ONTARIO AND MINNESOTA POWER COMPANY, LIMITED v. THE KING

[1925] 2 D.L.R. 37 (also reported: [1925] A.C. 196)

Judicial Committee of the Privy Council, Viscount Cave, Lord Dunedin, Lord Carson, Lord Blanesburgh, 23 October 1924

(On appeal from Supreme Court of Canada, Idington, Duff, Anglin, Brodeur, Mignault JJ., 22 December 1920 [unreported, see reference to judgment, infra p. 406] reversing judgment of Exchequer Court of Canada, reported sub nom. Rex v. Ontario and Minnesota Power Company, Limited, supra p. 386)

Estoppel III E--Taking benefit of Order in Council--Recitals-- Subsequent denial of truth.

Where a person has taken the benefit of an Order in Council which contains certain recitals, he cannot afterwards deny the truth of such recitals.

[*Smith v. Ontario & Minnesota Power Co.* (1918), 45 D.L.R. 266, 44 O.L.R. 43, approved.]

APPEAL by the defendants from the judgment of the Supreme Court of Canada, reversing the judgment of Audette, J. (1920), 20 Can. Ex. 279. Varied.

Tilley, K.C., and C.F.H. *Carson*, for appellants.

E. .L. Newcombe, K.C., and *Bristol*, for respondent.

The judgment of the Board was delivered by

VISCOUNT CAVE:--This is an appeal by the Ontario & Minnesota Power Co. Ltd. from a judgment of the Supreme Court of Canada by which the appellants were held liable for all damages sustained by His Majesty or by the Indians concerned as a result of the flooding or erosion of certain Indian Reserves bordering on the Rainy Lake by reason of a dam erected by the appellants in the Rainy River. The appellants do not deny that some damage was caused by their dam, but they justify under a grant made by the Government of the Province of Ontario in the year 1905; and the question is whether that grant absolves them from liability.

Before considering the terms of the grant it is necessary to state shortly the history of the reserves in question. By the North West Angle Treaty No. 3 dated October 3, 1873, the Salteaux Tribe of the Ojibewa Indians surrendered to the Crown the extensive reserves to which they were then entitled under the Proclamation of 1763, subject to a stipulation that particular reserves should be selected and set aside for them as soon as practicable and should be administered and dealt with for them by the Government of the Dominion of Canada. Power was reserved to the Government of Canada to appropriate such sections of the reserves so set aside as might be

required for public works or buildings, due compensation being made for the value of any improvements thereon. Pursuant to this treaty officers were deputed by the Government of Canada to confer with the Indians and select reserves, and on their report the Governor-General by Order in Council dated February 27, 1875, purported to approve the setting aside of certain reserves including the reserves now in question. These reserves have since been occupied by the Indians, being administered for them by the Government of the Dominion under the provisions of the Treaty, of s. 91 (24) of the B.N.A. Act 1867, and of the Indian Act, R.S.C. 1906, c. 81.

In the year 1888 this Board decided in *St. Catherine's Milling & Lbr. Coû v. The Queen* (1888), 14 App. Cas. 46, that by force of the surrender of 1873 the beneficial interest in the lands in Ontario comprised in that surrender was transmitted to that Province subject only to the Dominion powers of legislation over lands reserved for the Indians; and it was no doubt in consequence of that decision that in the year 1894 the Governments of the Dominion and of the Province of Ontario, having been empowered by statutes of Canada and Ontario so to do, came to an agreement as to such of the reserves which had been set aside as above mentioned as were found to be situate in that Province. By this agreement, which was dated April 16, 1894, it was agreed between the 2 Governments (among other things) as follows:--

"2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the Government of Ontario, as to the Reserves before the passing of the said Statutes laid out in the Territory, with a view of acquiescing in the loca- tion and extent thereof unless some good reason presents itself for a different course.

"3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in case other Reserves in the said territory are to be selected, a joint commission or joint commissions, shall be appointed by the Governments of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed Reserves."

No action appears to have been taken under these clauses until the passing of the Act of 1915 (Act to confirm the title of the Government of Canada to certain lands and Indian Lands, 1915 (Ont.), c. 12) hereafter referred to, and the Indians continued to enjoy the selected reserves.

Matters were in this position when in the year 1905 the Government of Ontario made the grant which is in question in these proceedings. By the deed of grant, which was dated January 9, 1905 and was made between the Commissioner of Crown Lands for the Province of Ontario (thereinafter called the Government) of the one part and E. W. Backus and others (thereinafter called the purchasers) of the other part, after recitals showing that the Rainy River formed the international boundary between the Province of Ontario and the State of Minnesota and formed in the neighbourhood of the Town of Fort Frances a valuable water power, and that the purchasers were the owners of the lands and water power on the Minnesota side opposite to Fort Frances, the Government agreed to sell to the purchasers certain land at Fort Frances including a part of the bed of the river at that point, and the purchasers agreed to construct a dam across the river and to develop and supply power to the full capacity of the river in manner therein provided. It is desirable to quote in full the following clauses of the deed.

