

BETWEEN:

HOWARD HERBERT VICTOR OLMSTED,

1915
Nov. 12.

SUPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT:

AND

HOWARD HERBERT VICTOR OLMSTED AND

WILLIAM ATCHISON OLMSTED,

SUPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

*Rideau Canal—Damage to lands from flooding—8 Geo. IV, c. 1, sec. 26—
Limitation of actions.*

Suppliants filed their petitions of right for damages arising out of the flooding of their lands, alleged to have been caused by the negligence of certain officers of the Rideau Canal in keeping the waters of the Rideau Canal at an improper level at divers times.

Held, that the claims for damages (if any) arose more than six months before the petitions were filed and that the same were barred by the limitation prescribed in sec. 26 of 8 Geo. IV, c. 1.

THESE were two petitions of right seeking damages for the flooding of lands alleged to be due to the negligence of the Crown's officers in charge of the Rideau canal.

The facts are stated in the reasons for judgment.

Ottawa, 15th and 16th September, 1915.

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The case now came on for hearing before the Honourable Mr. Justice Cassels.

R. V. Sinclair, K.C., for the suppliants;

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

CASSELS, J., now (November 12th, 1915) delivered judgment.

These two cases were tried together before me at Ottawa.

In the first case the petitioner claims as owner of the rear half of lot 5 in the fourth concession in the township of Kitley.

In the second case the petitioners claim as owners of lot No. 4, Kitley.

Lots 4 and 5 in Kitley adjoin each other and border on Irish creek.

Irish creek empties into the Rideau river about 7 to 8 miles below the lands in question.

Merrickville is situate on the Rideau river below the confluence of Irish creek with the Rideau river. As part of the construction of the Rideau canal, there was constructed at Merrickville, a dam for the purposes of controlling the waters for navigation purposes.

This control was effected by means of stop logs and flash or bracket boards, by means of which the waters of the Rideau canal were raised or lowered as the requirements of navigation necessitated.

The effect of the putting in of the stop logs and placing the flash boards on the dam was to pen back the waters of the Rideau river and also the waters of Irish creek.

Irish creek as it flows past the lands in question is a sluggish stream. The lands in question bordering on Irish creek are low lying lands and a comparatively

small rise in the waters of the dam at Merrickville above the 6 feet at the sill of the lock has the effect of flooding portion of the lands of lots 5 and 4 owned by the petitioners.

These petitions are filed claiming damages occasioned to the lands of the petitioners by reason of the alleged flooding.

There are allegations of fact in the petitions, and also in the statements of the defence, which are not in accordance with the facts as proved.

Owing to the lapse of time and the death of persons who could have testified with greater accuracy, counsel for the petitioners and for the Crown have experienced considerable difficulty.

The Rideau canal and the dam in question were constructed about the year 1830.

In the first case relating to lot 5 in the 4th concession of Kitley, the petitioner alleges in paragraphs 7, 8 and 9, as follows:—

“7. At the time of the construction of the said canal a depth of about 5 feet 3 inches of water on the lock sill at the Merrickville locks was established and was practically maintained from the year 1830 to about the year 1890.

“8. During the period last aforesaid, your suppliants’ lands aforesaid were not affected or flooded by the waters of the Rideau canal or those of Irish creek aforesaid.

“9. In or about the year 1890, the depth of the water on the lock sill of the said lock was raised to 6 feet which minimum depth has since been maintained, while during a very considerable period of each summer since 1890, the depth of the water on the sill has not been less than 6 feet 6 inches.”

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The defence of His Majesty's Attorney-General on behalf of His Majesty admits the allegations in paragraph 8 of the petition, but does not admit the allegations of fact in the 9th paragraph of the petition.

This allegation in the 9th paragraph of the petition is of importance, as it is clear on the evidence that when the waters are maintained on the lock sill at Merrickville at not less than 6 feet 6 inches, a considerable acreage of both lots is flooded.

In the petition of the two petitioners relating to lot 4 in the 4th concession aforesaid, there is a paragraph less than in the former petition, owing to a different allegation as to title and paragraphs 7, 8 and 9 in the first petition are the same as paragraphs 6, 7 and 8 in the second petition.

The pleader evidently copying the defence to the first petition admits the facts alleged in paragraph 8 of the petition, which I have inserted in full as being the same as the allegations in paragraph 9 of the first petition.

The Crown by its defence pleads title by lost grant also prescription, and also claims a right to flood by reason of a purchase from one Gideon Olmstead of his rights to pen back the waters as the owner of an old mill and mill dam.

