46, 1935

No. 95 of 1933.

In the Privy Council.

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.*

RESPONDENTS' CASE.

CASE FOR RESPONDENTS.

RECORD.

1. This is an appeal by special leave from a judgment of the Superior Court, District of Roberval, Province of Quebec, Canada, Gelly, J., assessing, under a special statute on a suit of Respondents the compensation which the latter should pay to Appellant for land of the latter taken and injuriously affected by the raising of the level of Lake St. John, of which Appellant was a riparian owner, as the result of a dyke built by Respondents under Government authority for hydro-electric purposes. p. 178. p. 169.

2. By this special Statute, Chapter 9 of the Quebec Statutes of 1927, it is *inter alia* provided that the Lieutenant-Governor in Council may appoint an arbitration Commission, Section 2, to determine the compensation to which the owners of flooded lands are entitled, through the construction, maintenance and operation of the dams built at the outlets of Lake St. John, Section 15.

It is provided, Section 22, when part only of the land is flooded that compensation must include not only the price of such land but the damage caused to the remainder.

It is further provided, Sections 23 and 32, that the award shall fix the amount of the compensation and describe the land or the right for which it is accorded and that upon payment to the party entitled thereto or upon deposit in Court of the amount of compensation, the Company shall be discharged and the award shall constitute a complete title to the land.

3. It is further provided, Sections 35 and 36, that every person entitled to compensation who has not come before the Commission and who has not been summoned or who, when summoned, refused to acknowledge the jurisdiction of the Commission, may have the compensation fixed by action before the Superior Court and that when a person summoned before the Commission refuses to acknowledge its jurisdiction and fails to bring a suit before the Superior Court, the Company, that is the Respondents, may, by an ordinary action, summon him before such Court to have the compensation fixed.

It is provided, Section 37, that the provisions respecting the effect of the award and the compensation when the Commission acts shall apply in such actions and to the compensation fixed by the judgment, save that such judgment shall be subject to appeal, according to the ordinary rules.

4. Appellant refused to accept the Commission's jurisdiction to assess the compensation to which he was entitled. He also neglected to bring suit to have that compensation fixed, and the Respondents then took this suit to have the compensation assessed by the Court.

5. The trial Judge assessed the compensation at $7,602·71, being the amount that the Company had tendered, expressing the opinion that this was even more than a fair compensation.

6. Appellant appealed to the Court of King's Bench, Appeal side, Province of Quebec, but his appeal lapsed through his failure to prosecute it within the delays allowed him and that Court declared the appeal lapsed in consequence.

7. An appeal was taken to the Supreme Court from this judgment and the latter appeal was quashed for lack of jurisdiction.

8. Appellant later asked for special leave to appeal to His Majesty in Council and this leave was granted.

9. In the petition for special leave and in the recital thereof embodied in the Order granting leave, it is stated that the principal question arising in the case is whether that part of Appellant's lands granted by the Crown to Appellant's predecessors, which was below the contour line reached by the water at the time of spring freshets, must be treated as having remained the property of the Crown so that Appellant, notwithstanding the enjoyment of such land by himself and his predecessors, must be held not entitled to compensation for the permanent loss of such enjoyment. p. 179, l. 5.

It is apparent that it was due to the belief that such a question did arise in this case that this leave was granted.

10. Respondents submit that although the trial Judge did express his opinion in the sense indicated, his judgment nevertheless does not proceed on that basis at all but expressly allows compensation for lands above and below the said contour line.

11. Alternatively Respondents submit that, if the judgment must be considered as being based on that view of the law, and as having denied compensation for land below the said contour line, the judgment was right.

12. Respondents will also submit that on the clear and uncontradicted evidence the amount tendered and allowed by the trial Judge and declared by him to be more than a fair compensation for all lands above and below said contour is amply sufficient to compensate Appellant for all such lands.

13. On the first point it is submitted that leave to appeal was granted under a misapprehension. It is true that an application was made unsuccessfully to have the leave to appeal rescinded on that ground, but it is submitted that this should not prevent Respondents from demonstrating now that according to the judgment and the record now for the first time before this Board such judgment does not turn on the important question of law supposed to be the principal question arising and that, in fact, that question plays no part whatever in the judgment.

14. The judgment after summarizing the pleadings, holds, that the ordinary high water mark on the lake is at 15 feet above the arbitrary zero and that the contour line drawn at that level is the limit between the public domain of Lake St. John, which is navigable, and the private property of Appellant. p. 172, l. 10.

