BETWEEN

1920
Dec. 22.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA.............PLAINTIFF;

AND

THE ONTARIO & MINNESOTA POWER COMPANY, LIMITED, DEFENDANTS.

Indian Lands, surrender of to Dominion—Powers thereof to accept—Indian Reserves—Transfer by Province to Dominion—Provincial Lands—B.N.A. Act 1867—5 *Geo. V, ch.* 12—6 *Ed. VII, ch.* 132 (*Ont.*)

Held: That upon a proper construction of the Nort West Angle Treaty (1873), the Dominion Government had full power under such treaty to accept the surrender on behalf of the Crown from the Indians, and as the result of such surrender the title to or beneficial interest in the lands so surrendered, within the Ontario boundaries, passed to the province under the provisions of section 109 of the B.N.A. Act, 1867, and that the entire beneficial interest therein was in the province until the conveyance of a part for Indian Reserves, by the province to the Dominion by the Act of the legislature of the province in 1915 (1).

2. That when the province assented to the "Reserves" being made and transferred them to the Dominion (5 Geo. V, ch. 12), the Dominion acquired them subject to the statutory rights, (2), and that the lands and privileges so granted were specifically eliminated from what was transferred to the Dominion, including among other things, the right granted to defendants to flood the land up to bench mark 497.

(1) *St. Catharines' Milling and Lumber Co.* vs. *the Queen*, 14 A.C. 46; and *Attorney-General P.Q.* vs. *Attorney-General Dominion*, 37 T.L.R. 125; *Ontario Mining Co.* vs. *Province of Ontario* (1910) A.C. 637; *the King* vs. *Bonhomme*, 16 Ex. C.R. 437, confirmed on appeal to the Supreme Court of Canada.

(2) See 6 Ed. VII, ch. 132 (Ont.

1920
THE KING
v.
THE ONTARIO & MINNESOTA POWER CO., LIMITED.

Reasons for Judgment.

3. That, by reason of a reserve for roads, etc., along the shores of Rainy Lake and River being contained in the description of the Indian Reserves so surendered by the province to the Dominion as aforesaid, the land so reserved, did not form part of the Indian Reserves, and the beneficial interest therein remained in the province.
4. That, therefore, in view of all the facts, plaintiff could not recover for injury due to the flooding of any of said lands previous to the Act of 1915 aforesaid; but that, in 1916 (after the conveyance of the Indian Reserves to the Dominion) in view of the defendants having accumulated large quantities of water in the upper lakes and reservoirs, plaintiff could recover damages occasioned by the flooding of the land between bench mark 499 (in the state of nature) and bench mark 500.

INFORMATION exhibited by the Attorney General for the Dominion of Canada claiming damages for injuries to an Indian Reserve in the Rainy Lake District in the province of Ontario, by reason of flooding due to a dam constructed on the banks of the river and other works of the defendant.

October 5th, 6th and 7th, 1920.

Case was heard before the Honourable Mr. Justice Audette at Fort Frances.

November 12th, 1920, trial and argument continued at Ottawa.

Peter White, K.C., and B. *H. L. Symmes* for plaintiff.

W. N. Tilly, K.C., for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 22nd, 1920) delivered judgment.

This is an information exhibited by the Attorney General whereby the sum of $23,413.50 is claimed from the defendants as damages, for the flooding of lands alleged to belong to the plaintiff.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question the day preceding the trial.

By the North West Angle Treaty, No. 3, made and concluded on the 3rd October, 1873, between Her late Majesty Queen Victoria and the Saulteaux tribe of the Ojibbeway Indians, a certain tract of land,—containing about 55,000 square miles, covering in general terms, the area from the watershed of Lake Superior to the North West Angle of the Lake of the Woods, and from the boundary of the United States of America to the height of land from which the streams flow towards Hudson Bay—was duly ceded, released, surrendered and yielded up to the Government of the Dominion of Canada for Her Majesty The Queen, subject to certain conditions mentioned in the treaty, and among others to lay aside reserves for Indians, etc. See Exhibit No. 11.

By an act of the Parliament of Canada, 54-55 Vic., Ch. 5 (1891) and an act of the Legislature of Ontario, 54 Vic. ch. 3 (1891) the government of the Dominion of Canada and that of the province of Ontario were given authority to enter into an agreement for the settlement of these reserves, and certain questions respecting the lands so surrendered by this Treaty No. 3, with such modifications or additional stipulations to the draft recited in such statutes, as may be agreed upon by the two governments.