"2. The purchasers covenant and agree to construct a dam, conduit or such other works on or near the said River at Fort Frances, in accordance with the plans hereto attached, sufficient to

develop power to the full capacity of said River (including any increased capacity of said River by reason of the construction of storage dams or works) according to the plans hereto attached, approved of by the Lieutenant-Governor in Council, and which are hereby made a part of this Contract, such dam to be built of solid masonry or concrete and to be of such character and of such dimensions as will make the same amply strong and safe for the purposes intended, and such works will be of such design as will fully provide for sufficient waste weirs to obviate danger in time of floods or freshets. The dams, head gates, waste weirs and works in connection therewith or incidental thereto shall not be proceeded with unless and until the plans, drawings and specifications for the same shall have been submitted to and approved of by the Lieutenant-Governor in Council, which said plans, drawings and specifications shall show the precise site and location of the said work: Provided, however that notwithstanding anything hereinbefore contained, and notwithstanding the approval of the plan hereto attached, the waters of the Rainy Lake shall not at any time be raised to a higher level than may be authorized by the Government, and the height of water to be maintained in the said Lake and the use or non-use of the Flash Boards as shown on said plans shall at all times be subject to such control and direction by the Government as in the opinion of the Government may be neces- sary to ensure safety and protection of property."

"17. It is distinctly understood and agreed that the lands, rights and privileges mentioned in this Agreement are confined solely to lands, rights and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario, and that no permission is given hereby to the purchasers to overflow or cause to be overflowed any lands not the property of the Crown in Ontario and not under the control and administration of the said Government, and if damage is done by the erection of any dam or the construction of any works under this Agreement no recourse shall be had against the Government in respect thereof."

The plan attached to this grant showed a dam across the river of which the crest was to reach the bench mark 497, an arbitrary datum which indicated approximately the high water mark reached by the river in ordinary seasons. The above grant was duly confirmed and the detailed plans, drawings and specifications approved by the Lieutenant-Governor of Ontario in Council.

The above grant obviously concerned, not only the Province of Ontario, but also the Government of the Dominion as custodian of the Indian Reserves which were the subject of the agreement of 1894 and of the navigation of the lake and river. Accordingly by a Statute of Canada passed in 1905 (1905 (Can.), c. 139) it was enacted that the appellant company might develop and operate the water power on the Rainy River at or near Fort Frances and construct, operate and maintain dams and other works in connection with the said power, but it was provided that no work so authorized should be commenced until the plans thereof should first have been submitted to and approved by the Governor-General in Council. In pursuance of this Act plans showing the nature of the proposed works were submitted to the Minister of Public Works of the Dominion and on his recommendation were approved by an Order of the Governor-General in Council dated September 19, 1905, "subject to the conditions inserted in the agreements between the Government of the Province of Ontario and the applicants, and also subject to all the conditions and reservations expressed in the Act of Parliament passed at its last Session respecting the Ontario and Minnesota Power Company, Limited". Some changes were afterwards made in the plans, but having regard to their Lordships' opinion on the other questions raised in the appeal these need not be further referred to. The dam was completed about the year 1909.

In the year 1915 the Legislature of Ontario passed a statute (1915 (Ont.), c. 12) by which, after reciting that in pursuance of the terms of the agreement dated April 16, 1894, the Government of Ontario had made full enquiry as to the re- serves laid out as therein mentioned and it had been decided to acquiesce in the location and extent thereof (with an exception not now material) subject to the modifications and additional stipulations set forth in the Act, it was enacted as follows:--

"1. The said reserves as shown on said plans, with the exception of Indian Reserve 24C, in the Quetico Forest Reserve, are hereby transferred to the Government of Canada, whose title thereto is hereby confirmed, and subject to all trusts, conditions and qualifications now existing respecting lands held in trust by the Government of Canada for Indians, and subject to the provisions of the following sections.

"2. All water powers which in their natural condition at the average low stage of water have a greater capacity than 500 horsepower, and such area of land, including roads in connection therewith, as may be necessary for the development and utilization thereof, and the land covered with water lying between the projecting headlands of any lake or sheets of water not wholly surrounded by an Indian reserve or reserves and islands wholly within such headlands shall not be deemed to form part of such reserve, but shall continue to be the property of the Province, and *The Bed of Navigable Waters Act* [R.S.O. 1914, c. 31] shall apply, notwithstanding anything contained in the fourth paragraph of the agreement hereinbefore mentioned."