Then a conflict of testimony between the land surveyor testifying for Appellant and the land surveyor testifying for Respondents is

p. 172, l. 23. dealt with, Respondents' land surveyor stating that 5·45 acres of lots Nos. 71 and 72 are flooded and 8·20 acres of the same lots are damaged by the raising of the level of the waters of the lake up to the maximum level allowed by the Government grants, namely: 17·5.

As to the other lot, namely: part of Lot A of Range B, according to this land surveyor, 1·78 acres are flooded and 3·34 acres are damaged.

The area testified to by the surveyor for Appellant is much greater than the one thus given.

p. 172, l. 46. The judgment then says, that this results from the fact that Respondents' land surveyor did not treat as belonging to Appellant the land below contour 15 for the reasons already given while the other land surveyor did.

p. 173, l. 16. It is then again stated that below high water, that is below contour 15, there is the public domain.

The area given by Respondents' surveyor is therefore accepted
p. 173, l. 34. for that reason and also on account of the care with which his measurements were taken.

15. The judgment then proceeds to discuss the question of amount.

p. 174, l. 44. The Judge finds as to lots 71 and 72 that the amount given by
p. 192, l. 1. Respondents' witnesses of $2,054·50 really represents the commercial value of the land taken and damaged.

p. 176, l. 9. As to lot A, the plan of Respondents' surveyor is held to be the more accurate of the two and is accepted, and the amount given by
p. 176, l. 22. Respondents' witnesses of $55·65 as compensation is also accepted.

Adding the two amounts, the trial Judge finds that the total
p. 176, l. 31. $2,110·15 is a fair valuation for the compensation due to Appellant.

p. 176, l. 35. **16.** The judgment then proceeds as follows:—

"Considérant que pour obvier au doute qu'elle pouvait avoir, lors de "l'institution de l'action, au sujet de la propriété du domaine public, "au-dessous du contour 15, la demanderesse, nonobstant les faits prouvés, offre, "par son action, la somme de $7,602·71 comme compensation au défendeur, "suivant les détails donnés dans l'exhibit P-4 de la demanderesse à l'enquête, "et les superficies mesurées par l'arpenteur Jacques, témoin expert de la "demanderesse, qui est retourné sur les lieux pour vérifier son mesurage, "et qui sont détaillées dans l'exhibit D-27 du défendeur, préparés par "lui-même ainsi qu'il le déclare dans la contre-preuve, pp. 319 et 320. Le "même témoin explique, dans les pages 313 et suivantes le tableau qu'il a

"ainsi préparé ; Exhibit D-27, et donne les évaluations qu'il a faites pour les "parties des lots 71 et 72 et A du rang B, au-dessous du contour 15 jusqu'à 10 ;

"Considérant que si l'on réfère à l'exhibit P-14 et au témoignage du dit "arpenteur Jacques, dans la contrepreuve, on voit que les évaluations se "trouvent considérablement augmentées et qu'elles comprennent non "seulement la valeur du terrain inondé et déprécié, dupuis 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 ;

"Considérant que l'estimation, qui appert à cet état, exhibit P-14, nous "parait, d'après la preuve, une estimation suffisante et même généreuse de la "valeur du terrain au-dessous du contour 15 ;

"Considérant qu'il appert aussi que la valeur du terrain entre les contours "15 et 17·5 a été portée à $200·00 l'acre au lieu de $150·00 qui a été "prouvé ;

"Considérant qu'il appert par le dit exhibit P-14 que la demanderesse "offre, en outre des intérêts, une indemnité de 25% à raison du fait de "l'expropriation ;

"Considérant qu'il nous parait que les offres faites par la demanderesse "sont plus que suffisantes pour compenser les dommages subis, même ceux "que le défendeur réclame au-dessus du contour 22·5 pour les deux arbres "d'ornement sur son terrain et le tort qui pourrait lui être causé pour les "réductions dans l'exploitation de sa ferme par suit de l'expropriation ;

"Maintient l'action de la demanderesse ;

"Déclare les offres de la demanderesse, au montant de $7,602·71, bonnes "et suffisantes pour couvrir l'indemnité à être payée, en capital et intérêts, "au défendeur par la demanderesse : 1o-Pour la superficie des lots Nos. 71 et 72 "du cadastre officiel pour le rang A du canton Caron, depuis l'extrémité nord "des dits lots, jusqu'au point 17·5 pieds au-dessus du zéro de l'échelle "d'étiage du quai de Roberval (contour 17·5), inondée par la surélévation "des eaux du Lac St-Jean, et 80% de dépréciation sur 6·91 acres, entre les "contours 17·5 et 20, et 50% de dépréciation pour 1·26 acre, entre les contours "20 et 22·5 ; 2o-et aussi pour couvrir l'indemnité à être payée, en capital et "intérêts, au défendeur par la demanderesse pour la superficie tiers sud-ouest "du lot No. A pour le rang B du canton Caron, qui se trouve inondée par la "su-élévation des eaux du lac St.-Jean jusqu'au point 17·5 au-dessus du "zéro de l'échelle d'étiage de Roberval (contour 17·5) et 50% de dépréciation "sur 1·24 acre entre les contours 17·5 et 20, et 25% de dépréciation sur 2·10 "acres entre les contours 20 et 22·5 ; le tout sans frais pour une action non "contestée de ce montant ; et avec dépens de contestation contre le défendeur."

