

John Stirrett and Sons, Limited - - - - - *Appellants*

*v.*

The Kaministiquia Power Company, Limited - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1929.

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*Present at the Hearing :*

VISCOUNT DUNEDIN.

VISCOUNT SUMNER.

LORD BLANESBURGH.

LORD THANKERTON.

MR. JUSTICE DUFF.

[*Delivered by* LORD THANKERTON.]

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This is an appeal from the judgment of the Supreme Court of Ontario, by which the judgment of Kelly J. in favour of the appellants and against the respondents was recalled and the appellants' action dismissed.

The appellants are a lumbering company, operating under licences from the Government of the Province of Ontario certain tracts of timber adjacent to Big Dog Lake in the District of Thunder Bay. The Dog River flows out of Big Dog Lake at its southern end, and, after its junction with the Mattawin River, is known as the Kaministiquia River, which discharges into Lake Superior. The appellants' sawmill is on the Dog River just above its junction with the Mattawin River.

The respondents have a dam and works for generating electric power at Kakabeka Falls on the Kaministiquia River about eight miles below the appellants' sawmill.

In 1911 a dam was erected at the outlet of Big Dog Lake by the Government, acting through the Public Works Department, the surrounding lands being all Crown property. No power works were erected at this dam. The control and management of this dam were placed by the Minister of Public Works in the hands of the Hydro-Electric Commission of Ontario, who were originally defendants to the action, and the actual control was entrusted by the Commission to the respondent company, subject to observance of certain maximum lake levels in the interests of public safety.

The action by the appellants sought an injunction and damages as against the defendants—the respondents and the Commission—upon the allegation that the defendants, without legal right, operated the dam at Big Dog Lake, and by that means interfered with the flow and levels of the water in the Lake and Dog River in such manner as to prevent the appellant company from bringing down its timber and carrying on its timber operations during the seasons 1921–22, 1922–23 and 1923–24, and also so as to destroy or damage the value of the appellants' plant and equipment and thereby prevent its further operation.

On the 2nd of September, 1926, the learned Trial Judge dismissed the action as against the Hydro-Electric Commission, but held the respondent company liable to the appellant company, except in respect of the operations during the season 1921–22, and referred the case for ascertainment of damages, but refused an injunction as of little service in the circumstances.

The respondents appealed to the Appellate Division of the Supreme Court of Ontario, and a cross-appeal was taken by the appellants who, however, did not thereby complain of the order of the learned Trial Judge so far as it dismissed the action against the Commission. On the 4th of July, 1927, the First Appellate Division of the Supreme Court of Ontario allowed the appeal, dismissed the cross-appeal and dismissed the action with costs.

At the hearing before this Board the learned counsel for the appellants confined the claim for damages to a claim in respect of the alleged unlawful interference by the respondents with the levels of Big Dog Lake during the season 1922–23, and the appellants' consequent inability in the spring of 1923 to get their tug or their logs afloat when the ice melted, these having been left in positions where the appellants claim they were entitled to expect sufficient depth of water to float them, when the ice melted.

The main question is, whether during the material period the dam at the outlet of Big Dog Lake was under the legal control of the respondent company, so as to give the appellants a right of action against it, or whether the action is misdirected in respect that the respondents were acting under the authority and direction of the Crown, which admittedly is owner of the dam.

Between 1897 and 1908 one Jenison had obtained authority

under several statutes to construct power works and to use the waters of the Kaministiquia River and its tributaries, and *inter alia*, to construct a dam at the outlet of Big Dog Lake, but no such dam was constructed by him, and in 1908 an "Act to provide for Development of Water Power at Dog Lake" (Ontario Statutes (1908), 8 Edw. VII, c. 24) was passed, which *inter alia* provided:—

"2. The Lieutenant-Governor in Council may, by and through the agency of the Commission or otherwise, construct, erect and maintain a dam or dams in Dog Lake or in the Kaministiquia River in the District of Thunder Bay in such place at or near the outlets of the said Dog Lake, as the Lieutenant-Governor in Council may deem best, for the purpose of storing and controlling, and may store and control, the water flowing into the said Dog Lake and from the said lake into the said river and may develop water power for the production of electrical power or energy at or near such outlet, and may lease such water power from time to time in such manner and to such persons, firms or corporations as the Lieutenant-Governor in Council may from time to time see fit.