On the 16th April, 1894, the agreement above referred to was entered into by both governments, and it is therein, among other things, recited that whereas, out of the lands so surrendered by the Indians, reserves were to be selected and laid aside; and whereas the *true boundaries of Ontario had since* been ascertained and declared to include part of the territory

1920
THE KING
v.
THE
ONTARIO
& MINNESOTA
POWER CO.,
LIMITED.

Reasons for Judgment.

surrendered; and whereas *before* the true boundaries had been declared as aforesaid, the Government of Canada *had selected and set aside* certain reserves for the Indians in intended pursuance of the treaty, although the Government of Ontario *was no party to the selection,* and *at that time had not concurred therein*—with the view of coming to a friendly and just understanding—the two governments had agreed between themselves as follows:

"1. With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract *have been decided to belong to the Province of Ontario* or to Her Majesty in right of the said province,the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering, or other purposes by the Government of Ontario or persons duly authorized by the said government of Ontario; and that the concurrence of the province of Ontario is required in the selection of the said reserves.

"2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the government of Ontario, as to the reserves before the passing of the said statutes laid out in the territory, with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course.

"3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in case other reserves in the said territory are to be selected, a joint commission or joint commissions, shall be appointed by the Government of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed reserves.

"4. That in case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid out or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve including islands wholly within such headlands, and shall not be subject to the public common right of fishery by others than Iudians of the band to which the reserve belongs.

"5. That this agreement is made without prejudice to the jurisdiction of the parliament of Canada, with respect to inland fisheries under the British North America Act, one thousand eight hundred and sixty-seven, in case the same shall be decided to apply to the said fisheries herein mentioned.

"6. That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the *concurrence of the government of Ontario.*"

Under the provisions of an order in council of the 8th July, 1874, Messrs. S. J. Dawson and Robert Pithers, had already been appointed to secure and select these reserves, and by a further order in council of

1920

THE KING v. THE ONTARIO & MINNESOTA POWER CO., LIMITED.

Reasons for Judgment.

the 27th February, 1875, the report upon the selection of such reserves was provisionally approved, after the maps accompanying the report of the commissioners had also been submitted *with a full description of the reserve.*

Now it has been established by Mr. Bray, the chief surveyor of the Indian Department at Ottawa, who has been in the employ of the Department for a long period of time, and who has knowledge of the matters concerning treaty No. 3,. and who was called as a witness on behalf of the plaintiff, that the reserves provided for by the treaty were duly selected by federal officers, and surveyed and accepted by all concerned. Mr. Bray filed as Exhibit No. 21 and as Exhibit "Q" (also marked "V") plans of the Indian reserve at Rainy Lake, together with the description of that reserve, which description forms part of the records of his department—the language (p. 33 of the evidence) used in setting apart the same and which is to be found, at page 1 of Exhibit "R-a" reads as follows:

"Treaty No. 3. Description of reserves to be set aside for certain bands of the Saulteaux tribe of the Ojibbeway Indians, under treaty No. 3.

"Rainy River. At the foot of Rainy Lake, to be laid off as nearly as may be, in the manner indicated on the plan, *two chains in depth along the shore of Rainy Lake* and bank of Rainy river, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes.

"This Indian reserve not to be for any particular chief or band, but for the Saulteaux tribe, generally and for the purpose of maintaining thereon an Indian agency with the necessary grounds and buildings."

This description appears to have been in existence and accepted by the department ever since 1875, when it was provisionally approved by an order in council of the 27th February, 1875 (Exhibit R-A).

Reading this description together with the two plans filed by Mr. Bray, it will be found that they conjointly agree. That is to say, that the "two chains in depth along the shore of Rainy Lake and bank of Rainy river, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes" appear on the one plan in the *shaded space,* and on the other in the road allowance plainly shown and marked thereon. All of this information is supplied by the Department of Indian Affairs, at Ottawa. The only conclusion to arrive at is that the 132 feet do not form part of the reserve, and that the fee or beneficial interest in these two chains is in the province, for the reasons hereinafter mentioned.

On behalf of the plaintiff it is contended that the plan (No. 70) of the reserve which is in the hands of the Ontario Government, and which forms part of the departmental records, does not show the reservation, and the witness who produced it testified that it had been filed with their department in January, 1890, and that no such reservation of 132 feet appear upon the plan. However, by the letter (Exhibit "W") of Mr. Hardy, the then Commissioner of Crown Lands for Ontario, written to the Deputy Minister of Indian Affairs on the 22nd May, 1889, it appears that while asking for tracings of the plans of the Indian reserves in the district of Rainy river, he stated: "it will be sufficient for our purpose if only the outside measurements and courses are put on." And there are some notes and writing on Exhibit No. 70, which do not appear on either exhibits "V" and "21," and vice versa.

1920
THE KING
v.
THE
ONTARIO
& MINNESOTA
POWER CO.,
LIMITED.

Reasons for
Judgment.

