

46, 1935



APPELLANT'S CASE.

# In the Privy Council.

No. 95 of 1933.

## ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC DISTRICT OF ROBERVAL.

BETWEEN

RAOUL TREMBLAY (Defendant) - - - Appellant

AND

DUKE-PRICE POWER COMPANY LIMITED  
(Plaintiffs) - - - Respondents.

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### CASE FOR THE APPELLANT.

1. This is an appeal by special leave from a judgment of the Superior Court of the Province of Quebec District of Roberval dated the 8th February, 1932, declaring the sum of \$7,602.71 to be good and sufficient compensation for the damages caused by the submerging of the Appellant's farm lands by the permanent raising by the Respondents' dams of the level of Lake St. John. Record.  
pp. 169-177.

2. By the Order of His Majesty in Council, dated the 24th July, 1933, granting special leave to appeal, the appeal was limited to the single point of principle raised by the question: "For what area should compensation be assessed?" The principal but not the only question arising on the appeal is as to whether the boundary line between the area of a navigable river or lake, which is vested in the Crown as part of the public domain, and the private property of riparian landowners should be taken as the line of ordinary high water within the bed of the river or lake, or as the trial Judge has here decided, at the point reached by the floods which occur at the time of the Spring break or thaw. p. 180, l. 31.

3. The Appellant's property which was situated in the township of Caron lay on a wide piece of land between the said Lake St. John and a stream called Belle Rivière, a non-navigable and non-floatable stream Plans 2, 19.  
p. 76, l. 40.

two or three feet wide when within its banks, which flowed into the Lake some distance below the Appellant's property. This property consisted of two parcels viz : (1) Lots 71 and 72 of Range A, comprising together according to the official survey about 198 acres, which lots had been granted by the Crown to the Appellant's predecessor in 1898 and 1889 respectively ; (2) a part of Lot A, Range B, about 30 acres in extent which adjoined the said Lots 71 and 72. There was no evidence as to any grant by the Crown of this second parcel.

The first of these parcels was about a mile from the shore of the lake, and almost as far from the bank of Belle Rivière. The second parcel was a narrow strip running from the lake to Belle Rivière and actually abutting upon each ; it also adjoined one end of the first parcel, the Appellant's property as a whole being thus roughly T-shaped.

**4.** Prior to the erection of the Respondents' dams the whole of the Appellant's land was above the level of the lake and Belle Rivière, but about 85 acres thereof were flooded for some days in the Spring owing to the rising of the waters when the winter snows melted. This flooding took place almost wholly by the overflowing of Belle Rivière, the water from the lake backing up that stream and passing over parts of the second parcel and the lands of third parties on to the first parcel. The only movement of the actual water line between the lake itself and the Appellant's land was at the point where the end of the second parcel met the lake ; and at that point only 0.27 of an acre of sandy soil of little value was affected. None of the flooding interfered to any appreciable extent with the cultivation of the land and the whole area had at all times been regularly used, occupied and enjoyed by the Appellant and his predecessors. The learned trial judge, however, decided that the boundary line below which the land belonged to the Crown as part of the public domain was the line reached by the Spring floods above mentioned ; and that inasmuch as the Appellant's title, although purporting clearly by description to grant to him the whole of the lands in question, was not derived from a Crown grant in which specific reference was made to this area, the 85 acres in question had never passed to the Appellant, but had remained in the Crown and could not be claimed by the Appellant against the Respondents as part of his property.

**5.** This result was held to follow from Article 400 of the Quebec Civil Code, which is as follows :—

“ 400. Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbours and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain.

“ The same rule applies to all lakes and to all non-navigable and non-floatable rivers and streams and their banks, bordering on lands alienated by the Crown after the 9th of February 1918.”

The learned judge expressed the view that the jurisprudence of the Province had established as the boundary line of rivers or lakes the limit reached by the waters during the Spring floods. It is submitted, however, that the overwhelming weight of authority is in favour of the view that the true boundary is the ordinary high water mark within the banks, excluding floods ; see especially *Chaurest v. Pilon*, R.J.Q. 17 B.R. 283.

10 It is, moreover, further submitted that, since no part of the boundary of the lake itself (save for the aforesaid 0.27 acre) is involved, the land in controversy could not be part of the public domain even if it were held to be part of Belle Rivière, which is not navigable or floatable, and cannot be treated as part of the lake.