"3. After the completion of such dam the Lieutenant-Governor in Council shall have full power at all times to regulate the use by the owner or lessees of or any person, firm or corporation entitled to any water power upon the said Kaministiquia River below the said dam of the water so stored or controlled and the times when and the quantities in which the same may be taken."

The dam here in question was constructed during the years 1909 to 1911 by the Crown, and paid for out of public funds. There is no evidence of an Order in Council expressly authorising its construction or exercising the power conferred by Section 3. However, in the opinion of their Lordships, statutory authority was unnecessary for the erection of a dam on Crown lands, subject to questions with other riparian owners or of obstruction of a navigable stream. But the appellants are not riparian owners at or anywhere near Dog Lake. Their complaint is in substance that the respondent company while in charge of the dam under and on behalf of the Government authority above stated, allowed the water to run out of Dog Lake as it would have done if the stream had been left in its natural state, but too soon for the appellants' convenience and so failed to operate the dam to suit them, and their claim arises out of changes of lake levels over a period of months as affecting the laying up of a tug and the storage of logs.

Their Lordships are further of opinion that, when constructed, the dam fell under the control of the Department of Public Works by virtue of Section 8—which was first enacted in 1910—of the Ontario Public Works Act (Ontario R.S. (1914) c. 35).

As already stated, the control of the dam was entrusted by the Minister of Public Works in 1911 to the Hydro-Electric Commission and, as appears from the correspondence, the regulation of the water was left in the hands of the respondent company (who were then in fact controlling it) for the time being, always with the understanding that the Commission could assume control

whenever they saw fit, and the respondent company was notified by the Minister to take instructions from the Commission for the future.

After consideration of the subsequent correspondence, their Lordships agree with the conclusion of Smith J.A., who says :—

“ After a careful perusal of the correspondence filed as exhibits I am unable to agree that the defendant company was in absolute control of the dam at any time. On the contrary, I am of opinion that while through its servants it was performing the manual acts required for control and regulation of the waters above the dam, it was at all times doing these acts subject to the direction first of the Hydro Commission and later of the Department of Public Works and the Department of Lands and Forests.”

It may be added that the action of the appellant company in its frequent letters to the Department of Public Works and other Government Departments affords confirmation of this conclusion.

