuation of \$1,500 in 1908. Further on in his evidence he named a high figure which he subsequently explained by saying that he named the amount in view of the business the suppliant proposed to start, and the money he was to expend upon the property—and he added he did not take into consideration whether the undertaking would pay.

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Witness Corbett bought a deep water property below the town, not quite half a mile from the Acadia Pier, on the Annapolis side, with about 1,200 to 1,300 feet frontage for which he paid between \$700 and \$730. About three years ago he also sold to the suppliant for \$3,000, two wharves with a block of land on a front street, 40 feet on St. George Street, running back to the front wharf 90 feet or 100 feet. One wharf is 200 feet long by 30 feet wide,—with a large block between—the other wharf is 100 feet by 40 feet wide. It is true the wharves were not in good repair, but such a sale will give an idea of the value of the property at Annapolis. Then it was contended by the Crown and is shown by the evidence, that this question of building the piers on the river to retain the ice in the winter and give a clear port below the Narrows, was agitated as far back as 1902—that the matter was mentioned at a meeting of the Board of Trade, and witness Corbett went to Ottawa asking for it. Furthermore, tenders were asked in March 1908 for these works, and after the contract had been first accepted the contractors refused to proceed with the works and the contract was given to a second firm, and the works were finally begun in June, 1909. The demand for tenders was posted in the Annapolis post office. In view of these facts, counsel for the Crown contended, and not without reason, that the suppliant must have been aware of such project of building the piers at the place where they are today, at the time he bought in December 1908. The suppliant, a keen business man who would likely acquaint himself with anything of public interest in Annapolis, denies the knowledge at the time he purchased that the piers were to be erected where they now stand, although the natural inference would be the other way. The claim made

by the suppliant in his evidence runs as high as \$25,000 with a close follower in the person of the vendor's brother, who acted as agent in the sale of this land. How could a bare piece of land bought in December 1908 for \$1,050 be damaged to the extent of \$20,000 or \$25,000 in June 1909 (the time at which the erection of the piers was started) when no improvements were made upon the property and no preparation made for that purpose. Then the damages that are recoverable here are not damages in the nature of loss of business; the damages the suppliant is entitled to recover are damages that are inherent to the land and not to the person or to the suppliant's business (1).

The price paid for this property in December, 1908, appears to have been the fair market price at the time and the court is of opinion that under all the circumstances of the case, if the sum of five hundred dollars, inclusive of the twenty five dollars for the value of the land upon which Pier No. 1 has been erected, is paid the suppliant, he will be fairly and liberally compensated for both the land taken and for all damages whatsoever to his property resulting from the construction of the said ice piers.

Therefore, there will be judgment that the suppliant is entitled to recover from His Majesty The King, the sum of five hundred dollars, upon his conveying to the Crown the piece of land, between high and low water marks upon which Pier No. 1 is erected, and giving a release of any incumbrance whatsoever which may be upon the same, the whole in satisfaction for all damages past, present and future resulting from the erection of the said ice piers on and opposite the suppliant's property, with interest upon the said sum of

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(1) See *The King v. Richards* ante, p. 365, and cases there cited.

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five hundred dollars, from the 15th day of June, 1909,
and costs.

Judgment accordingly.

Solicitor for suppliant: *T. R. Robertson.*

Solicitor for respondent: *H. Ruggles.*
