

1915
 Sept. 7

IN THE MATTER OF THE PETITION OF RIGHT OF
 WILLIAM C. MOORE AND ROBERT KENNEDY,
 SUPPLIANTS;
 VS.
 HIS MAJESTY THE KING RESPONDENT.

Waters—Canal—Grant of surplus water—Priority—Navigation—Liability of Crown for negligence—Repairs.

Under an order in council and grant from the Crown, the suppliant's predecessors in title were given, subject to the requirements of the public service, the right to draw off, take and use so much of the *surplus water* of the Bobcaygeon Canal as may be sufficient to drive their grist mill, subject, however, to the Crown being relieved and discharged, under a provision of the grant, from any liability in damages resulting from any loss or damage to the grantees in respect of the erection, construction, maintenance and performance of any works by the Crown.

Held, the surplus water mentioned in the grant is what is not required for navigation, the interest of navigation having a prior claim to any right to surplus water. The paramount right to all waters flowing in the canal is in the Crown for the purposes of navigation.

2nd. The Crown is not under the circumstances of the case bound to keep the canal in repair. To so hold would amount to a charge of personal negligence that cannot be imputed to the King, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity for personal negligence is in no way altered by the Exchequer Court Act.

PETITION OF RIGHT to recover damages for the shutting off of water from the mill of the suppliants, and damages resulting from the raising of Buckhorn Dam.

The case was heard by the Honourable Mr. JUSTICE AUDETTE at Lindsay, Ontario, May 4-5, 1915.

A. J. R. Snow, K.C., and *C. B. Naismith*, for suppliants;
I. E. Weldon and *F. N. Stinson*, for respondent.

AUDETTE, J. (September 7, 1915) delivered judgment.

¶ The suppliants by their petition of right, seek from this Court an order declaring their rights under the orders-in-council, the letters patent and grant hereinafter mentioned; also an order restraining the Crown from shutting off the water from the flume of their grist mill or from cutting

off or limiting in any way their supply of water. And they further claim from the Crown damages alleged to have been sustained by them from the shutting off their water supply during the past summer, together with the amount of damages suffered by them in the past by reason of the raising of the level of Buckhorn Lake and Pigeon Lake.

In the result, apart from the declaration as to the nature of their title and injunction against the Crown, their claim is twofold. 1st, damages resulting from the shutting off the water from the flume of their mill; and 2nd, damages resulting from the raising of Buckhorn dam.

For the purpose of the trial of this action the solicitor for the Attorney General put in the following admissions, in writing:

"1. That the copies of the orders-in-council dated "June 19, 1872, and August 15, 1873, produced, are also "copies of the original order-in-council and that same "shall go in as evidence without further proof.

"2. That copy of the patent or lease dated September 1, "1874, from Her Majesty Queen Victoria to Mossom Boyd "produced by the suppliants is a true copy and that same "shall be admitted as evidence in the same manner as if "the original patent under the Great Seal had been tendered "by the suppliants.

"3. That the copy of instrument dated September 13, "1910, between Robert Kennedy and William C. Moore of "the first part and His Majesty the King of the second "part produced by the suppliants is a true copy of the "original release and shall be received as evidence in "the same manner as if the original release had been put "in.

"4. It is also admitted that the suppliants Robert "Kennedy and William C. Moore are the owners in fee "simple free of encumbrances of the grist mill property "referred to in the statement of claim.

"5. For the purposes of this action it is admitted that "the suppliants have acquired and are entitled to all the "rights and privileges which Mossom Boyd acquired from "the Crown and are entitled to the rights, privileges "and benefits thereof and to exercise the same to the same "extent as the said Mossom Boyd could have exercised the

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"same in so far as the same appertain to the premises of
 "the suppliants.

"6. For the purposes of this action it is also admitted
 "that Robert Kennedy and William C. Moore the suppliants
 "in this action are the assignees of the patent dated Sept-
 "ember 1, 1874, from the Crown to Mossom Boyd in so far
 "as said patent grants the said Mossom Boyd the use of
 "water to run his grist mill on the Bobcaygeon Canal."

