JOHN MORRIS ROBINSON.....SUPPLIANT; 1895

AND Nov. 23.

HER MAJESTY THE QUEEN.....RESPONDENT.

*Public work—Injurious affection of property arising from construction—Damage peculiar to property in question—Compensation.*

To entitle the owner of property alleged to be injuriously affected by the construction of a public work to compensation, it must appear that there is an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which other of Her Majesty's subjects are exposed. It is not enough that such interference is greater in degree only than that which is suffered in common with the public.

PETITION OF RIGHT for damages arising from the alleged injurious affection of property by the construction of a public work.

The suppliant was the owner of a certain wharf property situate on the harbour of St. John, N.B., which was granted to his predecessors in title by the City of St. John, in whom the property in the said harbour was vested by Royal Charter in the year 1785.

In constructing the Courtenay Bay Branch of the Intercolonial Railway along the water front of the said harbour, it was deemed necessary to build a trestle across a slip or cove in the harbour upon which the suppliant's property fronted. The construction of this branch railway along certain public streets in the city to the harbour front was authorized by the Act of the Legislature of New Brunswick, 54 Vict. c. 51. Subsequently, an agreement with respect to the location of this railway was entered into between the city and the Dominion Government, which was ratified by 56 Vict. (N.B.) c. 40. In conformity with this agreement the railway was constructed. No part of the suppliant's

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property was expropriated, but the trestle, by protruding some little distance in front of his wharf, rendered the approach thereto from the harbour more difficult and reduced the capacity of the property for docking purposes by occupying a part of the harbour not granted to suppliant, but which he theretofore used. There was a draw made in the trestle for the purpose of facilitating access to the suppliant's and other properties; but this did not render such access as convenient as it was before the erection of the work in question. On account of such interference with the access to the suppliant's property, he was obliged to reduce the rents obtained by him from tenants of his wharf and stores, and he also lost dues for side-wharfage which he had been accustomed to collect from vessels using the adjoining wharf—a practice which could not be continued after the trestle was constructed. It was also shown that at the head of the wharf vessels could not lie and discharge cargo with the same convenience as theretofore, by reason of the proximity of the trestle. The evidence, on the whole, established that the damage suffered by suppliant by reason of the construction of the trestle was in part peculiar to his property, and different in kind from that suffered by the adjoining owners.

The case was tried at St. John, N.B., on the 5th, 6th and 12th days of June, 1895.

The argument took place at Ottawa on the 24th day of June, 1895.

*J. A. Armstrong* Q.C., for the suppliant, cites Local Public Statutes, N.B., vol. 3, p. 998, and the Royal Charter of the City of St. John, at page 998 thereof. He cites the Acts of 1840, 3 Vict. c. 81, to be found in the same volume as above, page 60; also cites from the evidence to show what application this Act has to the *locus* in dispute. He maintains that the Act in ques-

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tion does not affect this property in any way. He refers to page 164 of the same book 15 Vict. c. 11. This Act, he contends, does not interfere with this property, at least where the wharf is now. The City of St. John got power from the legislature, in 1854, to make a new harbour line. This new line does not apparently extend over the front of this property. He reads from the Act of 1864, which regulates all wharfs to be erected on the eastern side of the harbour, sections 3 and 5. It would be unjust for the legislature to alter the line of the harbour and interfere with the rights of lessees without giving compensation therefor. The Act of 1886 distinctly reserves the rights of parties who have leases from the city. It reserves them from the operation of the Act. But in 1891 an Act, 54 Vict. c. 51, was passed to authorize the City of St. John to aid in the construction of wharves on the eastern side of the harbour. (He refers to the Act.) But this Act is of no moment here for the reason that it was not acted upon, and in 1893 by 56 Vict. c. 40, which provides as follows, (reads 3rd section). Her Majesty was given power to extend the railway as has been done, but only on compensation to lessees for any injury done. Now injury has been done to the suppliant. The land was leased by the city to one Reed in 1844. In whatever way the right to the seashore had arisen, whether by grant by the Crown or through the legislature, the subject matter of the grant was freehold, but a shifting one as the sea recedes. The receding of low-water mark below the point in respect of which Mr. Robertson could originally have claimed accrues to the benefit of the suppliant. [He cites *Hunt on Boundaries* (1).] There is nothing to show, however, that low-water mark had either receded or advanced. Therefore, if there is any space below that portion of

(1) 3rd ed. p. 11.