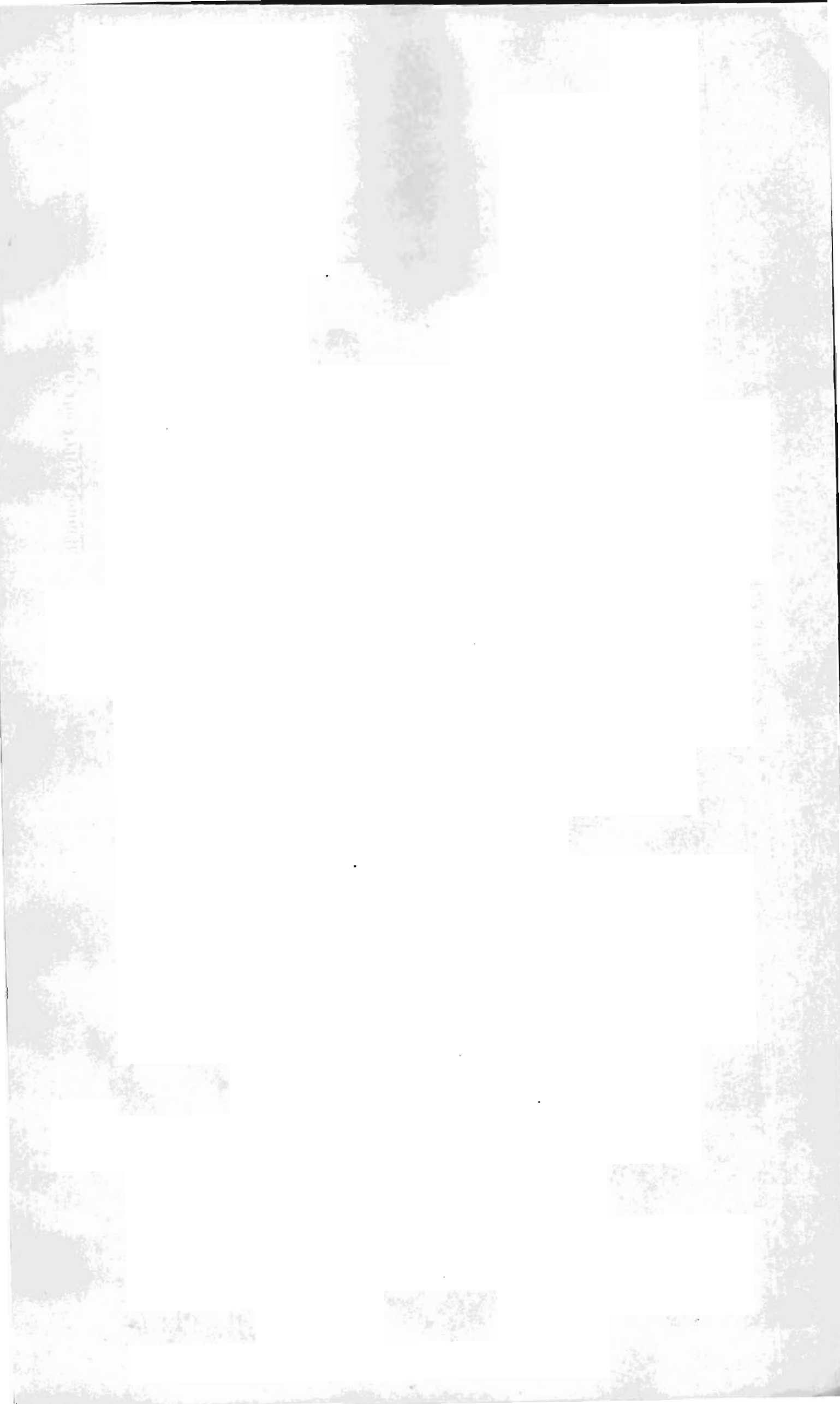
It follows that the action is misdirected as against the respondent company.

Their Lordships are also of opinion that the appellants have failed to establish that in laying up the tug on the shore of the lake or storing logs on the ice they were entitled to rely on the existence of a minimum level of the water in the lake when the ice subsequently melted. The claim is thus formulated in the appellants' case :—

“ In May, 1923, the level of Dog Lake was 7 feet lower than in May of any earlier year since the dam was operated and 9 feet lower than the average for May during that period. It is true the lake was still higher than its natural level would have been, and respondent contends that appellant has, therefore, nothing to complain about. The higher levels, however, which respondent had established and maintained for many years were of no advantage to appellant and were entirely for respondent's own purposes. Appellant had perforce accommodated itself to the situation created by respondent, and when appellant put up its tug at the close of the previous season it was of necessity put in a suitable place having regard to the conditions then existing and long established by respondent itself. Likewise appellant's logs were placed on the ice with a view to their floating in the spring in the locations selected in the expectation of usual conditions prevailing. Appellant's prior troubles had all been on the River, and it had no reason to anticipate any unusual change in Lake levels.”

Their Lordships are of opinion that in law the appellants had no right to calculate on such a definite draught of water by the respondents from the Lake.

Their Lordships are therefore of opinion that the appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly. The respondents will have the costs of the appeal.



In the Privy Council.

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JOHN STIRRETT AND SONS, LIMITED,

vs

THE KAMINISTIOUIA POWER COMPANY,  
LIMITED.

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DELIVERED BY LORD THANKERTON.

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