17. It is submitted that this judgment clearly holds that while, in the opinion of the Judge the land below contour 15 belongs

to the Crown and not to Appellant and the compensation for the land taken or damaged above contour 15 was fully covered by $2,110·15, he nevertheless, having before him a tender of $7,602·71 made by the Company, as compensation to avoid all doubt on the question, holds that this is a generous valuation for all land and damage above and below contour 15.

The tender, therefore, is declared sufficient and Appellant who
p. 171, l. 25. was claiming for a small part of a farm in a remote district of the Province $168,257·55, and whom Respondents had themselves to bring before the Court, is condemned to pay the costs.

If the judgment standing alone could leave the matter in doubt, the exhibits filed and the testimony, it is submitted, makes it superabundantly clear.

pp. 192, 3, 4. **18.** As stated in the judgment the evidence of Respondents gives as the area taken by raising the water up to level 17·5, the maximum authorized level assuming the lands below 15 to be public domain, 5·45 acres for lots 71 and 72 and 1·64 acres for lot A, and as compensation for that land and damage to the residue $2,110·15.

pp. 14, 22, 28, 30 and 40. The value of this land is established by the land surveyor who took the measurements and whose measurements were accepted by the Court and by three other witnesses, Alphonse Fortin, Osias Tremblay and Pierre Bergeron.

These witnesses also made measurements and a valuation on the assumption that land below level 15 should be included: their evidence on this was given in rebuttal.

pp. 196, 248 and 249. The area taken is increased for lots 71 and 72 from 5·45 acres to 68·92 acres and for lot A, Range B, from 1·64 acres to 21·90 acres.

pp. 154, 157, 165 and 166. The compensation is increased from $2,110·15 to $7,602·71.

p. 205. The areas testified to by Appellant's surveyor on the same assumption are for lots 71 and 72, 71·11 acres. For lot A his statement is not clear but, on the face of it, it is obvious that the area given cannot exceed that given by Respondents' surveyor.

The slight discrepancy of a few acres between the areas given by both surveyors on the same assumption is easily explainable by the difficulty of establishing how far below high water mark the land of Appellant extended or had any value, but there is no doubt that the testimony of Respondents' surveyor and the three other witnesses both as to area and value given in rebuttal establishing the amount accepted by the Judge, was meant to include compensation for land below 15.

It was clearly so understood by the trial Judge and this testimony was accepted and the judgment based on it.

19. If it is to be held that the amount awarded by this judgment is based on the assumption that Appellant was entitled to no compensation for land below high water mark, and that the amount awarded is therefore only compensation for land above that level, Respondents submit that this was a correct finding as a matter of law, the point having been definitely settled for a long time under the law of Quebec.

20. It is submitted that it is and has always been settled law in the Province that the beaches of navigable rivers and lakes, between high and low water marks, are the property of the Crown, that nothing but an express grant of such land can convey it to a grantee and that the grant of land bounded by a navigable river or lake stops at high water mark regardless of the area mentioned.

21. It is lastly submitted, should it be material that the adoption of 15 as the level of high water was in fact justified by the evidence, that the areas as proved by Respondents and found by the Judge, are correct and that the amount tendered and allowed is amply sufficient, under either views of the law, to compensate Appellant. In fact the evidence on that point is weighty and uncontradicted, the only testimony offered by Appellant as to compensation being based on such an erroneous basis that it should be ignored. p. 216.

This basis is discussed in the judgment and also explained in the record. p. 174, l. 8. pp. 129-134.

22. It is submitted that the judgment should be confirmed or alternatively that the leave to appeal should be rescinded for the following among other

REASONS.

1. Because the judgment does not proceed in assessing the compensation on the view that the land below high water mark belonged to the Crown:
2. Because if it had proceeded on that view, it would have been the correct view in law;
3. Because on the evidence the compensation allowed is more than sufficient, assuming the land below high water mark to be Appellant's property.

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LAWRENCE JONES & Co.,
Lloyd's Building,
Leadenhall Street,
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