The respondent also pleads the provisions of the statutes relating to prescription, and claims a right to flood the lands in question by virtue of title acquired under these statutes.

Howard Herbert Olmstead is the witness who testifies with knowledge more accurate than any of the other witnesses in the case. In both of the petitions, the suppliants limit themselves to a claim since the year 1890.

In paragraph 6 of the petition relating to lot 5 (being paragraph 5 of petition relating to lot 4) it is alleged as follows:—

“6. At the time of and as part of the construction of the Rideau canal a dam was built at or near the village of Merrickville, in the county of Grenville, which controls the level of the water in the reach between the said village of Merrickville and the village of Kilmarnock, in the county of Lanark, and also the level of the water in Irish creek aforesaid.

Paragraph 7 of the petition relating to lot 5 (being paragraph 6 of the petition relating to lot 4) is as follows:—

“7. At the time of the construction of the said canal a depth of about 5 feet 3 inches of water on the lock sill at the said dam was established and was practically maintained from the year 1830 to about the year 1890.”

Paragraph 8 relating to lot 5 (being 7 of the petition relating to lot 4):—

“8. During the period last aforesaid your suppliant’s lands aforesaid were not affected or flooded by the waters of the Rideau canal or those of Irish creek aforesaid.”

Then follow the allegations quoted above, paragraph 8 in one petition and 9 in the other.

Phillips, the only witness for the Crown, states that, for the last 20 years (he thinks) it has been kept at the same level as it is to-day. That is to say the minimum depth to which the water is kept on the sill has been changed from 5 feet 3 inches to 6 feet. That has been accomplished by means of stop logs in the regulating weirs of the dam.”

He is giving his evidence I think, based upon the statements in the petitions but apparently concludes

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that the records of the returns of the Lockmasters would show the fact.

In the report of Mr. Wise of the 19th of March, 1889, (Ex.D), he states that the general height the water is maintained at to give navigation is 5 feet 9 inches on the sill and this allegation is more in accordance with the heights given in the returns.

There is no contention on the part of the petitioners that any flooding of the lands at the time of freshets is made a claim. Howard Olmstead in his evidence states as follows:—

“Q. At what time in the spring of the year do the freshets occur?—A. Well, that is pretty hard to say, but I would say perhaps the last of March and the first two weeks of April, possibly three weeks, the freshet lasts. There is no special time, it varies from year to year.

“Q. But you would say roughly speaking, in the last week of March or the first three weeks of April?—

“A. Yes.

Further on he states:—

“Q. Do I understand you to say that you are not damaged at all by the freshets?—A. No, Sir. The freshets are a great benefit to our land.

“Q. The flooding is not caused by freshets?—A. No, Sir, we do not blame the Government for that whatever.

“Q. Have you any idea what the depth of water on the sill at Merrickville is when the freshets are on?—

“A. I would suppose an ordinary freshet would be 7 feet.

“Q. Did you say it would go as high as 9 feet?—A.

“Yes, but that would be exceptional, it depends on the heights there somewhat and the way the water gets away.”

Then he states "that if the dam at Merrickville was left as it is during a freshet the water would be off of our land altogether, we would have no flooding."

"Q. It would never be on your land at all?—A. In the freshet it would, but that is a thing that Providence does. We cannot help that.

"Q. But in the time of a freshet there is water on your land?—A. Is that on most of the land?

"Q. There is water on this 40 acres on lot 4 during a freshet?—A. Yes, up to 7 and 8 feet high. The freshet might rise as high as 8 feet at Merrickville.

"Q. I am talking of 8 feet on the sill at Merrickville. When there is a freshet in the spring of these months or at some time during them, your land is flooded?—A. Yes.

"Q. And it remains flooded you say as long as the freshets last.—A. Well, it goes down naturally, it falls perhaps three or four inches a day.

Phillips refers to the freshets as follows:—

"How do the freshets affect the water on the lock sill?—A. It rises it tremendously.

"Q. At what months?—A. The freshet occurs generally speaking about the first week in April. It may occur earlier or later but it is usually about the beginning of April and it lasts about two weeks, and during that period the water rises very much over the navigation height on the sill of the lock on account of the freshet and during that time all our stop logs are out in both of the weirs at Merrickville in order to allow the freshet to go away, and they are not replaced until about the last two or three days in the month so as to have navigation height on the sill for the first of May to commence the season, that is 6 feet."

A further point of considerable importance is that it is considered by Herbert Olmstead that if the water at

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the sill at Merrickville is maintained at 6 feet (after the freshets) there is no damage.

