

IN THE MATTER OF THE PETITION OF RIGHT OF
 WILLIAM J. HOPWOOD.....SUPPLIANT;
 AND
 HIS MAJESTY THE KING.....RESPONDENT.

1917
 March 10

Crown—Negligence—Public work—Canal—Flooding—Release.

An action does not lie against the Crown for an injury to land from the overflow of a government canal, "occasioned by spring floods and freshets" within the terms of a deed releasing the Crown from liability upon such contingencies; nor does it come under sec. 20 of the Exchequer Court Act (R.S.C. 1906, c. 140), subsecs. (a) and (b), which deal with compensation for a compulsory taking or injurious affection of land, nor under sub sec. (c) thereof, as an injury on a "public work," the property being situated about 25 miles from the canal route, and the injury not being shown to have 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 alleged to have been caused by an overflow of the Trent canal.

Tried before the Honourable Mr. JUSTICE AUDETTE, at Peterborough, Ont., February 26, 1917.

J. H. Burnham, for suppliant; *G. W. Hatton*, for respondent.

AUDETTE, J. (March 10, 1917), delivered judgment.

This case came up for trial before me at Peterborough, Ontario, and at the conclusion of the suppliant's evidence, the respondent moved for judgment of non-suit. This motion was taken under advisement.

The suppliant, by his amended petition of right, seeks to recover the sum of \$150 for alleged damages suffered in 1912 (although in his evidence he said his claim was for 1912 and 1913) to his property, as resulting from the flooding of the same "by reason of the unlawful and improper "handling of the waters known as the Trent Canal waters," at the Buckhorn Dam.

This property, which he acquired on September 10, 1900, is described in the deed of purchase as a small island in

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Chemong lake. At low water it becomes a peninsula; but when the waters are high it is entirely surrounded by water, and he has therefore constructed a small foot-bridge from the mainland to the island.

As appears by an indenture of August 29, 1910, filed herein as Exhibit No. 3, the suppliant was paid at that date the sum of \$150 in full satisfaction and discharge of all claims for damages to his property in consequence of the construction, maintenance and operation of the Trent Canal, so long as the waters of the said canal are held no higher than they were in the seasons of 1906, 1907, 1908, and 1909, and in consideration of the same he further grants, releases, indemnifies and discharges the Crown from and against all damages of any nature and kind whatsoever which have been heretofore caused or may hereafter be caused or done so long as the waters of the said canal are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909.

And this indenture further recites: "That for the consideration aforesaid the said party of the first part for himself, his heirs, executors, administrators and assigns doth grant confirm and assure to and unto His Majesty his successors and assigns forever the right to flow, flood, and submerge such part of the said lands hereinbefore mentioned to such an extent as may be found necessary to flow, flood and submerge the same by the raising and increasing the height or level from time to time of the waters of the said Trent Canal System in so far as they affect the lands and premises hereinbefore mentioned to the greatest level or height to which the said waters were brought at any time during the years of 1906, 1907, 1908 and 1909, as indicated by the records kept from time to time by the proper officers of the Government of the Dominion of Canada or by maintaining or supporting at all times the waters of the said Trent Canal System in so far as they affect the said lands to the said height or level and *such further increase thereof as may be occasioned by spring floods and freshets..*"

A new Buckhorn Dam was built in 1907, and completed in October, 1908, and much stress is placed on behalf of the suppliant, upon the difference of the 1907 dam and the

1908 dam. But no meritorious argument can apparently be set up from this comparison since that from the deed of August, 1910, it appears the release thereunder is valid provided the waters are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909, that is under the state of things obtaining under both old and new dams in the years above mentioned, and all of these years are the point of comparison with 1912.

Furthermore, the height of the waters in the years 1906, 1907, 1908 and 1909, is to be ascertained "from the *records kept from time to time* by the proper officers of the Government." and to the height of the waters so ascertained in the years 1906, 1907, 1908 and 1909, there is still a further margin allowed the Crown by the following words of this deed of 1910, viz.: "and such further increase thereof "as may be occasioned by spring floods and freshets."

