1963
May 30, 31
Jul. 3

BETWEEN:

ROBERT A. SHEPHERD, JR. .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ..... } RESPONDENT.

Crown—Petition of Right—Expropriation—Servitude on land adjoining Airport—Public needs—Expropriation Act R.S.C. 1952, c. 106, ss. 2(g) and 3(b)—Aeronautics Act R.S.C. 1952, c. 2, ss. 3(c), 9(1)(2), 23—Expropriation Act not ultra vires—Damages—Limited ownership of air space over property.

The Crown registered a servitude on suppliant's lands adjoining the Montreal International Airport prohibiting building beyond a certain altitude, and prohibiting the maintenance of any obstruction, tree, or any construction of a greater vertical elevation than prescribed, and including "the right of employees of the respondent to enter upon the said land for the purpose of cutting down any tree that exceeds the height allowable for structures as aforesaid". Suppliant is the owner of the land, the instrument of transfer to him containing a clause "the said property is sold subject to the Montreal Airport Zoning Regulations".

Suppliant brings his petition of right claiming that the *Expropriation Act* R S C. 1952, c. 106 is *ultra vires,* and a permanent injunction prohibiting aircraft from violating his air rights and claiming further damages in the sum of $36,000 alleged to have resulted from the operation of the adjoining airport by reason of low flying jets, glaring runway lights, resulting in loss of tenants, and for violation of air rights and the loss of certain trees.

Held: That compensation for depreciation of the value of the land be fixed at $1,500, and for the trees felled on the property, $500.

2. That by pleading that the *Expropriation Act* is invalid suppliant jeopardized the sole relief he might expect, namely, compensation for the depreciation of his property which defect was obviated by respondent in its statement of defence and suppliant could not claim any procedural surprise.

3. That a government shorn of the power of expropriation would lack one of the essential attributes of sovereignty, one pertaining to the furtherance of peace, order and generally speaking good government of the country.

4. That the servitude imposed for the public needs of Canada, legally authorized and executed, vested possession thereof in the Crown.

5. That the exploitation of a government built airport under government control was a perfectly normal enterprise, the sequels of which might be annoying, but in fact were blameless in law, save in the event of negligence.

6 That the owner of land had a limited right in the air space over his property which limited ownership vindicated a legalized expropriation wherever the public interest demanded.

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

PETITION OF RIGHT claiming damages from the Crown for injury to property through imposition of a servitude.

The action was tried before the Honourable Mr. Justice Dumoulin at Montreal.

Frank F. Hubscher for suppliant.

Paul Ollivier, Q.C. and *Roger Tassé* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (July 3, 1963) delivered the following judgment:

On January 9, 1963, the respondent, in right of Canada, filed and deposited in the Montreal Registration Office a plan and description of a servitude on, *inter alia,* lot 184-4 situate along Montée St. François Road in the City of St. Laurent, Quebec Province, Robert A. Shepherd being the owner of the above parcel of land, bearing civic number 1587.

Exhibit A, the certificate of Expropriation, in its more relevant passages mentions the taking of:

> . . . a limited interest (in part of lot 184 and of lot 184-4), being a servitude in perpetuity . . . for the purpose of a public work to wit: Montreal International Airport; the said servitude to consist of a prohibition from erecting or constructing on the said land any building, chimney, pole, tower or other structure whose highest point would exceed in height the elevation allowable by a 50:1 ratio for approach surfaces and 7:1 ratio for transitional surfaces calculated from a datum elevation of 106 feet A.S.L. at Station 0-00 being a point 300 feet horizontally distant from the end of the hard surface of said Runway 24-R . . . The said servitude shall, in addition, include the right of employees of Her Majesty the Queen to enter upon the said land for the purpose of cutting down any tree that exceeds the height allowable for structures as aforesaid.

This selfsame certificate also specifies that the easement is obtained "under the authority of the *Expropriation Act,* Chapter 106, R.S.C. 1952".

