Osgoode Hall Law Journal

Volume 3, Number 3 (October 1965)

Article 5

Constitutional Law: Simpson Land Co. Ltd. v. Black Contractors Ltd.

Bruce I. MacTaggart

CONSTITUTIONAL LAW

Simpson Land Co. Ltd. v. Black Contractors Ltd.

BRUCE I. MACTAGGART*

NAVIGABLE WATERS — PRIVATE AND PUBLIC RIGHTS IN MAN-MADE INLETS.

This decision provides an analysis of the definition of "navigable water". The facts are as follows: The Crown patent for the lot involved reserved to the Crown the right to enjoy any navigable water which might be found on, or flowing through, the lot in question. The issue raised was whether the owner, after removing sand from his lot in such a manner as to create a bay, could assert private rights over the waters in such bay so as to prevent others from sailing across it.

The Supreme Court of Canada, affirming the trial judge and the Ontario Court of Appeal, held that the owner of the lot could not prevent anyone from sailing across the bay, the waters being properly characterized as "navigable," even though he owned the land now forming the bottom of the bay.

In detail the facts are as follows: The defendants, while in the course of removing sand from Lot 3 of Grenadier Island, of which they eventually became the owners, caused a bay to be formed in this lot about 600 feet in horizontal depth and 545 feet in width at its mouth. The defendants likewise conducted similar operations on the adjacent lot, Lot 4, creating another bay which opened into the bay created in Lot 3. When the defendants' lease to remove sand from Lot 4 terminated, the plaintiff took up the lease to carry on similar sand removing operations. The plaintiff asked permission from the defen-

*Mr. MacTaggart is a second year student at Osgoode Hall Law School.

dants to cross the bay created in Lot 3 to gain access to Lot 4. The defendants refused. The plaintiff attempted to find another entrance into the bay on Lot 4, but found no other possibility that was economically feasible. The plaintiff, despite the defendants' refusal, commenced sailing across the bay of Lot 3, into the bay of Lot 4 with their sand removing equipment. To prevent this, the defendants put obstructions in the bay of Lot 3, preventing the plaintiff from navigating across the bay. The plaintiff sued for an injunction for the removal of the obstructions. The injunction was granted by the Court.

In reaching its conclusions the Supreme Court followed the case of *Cram v. Ryan*[1] and distinguished the case of *Sim E. Bak et al. v. Ang Yong Huat.*[2]

The facts in *Cram v. Ryan* are similar to *Simpson Sand Co. v. Black Douglas Contractors Ltd.*[3] In *Cram v. Ryan* the defendants had a licence to remove sand from lands situated along the St. Mary's River, and in doing so created a bay in which the plaintiff moored his boarding scow. The defendants proceeded to operate their sand removing equipment and while doing so ejected sparks which ignited and destroyed the plaintiff's scow. It was held that the plaintiff's scow, while in the bay created by the defendants, was not a trespasser since it was moored in public navigable waters and not private waters. In the case of public navigable waters there is a right of access to the shore. Armour, C.J. stated that when the shore line was moved back from its natural position, the water so let in was as much *publici juris* as an other part of the water of the river, and the removal of the shore line back from the natural line did not take away the free access to the shore as newly established.[4]

Perhaps one important similarity between *Cram v. Ryan* and *Simpson Sand Co. v. Black Douglas Contractors Ltd.* was that the deeds of the lands from which the sand was removed had identical reservations to the Crown. The Crown had the right to enjoy any navigable waters which may be found on, or under, or flowing through, or upon the lands granted.[5]

The case upon which the appeal to the Supreme Court was based, and which the Court chose to distinguish, was *Sim E. Bak v. Ang Yong Huat.* The waters in question there were the waters of the Kalang River of India, a tidal river which was described by Lord Wrenbury as more like a mango swamp than a public navigable

1 (1894), 24 O.R. 500; Aff'd 25 O.R. 524.
2 [1923] A.C. 429.
3 [1964] S.C.R. 333.
4 *Supra*, footnote 1, 25 O.R. at 528.
5 The deeds contained reservations similar to the following:
(a) reserving free access to the shore of the lands hereby granted for all vessels, boats and persons.
(b) reserving, nevertheless unto us, our heirs and successors, the free uses, pasage, and enjoyment of, in, over, and upon all navigable waters that shall or may hereafter be found on or under, or be flowing through, or upon, any part of the said parcel or tract of land hereby granted as aforesaid.

river.[6] In *Sim E. Bak* both the plaintiff and defendant owned lands in which holes had been dug for the purpose of removing brick clay. A bridge had been constructed about thirty years before via which water could be admitted onto the lands to fill these holes, thus creating many small ponds and lagoons. The defendant cut through the bank of the river so that tidal water could obtain access to a pond on his land, his purpose being to allow fish to come up with the tide, flow into the pond and there be intercepted by a sluice which he had erected. To prevent the fish from reaching the defendant's land the plaintiff erected a fence on his property extending across the mouth of the defendant's sluice. As a result the fish did not reach the defendant's pond. The defendant tore down the fence, but in the ensuing action the plaintiff successfully asserted his right to build this fence on his land.

