

IN THE MATTER of the Petition of Right of

THE BOARD OF WATER, LIGHT }
AND POWER COMMISSIONERS }
OF THE VILLAGE OF FENELON }
FALLS.....

SUPPLIANTS ;

1908
June 14.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Landlord and tenant—Lease by Crown—Surplus water passing through canal—Covenant—Navigation—Right of Crown to use dam—Maintenance of same.

A lease by the Crown of certain lands together with surplus water passing through a canal at a certain place in excess of the quantity required at any time for the purposes of navigation, provided that navigation should not be at any time obstructed or impaired by the employment of such surplus water by the lessees, contained the following clause:—

“ If the existing dam can reasonably be made use of, and a new dam
“ between it and Cameron’s Lake, can be dispensed with, the lessor
“ may rebuild, maintain and control the old dam or may build a new
“ one in substitution therefor, and may raise and alter the same to a
“ higher level or otherwise, paying damages consequent thereon
“ above as well as below it, but if it is found necessary to build a
“ dam higher up in the river, and if it becomes necessary to expro-
“ priate land in the bed of the river for that purpose the Smith
“ estate [the original lessees] are not to be entitled to any additional
“ compensation for the land expropriated nor for the old dam; and
“ if the old dam or a substitute therefor be used by the Government
“ as above, the same shall be maintained in perpetuity by the Gov-
“ ernment, and in so far only may be required for the purposes of the
“ navigation of said river and canal.”

Held, that so long as the Crown considered that the dam could be used for the purpose of improving the navigation and desired to use it it had the right to do so; and so long as the dam was used and in the occupation of the Crown, it was bound to maintain the same, but only to the extent to which, in the opinion of the Crown, it was necessary for the purposes of the navigation in question.

2. That the Crown was under no contractual obligation to the lessors to keep the dam in repair.

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Argument
 of Counsel.

PETITION OF RIGHT to obtain a declaration, *inter alia*, that the Dominion Government was obliged to maintain, repair and renew a certain dam on the Trent Valley Canal, in virtue of a covenant in a lease between the Crown and the suppliants' predecessor in title.

The covenant is set out in the reasons for judgment, and the principal facts are there stated.

May 7th, 1908.

The case came on for hearing at Toronto.

F. A. McDiarmid, for the suppliants: Grants for valuable consideration are construed most strictly against the Crown. *Bulmer v. The Queen* (1). The employment of the word "sub-lessees" shews an intention to make the covenant enure to the benefit of parties later in interest. *Shaber v. St. Paul Water Co.* (2). *Spencer v. Parry* (3). The Crown by its grant is under an obligation to maintain the whole dam in perpetuity. *Stodhart v. Hilliard*, (4) *People v. Gaige* (5) *Burnham v. Kempton* (6) *Colwell v. May's Landing Water Power Co.* (7) *Natoma W. & M. Co. v. Hancock* (8) *Hutchison v. Chicago* (9).

R. J. McLaughlin, for the respondent: There is no privity of contract or estate between the suppliants and the Crown; the suppliants are strangers to the land. The covenant does not run with the land unless there is mutuality or succession of interest. Privity of estate is essential to carry the benefit of the covenant to subsequent owners of the land in question. This is the law of the older States in the American Union and it is the law of England. See *Spencer's Case* (10) *Mygatt v. Coe* (11) *Norcross v. James* (12) *Webb v. Russell* (13).

(1) 3 Ex. C.R. at p. 214.

(2) 30 Minn. 179.

(3) 3 A. & E. 331.

(4) 19 Ont. R. 542.

(5) 23 Mich. 93.

(6) 44 N. H. 78.

(7) 19 N. J. Eq. 245.

(8) 101 Cal. 54.

(9) 37 Wis. at p. 603.

(10) Ruling Cases, Vol. 15 at p. 233.

(11) 142 N.Y. 78.

(12) 140 Mass. 188.

(13) Ruling Cases, Vol. 15 at pp. 244, 245 and 246.

CASSELS, J., now (June 14th 1908), delivered judgment.

This petition came on for trial at Toronto on the 7th May, 1908. I have been unable to consider it until my return from the Maritime Provinces.

I have gone carefully over the evidence and documents, and remain of the same view as I entertained at the trial.

I think it unnecessary to consider the questions of law argued at the trial by counsel for the Crown as to whether assuming the covenant to mean what the suppliants contend for there is any privity entitling the suppliants to enforce it.

The case made on behalf of the suppliants is that by contract the Crown is liable to keep in repair the dam the subject matter of the controversy.

I am indebted to counsel for the suppliants and the Crown for a careful presentation of both law and facts.

The right of the suppliants and of the Crown (assuming the suppliants have the right to enforce the covenant) depend on the meaning of the covenant contained in clause 9 of what is called the lease dated 12th April, 1890. It reads as follows:—

“9. If the existing Dam can reasonably be made use of, and a new Dam between it and Cameron’s Lake can be dispensed with, the Lessor may rebuild, maintain and control the old Dam or may build a new one in substitution therefor, and may raise and alter the same to a higher level or otherwise, paying damages consequent thereon above as well as below it; but if it is found necessary to built a Dam higher up in the river, and if it becomes necessary to expropriate land in the bed of the river for that purpose the Smith Estate are not to be entitled to any additional compensation for the land expropriated nor for the old Dam; and if the old Dam or a substitute therefor be used by the Government as above, the same shall be maintained in perpetuity by

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Reasons for
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the Government, in so far only as may be required for the purposes of the navigation of said River and Canal ”.

I agree with the contention of Mr. McDiarmid that the dam referred to includes that portion of the dam marked Wing Dam.

The suppliants were notified pursuant to the provisions of clause 8 of the lease to prevent waste of water. This clause reads as follows:—

“ 8. The whole water power at and above the Falls and so far as the Smith property extends below the said Falls (subject to the rights of the Government as above set out) is to remain under the control of the Lessees, it being understood that the Lessees shall maintain all their works, on both sides of the river, in sufficient repair at all times, so that no waste of water or damage to the canal, or to the navigation thereof or to the river, shall arise from leakage or otherwise—and that the canal officers shall at all times have access to the works and mills of the said Lessees to ascertain the state of repair and condition thereof.”

They therefore expended the sum of about \$4,000 in rebuilding a portion of the dam.

The work was essential if they desired to operate their work. To get the proper head a dam is a *sine qua non*.

From the standpoint of the Crown the only object of the dam was to back up the water of the river and so improve the navigation.

So long as the Crown considered the dam could be used for the purpose of improving the navigation and desired to use it, the Crown had the right to use it. So long as they used it and were in occupation the Crown was bound to maintain it, but only to the extent to which in the opinion of the Crown it was necessary for the purposes of the navigation of the river and canal.

I cannot find any contractual liability as claimed by the suppliants.

Counsel for the suppliants asked that having regard to the peculiar circumstances of the case and that it was proper to have a construction of the lease, no costs should be given against the suppliants in the event of the decision being adverse.

I think except under peculiar circumstances costs should follow the event. In this case, however, counsel for the Crown assented to my suggestion that if the suppliants would agree that this decision should be final and no appeal taken, then no costs should be given.

I dismiss the petition without costs.

Judgment accordingly.

Solicitors for suppliants: *McDiarmid & Weeks.*

Solicitor for respondent: *R. J. McLaughlin.*

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