Robert A. Shepherd, Jr., acquired this parcel of land by notarial deed of sale, dated December 30, 1958, from his father, Robert Austin Shepherd, for a price of one dollar

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

($1.00) and other good and valuable considerations (cf. Ex. 1). Clause 3, p. 3 of this instrument stipulates that:

> 3. . . . the said property is sold subject to the Montreal Airport Zoning Regulations,

a warning clause sufficiently explicit to have put the purchaser "on inquiry", had such cautioning been required to draw a buyer's attention to the local conditions when this identical person owned a home since 1954 on this particular stretch of land. The suppliant testified to these facts; his wife adding that "on or about May 1, 1960, they moved from their former house on Montée de Liesse Road to their present residence at number 1585 Montée St. François, a short distance away"; "some 3,000 feet from the airport and somewhat more remote from Runway 24-R", particularizes another witness, Ronald Uloth, one of two tenants living in the bungalow vacated by the Shepherd family. Apparently the petitioner objects more in law than in fact to the airport's vicinity as his residential persistence in the neighbourhood would indicate. True, Mr. Shepherd stressed this area's proximity to his office, an advantage, but insufficient to offset the severe inconvenience alleged in the Petition of Right.

In point of fact this procedure sets forward a twofold claim, the first of which is not devoid of some originality to wit: that the statutory enactments constituting the Canada *Expropriation Act,* 1952 R.S.C., Chapter 106 ". . . are *ultra vires* and contrary to the constitutional provisions of the *British North America Act* with respect to the Province of Quebec's jurisdiction in matters of property and civil rights as well as contrary to the Canadian *Bill of Rights Act*" (Petition, section 9). Section 12 renews this attack against the constitutionality of the Act on the score:

> 12. That it is ultra vires of the Parliament of Canada to impose building restrictions or prohibitions, on immoveable property, which is not Crown land as same is solely within the jurisdiction of the Provinces pursuant to the British North America Act.

The notion that the Crown could impose building restrictions or any other kind of servitudes on its own property only appears somewhat startling, but it also seems rather purposeless. At all events the respondent denied the preceding propositions and all others as formulated in the Petition of Right.

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

The second ground of grievance urges that damages of many sorts threaten suppliant's land and bungalow ". . . as a result of low-flying jet aircraft" entailing a loss of tenants and being "a source of inherent danger to potential new occupants . . ."; also prejudice to the landscape—a somewhat bleak one at best (cf. photos Exhibits 15 and B), brought about by the felling of "a fifty-six-foot stately tree".

Damages in a sum of $36,000 are sought plus a permanent injunction ". . . ordering the Minister of Transport and/or his Deputy, officers of the Crown, or any party and/or parties and representatives:

(a). To immediately quit and vacate the suppliant's property;

(b). to cease felling and interfering with the suppliant's enjoyment and possession of the trees incorporated and annexed to his immoveable property".

Paragraphs (c) and (d) pray for an order prohibiting aircraft (no particular indication of the airlines to be enjoined and none were called in the case) "from violating aeronautical height regulations in the City of St. Laurent . . .", and "to cease trespassing and/or violating the suppliant's air-rights and air-space extending over his aforesaid immoveable property".

The petitioner manifestly misapprehended the true nature of his recourse and in denying the legality of our Expropriation Law jeopardized the sole relief he might expect, namely, compensation for depreciation of his property. Nevertheless, I would be reluctant indeed to allow a technical flaw to defeat a substantive right.

Moreover, the respondent in paragraphs 2, 11 and 12 of its Statement of Defence clearly obviates this defect and cannot complain about any procedural surprise. Paragraph 11, for instance, reads as follows:

> 11. The expropriation of the servitude alleged in paragraph 2 above was authorized under the provisions, validly enacted, of the Expropriation Act, R.S.C. 1952, c. 106.

Insofar as law permits, a liberal view of procedure should be adopted, I believe, in matters opposing Crown and subject. Therefore, the undersigned proposes to deal with the instant suit in its exact light that of an ordinary expropriation.

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

Reverting here to the moot question initially raised: invalidity of the *Expropriation Act,* the fundamental answer is that a Government shorn of such a power would lack one of the essential attributes of sovereignty, one pertaining to the furtherance of Peace, Order, and generally speaking, to the good Government of the country (cf. *B.N.A. Act,* 1867, s. 91), and to its Defence. This obvious principle does not call for more ample elaboration. Basic legislation governing the taking of property and other rights is found in s. 3, s-s. (*b*), sec. 2(*g*) of the *Expropriation Act,* and also in the *Aeronautics Act* (R.S.C. 1952, chapter 2, s. 3, s-s. (*c*)).

In the first mentioned statute we see that:

> 3. The Minister may by himself, his engineers, superintendents, agents, workmen and servants
>
> (*b*) enter upon and take possession of any land, real property . . . the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto;

"Public work" as defined by section 2(*g*) means and includes:

> 2(*g*) . . . other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, *repaired or improved at the expense of Canada* (emphasis mine throughout), *or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament* . . .