The Privy Council held that the waters in question were not navigable despite the fact that boats within limited size could and did pass through the bridge and up the waterway to bring brick clay out from the lands, and despite the fact that *tidal* waters did reach the land. The court indicated that the flowing of the tide is strong *prima facie* evidence of the existence of a public navigable right, but whether there was such a right depended upon the situation and the nature of the channel. Not every ditch or catchment which is reached by the tide forms part of navigable waters, even though they be sufficient to admit the passage of a boat. The question is one of fact for the jury to decide in light of all the circumstances.[7] Because the waters were characterized as non-navigable, the defendant could not object to any erection of a fence made by the plaintiff on his own land, notwithstanding that the lands were from time to time covered by tidal waters.

The Supreme Court in *Simpson* distinguished *Sim E. Bak* on the basis that there the plaintiff created the channels for a specific purpose,[8] *i.e.*, for the purpose of creating a fish catchment, whereas in both *Cram v. Ryan* and in *Simpson Land Co. v. Black Contractors* the water was on the land only as the incidental result of a sand removal operation. The Court felt that the letting of water on to one's land artificially for a specific purpose was quite distinguishable from the mere broadening of the St. Mary's or St. Lawrence Rivers by a sand removal operation on the banks.[9]

It is significant to note that the Supreme Court played down the factor of commercial utility[10] in the test for navigability, although paying it lip service.[11]

---

[6] *Supra*, footnote 2 at 432.
[7] *Id.* at 433.
[8] *Supra*, footnote 3 at 337.
[9] The St. Lawrence and the Great Lake chain are recognized as navigable waters (*Dixon v. Snetsinger* (1873), 23 U.C.C.P. 235).
[10] *A.G. Que. v. Fraser* (1906), 37 S.C.R. 577; *Keewatin Power Co. v. Town of Kenora* (1907), 13 O.L.R. 237; *Rotte v. Booth* (1886), 11 O.R. 491; *Gordon v. Hall*, 16 D.L.R. (2d) 379.
[11] *Supra*, footnote 3 at 440.

It is worth while to consider the past history of the test of navigability and its connection with ownership of the *solum* below such waters. At common law the test for navigability originally was based on the ebb and flow of the tide. The beds of all such navigable waters were vested *prima facie* in the Crown for the benefit of the subject. The beds of all other rivers vested in the riparian owners *ad medium filum aquae,* and this right included fishing rights.

In Canada, the tidal/non-tidal test for navigable waters and hence ownership of the *solum* was not imported into our law because of its inappropriateness to our situation.[12] The test of navigability, which in turn determined ownership of the *solum,* became a question of fact.[13] Thus only where the waters are characterized as non-navigable, does the concept of riparian ownership come into play. The tidal distinction is now only applicable to fishing rights. In tidal waters, there is a public right to fish, but not in non-tidal waters.[14]

Where the Crown grants a water-lot to a subject, but retains a reservation in respect of any navigable waters, the express grant severs the ownership of the *solum* from the rights of public navigation. The public right of navigation is much like an easement and the grantee of the *solum* takes subject to such right. The grantee cannot interfere with or obstruct the public right of navigation which is paramount to all other rights in the water.[15]

What are the factors that point towards navigability? The flowing of tidal waters is a *prima facie* but not conclusive test.[16] User for commercial purposes is a factor that has been often considered.[17] With this decision, the Supreme Court has created a still further test. If the waters are let onto land for a specific private purpose from a source that itself qualifies as navigable, they are not characterized as navigable; but if the waters flow onto land as the indirect result of a dredging operation which has the effect of merely indenting the shoreline of recognized navigable waters, they will be characterized as navigable.[18]

It is submitted that such a test could produce problems. What if a person creates a bay such as the one in question for use as a private harbour? Should the fleeting element of a man's intention determine the character of the waters? The difficulty lies in distinguishing fact situations in the twilight zones. It is submitted that a subjective test, such as that here adopted by the Court, is inappropriate and should be avoided.

---

12 *Clarke v. Edmonton* [1930] S.C.R. 137; *Dixon v. Snetsinger* (1873) 23 U.C.C.P. 235; now codified in *The Beds of Navigable Waters Act,* R.S.O. 1960, c. 32.

13 *A.G. Que. v. Fraser* (1906), 37 S.C.R. 577; *R. v. Meyers* (1853), 3 U.C.C.P. 305 (the Canadian common law and civil law positions now being the same).

14 *A.G. Can. v. A.G. Que.* [1921] A.C. (civil law).
A.G. B.C. v. A.G. Can. [1914] A.C. 153 (common law).

15 *Cunard v. R.* (1910), 43 S.C.R. 88.

16 *Supra,* footnote 2 at 443.

17 *Supra,* footnote 10.

18 *Supra,* footnote 9.