1965

*Oct. 18, 19
Dec. 14

CITY OF PORTAGE LA PRAIRIE (*Defendant*) ..... APPELLANT;

AND

B.C. PEA GROWERS LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Nuisance—Seepage from city's sewage lagoon to plaintiff's farm land—Liability for damages—Charter of the City of Portage la Prairie, 1907 (Man.), c. 33, ss. 98, 99, 100—The Expropria-

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

tion Act, 1962 (Man.), c. 18, s. 28A—The Municipal Act, R.S.M. 1954, c. 173, s. 944.

The plaintiff was the owner of land, on which it operated a seed cleaning mill and a farm, which adjoined land owned by the defendant on which the defendant located and operated a sewage lagoon, erected in 1958, for the purpose of disposing of sewage from the City of Portage la Prairie. It was put into operation in the year 1959. The plaintiff claimed that during the fall of that year, in 1960, and in 1961 to the date of the statement of claim, "water" had seeped from it on to the plaintiff's land, causing damage to crop and the flooding of the pit in its mill, so that it could not be operated without extensive repairs. The judgment at trial in favour of the plaintiff granted an injunction restraining the defendant municipality from causing or permitting sewage, water, or effluent, or any part of these to escape from its sewage lagoon and to flow or pass into or upon the plaintiff's land, and also awarded damages and costs. The Court of Appeal unanimously affirmed the trial judgment and the municipality then appealed to this Court.

Held: The appeal should be dismissed.

The appellant, having created a nuisance which caused damage to the respondent, was liable therefor, because that which was complained of as a nuisance was not expressly or impliedly authorized by the statute (*Charter of the City of Portage la Prairie,* 1907 (Man.), c. 33) in accordance with which the lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated. Other statutory provisions relating to construction of sewage facilities, *i.e.* 1957 (Man.), cc. 86 and 87, added nothing to the powers which were given to the appellant under its charter. The same applied to the regulations made pursuant to *The Public Health Act,* R.S.M. 1954, c. 211.

Section 28A of *The Expropriation Act,* 1962 (Man.), c. 18, respecting compensation for land taken or injuriously affected, was not a bar to the respondent's action. That section did not provide any remedy to the respondent, because, in the light of the findings of fact made by the trial judge, it could not be said that damage to the respondent necessarily resulted from the exercise by the appellant of its power to construct a sewage system. Nor was there any intention on the part of the Legislature to deprive the respondent of those remedies available to it at common law in respect of the damage which it sustained. *District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.,* [1965] S.C.R. 377, distinguished.

The liability of the appellant for damages did not arise from negligence on the part of its engineers. Accordingly, s. 944 of *The Municipal Act,* R.S.M. 1954, c. 173, which provides a defence in respect of an engineer's negligence, was not applicable.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Nitikman J. Appeal dismissed.

G. T. Gregory, for the defendant, appellant.

J. K. Knox, for the plaintiff, respondent.

[1] (1965), 50 W.W.R. 415, 49 D.L.R. (2d) 91.

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

The judgment of the Court was delivered by

MARTLAND J.:—This appeal is from the unanimous judgment of the Court of Appeal for Manitoba[1], which affirmed the judgment at trial in favour of the plaintiff, which granted an injunction restraining the defendant from causing or permitting sewage, water, or effluent, or any part of these to escape from its sewage lagoon and to flow or pass into or upon the plaintiff's land, and also awarded damages and costs.

The respondent is the owner of land, on which it operates a seed cleaning mill and a farm, which lies immediately to the north of land owned by the appellant on which the appellant located and operated a sewage lagoon, erected in 1958, for the purpose of disposing of sewage from the City of Portage la Prairie. It was put into operation in the year 1959. The respondent claimed that during the fall of that year, in 1960, and in 1961 to the date of the statement of claim, "water" had seeped from it on to the respondent's land, causing damage to crop and the flooding of the pit in its mill, so that it could not be operated without extensive repairs. A claim was also made in respect of noxious odors emanating from the lagoon, but this aspect of the claim is no longer in issue.

After a careful review of the evidence, the learned trial judge reached the following conclusions:

> I am convinced that there is seepage from the lagoon with the result that the escaping water flows into and onto the plaintiff's land and into the pit of the mill and basement of the farm buildings. In consequence thereof, the plaintiff's land has become overburdened and cannot be used for farming operations or, for that matter, any operation formerly carried on there by the plaintiff. Nor can the mill be used for the purpose for which it was intended, or was put to, prior to operation of the defendant's lagoon.
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> I find as a fact that the water-logging and overburdening is caused by, and is the result of, seepage from the defendant's sewage lagoon and that, insofar as the plaintiff is concerned, this constitutes a nuisance. It is an interference with the plaintiff's rights. I further find as a fact that by reason of the overburdening by water on the plaintiff's land, the plaintiff was unable to farm it for the period from 1961 onward and that, in addition, due to water in the mill pit, operation of the mill could not be carried on for part of 1960, and from 1962 onward.