The *Aeronautics Act* specifies that:

> 3. It is the duty of the Minister
>
> (*c*) to construct and maintain all government aerodromes (Dorval Montreal Airport is in this category) and air stations, including all plant, machinery and buildings necessary for their efficient equipment and upkeep.

As for the method prescribed to effect the actual taking of land or of a limited estate or interest therein and the legal consequences thereof, section 9(1) and s-s. (2) outline it plainly:

> 9(1) . . . a plan and description of such land (appropriated for a public work) signed by the Minister, the deputy of the Minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed . . . shall be deposited of record in the office of the registrar of deeds for the county of registration division in

which the land is situate, *and such land, by such deposit, shall thereupon become and remain vested in Her Majesty.*

(2) When any land taken is required for a limited time only, or only a limited estate or interest therein is required, the plan and description so deposited may indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate or interest therein is taken, *and by the deposit in such case, the right of possession for such limited time, or such limited estate or interest, shall become and be vested in Her Majesty.*

Exhibit A evidences due compliance with these mandatory formalities. Therefore the servitude imposed for the public needs of Canada, legally authorized and executed, has vested the possession thereof in Her Majesty the Queen since January 9, 1963.

In principle a just indemnity is due for any damages proved and according to section 23:

23. . . . any claim to or encumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof . . .

Coming now to the matter of damages alleged by the suppliant, a differentiation must be made between those supposedly resulting from the operation of the adjoining airport: low flying of jet aircraft, glaring runway lights, loss of tenants, and the just indemnity for depreciation in value of the property affected to the servitude.

The petitioner seems to confuse two different facts: the activities of the airfield and the limited estate or interest taken in his land. No connection whatever exists between the two, a distinction neatly commented upon in the written argument submitted by the respondent's counsel (Notes soumises par Sa Majesté la Reine, intimée, au droit du Canada, page 4). I quote:

Ensuite, il importe de souligner que les deux chefs de dommage dont se plaint le pétitionnaire sont tout à fait indépendants l'un de l'autre. En effect, ce n'est pas à cause de la servitude expropriée sur le terrain du pétitionnaire que les avions passent au-dessus de sa propriété. Même en l'absence d'une telle servitude, les avions continueraient quand même de passer au-dessus de la propriété de M. Shepherd. D'ailleurs, avant l'expropriation, les avions circulaient au-dessus de la propriété du pétitionnaire.

Ronald Uloth, William Crabtree, occupants at a monthly rental of $95 of the Shepherd bungalow, and Mrs. Robert Shepherd, reported two or three instances of jet flying at an altitude of some 150 or 200 feet, thereby creating the

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

unescapable inconveniences of noise and alarm. Fortunately no material prejudice ensued, and even though some had occurred, redress could not be obtained merely on the strength of the conditions depicted in paragraphs 14, 15 and 16 of the actual petition.

Mr. Shepherd, in 1954, thirteen years after the completion of the Dorval or Metropolitan airfield, erected his bungalow at a slight distance from the limits of that public work.

Five years later, on December 30, 1958 (cf. Ex. 1) with full personal knowledge of the expanding airport and of the runway's imminent extension from 7,000 to 11,000 feet, he was satisfied to buy the soil on which his house stood.

I already observed that clause 3 of the deed of sale (Ex. 1) expressly submitted the property then sold "to the Montreal Airport Zoning Regulations".

Possibly matters, from the petitioner's viewpoint, worsened around mid-December 1962, when the first jet liners began using the extended R-24 runway, yet all of this loomed in the offing since 1954, and had become a certainty by the end of 1958, to any person living in the airport's vicinity. Such is the factual situation, affording the respondent some ground on which to base a plea of *volenti non fit injuria.*

A legal proposition of far more weight, however, removes all doubts should any still persist. The exploitation of the government built Montreal airport under government control is a perfectly normal enterprise, offending against no law, and therefore its activities are governed by appropriately attuned rules of objective responsibility, the law of torts. The Court, on this point, fully agrees with respondent's comments at page 12 of its Memorandum hereunder cited:

> Nous prétendons, nous prévalant de la décision du Conseil Privé dans la cause de C P R v. Roy précitée (1902 A.C. p. 220), que aucune action en dommages-intérêts ne peut être maintenue contre Sa Majesté la Reine au droit du Canada résultant de l'opération d'un aéroport à moins que la personne en question ne puisse prouver négligence de la part des officiers de la Couronne, dans l'exécution de leurs fonctions . . .
>
> Nous prétendons donc que l'autorisation du Parlement donnée au Ministre de maintenir et opérer l'aéroport de Dorval constitue en quelque sorte une fin de non-recevoir à une action en dommages-intérêts, sauf le cas où il y aurait preuve de négligence, ce qui n'a pas été fait dans le cas présent.