This does not in any manner conflict with the records at Ottawa, in the Department of Indian Affairs. The plan, as requested, was sent to the Ontario government, but it was not as complete as the plan of record at Ottawa, where in addition thereto was also to be found, as would be expected, a description of the reserve. At the trial, I asked for the production, if available, of the field notes of surveyor Caddy, who prepared these plans in 1876; they have not been forthcoming, but after all they are not needed for adjudicating upon the case.

Then, briefly stated, freed from a welter of details and facts which when properly analysed resolve themselves into a small compass, we have the agreement between E. W. Backus and the Ontario government, bearing date the 9th January, 1905, and the assignment of his rights thereby secured to the defendant company, coupled with the act of the Ontario legislature (1906) Ch. 132, 6 Ed. VII, together with the act of the parliament of Canada, 4-5 Ed. VII, ch. 139, whereby the defendants acquired their franchises, the right to erect a dam, to flood the Ontario lands, to interfere with a navigable river, etc.—all of which is so well known to all parties, that I will dispense with mentioning more than the source of such rights.

The defendants in 1906 acquired from the province of Ontario certain land together with leave to construct their dam, and also the right to flood any land that was the property of Ontario to the bench mark of 497.

The defendants further acquired from the Dominion the right under 4-5 Ed. VII, ch. 139, to develop the water power in question, provided that no work authorized by that act, be *commenced* until the plans thereof

1920

THE KING
v.
THE
ONTARIO
& MINNESOTA
POWER CO.,
LIMITED.

Reasons for Judgment.

be first submitted and approved by the Governor in Council. The plans were duly submitted and approved before commencing the works, but subsequently thereto some alterations and changes were made, which, under the evidence were approved verbally by the Minister as provided, I would think, by the order in council of the 19th September, 1905 (Exhibit No. 13). However, the matter is here mentioned, because great stress was laid upon the point by the plaintiff to the effect that the works as constructed were not properly authorized, and that the defendants were therefore trespassers. I dismiss this contention, and it would appear also to be *de minimus* in a case like the present one. In the result it means that these changes and alterations were of an essential benefit to the works and had been approved of by the Minister,—and the plans of these works as a whole had been authorized and approved by order in council before being commenced. The sluices as built were constructed with a capacity to discharge more than in the state of nature. See *Montreal St. Railway* vs. *Normandin.* (1)

Now, the Dominion Government had full power to accept the surrender on behalf of the Crown from the Indians by the North West Angle Treaty, and as a result of such surrender the title to the lands, coming within the Ontario boundaries, passed to that province under the provisions of sec. 109, of the British North America Act, 1867 (2).

(1) 33 T.L.R. 174.

(2) *St. Chatherine's Milling and Lumber Co.* vs. *the Queen*, 14 A.C. 46; and *Attorney General P.Q.* vs. *Attorney General, Dominion*, 37 T. L.R. 125; *Ontario Mining Co.* vs. *Province of Ontario*, (1910) A.C. 637; *the King* vs. *Bonhomme*, 16 Ex. C.R. 437, confirmed on appeal to the Supreme Court of Canada.

1920
THE KING
v.
THE
ONTARIO
& MINNESOTA
POWER CO.,
LIMITED.

Reasons for
Judgment.

Having found so much, it results, that no part of such lands ever passed to the Dominion before 1915, and that from the day of the surrender to 1915, when the Act 5 Geo. V, ch. 12, was passed by the legislature, the entire beneficial interest in these lands was in the province. Therefore, it follows that when by the Act of 1915 (5 Geo. V, ch. 12) the province assented to the reserves and transferred them to the Dominion, by what may be termed a statutory deed, the Dominion acquired them subject to the statutory rights, conveyance, etc., that had been previously granted to the defendants, as set forth in the Ontario statute of 1906 (6 Ed. VII, ch. 132) which adopted the agreement between the province and the defendants, or their predecessors in title, giving them the right to build their works and dam, to flood the Ontario lands to the bench mark of 497, the height of the crest of the dam, etc. Moreover, under the provisions of sections 2 and 4 of this Act, 5 Geo. V, ch. 12, the lands and privileges granted the defendants would appear to be specifically eliminated from what is transferred to the Dominion by that Act. It may also be observed that by this 1915 Act, modifications have been made to the agreement of 1894. The Dominion, however, has no interest outside the reserve proper, and the reserve is 132 feet from the water's edge.

Having found that the Dominion had no beneficial interest in these lands up to the passing of the Act of 1915, and that the lands for the reserves were by that Act transferred to the Dominion subject to the rights, powers and privileges acquired by the defendants prior to that date; having further found, that "the two chains in depth along the shore of Rainy Lake and bank of Rainy river" did not pass to the Domin-

ion, but that the beneficial interest in the same is in the province, it remains to be ascertained if the plaintiff suffered any damage, and to what extent.