[1] (1965), 50 W.W.R. 415, 49 D.L.R. (2d) 91.

Dealing with the question as to whether the escape or seepage of the effluent was necessarily incidental to the operation by the appellant of the sewage lagoon, he found as follows:

> I cannot under any circumstances conceive seepage to be incidental to the operation of a lagoon. As stated earlier, the purpose of a lagoon is to contain the effluent, not permit it to escape.
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> Nor has the defendant satisfied me that seepage is the inevitable result of lagoon construction or operation and cannot be prevented by the employment of proper means. The defendant has not only failed to establish that it has used reasonable diligence or taken all reasonable steps and precautions to prevent leakage from the lagoon with its resulting nuisance, but to my mind quite the contrary is the case.

The conclusions of the learned trial judge were upheld by the Court of Appeal.

On the appeal to this Court the argument of counsel for the appellant was in respect of two submissions of law:

1. That the appellant was under a statutory mandate to erect and maintain the work in question, and that it was required to do what it did, in the fashion which it did, by such mandate.
2. That s. 944 of *The Municipal Act*, R.S.M. 1954, c. 173, provided a complete defence to the action.

In determining the first question, it is necessary to consider the statutory provisions upon which the appellant relies. These are ss. 98, 99 and 100 of the *Charter of the City of Portage la Prairie*, 1907 (Man.), c. 33, which provide as follows:

> 98. The city may and shall have power to install, design, contract, build, purchase, improve, hold and generally maintain, manage, operate and conduct a system of waterworks and sewerage, and all main pipes, buildings, matters, machinery and appliances therewith connected or necessary thereto, in the City of Portage la Prairie, and parts adjacent as hereinafter provided.
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> 99. The city shall have all the powers necessary to enable it to build the waterworks and sewers hereinafter mentioned, and to improve, secure, maintain and enlarge any of said works from time to time as to the said city may seem meet, and to carry out all and every the other powers conferred upon it by this Act.
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> 100. It shall be the duty of the council of said city to examine, consider and decide upon all matters relative to supplying the said City of Portage la Prairie, by the means contemplated by this Act, with a sufficient quantity of pure and wholesome water for the use of its inhabitants, and also to provide, build or construct the necessary waterworks, sewers, buildings, machinery and other appliances requisite for the said object.

Section 98 gives to the city the power to install, maintain and operate a system of waterworks and sewerage in the

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

Martland J.

city and parts adjacent. The lagoon in question was in a part adjacent.

Section 99 confers on the city all powers necessary to enable it to build the waterworks and sewers mentioned in the subsequent sections of the Act and to improve, maintain and enlarge them from time to time.

Section 100 relates not to the city, but to the city council, upon which is imposed the duty to decide upon matters relating to supplying the city with a sufficient quantity of pure and wholesome water, *i.e.*, to formulate the plans necessary for that purpose, and also to carry them out by providing, building or constructing the necessary waterworks, sewers, etc., requisite for that object.

The combined effect of these sections, in relation to the circumstances of this case, is that the appellant was granted the power to build and maintain a sewerage system, with a duty imposed upon its council to devise the necessary plans for the object of providing a water supply and to carry them out, including the provision of sewers. There was no direction to adopt any particular method of sewage disposal. The appellant was given the power to construct a sewage lagoon but it was not subject to a specific mandate to do so irrespective of whether a nuisance was thereby created or not. There is nothing in the City Charter expressly providing that it was to be exempted from its common law liability for maintaining a nuisance if, in fact, a nuisance did result. Nor is this a case in which the appellant can contend successfully that the creation of a nuisance was an inevitable consequence of the exercise of its statutory powers and that, in consequence, the statute would provide a defence to a claim in respect of it. The learned trial judge has made a specific finding to the contrary.

In addition to the provisions, previously quoted, contained in the *Charter of the City of Portage la Prairie,* some reliance was placed on other statutory provisions. Counsel referred to the two special Acts, Chapters 86 and 87 of the Statutes of Manitoba 1957. These statutes ratified, confirmed and made binding on the appellant by-laws authorizing it to enter into an agreement with Campbell Soup Company Limited, and to borrow money, without a vote of the ratepayers for the construction of sewage facilities necessitated by that agreement. In my

opinion they do not assist the appellant's submission on this point. They do not add anything to the powers which were given to the appellant under its charter.