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the land which is occupied by the wharf which could be called low-water mark it belongs to the suppliant. [He cites *Scratton* v. *Brown* (1); *Attorney-General* v. *Terry* (2); *Bickett* v. *Morris* (3).] The soil of the alveus is not common property. [He cites the Acts relating to the Harbour of St. John in 3 P. & L.S. N.B. p. 68; *Hartlepool* v. *Gill* (4).] Our case is still stronger than these cases, as we have an Act of the legislature making our rights perpetual. [He refers to 23 Vic. ch. 60.] The most important case I have to present is *Lyon* v. *Fishmonger's Co.* which is to be found in 10 Ch. App. 579 and 1 App. Cas. 662. It was said in that case that the rights of a riparian owner might be likened to the case of a man having a property fronting on the street—having his front door on the street. He might have no title in the street but he has a right to the uninterrupted use of it, and the city has no right to place any obstruction upon the egress and ingress to and from his property. The *Lyon* case is a case in point. This work was attempted to be done under the Act of Parliament which reserved the rights of the lessee. This authorization does not amount to more than this that the boundaries might be changed upon compensation being made to the person who holds the lease. This Act authorizes wharfs to be built. Here it is not a wharf that is built at all. It is a trestle built for the purposes of running railway trains. The statute does not authorize the building of such a work. I maintain that where this has injured the suppliant's property he is clearly entitled to damages. Here we have a wharf which the evidence establishes has brought in a sum of $225 a year, that is the part which is bounded by the alveus and goes down to low-water mark. So far back as *Magna Charta* the alveus was

(1) 4 B. & C. 485.
(2) L. R. 9 Ch. Ap. 423.
(3) L. R. 1 H. L. Sc. App. 47.
(4) 5 Ch. Div. 713.

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free. Such a wharf as this would never have been built if it had been possible for the access to have been cut off at any time without compensation. Now, the wharf has been practically destroyed. Its whole value depended on vessels going there and discharging cargo. The loss suffered by the suppliant is the difference between $225 a year and nothing. [He cites *Bell* v. *The Corporation of the City of Quebec* (1).] If Mr. Robertson succeeds in this case it does not follow that the other owners along there may succeed, because though it is an interference with their access to some extent they might not be able to prove any damage. In our case we have proved substantial damages.

[BY THE COURT: It would not follow that if the lands in question were injuriously affected the proprietor would have a right to damages. The strongest point in your case is that the trestle overlaps your wharf. The test is not mere injurious affection, because one's property may be injuriously affected, and he not be entitled to damages.]

The trestle deflects and comes in front of our property. Suppose a vessel came there, she would find that the front of the first bent is 10 feet in front of our wharf.

The damages are said by suppliant to be $3,000. It was made up on a basis of 7 per cent., the actual loss to him being about $225 per year.

*E. McLeod*, Q.C. followed for the suppliant: I will not trouble your lordship as to the title. It is not denied that we occupy and own the property in dispute. We claim we are injuriously affected. We claim we are entitled to compensation. I think that the rules laid down in the *Chamberlain* case (2), *McCarthy's* case (3), *Caledonian Railway* case (4), *Wal-*

(1) 5 App. Cas. 84.
(2) 2 B. & S. 605.
(3) L. R. 7 H. L. 243.
(4) 2 MacQ. H. L. C. 229.