20 **6.** Further, apart from the questions mentioned above, a point arises as to whether the doctrine of Quebec law, that a grant by the Crown which includes land vested in the Crown by virtue of Article 400 does not pass the latter portion unless specific reference is made in the grant to the fact that it is part of the public domain by virtue of this Article, has any application to the present case. As Belle Rivière is not a navigable or floatable stream, and the Appellant's first parcel was clearly granted by the Crown before the 9th February, 1918, and there is no evidence that the second parcel was granted after that date, it is submitted that Article 400 has no application to the flooded portion of the Appellant's land.

30 **7.** Under Letters Patent granted by the Crown in 1922 the Respondents were granted certain rights to develop water power in the Saguenay River, which flows out of Lake St. John. By the Quebec Statute of 1927 (17 George V. ch. 9) a Commission was appointed to determine inter alia the compensation to which the owners of lands flooded owing to the raising of the water level of Lake St. John were entitled.

**8.** Section 22 of the Act provides that when part only of the land is flooded the compensation is to include not only the price of such part but the damage caused to the remainder.

**9.** By Section 17 of the Act it is provided that land owners may reject the jurisdiction of the Commission and in that event Sections 35 and 36 enable either the land owner or the Respondents to bring an action in the Superior Court to have the compensation fixed.

**10.** Section 42 of the Act is as follows :—

“ 42. Subject to the provisions of this Act, the right of the company to maintain and operate the dams and other works at the *Grande Décharge* and the *Petite Décharge* of Lake St. John, as they now exist, and thereby to raise and maintain the water at a maximum level of 17.5 feet above zero on the low water scale at Roberval wharf, is confirmed.

“ This section shall not however have the effect of freeing the company from any liability for compensation or damages, nor from the obligation of fulfilling each and every one of the conditions 10 mentioned in its grants.”

p. 50, l. 13.

**11.** The dams authorised by Section 42 were completed in 1926 and the level of the lake was raised with the result that the Appellant's lands were submerged.

pp. 2-3.

He did not accept the jurisdiction of the Commission and on the 10th December, 1928, the Respondents brought an action against the Appellant in the Superior Court of the Province of Quebec, District of Roberval, and by their Declaration alleged inter alia that under their Crown Grant they had the possession and the legal ownership of the banks of Lake St. John and its navigable tributaries to the high water mark 20 and that the Appellant was not entitled to any indemnity in respect of lands below high water mark. The Respondents, however, in order to avoid a contest as to the limit of the banks and to cover the damage which might have been caused to the residue of the Appellant's property if the Court should decide that a strip of land existed between the line of high water mark and the 17.5 contour, deposited with the Declaration the sum of \$7,602.71. The Respondents asked that if the sum deposited were not accepted by the Appellant the Court should declare the amount deposited to be sufficient to cover the indemnity to which the Appellant was entitled. 30

p. 12.

**12.** The Appellant in his defence claimed an indemnity of \$168,257 and refused the Respondents' offer of \$7,602.71.

**13.** On the 24th, 25th, 27th, 28th and 29th October, 1930, the action came on for hearing before Mr. Justice Letellier.

pp. 169-177.

**14.** On the 8th February, 1932, another Judge, Mr. Justice Gelly, delivered judgment declaring the \$7,602.71 deposited by the Respondents sufficient to cover all compensation to which the Appellant was entitled.

p. 173, l. 26.

The learned Judge considered, as above stated, that, as the land below contour 15 was flooded each Spring, this contour should be taken to be the high water level and to constitute the boundary of the Appellant's 40

lands and that all land below this level was the property either of the Crown or of the Respondents by virtue of their concession and not the property of the Appellant, who was entitled to no compensation in respect of such land.

**15.** The learned Judge accepted the calculation made by Surveyor Jacques (the Respondents' Surveyor) and came to the conclusion that the amount paid into Court by the Respondents was sufficient to satisfy the Appellant's claim. In the course of his judgment he states inter alia as follows :—

10           “ Considérant que le niveau des hautes eaux ordinaires du Lac St-Jean doit être placé à quinze pieds au-dessus du zéro de l'échelle d'étiage du quai de Roberval, et que la ligne délimitant ce niveau, désigné sur les plans produits dans cette cause et dans la preuve, comme le Contour 15—est la limite entre le domaine public du Lac St-Jean, qui est navigable, et le domaine privé du défendeur ; p. 172, l. 10.