He states:—

“Q. Then they wait until the water has run away before they put on the flash boards?—A. It is impossible to put on the flash boards with a very high freshet of water.

“Q. You find if there is a depth of 6 feet of water at Merrickville that your land is not flooded?—A. It does not overflow at 6 feet.

“Q. When you say overflow, you mean the water is backed up in Irish creek?—A. The water will not overflow the bank at 6 feet level.”

The dam was recovered in 1887—not in 1890—as alleged, and it is clear that while the dam was partially renewed, the flash boards were shorter so as to compensate for any extra height of the dam.

In any event, it is of no consequence how high the dam was, as by means of the stop logs, the waters could be controlled.

A further point to be considered is that the lands in question are low lying. The old map produced would indicate that there was a considerable quantity of swamp lands. The petitioner, Howard Olmstead, admits that between the years 1880 and 1890, a considerable quantity of the land was allowed to grow up with bush and under-brush.

In the record of the evidence the following appears:—
 “[His Lordship to Mr. Sinclair]:—If you limit your claim to six years before action, then you are proving the Crown’s case by going back.”

Mr. Sinclair: “I do not think necessarily, because I will only prove it is flooded particular years, and I will show it was intermittent.”

Mr. Olmstead is then asked:—

“Q. Then after 1883, were there years when you were not flooded?—A. Yes, sir, in 1884, and up to and including 1888, we were not flooded to any extent, possibly a few days.

“Q. Up to 1888?—A. Yes.”

Then he says further on:—“Our protests of 1889 seem to have had an effect, for some years—I think in 1890, 1891, 1895, 1911 and 1914—there could scarcely be said to be any flooding.”

“Q. But so far as the land which you have had under cultivation in the early years of 1876 and on, were you able in these other years to do anything with it?—A. No.

“Q. Why?—A. Well, it had grown up in bushes in those three years and it would be an exceedingly hard job to bring it under cultivation in the first place and we did not think there was any guarantee for us to go through the same work if we did not know the water was going to be raised. If it would be in the same condition as it was in 1880, we could have worked it in 1885, 1886, 1887 and 1888.

“Q. And subsequent years?—A. Yes.

“Q. What I want to ask you is this, was there any year, we will say after the first of June that you were in possession of the whole property so that you could go over it?—A. I think there were three or four years with the exception of 1903, 1904, 1905 and 1906, the water was never held continuously as high as 6 feet and a great deal of the time very much lower.

“Q. When the water at Merrickville is not higher than 6 feet, how far can you go on your land, dry towards the creek?—A. We can go to the creek.”

Now if in point of fact no claim arises between 1830, and 1890 as alleged, the flooding must have arisen from causes additional to the retention of the water at too

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high a level at the sill at Merrickville, and no doubt the fact that the petitioners allowed a considerable portion of the land to grow up in bush and under-brush, would have the effect of retarding the draining of the land after the spring freshets, and in addition as pointed out by Mr. Wise, Irish creek would probably be choked to a certain extent, and should be cleaned out.

To my mind an important point is that between 1890 and the time of the filing of the petition, the instructions to the lockmasters were that the waters of the dam should be kept not higher than 6 feet at the sill of the lock.

See the evidence of Phillips. The allegations in the petition also supports this statement, and I would refer to the evidence of Olmstead previously quoted.

Olmstead states: "That during the year 1914 the farm was cropped." He states: "Q. During 1914 did you crop the farm?—A. Yes.

"Q. How much of it?—A. Three-fifths of lot 5 and all of the two-fifths of lot 5 and all of lot 4 that is still cleared, and of course we had pasture.

"Q. You had pasture?—A. Yes, we are getting the use of it all.

"Q. That was in 1914?—A. Yes."

Norman Kinch, a witness for the petitioners was called to substantiate the statement that there was no flooding during the year 1914 that would interfere with the enjoyment of the lands.

As to the year 1914, in respect to which no claim is made, it might be well to refer to the returns of the lockmaster in order to ascertain the heights at which the water was raised at the sill.

On the 21st of April, the height was 5 feet 1 in.				
“ 22nd of April,	“	6	“	3 “
“ 23rd of April,	“	6	“	8 “
“ 24th of April,	“	6	“	8 “
“ 25th of April,	“	6	“	8 “
“ 27th of April	“	6	“	8 “
“ 28th of April,	“	6	“	9 “
“ 29th of April,	“	6	“	9 “
“ 30th of April,	“	6	“	9 “

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On May 1st the height was 6 feet 9 inches.				
“ May 2nd	“	6	“	7 “
“ May 3rd	“	6	“	6 “
“ May 4th	“	6	“	4 “
“ May 5th	“	6	“	2 “

Down to this period no doubt, the heights given were owing to the freshets.

