

1920
Oct. 23.

IN THE MATTER OF THE PETITION OF
 RIGHT OF WILLIAM J. YATES,
 OF THE TOWN OF NEW LISKEARD, SUPPLIANT;
 IN THE DISTRICT OF TEMISKAMING,
 IN THE PROVINCE OF ONTARIO, MER-
 CHANT.....

AND

HIS MAJESTY THE KING.....RESPONDENT.

Exchequer Court—Jurisdiction—Injurious affection—Tort—Expropriation of Easement.

Y. by his petition alleged that respondent constructed a dam at the south end of Lake Temiskaming which was operated by the Department of Public Works for the Dominion of Canada and which raised the level of the water in the lake, flooding part of Y's. land, and injuriously affecting his property. No part of his property, which is some 80 miles from the dam, was taken, nor was any easement to flood expropriated. It is not alleged the flooding was the result of the negligence of any officer or servant of the Crown.

Held, That sub-sections (A) and (B) of section 20 of the Exchequer Court Act must be read together, as they deal with questions of compensation, and not damages, i.e., the indemnity recoverable by owners for lands compulsorily taken, or injuriously affected by expropriation.

The Crown, in this case, not having expropriated any part of suppliant's property or any easement to flood the same, the case did not come within the ambit of said section and the court had no jurisdiction to entertain the claim under the Expropriation Act or any other provision of law.

2. *That* the action being for the recovery of damages to land, sounded in tort, and apart from special statutory authority no such action will lie against the Crown.

THIS case came before this court under the provisions of rule 126 for argument on points of law raised in the pleadings.

1920

WILLIAM J.
YATES
v.
THE KING.Reasons for
Judgment.

The argument was heard before the Honourable Mr. Justice Audette at Ottawa on the 19th day of October, 1920.

C. J. R. Bethune, for suppliant.

W. D. Hogg K.C., for respondent.

The points of law involved and the facts necessary for the understanding of the matter are stated in the reasons for judgment.

AUDETTE J. now (October, 23, 1920) delivered judgment.

This matter comes now before this Court, under the provisions of Rule 126, for the disposal of the points of law raised by the fifth paragraph of the Statement in Defence, which reads as follows: "The petition of right does not disclose any cause of action within the jurisdiction of this Honourable Court which entitles the suppliant to the relief sought herein."

The suppliant, by his Petition of Right, claims to be the owner of certain parcels or tracts of land in the town of New Liskeard, which, it is alleged, as the result of the construction, by the respondent, of a dam at the southern end of Lake Temiskaming, have been overflowed and flooded.

The dam in question has been constructed in or about the month of August, 1912, and is operated by the Department of Public Works for the Dominion of Canada, and it is alleged that the effect of such construction has been to raise the level of the waters of Lake Temiskaming, thereby creating the damages complained of herein.

The action is for the recovery of damages to land and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority, no such action will lie against the Crown.

1920
WILLIAM J.
YATES
v.
THE KING
Reasons for
Judgment.

As between subject and subject there can be no doubt that a right of action would exist in a case like the present one, but the law is different as between the subject and the Crown.

The respondent, in the present case, has not expropriated (The Expropriation Act, R.S.C. 1906, ch. 143, sec. 2, sub-section f.-sec. 3) the easement to flood the suppliant's land and it therefore follows that the Court has no jurisdiction to entertain the claim under the Expropriation Act.

The case does not come within the ambit of sec. 19 of the Exchequer Court Act, which as defined in the Supreme Court of Canada in the case of *Gauthier v. The King*, (1) merely recognizes pre-existing liabilities, *in posse*, of the Crown and confers jurisdiction upon the Court only to regulate the remedy and the relief to be administered.

Can it be said that the case comes within the provisions of sec. 20 of the Exchequer Court Act?

The suppliant seeks to rest his case upon sub-sec. (b) of this section 20; but that contention has already been answered by the decision of the Supreme Court of Canada in *Piggott v. The King*, (2) when His Lordship the Chief Justice, says: "Paragraphs (a) and (b) of sec. 20 are dealing with questions of compensation, not of damages."

(1) 56 Can. S.C.R. 176, at pp. 182, 190.

(2) 53 Can. S.C.R. 626.

1920
 WILLIAM J.
 YATES
 v.
 THE KING
 ———
 Reasons for
 Judgment.

“Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken in, or injuriously affected by, the exercise of statutory powers.”

And His Lordship, Mr. Justice Anglin, in the same case, at pp. 632 and 633, says: “As to clause (b) of section 20 of the Exchequer Court Act, invoked in this court by the suppliant, damage to property sustained in the course of construction of a public work, through negligence or otherwise, is not ‘damage to property injuriously affected by the construction’ of such public work.”

Therefore the present claim does not come either under sub-secs. (a) or (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 under the provisions of sub-sec. (c) of sec. 20, the injury to the property must be the result of some negligence of an officer or servant of the Crown while acting within the scope of his duties and employment.

No such negligence is even alleged upon the pleading.

The law and jurisprudence upon the subject matter under consideration is now well settled and as said by His Lordship Sir Louis Davies, at p. 553, re *Chamberlin v. The King* (1): “With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given, the Exchequer Court Act can easily be amended.”

(1) 42 S.C.R. 350.

In the result, following the numerous decisions upon this point of law given by the Supreme Court of Canada and my own view expressed in the case of *Poisson v. The King* (1); and *Hopwood v. The King* (2), it must be found the suppliant is not entitled to any portion of the relief sought by the Petition of Right herein.

1920
WILLIAM J.
YATES
v.
THE KING
Reasons for
Judgment.

Solicitor for suppliant: *C. J. R. Bethune.*

Solicitors for respondent: *Hogg & Hogg.*

(1) 17 Ex. C. R. 371.

(2) 16 Ex. C.R. 419.