\*           \*           \*           \*           \*

20           “ Suivant l'article 400 du Code Civil, la doctrine et la jurisprudence bien établie dans notre Province, les fleuves et rivières navigables, leurs rives et rivages, et cela comprend les lacs navigables, comme le Lac St-Jean, forment partie du domaine public, et ne peuvent être aliénés sans une concession expresse, formelle et bien explicite de la Couronne. Or, les titres produits par le défendeur ne lui confèrent aucun droit de cette espèce. On doit considérer comme lit d'une rivière ou d'un lac navigable, tout le terrain couvert par les eaux jusqu'aux plus hautes eaux. Ce terrain doit être considéré comme le lit du fleuve ou du lac, et aucune aliénation n'en peut être faite à moins d'une concession expresse et explicite ; p. 173, l. 16.

30           “ Or, il est prouvé que chaque printemps, lors de la crue des eaux du Lac St-Jean, ces eaux pénètrent dans la Belle-Rivière, avoisinant partie des terres du défendeur, et se répandent sur ceux-ci et les couvrent pendant plusieurs jours jusqu'à la ligne du contour 15. A cette époque de l'année toute la partie Nord des Lots 71 et 72 comprenant la plus grande partie du terrain boisé et même une parcelle du terrain cultivé, se trouve couverte par l'eau. Cette crue des eaux est périodique et ordinaire, et arrive chaque printemps ;

“ Conséquemment, il nous parait que le calcul des superficies fait par l’arpenteur Jacques a une base juridique et doit être accepté de préférence à celui de l’autre arpenteur.

\* \* \* \* \*

p. 176, l. 25. “ Considérant que bien que quelques témoins du défendeur aient déclaré que les lots 71 et 72 paraissent avoir souffert des dommages jusqu’au pied de la côte, au-delà du point 22.5, ils n’ont pas établi, à la satisfaction de la Cour, le montant des dommages soufferts pour la partie au-delà de 22.5. Il ne parait pas de preuve de dommages appréciables au-delà du contour 22.5, et tous les témoins experts de la demanderesse le jurent ; 10

p. 176, l. 31. “ Considérant que le montant total des dommages évalués pour tous les terrains du défendeur est de \$2110.15, et que le preuve démontre que c’est une évaluation juste et raisonnable des dommages occasionnés au terrain du défendeur ;

\* \* \* \* \*

p. 177, l. 1. “ Considérant que si l’on réfère à l’exhibit P. 14 et au témoignage du dit arpenteur Jacques, dans la contre-preuve, on voit que les évaluations se trouvent considérablement augmentées et qu’elles comprennent non seulement la valeur du terrain inondé et déprécié, depuis le point 15, mais tout le terrain au-dessous du contour 15 jusqu’au contour 10 au-dessous duquel il n’a plus aucune valeur ;” 20

p. 175, l. 22. **16.** With the exception of the last-mentioned Considérant, the whole judgment of the learned Judge is based on the view that the 85 acres below contour 15 were not in the Appellant’s ownership at all and should not therefore be included in the valuation of the expropriated land. On this footing he finds that the Appellant’s claim in respect of his forest land, subject to Spring flooding, is fantastic and exaggerated, in view of the fact that only .45 of an acre of this land was above contour 15. He fails to observe that the evidence in support of this claim was addressed to the hypothesis that the land below contour 15 was the Appellant’s property for which he was entitled to compensation and if, as is submitted, this contention is right the area of forest land to be valued was 55 acres and not as found by the learned Judge .45 of an acre. 30

p. 174, l. 8. He further rejected as irrelevant the Appellant’s evidence as to the actual income derived by him from the land affected and bases his finding as to the sufficiency of the sum paid into Court by the Respondents as compensation for all the Appellant’s land, including that below contour 15, on the evidence of the Respondents’ surveyor contained in Exhibit P. 14.

This is a valuation of the submerged land made from a boat after the level of the lake had been raised and is as follows :—

“ File No. 311. Canton : Caron p. 196.  
Rang : A.B.  
Lot : 71, 72, 1/3, SO, ‘ A.’

Raoul Tremblay  
St. Jérôme, Que.