The same applies to the regulations made pursuant to *The Public Health Act,* R.S.M. 1954, c. 211. In brief, these regulations require a municipality contemplating the construction of a sewage disposal or treatment system to submit plans, specifications and other material to the Minister, and prohibit such construction without his certificate that such construction may be carried out. These provisions do not add to the appellant's statutory powers, but make their exercise conditional upon this required procedure being followed. Nor are the appellant's powers enlarged by the provision which enables the Minister to authorize the construction by one municipality of sewage disposal works in another municipality.

Some reliance was placed upon the decision of this Court in *District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.*[1]. Reference was made to the statutory provision contained in s. 28A of *The Expropriation Act,* enacted by c. 18, Statutes of Manitoba 1962, which replaced s. 398 of *The Municipal Act,* R.S.M. 1954, c. 173. It reads as follows:

> 28A. A municipal corporation shall make to the owners of, or other persons interested in, land entered upon, taken, or used by it in the exercise of any of its powers, or injuriously affected thereby, due compensation for the land so entered upon, taken, or used, and for any damages necessarily resulting from the exercise of those powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, or if no other provision is made for determining the compensation, shall be determined by arbitration as herein provided.

The wording of this section is similar to, but not identical with, that of the first portion of s. 478(1) of the *Municipal Act,* R.S. B.C. 1960, c. 255, which was referred to in that case.

Section 398 of *The Municipal Act* of Manitoba was repealed on August 4, 1959, and an entirely different section was substituted for it. It reappeared, as a part of *The Expropriation Act,* by an amendment to that Act enacted on March 30, 1962, and was then given retroactive effect to August 4, 1959. The provision did not exist at the time the

[1] [1965] S.C.R. 377, 49 D.L.R. (2d) 710, 51 W.W.R. 193.

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

Martland J.

respondent suffered the damage complained of in the statement of claim, nor at the time the statement of claim was issued.

The essential difference between the British Columbia case and the present one was the existence in the British Columbia statute of s. 529, which provided that:

> No action arising out of, or by reason of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch authorized by section 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any district municipality.

The decision in the *District of North Vancouver* case was that, in the light of that provision, a person who sustained damage as a result of the construction, maintenance, operation or user of a drain or ditch authorized by s. 527 could only make such claim for compensation as might be available to him under the provisions of s. 478(1). There is no statutory provision similar to s. 529 in any Manitoba statute to which we were referred.

I do not regard s. 28A of *The Expropriation Act* of Manitoba as constituting a bar to the bringing of an action for damages by the respondent in the circumstances of the present case. That section did not provide any remedy to the respondent, because, in the light of the findings of fact made by the learned trial judge, it could not be said that damage to the respondent necessarily resulted from the exercise by the appellant of its power to construct a sewage disposal system. Nor do I find in this section, or in the other statutory provisions cited to us, any intention on the part of the Legislature to deprive the respondent of those remedies available to it at common law in respect of the damage which it sustained.

My conclusion, in respect of the first point raised by the appellant, is that the appellant, having created a nuisance which caused damage to the respondent, is liable therefor, because that which is complained of as a nuisance was not expressly or impliedly authorized by the statute in accordance with which the lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated.

The next point raised is that a complete defence to the action is to be found in the provisions of s. 944 of *The Municipal Act*, which provides:

944. Where a municipal corporation constructs any public work under the supervision of a civil engineer, a Manitoba land surveyor, or some other person competent to perform the work, if the work is carried out in accordance with the plans and specifications and in good faith, the corporation is not liable for damages arising from any negligence on the part of the engineer, surveyor, or other person entrusted with the supervision of the work.

1965

CITY OF PORTAGE LA PRAIRIE v. B.C. PEA GROWERS LTD.

Martland J.

The learned trial judge made a specific finding that there was no evidence of such negligence in this case and, in consequence, held that the section had no application. The reasons delivered in the Court of Appeal confirm this view and point out that the appellant's liability in this case is founded, not on negligence, but on nuisance.

The appellant's submission before us was that a nuisance could not have arisen unless the appellant's engineers had been negligent, and that, since s. 944 provides a defence in respect of an engineer's negligence, the action fails for that reason.

I do not agree with this reasoning. It was not necessary, in order to fix the appellant with liability for the creation of a nuisance, for the respondent to establish negligence on the part of the appellant or of its engineers in the construction of the lagoon. The learned trial judge has found that there was no negligence on the part of the engineers. The position is that a nuisance was created, even though the engineers were not negligent, which was not expressly or impliedly authorized by the statutory powers which permitted its construction, and that is sufficient to make the appellant liable. In these circumstances s. 944 can have no application. The liability of the appellant for damages, in this case, does not arise from negligence on the part of the engineers.

For the foregoing reasons, in my opinion, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Swift, Macleod, Deacon, Kirby & Gregory, Winnipeg.

Solicitors for the plaintiff, respondent: Tupper, Adams & Co., Winnipeg.