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*ker's Trustees* case (1), and *Becketts'* case (2), laid down the rules very clearly. *Ricketts'* case (3), and others of that class go upon a different ground. It was decided in those cases that the injury arose from operating the railway, that the damages were personal, if any, and not to the land, and that they were too remote to be considered.

Taking that class of cases as governing this particular one, then we have two kinds of damages in respect of which we are entitled to be indemnified. First, we cannot lay a vessel at our wharf now as we were able to do before the trestle was built; secondly, in addition to this the trestle coming in front of our wharf cuts off our access. The main part of the trestle comes within 29 feet of our wharf.

I submit that the interference with the mode of access to our wharf is one peculiar to the property, and not such a one as affected property generally there. However, the others might be affected, the trestle is a distinct impairment of our rights of access. As soon as we establish an interference with our access, then we have a right to damages.

[BY THE COURT: If there is physical interference with your right of access, then you have a right to come into court; but if it is an interference with a right common to all the subjects of Her Majesty, then you cannot come here and get damages.]

If you put an obstruction across the highway and thereby shut up the property, the owner whose access has been destroyed has a right to damages.

[BY THE COURT: But in your case you have a draw by which you can go through the trestle.]

But even so, they have made access more difficult. They may not have destroyed the access, but they

(1) 7 App. Cas. 259. (2) L. R. 3 C. P. 82.
(3) L. R. 2 H. L. 175.

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have impaired it, and *quoad hoc* they must pay us damages. What I submit to your Lordship under the authorities is, that supposing this obstruction had been made and no draw put there, the law would not have been different from what it is now. Starting with the proposition that the right to come into the wharf was destroyed and therefore a right to damages arose, I submit that if the obstruction was not absolute, a right to damages for such partial interference with the right of access would still obtain. The cases show that where the property is injuriously affected in its use and occupation, you are entitled to damages. *Brand's* case (1) only goes to show that you are not entitled to damages from the vibration of trains, the property not being affected thereby. [He cites *Ford* v. *The Metropolitan Railway* (2).] I submit that as this man's property is damaged, *qua* property, he is entitled to be indemnified. It is a damage incidental to the property. It is a physical interference with Mr. Robinson's private right of access to his property.

*C. N. Skinner*, Q.C., for the respondent: The rights of persons to water lots in the harbour of St. John were very fully considered in the case of *Brown* v. *Reed* (3). The charter does not give the city power to grant their rights to any one, but limits it to their successors. This does not mean their assigns, it means their successors in office, the persons who have the local government of the city entrusted to them. So far as the law is concerned, I claim that no private person in St. John has a right to put any wharfs at all on the harbour, except with the authority of the legislature. The city itself cannot give them the power, they can get it only from the legislature. The Act of 1840, 3 Vict. c. 80, only refers to wharfs built

(1) L. R. 4 H. L. 171. (2) 17 Q.B.D. 12.
(3) 2 Pugsley 206.

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by the city. (See sections 3 and 4.) Under that Act, unless a private individual has a legislative authority he has no right to build a wharf there at all. (He reads the *Reeds' Point Act* of 1852, p. 163, vol. 3, N.B. Statutes). Reference has been made to the Act of 1864. This is an Act relating to the harbour of the City of St. John. It establishes that no private individual has a right to put wharfs between high and low-water mark, unless authorized by the legislature especially to do so. Counsel for the suppliant said that the Act of 1864 reserves the rights of private persons. This must be taken to mean owners who have previously the right to build. If counsel mean that the Act reserves the rights of people who have built there without a legislative authority, I join issue with him on that point.