Dealing first with the shutting off of the water from the
 flume of their mill, it will be seen that from deeds and
 transfers filed herein that their claim is based and founded
 upon the grant from the Crown of September 1, 1874,
 and the orders-in-council therein referred to. Under this
 grant, the suppliants or their predecessors in title, *subject
 to the requirements of the public service, are given the right to
 draw off, take and use so much of the surplus water of the
 Bobcaygeon Canal as may be sufficient to drive their grist mill.*

This grant is, however, made subject further to the
 following proviso recited in the grant, and which reads
 as follows, viz:

"Provided always and these presents are granted upon
 "this express condition, that we, our successors or assigns,
 "shall not nor shall our Dominion of Canada or any depart-
 "ment of the Government or public service thereof be,
 "or be deemed, held or taken as liable to the said Mossom
 "Boyd, his heirs, or assigns, or to any person or persons
 "claiming by through or under him or them for any loss,
 "costs, damages, injury, detriment or expenses to which
 "the said Mossom Boyd, his heirs, or assigns, or any person
 "or persons as aforesaid may be put, or which he or they
 "may pay, bear, sustain, incur or expend, by, or by any
 "means, or in consequence or arising out of the erection,
 "construction, maintenance or performance of any works
 "or operations at any time hereafter, by us, our successors
 "or assigns, or our Dominion of Canada, or any department
 "of the Government or public service thereof in or upon the
 "Bobcaygeon canal nor shall any claim or demand for
 "compensation, in any of the respects aforesaid be hereafter
 "made against us, our successors or assigns, or our Dominion
 "of Canada, or any department of the Government or
 "public service thereof."

Now, it has been established beyond controversy, that the Bobcaygeon Canal of late years is leaking very much, that such leakage is increasing all the time, resulting in a serious current rendering it very difficult to take boats and cribs through the canal. Some of the suppliants' witnesses even stated that, the waste resulting from such leakage might be as great and more than the surplus waters, adding that the waste for the last 3 or 4 years has been about equal to the surplus waters. For a number of years past a deal of money has been spent by the Government in repairing the canal; but on account of the nature of the ground or soil, upon which the canal works have been erected, it has been found impossible to make a "tight job" of it. The Crown's officers, heard as witnesses, also admit that the Canal is in a leaking condition and the superintendent engineer of the Trent Valley Canal, states that he would not recommend any repairs to the locks, as it would be a waste of money, the locks being in too bad a condition. The south wall has subsided 6 inches and it slopes inside, &c., &c. He has recommended the building of a new canal at a cost of \$220,000 and tenders for the same were received on August 17, 1914, but the war stopped the works.

It is unnecessary to go into further details to show the bad condition of the canal, which is conceded by the Crown. As the result of such condition it has been found necessary, by the proper officer in that behalf, to off and on shut off the flume taking the water to the suppliants' mill, all such waters being found necessary for the purpose of navigation, as the closing of this flume helps to quite an extent in decreasing the current.

What is this surplus water to which the suppliants are entitled subject to the conditions of their letters patent? The interests of navigation have a prior claim to any rights of the suppliants to surplus water. The paramount right to all the waters flowing in that canal is obviously in the Crown for the purposes of navigation, and the surplus water mentioned in the grant is what is not required for navigation.

Under the grant the Crown has an absolute right to so shut off this so-called surplus water when required for the

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purposes of navigation, and it has been clearly established, under the evidence, that this right has been exercised under not only justifiable, but necessary circumstances. Moreover, under the provisions of the grant as above recited, the Crown has the power to exercise such right, under the circumstances, with perfect and unqualified immunity, and such immunity results from the grant which is nothing but a contract as between the grantee and his assigns on the one hand and the Crown on the other.

It is contended on behalf of the suppliants that the Crown is bound to keep the canal in repair, a question which has been passed upon at different times but which has been clearly defined by the Supreme Court of Canada in the case of *Hamburg Packet Co. v. The King*;¹ See also *Board of Water of Fenelon Falls v. The King*;² *McHugh v. The Queen*;³ *Harris v. The King*;⁴ *Municipality of Pictou v. Geldert*;⁵ and *City of Quebec v. The Queen*.⁶

The Crown is not bound to keep this canal in repairs, under the above decisions and under the present circumstances. It has done all it could do, and had even decided to rebuild when this nefarious war stopped it. To hold the Crown liable for want of repairs under the circumstances would practically be a charge of personal negligence that cannot be imputed to the King, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity from liability for personal negligence is in no way altered by the Exchequer Court Act: *City of Quebec v. The Queen* (Ubi supra).

