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HER MAJESTY THE QUEENAPPELLANT;

AND

EDGAR LOISELLERESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Injurious affection to land—Garage and service station located on highway—Highway closed and diverted by St. Lawrence Seaway—Whether garage owner entitled to compensation—St. Lawrence Seaway Authority Act, R.S.C. 1952, c. 242, s. 18(3).

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

1 [1905] A.C. 239, 74 L.J.K.B. 525. 2 [1906] A.C. 384, 75 L.J.K.B. 961.

The respondent operated a garage and service station on highway no. 3 in the Province of Quebec. As a result of the construction of the St. Lawrence Seaway, the highway was closed some 80 feet beyond the respondent's property and diverted a distance of some 1500 feet. The respondent's property was now located on a dead-end highway. No portion of his property was taken for the purposes of the seaway. By a petition of right the respondent claimed compensation for injurious affection. It was argued by the Crown that the injurious affection had not been caused by the construction of the seaway, but by the decision of the provincial Government to change the location of the highway and that there was therefore no claim in law against the Crown in the right of Canada. The trial judge maintained the petition of right and the Crown appealed to this Court.

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Held: The appeal should be dismissed.

It was clearly established in evidence that the diversion of the highway was made at the request of the Seaway Authority and largely at its expense; it was also clear that had the seaway not been built, the location of the highway would not have been changed.

It seemed obvious that had the Seaway Authority or any other person, without statutory authorization, constructed a canal and blocked the main highway adjacent to the respondent's property the latter—aside from any other remedies which might have been open to him—would have had a valid claim for damages under the general law. The statutory authority given to construct the works in question was however expressly made subject to the obligation to pay compensation for damage to lands injuriously affected. It seemed clear that there was a physical interference with a right which the owner was entitled to use in connection with his property, and that on the evidence such interference substantially diminished its value as a commercial property. The trial judge found that the construction of the canal and the diversion of the highway had adversely affected the respondent's land as a commercial property and there was ample evidence to support that finding. The amount awarded by the trial judge was not in issue in this appeal.

Autographic Register Systems Limited v. C.N.R., [1933] Ex. C.R. 152;
Metropolitan Board of Works v. McCarthy, L.R. 7 H.L. 243; *C.P.R. v. Albin*, 59 S.C.R. 151, referred to.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada¹, awarding damages for injurious affection. Appeal dismissed.

P. M. Ollivier, and *R. Tassé*, for the appellant.

François Dorval, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The Crown has appealed from a judgment of the Exchequer Court¹ awarding respondent an amount of \$18,018.32 as indemnity for injurious affection caused

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Abbott J. to respondent's property as a result of the construction of the St. Lawrence Seaway by the St. Lawrence Seaway Authority, a statutory corporation, acting as agent for the Crown in the right of Canada.

The facts are not in dispute. Since 1949 respondent had been operating a garage and service station on the outskirts of Melocheville in the Province of Quebec. This garage was located on provincial highway no. 3, which is the main Montreal-Valleyfield highway running along the south shore of the St. Lawrence River. In 1957, by reason of the construction of the seaway, this highway was closed some 80 feet beyond respondent's property and diverted a distance of some 1500 feet to the east, passing under the seaway canal by means of a tunnel. As a result of the works constructed by the Seaway Authority and the diversion of the highway, respondent's property was thereafter located in a cul-de-sac at the very end of a street, some 80 to 90 feet from one of the canals and some 1500 feet from the intersection of the re-located highway. No portion of the property of respondent was taken for the purposes of the seaway and his claim is entirely one for injurious affection.

Counsel for the Crown first argued that the injurious affection had not been caused by the construction of the seaway but by the decision of the provincial government to change the location of the highway and that there was therefore no claim in law against the Crown in the right of Canada. We were all of opinion at the hearing that this was not so and we did not hear the respondent on this point.

It was clearly established in evidence that the diversion of the highway was made at the request of the Seaway Authority and largely at its expense. It is also clear that had the seaway not been built the location of the highway would not have been changed. Decisions of the Quebec Courts in cases where damages have been claimed for injurious affection resulting from the closing or relocation of roads or streets under the *Municipal Code* or other relevant statutes are therefore of little assistance in the present case.

Respondent's claim was made under s. 18(3) of the *St. Lawrence Seaway Authority Act*, Statutes of Canada 1951 (2nd session), 15-16 Geo. VI, c. 24, which reads:

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(3) The Authority shall pay compensation for lands taken or acquired under this section or for damage to lands injuriously affected by the construction of works erected by it and all claims against the Authority for such compensation may be heard and determined in the Exchequer Court of Canada in accordance with sections 46 to 49 of the Exchequer Court Act.

The conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken, are now well established; *Autographic Register Systems Ltd. v. Canadian National Railway Company*¹; Challies "The Law of Expropriation", p. 136. These conditions are:

(1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;

(2) the damage must be such as would have been actionable under the commonlaw, but for the statutory powers;

(3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

(4) the damage must be occasioned by the construction of the public work, not by its user.

Mr. Ollivier for the Crown agreed that conditions 1 and 4 had been met in the present case but he argued that conditions 2 and 3 had not.

As to the second of the four conditions, it seems obvious that had the Seaway Authority or any other person, without statutory authorization constructed a canal and blocked the main highway adjacent to respondent's property, the latter—aside from any other remedies which might have been open to him—would have had a valid claim in damages under the general law. The learned trial judge so found and in my respectful opinion he was right in so doing. The statutory authority given to construct the works in question was however expressly made subject to the obligation to pay compensation for damage to lands injuriously affected.

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Abbott J. As to the third condition it seems clear to me that there was "a physical interference with a right which the owner was entitled to use in connection with his property"—*Metropolitan Board of Works v. McCarthy*¹; *C.P.R. v. Albin*²;—and that on the evidence such interference substantially diminished its value as a commercial property.

Respondent carried on a general garage and service station business selling oil, gasoline and the like, and prior to the construction of the canal the property was well located for that purpose. The learned trial judge found that the construction of the canal and the diversion of the highway had adversely affected respondent's land as a commercial property and there is ample evidence to support that finding. He fixed the damages at \$18,018.32. This amount included a sum of \$5,280.90 for depreciation of respondent's residence on the basis that the garage building and residence were interdependent. Under ordinary circumstances, it would seem unlikely that the construction of the canal and the diversion of the highway would diminish the value of land for residential purposes. However we do not have to consider that aspect of the matter here, since counsel for appellant made no special point of the house and at the conclusion of the argument stated that in the event of the Crown being found liable the amount awarded was not now in issue.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitor for the respondent: F. Dorval, Beauharnois.

¹ (1874), L.R. 7 H.L. 243, 253.

² (1919), 59 S.C.R. 151 at 159.