Passing now to the facts which gave rise to this litigation, it appears that in several years after the erection of the appel- lants' dam the Indian Reserves bordering on Rainy Lake and on the Rainy River where it issues from the lake about 2 miles above the dam, known as Reserves No. 1, No. 18B and No. 16D, were injured by floods which were wholly or partly attributable to the action of the dam. In some of these years the water rose above the 497 bench mark, and in the year 1916 when there was an extraordinary flood it is said to have risen above the 500 mark. The result of this flooding was that crops and other property belonging to the Indians were injured or destroyed and the land itself was washed away or eroded and a number of trees were killed. The Dominion Government claimed from the appellants compensation for these injuries, and after some correspondence the Attorney-General of Canada filed this information against the company claiming on behalf of the Indians (on whose behalf he was authorized to sue by the Indian Act, as amended) $3,153 to compensate them for damage done to their property on the 3 reserves and also claiming on behalf of His Majesty $19,360 for damage caused to Reserve No. 1 known as Pither's Point.

This suit was heard by Audette, J., (1920), 20 Can. Ex. 279, who held that on the selection of the reserves in question in 1875 a road-space 2 chains in depth along the shore of Rainy Lake had been excepted out of the reserves; that the raising of the water of the lake up to the bench mark 497 was authorized by the grant of 1905; that the title acquired by the Dominion in 1915 was subject to an exception of the road-space and to the terms of the grant of 1905; and accordingly that the Attorney-General was only entitled to compensation in respect of damage caused to property lying beyond the road-space 2 chains in depth by raising the water above the level of bench mark 497. Upon this footing he estimated the damages caused by such flooding at $500 and directed that if this figure was not accepted there should be an enquiry as to damages.

Both parties having appealed against this judgment to the Supreme Court of Canada, that Court

(by a majority) held that neither the reservation of the road-space nor the right to flood the reserves by raising the level of the water up to bench mark 497 was established; and they accordingly set aside the judgment of Audette, J., and ordered and adjudged as follows:--

"That His Majesty the King in the right of Canada do recover from the defendant all damages sustained by His Majesty or by the Indians concerned as a result of the flooding or erosion of the lands comprised in the Indian Reserves, whose boundaries extend in all cases to the water's edge as shown on the plan marked Exhibit 70 at the trial of this action, where such flooding or erosion was occasioned by the level of the waters bordering the said lands being raised or maintained from time to time since the construction of the defendant's dam and works to or at higher levels than the said waters would have attained or maintained had the said dam and works not been constructed."

And the Court ordered that the cause be referred back to the Judge of the Exchequer Court to ascertain the amount of the said damages if any. It is against this judgment that the appellants have appealed to this Board.

It was argued on behalf of the appellants that the title of the Dominion to the reserves in question is held subject to the grant made by the Province to the appellants in 1905, and their Lordships are of opinion that this contention is justified. It may well be that, having regard to the terms of the agreement made between the 2 Governments in the year 1894 (which was the agreement referred to in the case of *Ont. Mining Co. v. Seybold*, [1903] A.C. 73), the Government of the Province had no authority to make a grant affecting the reserves referred to in that agreement without the assent of the Government of the Dominion. But the Dominion by its Act of 1905 and the Order in Council made under that Act adopted and confirmed the grant to the appellants subject only to the additional conditions contained in those instruments; and accordingly the grant is now binding (subject to those conditions) on the Dominion, and the only question to be determined is the construction of the grant.

Then did the grant authorize the appellants to raise the water of the Rainy Lake above the ordinary level and so to flood the reserves? In their Lordships' opinion this question should be answered in the negative. The grant does indeed authorize the appellant company to construct a dam having its crest at bench mark 497 and to "develop the water power to the full capacity of the stream from side to side at high water mark"; and it may be that the raising of the level of the upper part of the river by means of the dam would to some extent affect the level of the lake. But under the terms of the grant the dam was to be provided with weirs sluices and other apparatus sufficient to regulate the head of water above it; and it was expressly provided by clause 2 of the deed that notwithstanding anything therein contained and notwithstanding the approval of the plan thereto attached the waters of the Rainy Lake should not at any time be raised to a higher level than might be authorized by the Government. This proviso appears to their Lordships to have been intended to override the powers given by the deed to the appellant company and to compel them, in the absence of express authority by the Government to the contrary (which was not obtained), so to operate their works that they should not have the effect of raising the waters of the lake beyond their ordinary level to the detriment of the adjoining property. Further it was provided by clause 17 of the deed that the lands, rights and privileges therein mentioned were "confined solely to lands rights and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario" and that no permission was given thereby to the purchasers to overflow or cause to be overflowed any other lands; and these

stipulations appear to have been intended to protect from flooding the Indian Reserves, which were under the control and administration not of the Province but of the Dominion. If so it follows that the appellants had no authority to cause the waters of the lake to flood the reserves and are liable in damages for so doing.