The scope of the action has been at trial entirely changed from what appears under the written pleadings. The plaintiff is not entitled to any damage resulting from the maintenance of the water to the bench mark 497, and it is impossible under the evidence adduced to assess, at this stage, with any satisfaction, the damages which might have been suffered in 1916 when this bench mark of 497 had been exceeded. In the extraordinary flood of 1916, qualified by Crown witness Smallian as a flood not likely to happen again, the waters rose to 509.06, although the waters had risen very high in 1896, as shown by Exhibit No. 30. Whereas it has been established that under the state of nature they would have risen to 499.65. This rise, however, should be decreased by six inches as it was increased by these six inches through the booms and the jam at the bridge between the 14th and the 27th May, 1916.

For the damages occasioned in 1916 (which were maintained for the best part of the year) between the actual flooding and the flooding that would have obtained in a state of nature, and above the 132 feet along the water front, the plaintiff is entitled to recover. I am unable to charge the defendants with negligence in taking care of this enormous volume of water in 1916, including the accumulation in the upper lakes used partly as reservoirs, when 95 per cent thereof was successfully handled before the state of nature was exceeded. It is easy to be wise after the event and say if this or that means had been resorted to, the flood would or might have been decreased.

1920

THE KING v. THE ONTARIO & MINNESOTA POWER CO., LIMITED.

Reasons for Judgment

However, under the evidence it is impossible to find negligence. A man of ordinary prudence could not have foreseen the extent of the flood of 1916, as testified to by Crown witness Smallian.

The case has been especially well argued, and with the argument and the information already spread upon the record, it is perhaps possible to form a fair idea of the damages of 1916, although not with any great precision.

What is the damage? The damage to the trees has been caused by the raising of the water to 497. It must be found that the flood of 1916 did not of itself affect the trees that were then cut or otherwise. As I have already stated it is impossible, at this stage, under the new state of facts which arose only at the time of the argument and when the evidence was on the record, to arrive at any satisfactory conclusion with respect to the assessment of the damages; but I have come to the conclusion on this subject of damages, to adopt the following course, assuming that the Indians claiming herein are beyond the 132 feet and the 499 bench mark. From the general evidence, the perusal of plans "G" and "H" and other plans dealing with the same matter, and bearing in mind the evidence of witness Walker, who testified respecting the revenue derived from the Park, it clearly appears what territory would suffer at the two respective bench marks above mentioned—and considering that the flood of 1916 lasted somewhat longer on account of the dam, than it would in a state of nature, which could not be called *damnum fatale* (1). I am willing to name as compensation and in satisfaction of these damages, which are not of a permanent nature, the sum of five hundred dollars. The parties herein to signify

(1) *Corp. of Greenoch* vs.. *Caledonian Ry. Co.* (1917) A.C. 556.

by a written document to be filed of record, within fifteen days from the date hereof, if they accept this figure in satisfaction of the said damages. Failing the parties to accept this assessment, there will be a reference to the registrar of this court, for enquiry and report upon the question.

Subject to the right of the parties to elect to accept either a reference or the lump sum above mentioned, I wish to offer the following observations. The reference would be expensive, and the amount recoverable thereunder would very likely be less than its costs, so I embark upon the assumption that the parties would suffer less from an assessment under the present impossibility of accurate ascertainment than from having recourse to a reference. Indeed, according to the testimony of the Indian agent, Mr. Wright, and another witness who spoke upon the question of damages in 1916, it would seem that Pither's Point would not have suffered any appreciable damage from flooding under the circumstances—although the plaintiff might be entitled to recover damage for the deprivation of the use of flooded lands used as a park or otherwise, and even to nominal damages in respect of the same for flooding the plaintiff's land between the two bench marks above mentioned, being an invasion of the plaintiff's right to full and undisturbed possession. The material damage, if any, suffered would be with respect to the Indians; but if the Indians squatted within the 132 feet from the water's edge, they squatted upon provincial lands and not upon the reserve, and if the damages suffered by them is beyond the 499 bench mark, they cannot recover. They cannot recover as such squatters, under the decision of *Smith* vs. *Ontario & Minnesota Water Power Co.* (1).

(1) 44 O.L.R. 43.

1920
THE KING v. THE ONTARIO & MINNESOTA POWER CO., LIMITED.
Reasons for Judgment.

Upon the question of costs, as the success of the parties upon the result of the case is practically divided, I find that there should be no costs allowed as between the respective parties as well upon the trial, as upon the adjournment and the reopening of the case.

Solicitor for plaintiff: *J. W. Bain.*

Solicitor for defendants: *Arthur* D. *George.*