Moreover, under the very wording of the provisions of the grant of 1874, as above recited, the Crown is absolutely relieved from any liability with respect to this surplus water thereby granted to the suppliants predecessors in title. Indeed, the grant specifies that all rights given thereunder (these presents) are so granted upon the *express condition* that the Government shall not be deemed liable for any loss, costs, damages, injury, detriment or expenses to which the grantee may be put, or which he may bear, sustain, incur or expend by, or by any means, or in conse-

¹ 33 Can. S.C.R. 252, 7 Can. Ex. 150.

² 12 Can. Ex. 217.

³ 6 Can. Ex. 374.

⁴ 9 Can. Ex. 206.

⁵ [1893] A.C. 524.

⁶ 2 Can. Ex. 252; 24 Can. S.C.R. 420.

quence or arising out of the erection, construction, *main-tenance* or performance of any works or operations at any time thereafter &c. It is obvious that the grant was made under the express condition that the Crown be relieved of any liability from any damages arising from the same.

The suppliants are not entitled to recover under the head respecting the shutting off of the surplus water whenever the requirements of navigation calls for it.

Coming now to the consideration of the second branch of the case, that is respecting the damages claimed from the raising of the Buckhorn Dam.

The Buckhorn Dam, which is part of the Trent Valley Canal System, having become old and worn out, in 1907 a contract was entered into to rebuild it and it was completed in 1908. This new dam is 1 foot and 3 inches higher than the flush board of the old dam. After this new construction, witness Hill says the water rose quicker and took a longer time to get away. Two new sluices of about 18 feet wide were put in by the Government last year, and it is contended that the sluices are large enough now to control the water.

There can be no doubt that if the suppliants have suffered damages from *these new works* in the reconstruction of the Buckhorn Dam, that they are entitled to recover. Damages have already been paid to the land owners in the neighbourhood, including the suppliants who recovered \$300 for damages suffered during the years 1906, 1907, 1908, 1909 and up to March 31, 1910, as appears by the instrument of release, dated September 13, 1910, and filed herein as Exhibit No. 9d.

The suppliants would therefore be entitled to damages resulting, from such reconstruction of the dam, by the backing up of the water in his mill, interfering with his head of water, and stopping the operation of the mill.

In arriving at a proper amount of compensation in that respect, once for all, for all time to come, as resulting from such new works, it must not be overlooked that it was stated by witness Moore that there has always been damages every year through the Buckhorn Dam for two to three weeks, and that in such case it becomes a question of degree. Furthermore, he further stated that sometimes

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the closing or shutting of his mill, was the result of the combined interference by flood and want of water coming from the flume.

Under all the circumstances of the case I think that the suppliants should recover the total sum of \$1,200, in respect of all damages, past, present and future, that is as an assessment once for all. But as they have already recovered in this respect the sum of \$300, they should now recover the balance thereof, namely the sum of \$900. The whole representing a capital at 5% with a return about equal to the yearly compensation already allowed.

The yearly rent of \$5 had not been claimed by the pleadings, and therefore I have no jurisdiction to adjudicate upon that question in the case as framed. It is a matter that is left to the officers of the Crown to be hereafter adjusted.

Therefore the suppliants are entitled to recover from the respondent the sum of \$900 in full settlement of all claims once for all, for damages past, present and future, resulting from the reconstruction of the Buckhorn Dam in 1907-1908, and it is further adjudged that they are not entitled to any of the other reliefs sought by their petition of right.

The suppliants are further entitled to their full costs of action upon the issue of damages resulting from the reconstruction of the Buckhorn Dam and there will be no costs to either party on the other issues.

Judgment for suppliant.

Solicitors for suppliant: *Snow and Naismith.*

Solicitor for respondent: *I. E. Weldon.*