The Act of 1891 was acted on. It was intended that in running along the street the abutting proprietors would have no claim for damages or injuries. [He reads the recital to the New Brunswick Act of 1893]. The Act of 1891, it was contended, was not acted on. I do not concede that point. I say that under the Act of 1891 the railway was built and that the only section at all that applies under the Act of 1893 is the 3rd section. Now what does this 3rd section do and say? [Reads it.] That means that whenever any private property has been taken, as provided in the Act of 1891, it has to be paid for, and so if we had taken any of Mr. Robertson's private property we should have to pay for it, but we did not take any. The road was built and the work done upon it under these two Acts, and they must be read together to show what was done. Now what was the object in erecting this trestle there? This work was built with the idea that by placing it there and running the railway across it, it would have a tendency to bring business to these

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wharves. The object of the whole thing is to enable the freight business to and from the harbour of St. John to be done more expeditiously, so that cars for the transmission of freight coming by water could meet the ships at deep water and so lessen the expense of trans-shipment, etc. The idea was that all these wharves would be enhanced in value. Now how does it effect Mr. Robertson's wharf? The railroad goes quite close to it and thus the idea is realized. Mr. Robertson's wharf might be very much improved in value by this work, because cars can receive freight on the wharf, but as a matter of fact the railway has been of no advantage as yet; still it might become so in the future.

Now then it has been contended that as low-water mark recedes the lands become the property of the suppliant. I doubt this very much. Although this was in the nature of a base fee yet, perhaps, the land would belong to the owner of the fee. But there is no evidence that the alveus has been changed or that the land has been increased there.

Although the trestle might be in front of the Robinson wharf it is not above low-water mark. As to the question of suppliant's property overlapping beyond low-water mark, there is a difference between overlapping as a matter of wrong and overlapping as a matter of right. Now the evidence shows that so far as the west side of the wharf goes it is all below high-water mark. He would not have the right under his lease to extend below water mark even on the west side and he could not get below low-water mark anywhere. Therefore I say that their overlapping beyond low-water mark would not be as a matter of right, but it would be a matter that could be interfered with any time by one of the public or by the city.

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The suppliant cannot say he is entitled to compensation because he never had any property below low-water mark. He had not been assigned the rights of the city to the use of this water.

The city being the owners of the bed of the harbour and the conservators of navigation they have a perfect right to authorize the construction of the trestle. The Act of 1893 says that the work was a lawful structure. Now, granting that the city have the right to build a railway and they grant the right to the Crown to build a railway across there, then the case is governed by the 2nd section of the Act of 1893. The Act of 1893 leaves the parties just as they were under the Act of 1891. They cannot get any compensation unless their lands were taken. My learned friends must take it either upon the ground that the Crown was a trespasser or that they got authority under the Act of 1893, which was an Act confirming the Act of 1891.

My idea is that at common law the rights of riparian owners are similar to the rights of the public and the owners here as regards high and low-water mark. The soil between high-water mark and low-water mark is generally granted in the deed. If it is a navigable stream the boundary goes to low-water mark, and in non-navigable streams the boundary goes to the centre of the stream. But in the case of a river like the St. John River the boundary would be at low-water mark, and the soil between high-water mark and low-water mark would be held by the proprietor as a servient tenement, so to speak. The riparian proprietor has certain rights in this stream but they are rights in common with the rest of the public. The riparian proprietor has no right to put any permanent structure there. He has the right to come and go merely. The riparian owner and the public have a joint interest between high and low-

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water mark, the soil remaining in the proprietor. In the harbour of St. John the soil was vested in the city. [He reads the boundaries of the city in the Royal charter.] In this description of territory the city is bounded on both sides of the river. But supposing that the charter had stopped there the city would not have had any rights between low-water mark and high-water mark, except only the necessary rights of a riparian, but the charter went further than that. The city under the charter has the property in the soil in such a way as to leave it substantially and entirely in the public for the purposes of navigation. The city are conservators of the harbour, and the soil is vested in them for that purpose. That is a restricted property in the city. They may be merely said to be trustees for the public, not the absolute owners of the fee; therefore the practice is whenever the city want to build or to do anything of that sort they go to the legislature for authority. That was the principle of the case of *Brown* v. *Reed* (*supra*). I do not see why Brown had not just as much right to build as the suppliant here? Brown had a grant before the charter was given to the city. When he went there to build a wharf the city interfered, and the court held, rightly. With reference to the case of *Lyons* v. *The Fishmonger's Company* (*supra*) I understand counsel's point in reading that case was to show that the City of St. John had no right, as riparian owners between high and low-water mark, to place this structure in front of Robinson's wharf. But the fact is that the suppliant is a trespasser himself. The suppliant had no right to build a wharf there. There is a contention that he had it there for 35 years, but it is established by the evidence that he is there without the slightest authority.

