

Privy Council Appeal No. 186 of 1919.

The City of Quebec - - - - - *Appellants*

Ludger Bastien - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH JULY, 1920.

Present at the Hearing:

VISCOUNT HALDANE.

VISCOUNT CAVE.

LORD DUNEDIN.

LORD ATKINSON.

MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT HALDANE.]

The actual field of controversy in the argument at the Bar in this appeal turned out to lie within narrow limits. The only question that really arose proved to be whether the appellants, in exercising a statutory power which undoubtedly entitled them to do what they actually have done, could do it without paying for the damage they have inflicted.

In 1846 the then Parliament of Canada passed an Act for the supply of the City of Quebec with water, and, after various amending Acts had been passed, the relevant provisions on the subject were consolidated in an amending Act of 1865 (29 Vict., c. 57 of the Statutes of Canada), entitled "An Act to amend and consolidate the provisions contained in the Acts and Ordinances relating to the incorporation of and the supply of water to the City of Quebec." The most important provisions of this statute are reproduced in the existing Act of Incorporation of the City of

Quebec, passed by the Legislature of the Province of Quebec (59 Vict., c. 47, art. 12). They are included in a compilation of which paragraphs 520 and 522 include the relevant sections of this statute, and are as follows :—

“ 520. The corporation of the city of Quebec is authorised to make, erect, construct, repair and maintain, in the city of Quebec, and without the limits of the said city for a distance of 50 miles, water-works, together with all appurtenances and accessories necessary to introduce, convey and conduct throughout the said city and parts adjacent a sufficient quantity of good and wholesome water, which the said corporation is authorised by the present Act to take and distribute for the use and supply of the inhabitants of the said city and for the parts thereto adjacent ; and also to improve, alter or remove the said water-works or any part or parts thereof ; and to change the site of the several engines and places or sources of supply thereof ; and also to erect, construct, repair and maintain all the buildings, houses, sheds, engines, water-houses, reservoirs, cisterns, ponds and basins of water and other works necessary and expedient to convey water to the said city and parts adjacent thereto :—For this purpose the said corporation may purchase, hold and acquire any lands, tenements and immovable estates, servitudes, usufructs and hereditaments in the said city, or within a circuit of fifty miles from the limits of the said city ; and also to make contracts for the acquisition of lands necessary for the said water-works ; acquire a right of way whenever it may be necessary ; pay any damages occasioned by such works either to buildings or lands ; enter into and make agreements and contracts with any person for the construction of the said water-works in whole or in part ; superintend and direct the works completed ; name and appoint an engineer and all officers and labourers necessary, and fix their salaries or wages ; enter during the day-time, upon the lands of private individuals for the purposes aforesaid and also make excavations and take and remove stones, soil, rubbish, trees, roots, sand, gravel and other materials and things, but by paying or offering a reasonable compensation for the said materials and things, and by conforming in all things with the provisions of this section.”

“ 29 Vict., c. 57, art. 36, para. 1 ; 59 Vict., c. 47, art. 12.”

“ 522. All bodies politic or corporate, or corporate or collegiate corporations, aggregate or sole, communities, husbands, tutors or guardians, curators, *grevés de substitution*, executors, administrators and other trustees or persons whatsoever, are authorised to sell to the said corporation such lands, tenements, servitudes, usufructs and hereditaments, which the said corporation may require for the purpose of the present section, and which they may be possessed of in their present qualities ; they may also agree with the said corporation in the same way as private individuals, respecting all matters relative to the works mentioned in the tenth and eleventh subsections (*art. 524 and 525 hereafter*) of the present section ; and all contracts, agreements, references to arbitrators, sentences and verdicts rendered for or against them, shall be equally binding upon those whom they represent, wherever the property or interests of such may be concerned.”

“ 29 Vict., c. 57, art. 36, para. 3.”