Now, we have uncontroverted evidence that there was a very heavy freshet in the spring of the year 1912, and that heavy rain and deep snow occasioned an extremely high precipitation. The highest point the waters reached at the dam in 1912 was on April 24, when it reckoned 9.11 on the upper gauge. Then the waters dropped down till they again rose to 7.07 on May 17, and around June 5 it reached 9.08. In 1912 the water rose up to 9.11, that is 6 inches higher than in 1909, when it went up to 9.05. But even if the case were to be decided exclusively upon the facts, as controlled by the deed of August, 1910, the action would fail, because to whatever height the water did go in 1912, over and above the years 1906, 1907, 1908 and 1909, must obviously and reasonably be taken to be due to the unusual spring floods and freshets of 1912, and that would be only 6 inches of leeway or margin allowed by the 1910 deed over the highest point reached between 1906 and 1909.

Approaching now the case under its legal aspect it must be said that this action is in its very essence one in tort, and that apart from special statutory authority such an action does not lie against the Crown. The suppliant to succeed, must bring his case within the ambit of sec. 20 of *The Exchequer Court Act*.

If the suppliant seeks to rest his case under subsec. (b) of sec. 20, as was mentioned at trial, I must answer that

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contention by the decision of the Supreme Court of Canada in *Piggott v. The King*¹ where His Lordship the Chief Justice of Canada, 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 compulsorily "taken under, or injuriously affected by, the exercise of "statutory powers."

Therefore, it obviously follows that the present case does not come under subsec. (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?

To bring this case within the provisions of subsec. (c) of sec. 20, the injury to property must be: 1st. On a public work; 2nd. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; and 3rd. The injury must be the result of such negligence.

The suppliant's property is situate 20 or 25 miles south of Buckhorn Dam, a dam which is part of the Trent Canal System, which undoubtedly under sec. 108 of the B.N.A. Act and the third schedule thereof is the property of Canada. The canal route, however, runs through the north western part of Buckhorn Lake and does not go through Chemong Lake at all. Buckhorn Lake on the east connects with Chemong Lake through a passage, and the suppliant's property is on the south east shore of the latter lake, as the whole appears upon a general plan exhibited at trial.

Under the circumstances and under the decisions in *Macdonald v. The King*;² *Hamburg American Packet Co. v. The King*;³ *Paul v. The King*;⁴ and *Olmstead v. The King*,⁵ it is impossible to find that the suppliant's lands in question in this case, so situate 20 to 25 miles from Buckhorn Dam and entirely out of the canal route, are *on a public work*.

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

¹ 53 Can. S.C.R. 626, 32 D.L.R. 461.

⁴ 38 Can. S.C.R. 126.

² 10 Can. Ex. 394.

⁵ 53 Can. S.C.R. 450, 30 D.L.R. 345.

³ 7 Can. Ex. 150; 33 Can. S.C.R. 252.

the evidence that an officer or servant of the Crown, while acting within the scope of his duties or 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 the case.

In the result it must be found, following the decisions of *Chamberlin v. The King*,¹ *Paul v. The King (supra)*, *The Hamburg American Packet Co. v. The King (supra)*, *Macdonald v. The King (supra)*, and especially *Olmstead v. The King (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.

Therefore, both under the facts, as controlled by the deed of August, 1910, and under the law the suppliant fails.

The motion for non-suit made at trial, by counsel on behalf of the respondent, at the conclusion of the suppliant's evidence, is granted and the suppliant is declared not entitled to any portion of the relief sought by his petition of right.

Action dismissed.

Solicitors for suppliant: *Ruddy & Burnham.*

Solicitor for respondent: *G. W. Hatton.*

¹ 42 Can. S.C.R. 350.