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*Beckett* v. *The Midland Railway Co.* (*supra*) was cited by my learned friends for the purpose of sustaining the proposition that without legislation it would have been trespass on the part of the city or the Crown to erect such a structure, and the suppliant could have an injunction against the party putting it there. Now if he were a trespasser he would be out of court, and on the other hand if it has been built by virtue of legislative authority and such legislative authority is to be found in the Acts which I have quoted from, and relied on, clearly no damages are recoverable. The case of *Walkers Trustees* (*supra*) affords us no help because it is upon special Acts. The case here arises under an Act of N. B. which confirmed a grant made by the city to the Crown, and that has to be taken and construed with reference to the Act of 1891, and that Act provides that no compensation will be allowed for such a case as this.

Therefore, my argument comprises three propositions. First, we have not taken any lands, the property of the suppliant. Secondly, that if the suppliant has been damaged by what the Crown has done here, he has no remedy for it in a suit of this character because his damages are entirely consequential, and, under this Act and the law we have referred to, the Crown is not answerable here for consequential damages. Thirdly, that the property which the suppliant says has been injured is property which has been placed there contrary to law, and the suppliant can, therefore, get no damages against the Crown or the city.

*E. McLeod* Q.C. replied: In the case of *Brown* v. *Reed*, (*supra*) Brown proposed to build a wharf out into the harbour and the city came in and stopped him as conservators of the navigation of the harbour. I submit that we had an absolute legal right to build the wharf,

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and if our wharf is a nuisance it has never been abated by the city.

We have seen that the city does from time to time have wharves extended out beyond the harbour line. But this is within the alveus or harbour line, so that on this question it does not seem to me that there should be the slightest doubt. Then, as we are properly there, I do not think that the Crown could have built a wharf which would injure our property without paying damages, and they certainly cannot build a trestle and extend it over the front of our wharf. Our property is injuriously affected and we are entitled to compensation.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895) delivered judgment.

The petition in this case is filed to recover damages for the injurious affection of a lot of land and premises situate in the City of St. John, and belonging to the suppliant, which were injuriously affected by the construction of an extension or siding of the Intercolonial Railway, a public work of Canada. There is no question but that the property has been injuriously affected by the construction of this work, and the only question presenting any difficulty is as to whether or not the facts of the case bring it within the class of cases in which the land owner is entitled to damages. I had occasion in *The Queen* v. *Barry* (1) to discuss the rule or principle by which the question as to whether or not the claimant in such cases is entitled to damages, is to be determined, and in *Archibald* v. *The Queen* (2) briefly to state the rule. To entitle the suppliant to succeed, it must appear that the interference with some right incident to his property, such as a right of

(1) 2 Ex. C.R. 333.

(2) 3 Ex. C.R. 257; 23 Can. S. C.R. 147.

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way by land or water, differs in kind from that to which other of Her Majesty's subjects are exposed. It is not enough that such interference is greater in degree only than that which is suffered in common with the public. In this case there is, I think, an interference with rights incident to the suppliant's land and premises, differing not only in degree but in kind, from that to which the public generally are subjected.

There will be judgment for the suppliant for two thousand dollars, and costs.

*Judgment accordingly.*

Solicitor for suppliant: *J. R. Armstrong.*

Solicitor for respondent: *C. N. Skinner.*