		Superficie.				
10	Lot No. 71	35.21	acres-10.0	à	\$30.00	\$1056.30
	” ” 72	16.55	” 10.0	12.5	80.00	1324.00
		11.94	” 12.5	15.0	120.00	1332.80
		5.22	” 15.0	17.5	200.00	1044.00
		6.91	” 17.5	20.0	200.00 80%	1105.60
		1.26	” 20.0	22.5	200.00 50%	126.00
		<hr/>				<hr/>
		77.09				\$5988.70
				Plus 25%		1497.18
						<hr/>
						\$6485.88
	1/3, SO. ‘ A ’					
	Rang B.					
20	Billet de location émis le 31 mars 1892—pas patenté.					
		13.65	10.0	à	\$15.00	\$204.75
		5.55	10.0	C.N.R.	25.00	138.75
		2.70	C.N.R. Lac.		25.00	67.50
		<hr/>				<hr/>
		21.90				\$411.00
				Plus 25%		102.75
						<hr/>
						\$513.75
		77.09	montant rapporté			\$6485.88
		<hr/>				<hr/>
		98.99				
						\$6999.63
30	Int. av /1./27 - dec. 20 /28					603.08
						<hr/>
	Offre totale en Cour.”					\$7602.71

**17.** It is respectfully submitted that, owing probably to the fact that the learned Judge did not have the advantage of hearing and seeing any of the witnesses who gave evidence, he has entirely misconceived the true effect of this evidence. The witness Jacques did not say as the learned Judge finds that the land below contour 10 which comprised an area of 48.56 acres was valueless ; on the contrary, though placing a much lower value on this land than the Appellant’s witnesses, he values 35.21 acres

of it at \$30.00 an acre and the rest at \$15.00 an acre. Further it will be observed that, owing to an error in casting, the value placed upon parts of lots 71 and 72 is stated at \$6485.88 instead of \$7485.88. Allowing for this error the total compensation as computed by the Respondents' Surveyor is \$8602.71 or \$1000 more than the amount deposited in Court.

p. 143, l. 35. **18.** It appears from the evidence that a certain part of the Appellant's land lying above contour 22.5 and below the foot of a ridge stretching across the property was as a result of the flooding rendered more difficult to cultivate. The learned Judge however refused to award any compensation for damage to land above contour 22.5.

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**19.** Owing to a mistake the Appellant lost his right of appeal to the Court of King's Bench and his subsequent attempt to appeal to the Supreme Court of Canada was quashed.

**20.** The Appellant submits that the said judgment of the Superior Court dated the 8th February, 1932, is wrong and should be reversed and that the case should be remitted to the Superior Court with a direction that compensation should be assessed in respect of the whole of the 228 acres claimed by the Appellant for the following among other

## REASONS.

- (1) BECAUSE the 85 acres which Mr. Justice Gelly held 20 did not belong to the Appellant, should have been included in the land for which the Respondents were liable to pay compensation.
- (2) BECAUSE it is in accordance with the jurisprudence of the Province of Quebec and with a reasonable construction of Article 400 that the boundary line between the private property of riparian landowners and the beds of navigable rivers and lakes should be the ordinary high water mark within the banks and not the level reached by flood water outside the banks. 30
- (3) BECAUSE the bed of Belle Rivière is not vested in the Crown by virtue of Article 400 and no pretended extension of the limits of that stream by flooding can affect the Appellant's title to his lands.
- (4) BECAUSE Lots 71 and 72 were granted by the Crown before 9th February, 1918, and there was no evidence that the Crown grant of Lot A Range B was after this date.



- (5) BECAUSE on the true construction of Article 400 of the Quebec Civil Code land which for many years has been occupied and cultivated does not form part of a river, stream or lake or a bank thereof, merely because it is occasionally flooded.
- (6) BECAUSE the high water mark of a river stream or lake must be below the level of land which is habitually cultivated and on which ordinary forest trees grow.
- 10 (7) BECAUSE the value of standing timber ought to be taken into account in fixing the amount of compensation.
- (8) BECAUSE the learned Judge erred in holding that no part of the Appellant's land above contour 22.5 was injuriously affected.
- (9) BECAUSE the learned Judge erred in holding that the evidence of the Appellant as to the income derived by him from his land was irrelevant.
- (10) BECAUSE the learned Judge failed to appreciate correctly the evidence on which his alternative finding as to the value of all the Appellant's land was based.

**In the Privy Council.**

No. 95 of 1933.

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*On Appeal from the Superior Court of the  
Province of Quebec District of Roberval.*

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BETWEEN

RAOUL TREMBLAY

(Defendant) - - - *Appellant*

AND

DUKE-PRICE POWER  
COMPANY LIMITED

(Plaintiffs) - - - *Respondents.*

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CASE FOR THE APPELLANT.

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