

IN THE MATTER OF THE PETITION OF RIGHT OF
PIERRE MOISAN.....**SUPPLIANT;**
 AND
HIS MAJESTY THE KING.....**RESPONDENT.**

1917
 April 26

Expropriation—Compensation—Railways—Flooding from ditches.

The Commissioners of the National Transcontinental Railway had expropriated a certain portion of a farm while in the possession of the suppliant's predecessor in title and paid him compensation therefor and for all damages resulting from the expropriation—the deed of sale stating that the compensation paid comprised "*tous les dommages de quelque nature que ce soit.*" After the suppliant acquired the farm flooding occurred, and the suppliant claimed that it was due to the construction of a new drain by the railway authorities. The evidence showed that the flooding was occasioned by the failure of the suppliant to open and complete his boundary ditches.

Held, that the injury even if it arose from anything done by the railway authorities was covered by the compensation paid to the suppliant's auteur, and that no claim for damages would lie unless another expropriation had been made or some new work performed, causing damages of a character not falling within the scope of those arising from the first expropriation. *Jackson v. The Queen*, 1 Can. Ex. 144, referred to.

PETITION OF RIGHT for damages for flooding suppliant's land alleged to be caused by the construction of the National Transcontinental Railway.

Tried before the Honourable Mr. JUSTICE AUDETTE, at Quebec, April, 4, 5, 1917.

Paul Drouin, for suppliant; *H. LaRue*, for respondent

AUDETTE, J. (April 26, 1917) delivered judgment.

The suppliant by his petition of right claims damages for the flooding of a portion of his farm, adjoining the National Transcontinental Railway, known as lot No. 17, of the Official Cadastre for the Parish of Pointe-aux-Trembles, in the County of Portneuf, Province of Quebec.

Three pieces or parcels of land are described in severalty, in the petition of right as parcels A, B and C; and perhaps it is well to say that under the evidence, only parcel A would have been affected by the flooding in question, in the spring of the year or by occasional freshets.

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There is a rock cut, varying from 14 feet down, on lot No. 17 where it is intersected by the said railway running practically east and west across lot No. 17, which is about one acre in width.

The farm is hilly where it is intersected by the railway, and its topography, as ascertained by the engineer, gives us a slope of 30 per cent., from north to south, and a slope of 6 per cent. to 7 per cent., from east to west. It would further appear from plan Exhibit "D", that upon a distance of 285 feet south of the top of the rail elevation, there is a slope of 45 feet.

The flooding complained of is at the south of the railway. There are good deep ditches on each side of the track, on the land taken for the right of way, and the southern ditch is at about 39 feet from the southern fence of said right of way. At the point A, on plan Exhibit "B", a trifle to the west of the centre of lot 17, the railway ditch ends and the water then spreads upon the ground. From A to H there is no ditch on suppliant's land, and it is alleged that in the spring the water spreads and has thus caused surface erosion for about 300 feet, that is for 100 feet by 3 feet, between H and B. And the damages claimed herein are alleged to result from such erosion, the washing away of soil, carrying away some manure and delaying the sowing and the crops at that place.

Now it is contended that at point A on plan Exhibit "B," which is point N on diagram, Exhibit No. 3, that the Crown has built or continued in a curved southerly direction its railway ditch for 6 to 7 feet, according to some witnesses, and for slightly longer according to others. The suppliant contends this 6 or 7 foot ditch has been built since he purchased, and some say during the fall of 1916. In respect of the construction of this ditch the suppliant's evidence is very vague, meagre and conflicting, and while the Resident Engineer of the Transcontinental Railway says he never ordered any work at this point N, his assistant, when heard as the suppliant's witness, states that when he went upon the premises in May and August, 1916, with the very purpose of making his report upon the present claim, he did not see the piece of ditch (ce bout de fossé) claimed to exist at N on Exhibit No. 3. One of the suppliant's witnesses

suggests that this small curve or *bout de fossé* might have been made by the running of the water itself.

While it is claimed by one witness that some of the waters running on the northern railway ditch, crosses opposite lot No. 17, under the farm crossing to the southern ditch, the resident engineer says physical conditions there lead him to believe that the waters from the northern ditch do not pass to the southern ditch, and that part of the bed of the track is rock and the balance gravel and sand through which the water does not run.

These railway ditches, both north and south respectively, take care of the water as well coming from the north as coming from the east, that is the northern parts of lots 18, 19 and part of 20, and while perhaps it might gather more water than formerly at the end of the blind south ditch, the intersection of the railway materially relieves the southern part of lot No. 17 of northern waters, which run in the northern railway ditch, and thereby acts as a set off as compared with the past. And lands on a lower level are subject, under art. 501 of the Civil Code towards those of a higher level to receive such waters.