From the 8th of May inclusive down to the 31st of May, the height was maintained at 6 feet and during the month of June at a lower height, and during July and the greater part part of August, it was never maintained at a height greater than 6 feet. I mention these returns as Olmstead’s statement is that no damage is occasioned when the height of the water, excepting during freshets, is maintained at a height of not greater than 6 feet at the sill, and no claim is made for 1914.

I think it is quite apparent that the respondent never intended that the water at the dam (excepting during freshets) should be maintained at a greater height than 6 feet at the sill. There is no complaint so long as the water is kept at this height.

Any retention of the waters at various times at a greater height, would be contrary to the orders of those in authority.

If it were necessary to pass on the right of the Crown to retain the water at the height of 6 feet, I would

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think the Crown had acquired such right by prescription.

The petitions were filed on the 28th of May, 1914, and it is clear from the data which I have given, the water was maintained up to the time of the filing of the petition at this height or over.

I do not see how the Crown can prescribe for a greater height than 6 feet, in view of the provision of the statutes relating to prescription and the evidence.

In the view I have formed of the case, it is not necessary to pursue this question or to comment on the various authorities bearing on the construction of the statutes relating to prescription cited by counsel.

As I pointed out no claim is made for damages by reason of any flooding during the year 1914. This is shown by the evidence of Olmstead and Klinch.

I am referred by counsel to three statutes relating to the Rideau canal. The first (8 George IV, Chap 1, U.C.), is "an Act to confer upon His Majesty certain powers and authorities necessary to the making, maintaining and using the canal intended to be completed under His Majesty's direction, for keeping the waters of lake Ontario out of the river Ottawa and for other purposes therein mentioned. This statute, section 4, provides 'and by it is further enacted by the authority aforesaid that if before the completion of the canal *through the lands of any person or persons*, no voluntary agreement shall be made, etc.'" and then there follows a provision for arbitration to ascertain the amount of the compensation.

There is no reference under this section except where the canal is constructed through the lands. There appears to be no provision for damages for flooding.

Section 9 provides "and be it further enacted by the authority aforesaid, that in estimating the claim for compensation for property taken or for damage done unto the authority of this Act, etc."

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The second statute (Chap. 16, 6 Wm. IV, U.C.) supplements the earlier statute and provides a method of compensation to be given to the owner of any mill site, by reason of the damming back of the water. This does not, however, cover the case of injury by flooding other than of a mill site. The only other provision of this statute that has any bearing would be section 3, which refers to the right of purchaser claiming for damages to the land prior to his purchase. This section has no bearing, except the effect it may have coupled with the previous statute, that perhaps the proper forum for ascertaining compensation for permanent expropriation of the lands, may be by arbitration and not by suit in this Court.

It is not necessary for me to deal with this question, as I do not think it arises in the present case, but the cases of *Williams v. Corporation of Raleigh*, (1) *Water Commissioner of the City of London v. Saunby*, (2); and *Yule v. The Queen*, (3), may be referred to.

The only other statute cited to me is Chap 19, 2nd Victoria, which I think has no bearing on the case.

The section of the statute (8 George IV, chap. 1) which I think governs this case is section 26, which is as follows:—

"And be it further enacted by the authority aforesaid that if any plaint shall be brought or commenced against any person or persons for anything done or to be done in pursuance of this act or in execution of the powers and authorities or the orders and directions hereinbefore given or granted, every such suit

(1) 21 S.C.R. p. 104; A.C. (1893) p. 540.

(2) A.C. 1906, pp. 8, 15.

(3) 30 S.C.R. p. 34.

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“shall be brought or commenced within six calendar months next after the fact committed, or in case there shall be a continuation of damages, then within six calendar months next after the doing or committing of such damages shall cease and not afterwards.”

I am of the opinion that all the acts of damage (if any such exist) fall within the provisions of this section, and that if an action lies, all right of action on the part of either petitioner has been barred. As Mr. Sinclair has pointed out the acts complained of were not continuous but acts of trespass committed at various times and committed contrary to the instructions of those having authority over the canal, I think the petition should be dismissed and with costs.

Judgment accordingly.

Solicitor for suppliants: *R. V. Sinclair.*

Solicitors for respondent: *Hogg & Hogg.*