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

Just as one may expect a hospital to create a silent zone, it is as natural for an airfield's regular trade to be carried on in an atmosphere of perpetual noise. Alone the transgression of the unavoidable measure of annoyances fosters a case of delictual liability.

I seldom reproduce at great length jurisprudence, but aeronautics open relatively new vistas of thought to doctrinal authors, amongst whom the French jurist, Aubert, holds a distinguished rank. In his treatise, Les Aérodromes et leur régime juridique (Paris, 1941, pages 272-273), the entire problem of responsibility in connection with aerial navigation is most lucidly resolved, as we may conclude from the undergoing excerpts:

A notre sens, la responsabilité de l'exploitant de l'aéronef pour le survol doit être appréciée, comme en cas de dommages directs causés aux tiers à la surface, suivant les principes de la responsabilité objective.

Toutefois, il est à craindre que l'application brutale de tels principes n'ait pour conséquence de soumettre les aviateurs à un régime de responsabilité du seul fait du préjudice, sans qu'il y ait lieu de rechercher si ce survol gênant n'est pas dû à des raisons autres que la volonté ou la faute de l'aviateur.

Ceci est particulièrement probant en ce qui concerne le survol des propriétés situées dans le voisinage des aérodromes. Ce survol, en effet, s'effectue forcément à très basse altitude, les avions n'atterrissant et ne s'envolant pas à la verticale, mais suivant un certain angle d'incidence.

Par suite les propriétés voisines seront soumises à un survol exceptionnellement gênant Dans ces conditions chaque survol pourra-t-il donner lieu à une action de la part des propriétaires troublés?

On voit à quelles conséquences extrêmes conduirait l'application pure et simple de la responsabilité objective.

Aussi croyons-nous, comme le propose M^lle^ Brunswick, qu'il convient de la nuancer en faisant appel à la théorie de la normalité de l'acte.

Dans ces rapports nouveaux de voisinage, l'aviateur ne sera tenu pour responsable que s'il n'a pas agi suivant les circonstances normales de son époque et de son milieu.

C'est ainsi qu'un survol à basse altitude, lors des envols et des atterrissages, étant interdit à la technique même de l'aviation, ne saurait constituer actuellement un acte anormal: ni pour l'époque, l'aviation étant suffisamment entrée dans les mœurs, ni pour le milieu, ces propriétés se trouvant à proximité de terrains spécialement réservés aux aéronefs.

A last grievance mentioned in paragraph 11 of the Petition states that:

11. . . . the suppliant is the proprietor of the air space and air rights to the upper-most tip of the bungalow or television antenna or tower or pole or fence or tree whichever may in the case be the highest elevation.

1963

ROBERT A. SHEPHERD, JR.
v.
HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

Appropriately, the suppliant in the "Notes, Arguments and Jurisprudence" filed of record appears reconciled with a more realistic interpretation when he writes that:

> . . . in other words, as the owner of the land, he (i e. Shepherd) has a limited right in the air-space over his property to the extent that he can or will possess or occupy for the use and the enjoyment of his land (cf. page 1, 1st paragraph).

The late Mr. Justice Fournier, in a 1954 decision: *Lacroix v. The Queen*[1] very aptly expressed a similar criterion, saying:

> 3. That the owner of land has a limited right in the air-space over the property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land . . .

This "limited ownership" of the overhead air strip, reserved to the owner of the land, vindicates a legalized forcible taking, a synonym for expropriation, whenever the public interest so demands.

The servitude registered on lot 184-4 is one of *non altius tollendi* prohibiting building beyond a certain altitude, in the instant occurrence a maximum height of 38 feet, interdicting also the maintenance of any obstruction, tree or construction of a greater vertical elevation. The final question lies in the determination of the prejudice thereby inflicted to a 24 feet high bungalow and a semi-rectangular plot of land 12,050 square feet in surface (*vide* Robert Eklove's report, Ex. 15, p. 3).

Mr. Robert Eklove, a Montreal real estate Broker and Appraiser, gave expert evidence in support of the petition. He believes that, previous to January 9, 1963, the Shepherd property, if put to its best possible use, viz: industrial purposes, which was not the case, could have sold for a price of $17,600, apportioned thus: 12,050 sq. feet of land, 55 cts per sq. ft., $6,600; estimated value of building in 1954: $11,000 (cf. Ex. 15, p. 3).