The above conclusion is supported by the terms of a recital contained in the Order made by the Governor-General in Council on September 19, 1905, to which reference has not yet been made. That Order contained a recital that the Chief Engineer of the Department of Public Works had reported "that the only objection that could be raised to the proposed elevation of the dam is provided for by a proposed revetment wall to be constructed by the company and also by a clause in the Act of Incorporation of the company which makes all damages to lands caused by their works a charge to be borne by them". The report so made by the chief engineer was incorrect, for the Act of Incorporation of the company contains no such clause as is here mentioned. The chief engineer appears to have obtained the information on which his report was based from a report made to him by Gray, the engineer in charge; and there is nothing to show from what source Gray derived the information, or to connect the appellant company with the misstatement contained in these documents. But what is certain is that the appellant company took the benefit of the Order in Council, the terms of which must have been known to them, and it does not appear that they took any steps to inform the Government of the Dominion that the recital was incorrect. This being so, their Lordships agree with the decision of Riddell, J., in *Smith v. Ontario & Minnesota Power Co.* (1918), 45 D.L.R. 266, 44 O.L.R. 43, that the appellants must be taken to have accepted the recital as correct, and accordingly must be held liable for compensation for damages caused by their works. A correspondence which took place between the Department of Indian Affairs and the appellants in the years 1906-9 proceeded upon the footing that the appellants were liable for damages caused by flooding, and they did not then dispute their liability.

For the above reasons their lordships agree in the main with the decision of the Supreme Court of Canada, but they are of opinion that the judgment pronounced by that Court requires to be varied in two respects.

In the first place their Lordships are unable to agree with the Supreme Court in holding that the 3 reserves in question extend to the water's edge. The evidence as to the setting aside of the reserves in 1875 is incomplete; but it appears from a report of a Committee of the Privy Council appointed to deal with the matter that the persons appointed to select the reserves had recommended "two chains in depth along the shore of Rainy Lake and the bank of Rainy River to be reserved for roads, right of way to lumbermen, booms, wharves, and other public purposes"; and this recommendation appears to have been accepted by the Committee and approved by the Governor- General in Council. Further, a map (ex. "Q") dated in July 1876, and produced by the Indian Department, shows this road as having been excepted out of all the reserves abutting on the lake. It is true that in the year 1889 the Department of Indian Affairs, in answer to a request of the Commissioner of Crown Lands for Ontario for a tracing of the reserves, forwarded a plan (ex. 70) not showing the roadway; and this appears to have been the plan which was referred to in the Act of 1915. But the reserves transferred by that Act were the reserves as laid out in 1875; and if on the laying out of the reserves the road was excepted, as appears to have been the case, the Act of 1915 would not have the effect of adding it to the reserves. The plan, ex. 70, must therefore be rejected to as *falsa demonstratio*. On the whole their

Lordships are satisfied that the 2 chains in depth were not included in the reserves and accordingly did not pass to the Dominion by the Act of 1915.

In the second place it appears that on May 18, 1910, His Majesty by the Superintendent-General of Indian Affairs, leased a part of Reserve No. 1 (known as Pither's Point) to the corporation of the Town of Fort Frances for a term of 99 years, such part to be used for park purposes subject to the right of the Indians to camp and sell wares upon it. This lease was apparently invalid at the time, as the title to the land was in the Province; but it appears to be now effective, the land having been acquired by the Government of Canada in 1915. On August 19, 1918, just before the commencement of this suit, the Municipality of Fort Frances released to the Crown that portion of the land lying along the shore of Rainy Lake which would be covered by water when the latter was raised to the 497 bench mark and all trees killed at high water during 1916, and also purported to assign to the Crown all claims that they might have against the appellant company or other persons for damages to the said lands caused by raising the waters adjacent thereto; but this deed was not effective to pass a right of action for damages for wrongs already committed. It follows that as regards the land comprised in this lease, and apart from the right of the Indians to compensation, the Government of Canada can only recover for injury to its reversion.

For the above reasons their Lordships are of opinion that the judgment of the Supreme Court of Canada should be varied by striking out the words "whose boundaries extend in all cases to the water's edge as shown on the plan marked Exhibit 70 at the trial of this action" and substituting a statement that the boundaries of the reserves extend to a line 2 chains distant from the water's edge as shown on ex. "Q," and also by adding a declaration that as to so much of Reserve No. 1 as is comprised in the lease of 1910 the damages recoverable by His Majesty are limited to the damage sustained by the Indians together with the injury (if any) caused to the reversion of His Majesty expectant upon the determination of that lease, but that in all other respects the judgment should be confirmed. As the appellants have only partly succeeded, there will be no costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Judgment accordingly.