Before leaving the questions of fact, it may be permissible to add that if there were a desire on the part of the suppliant and his neighbour on the east to avoid litigation with the Crown and its contingent profit, the desire could be easily achieved. Indeed, it is too obvious upon looking at the plan, and it is conceded by all the witnesses to whom I have put the question, that if the boundary ditches between lots 17 and 18, which at the present time extend only to a few feet of the railway fence were duly completed and opened, this boundary ditch would easily take care of all the waters coming from the railway ditches. A matter which should have been attended to ever so long before today and which also might be adjusted under the provisions of art. 198 and 694 of the Municipal Code.

There is no doubt and the matter is too apparent that if the boundary ditch between lots 17 and 18 were only continued to the southern railway ditch, that the waters would run freely without the flooding of any land. And as it has been held in the case of *Filiatrault vs. Corporation of Coteau*

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*Landing*¹ "When there is, in the power of the person complaining, an obvious and inexpensive method of reducing, diminishing, or wholly doing away with the damages complained of. . . . it is his duty to adopt it, and in default of his doing so, he is only entitled to recover such loss as he would have suffered if he had taken proper measures to prevent or diminish the damages,"

Coming now to the merits of the case on its legal aspect, we find that the Commissioners of the Transcontinental Railway, on December 26, 1907, purchased from one Olivier Darveau, who was then proprietor and owner of lot 17 in question, an area of (0.43) forty-three hundredths of an acre for the right of way, and the said commissioners paid him the sum of \$240 for the said piece of land and for all damages of any nature whatsoever (*y compris tous les dommages de quelque nature que ce soit*). The deed of sale contains this further clause, viz.:

"Et en considération de ce que dessus les vendeurs renoncent envers l'acquéreur à toutes réclamations qu'ils et leurs représentants légaux pourraient avoir sur le dit terrain et déchargent de plus les acquéreurs de toutes demandes et réclamations pour dépréciation ou provenant de l'expropriation et de la prise de possession du dit terrain par les acquéreurs, ou encore provenant de la construction, de l'entretien et de la mise en opération sur le dit terrain de la ligne du chemin de fer National Transcontinental,"

Darveau sold the lands to Guillaume Morissette, on July 24, 1913, and Morissette in turn on May 5th, 1914, as appears by Exhibit No. 1, sold the same to the suppliant. In this last deed it appears that the sale is made, "tel que le tout est actuellement avec les servitudes actives et passives sans exception ni réserve, circonstances et dépendances."

It has been contended on behalf of the suppliant that this alleged construction of a 7 or 8 foot drain at the end of the blind southern railway drain or even the removal there of one shovel full of soil constituted new work which would give rise to this action. With this contention I am unable to agree. The new works must consist in some-

¹ 23 Que. S.C. 62; 9 R.L. (N.S.) 309.

thing substantial and real, and the damages must be of a different character than those arising under the expropriation. And the damages complained of are such that may have been foreseen at the time of the expropriation. Moreover, the flooding of the land is not occasioned by any defect or want of repair in the railway ditches, but happens because the proprietors have not kept their boundary ditches open and in repair.

Furthermore, the evidence in respect of the nature and extent of the damages claimed is meagre, vague and intangible.

Inasmuch as compensation for all damages whatsoever, obviously resulting from the expropriation by the Transcontinental, has been paid Darveau, who sold to Morissette, the suppliant's predecessor in title (auteur) while in possession, no right of action for damages as claimed in this case accrued to the suppliant unless (as was not the case here) another expropriation had been made or some new work performed, causing damages of a character not falling within the scope of those arising from the first expropriation. *Jackson v. The Queen*.¹

Under the terms of the deed of purchase for the right-of-way by the Transcontinental, the suppliant, who is bound thereby, cannot recover the damages claimed herein. The whole trouble can be perfectly remedied by completing his boundary ditch, between Nos. 18 and 17 to the right-of-way. The flooding is the result of his negligence in not attending to these necessary works, and the Crown is not bound in law or otherwise to dig or maintain his boundary ditches. *Morin v. The Queen*;² and *Simonéau v. The Queen*.³

Moreover this action is in its very essence one in tort and such an action does not lie against the Crown, except under special statutory authority, and to succeed, the suppliant would have to bring his case within the ambit of subsec. (c), of sec. 20, of *The Exchequer Court Act*. The injury or damages complained of did not happen on a public work, but upon the suppliant's land, and following

¹ 1 Can. Ex. 144.

² 2 Can. Ex. 396; 20 Can. S.C.R. 515. ³ 2 Can. Ex. 391.

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the decisions in *Chamberlin v. The King*;¹ *Paul v. The King*;² *The Hamburg American Packet Co. v. The King*;³ *Piggott v. The King*;⁴ and more especially *Olmstead v. The King*,⁵ I must find that the suppliant is therefore not entitled to recover.

Under the circumstances, following these decisions, it must be found, the damages claimed not having been suffered on a public work, the suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitors for suppliant: *Drouin, Sevigny & Amyot.*

Solicitor for respondent: *W. La Rue.*

¹42 Can. S.C.R. 350.

²38 Can. S.C.R. 126.

³33 Can. S.C.R. 252.

⁴53 Can. S.C.R. 626; 32 D.L.R. 461.

⁵53 Can. S.C.R. 450; 30 D.L.R. 345.