On page 2 of his written report, this witness expresses the opinion that:

> 5. . . . The value of the land as if it were vacant without the present building on it, will reduce in value from 55 cts per sq. foot to 45 cts per sq. foot due to the building height restriction of 140 A.S.L. (Above Sea Level).

[1] [1954] Ex. C.R. 69.

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

Eklove mentions the existence nearby of an important industrial development, specifying that the constructional limitation of 57 feet, originally imposed, would not be detrimental since industrial concerns might consider building at 57 feet, but it is quite doubtful they would at a top height of 38.

If sound enough the appraisal above provides a clue for an equitable solution. According to Mr. Eklove, the restricted altitude of 57 ft. would nowise hamper the highest and best use of the lot, at 55 cts a foot, on condition that Shepherd tore down his cottage, not on account of the servitude, but to suit the exigencies of an industrial purchaser. So far then no damages are attributable to the government's initiative. At 38 feet, the highest and best utilization becomes problematical to a degree assessed by the expert in terms of a shrinkage in value of 10 cts per foot. And here again the petitioner's bungalow would have to disappear to suit the needs of industry. On the other hand, should Mr. Shepherd maintain the residential character of his property, the existing house of 24 feet remains undisturbed and ample clearance is afforded, should the occasion occur, for a substituted residence of some 38 feet. The real exponent of the prejudice caused centers on the price decline from 55 cts to 45 cts a square foot.

No ascertainable depreciation affects the 1954 bungalow, only 24 feet high. Its intrinsic worth, to all intents and purposes, persists as undamaged by the restricted 38 feet altitude as admittedly would have been the case (Robert Eklove *dixit*) with a 57 feet margin.

Another point to settle consists in the claim for a loss in the rental yield of Mr. Shepherd's bungalow occasioned by the jet planes' utilization of runway 06L-24 R and the resulting ". . . noise, gasoline odors and risk hazards . . . such that no other tenants (except the present occupants: Uloth and Crabtree) will rent or dwell in subject house thereby creating a total loss of revenue". I can only refer the suppliant to the exhaustive analysis previously made of those consequences attaching to an airport's normal exploitation, sequels annoying in fact but blameless in law, save in the event of negligence. Furthermore, I am not convinced that the outcome of this latest development: runway R-24, will be so pecuniarly harmful as anticipated.

1963

ROBERT A. SHEPHERD, JR. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Dumoulin J.

The first compensatory assessment must then be limited to the depreciated value of those 12,050 ft. of land subjected to the servitude, a depreciation set at 10 cts a foot by petitioner's expert (cf. Ex. 15, p. 2) who, by the way, thinks that the loss of fair market value suffered by "said property, as of this date (May 24, 1963), is: $11,600".

I will grant slightly more, *ex majore cautela,* than did Mr. Eklove and allow petitioner an indemnity of 12 cts per square foot, or $1,446 for 12,050 feet, in round figures $1,500.

A last item outstanding: trees felled on the property, something unmentioned in Eklove's appraisement (Ex. 15), but valued by Shepherd at $5,000, received scant proof at the hearing. A 56-foot elm and some shrub trees were cut down on January 31 last. A second and taller elm is marked for removal. One Bernard Ciccione, the sub-contractor attending to this job for Highway Paving Company, the respondent's agent, merely says that "several trees were chopped off and burned", but cannot identify the cadastral lots on which those operations took place.

It goes without saying that a $5,000 figure is as preposterous under the circumstances (cf. photos Ex. 15 and B) as that of $1,600 for replacement per elm suggested by William Ed. Kelly, an arborist. An allotment of $150 a piece for the two elms, $300, plus $200 for the unspecified shrubs and "scorched earth", in all $500, does seem fully sufficient.

Since the suppliant adopted an unorthodox procedure, and because the respondent, in spite of this non-fatal defect, should have offered indemnity, no costs will be granted to either party. I need not trouble about the injunction fantasy for reasons already stated.

There will, therefore, be judgment declaring that the servitudes and easements described in Exhibits A and E of the record, are vested in Her Majesty the Queen as from January 9, 1963; that the total amount of compensation to which the petitioner is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is $2,000, with interest thereon at the rate of 5 per cent per annum from January 9, 1963, to this date. No costs.

Judgment accordingly.