The interpretation of Section 520 appears to their Lordships to be clear. The corporation is empowered to make any water-works it requires, within the limits specified, and to take as much water as it pleases for the supply of the city. It may purchase any interests in land or any servitudes it desires. All this is rendered lawful, but the corporation must, by way of compensation for actual injury done, pay any damages from time to time occasioned by its water-works to buildings or lands, including

damage by abstraction of water. Section 522 contains a power enabling the corporation to purchase lands, servitudes, usufructs or hereditaments, and, if it chooses to take this course, it may so get rid of present or future liability to pay for by way of damage, which might prove to be of a continuing or recurring character. But it need not take this course, if it prefers to remain under the continuing or recurring liability which Section 520 imposes.

The river St. Charles flows from the north-west down to the City of Quebec. In 1851 the appellants, the corporation, acting under the powers they originally possessed, erected a dam up the river, about eight miles above the city, and there established the intake of their water supply. In the first instance the supply pipe was an 18-inch one. About 1883 this pipe had a 30-inch one added to it, to provide for the requirements of the growing city, and, before 1914, a third pipe, of 40 inches in diameter, was added.

The respondent has a mill on the river about half a mile below the intake of the appellants, which he uses as a tannery. In August 1914 he commenced the action out of which this appeal arises, alleging that the appellants' abstraction of water had deprived him of the pressure necessary for working his mill, and claiming damages. All other questions, including that of the quantum of damages, have been finally disposed of in the Courts below, and the question which remains is whether the appellants are under any liability at all for damages for taking the water. Their case is, firstly, that they have not been shown to have acted negligently or outside their powers, that the Legislature having authorised them to take the water in the way they have done, they have committed no wrongful act, and, secondly, that in any case no damage has been occasioned to buildings or lands within the meaning of Section 520.

In their Lordships' view, if the appellants are wrong on their first point, they are not entitled to succeed on their second point. Article 503 of the Civil Code of Quebec, which does not materially alter the common law, provides that—

“ He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs.”

This provision, in their Lordships' view, must be taken, having regard to the character of the common law on the subject in Quebec, to mean that the lower riparian owner has a right and title to the natural flow of the water as an incident of his right of property in his land. This right and title may be surrendered by the constitution of a servitude in favour of an upper riparian owner. But that not having been done, damage occasioned to the enjoyment of this right is, in law, damage to the land within the language of Section 520. The only point open to the appellants is thus their first point, and on this subject their Lordships are of opinion that the contention maintained at the Bar for the

appellants fails. It is true that what was done was rendered lawful by Section 520. But it was rendered lawful, if the appellants had not, under Section 522, bought up the proprietary rights which might be injured under Article 503 of the Code or otherwise, only under the condition subsequent that the appellants should, notwithstanding that there was no *injuria*, pay, under a liability imposed by Section 520, for the *damnum* which should from time to time prove to have been occasioned.

This was in substance the view taken of the law by Mr. Justice Roy, the learned Judge of the Superior Court of Quebec who tried the action. The majority of the learned judges who heard the case in the Court of King's Bench on appeal have come to the same conclusion as he did. In this conclusion their Lordships concur. They are unable to accept the reasoning of Mr. Justice Cross, who dissented. That learned judge thought the appellants had been given power to supply all the inhabitants of the City of Quebec, and to take all they needed for this purpose. No doubt this is so, but when the learned judge proceeds to suggest that in being given such a power the appellants have been put into a position not differing from that of a landowner, who may take and consume the water for the reasonable needs of his land, their Lordships cannot agree with him. The appellants have been put by the statute into the position of being able lawfully to take the water, and, if necessary, all the water in the river, without any of the restrictions which under the Code and by the common law would restrain the action of an ordinary riparian landowner in doing so, but they have been freed from these restrictions only upon condition that they should pay for *damnum* occasioned.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. Having regard to the special terms on which leave to bring the appeal was granted to the appellants, their Lordships think that these costs before this Board should be given in the circumstances as between solicitor and client.

In the Privy Council.

THE CITY OF QUEBEC

2.

LUDDER BASTIEN.

DELIVERED BY VISCOUNT HALDANE.

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