

1894
 April 4.

LEWIS P. FAIRBANKS.....SUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injurious affection of property—Undertaking to abate cause of injury before action brought—Omission in pleadings—Costs.

Where an offer to do certain work, which would abate an injury to suppliant's property caused by a public work, was made in writing by the Crown and its receipt acknowledged by the suppliant before action brought, but such offer was not repeated in the statement of defence (although filed subsequently pursuant to leave given), the Court, in decreeing the suppliant relief in the terms of the undertaking, refused costs to either party.

PETITION OF RIGHT for damages alleged to have been sustained by the suppliant by reason of the construction of a public work.

In the year 1878 the Dominion Government constructed a new railway bridge over the Shubenacadie River at Enfield, Hants County, in the Province of Nova Scotia.

The portion of the waters of the Shubenacadie River across which such bridge was built formed part of the Shubenacadie Canal. This was a work constructed by private enterprise for commercial purposes in Nova Scotia, and the suppliant claimed to have become, by purchase, proprietor thereof and of the rights and franchises appertaining thereto. The canal had never been operated efficiently from its inception, and many years before the bridge in question was constructed had ceased to be operated at all. The evidence offered by the suppliant failed to show that his property, in respect of its present use, had suffered any injury by reason of the bridge constructed by the Dominion Government ; but it was shown that the girders of this

bridge were lower than those of the old bridge, on the site of which it was erected, and might interfere with traffic through the canal, should it be put into operation in the future. Prior to action brought the Crown offered to raise the girders of the bridge in such an event, and communicated the offer to the suppliant in writing. He did not accept such offer, however, and filed his petition claiming a larger measure of relief than the offer of the Crown would have afforded him. The Crown did not repeat the undertaking in its statement of defence.

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 of Facts.

May 15th, 1893.

The case now came on to be tried at Halifax, the suppliant appearing *in person*, and *Borden* Q.C. and *W. F. Parker* for the respondent.

The court referred the matter to *William Compton*, Esquire, one of the Official Referees of the court, to ascertain and report the damages.

October 23rd and 24th, 1893.

The Official Referee having filed his report the case was now argued at Ottawa.

The suppliant *in person*;

W. F. Parker for the respondent.

BURBIDGE, J. now (April 2, 1894) delivered judgment.

The jurisdiction of the court in such a case as this is defined by clauses (a) and (b) of the 16th section of *The Exchequer Court Act* (1), by which it is provided that the court shall have exclusive original jurisdiction to hear and determine every claim against the Crown— (a) for property taken for any public purpose; and, (b) for damage to property injuriously affected by the construction of any public work. The Crown in this statute

(1) 50-51 Vict. c. 16.

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The suppliant claims to be the proprietor of the Shubenacadie Canal, in the Province of Nova Scotia, and of the rights and franchises appertaining to the canal, and it is in respect of his interest therein that he brings his petition. I do not wish to be understood to express any opinion, one way or the other, as to the merits of his claim to be the owner of the canal, or as to the extent and nature of the rights that attach to such ownership. That, I think, is not necessary to the determination of the case before me. Assuming that his title is what he claims it to be, there is no evidence that the Crown has, during the time of his ownership, taken or expropriated for any public or other purpose any part of the Shubenacadie Canal, or any right therein. I also agree with the Official Referee that the suppliant has failed to show that he has suffered any damage by the injurious affection of his property by the construction of any public work. The only substantial ground of complaint was the construction, in 1878, of a new railway bridge over the Shubenacadie River at Enfield, the girders of which were lower than those of the old bridge on the site of which the new bridge was erected. But at that time the canal was not being operated, and up to the present time, the canal property has not been injuriously affected by the construction of the new bridge, and no damages have been occasioned thereby. Any just complaint that the suppliant might otherwise have had, is met by the undertaking filed by the Crown to raise the girders of the bridge whenever traffic through the canal shall be obstructed or in any way impeded by the bridge.

As bearing upon the question of costs, I see by the correspondence produced that a similar offer was made by the Minister of Railways and Canals in a letter from

the acting Secretary of his department to the suppliant, of the 23rd of February, 1892, the receipt of which was acknowledged by the suppliant on the 4th of March following, of which day the petition in this case also bears date. This offer or undertaking was not, however, renewed in the statement in defence, but was filed subsequently, pursuant to leave reserved, at the hearing of the motion against the Official Referee's report.

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There will be a declaration that the suppliant is entitled, whenever the Shubenacadie Canal shall be *bonâ fide* opened for traffic, and so soon as the traffic through the canal shall be in fact obstructed or in any way impeded by the railway bridge at Enfield over the Shubenacadie River, to have the construction of the said bridge so altered as to raise the girders thereof to the same height above the said river as the girders of the original bridge there were before the construction of the first mentioned bridge in 1878.

There will be no award of damages, and no costs to either party.

Judgment accordingly.

Solicitors for respondent: *Borden, Ritchie, Parker & Chisholm.*
