1946

Jan. 17, 18, 21

Mar. 27.

BETWEEN:

LORNE PUCKRIN ..... SUPPLIANT,

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Expropriation—Damages—Abandonment of part of lands expropriated—Value of leasehold interest in land—"Public Work"—"Officer or Servant of the Crown"—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (a) (b) (c)—Expropriation Act, R.S.C. 1927, c. 64, s. 24 (4).

Suppliant claims compensation from the Crown for the expropriation of a part of land held by him under lease and also for the injurious affection to the balance of that leasehold land and to adjoining freehold land owned by him, suffered because of the expropriation. Suppliant also claims compensation for damages to his crops and lands through the construction of a railroad spur across the leased land, and damages for loss through flooding of his lands, caused by the operation of a factory erected on the expropriated land, prior to April 1, 1943, and on and after that date. The Crown had expropriated 30·6 acres of the leasehold land and had abandoned 22·77 acres of it.

Held: That since the contractors who had constructed the railroad spur were not servants of the Respondent there was no liability on the Crown for any damage suffered by Suppliant.

2. That the claim for compensation should be on a basis of the acreage originally expropriated and the abandonment of part thereof is an element to be considered in arriving at the amount of compensation.

3. That the value of the tenancy is considered to be the present value of the difference between the rental paid by the tenant and the rental that the property is worth for the unexpired portion of the lease.

4. That the farming of the leasehold land had been rendered more difficult because of the severance due to the expropriation of part of such land and Suppliant is entitled to compensation for such injurious affection.

5. That since the manufacturing plant known as Defence Industries Limited which caused the flooding of the lands in question did not belong to Canada, and was not acquired or constructed at the expense of Canada, and no money for the acquisition or construction of it had been voted by the Parliament of Canada prior to April 1, 1943, it was not a public work within the meaning of s. 19 (*b*) of the Exchequer Court Act and Suppliant is not entitled to any relief for damages suffered during that period.

6. That since Defence Industries Limited had been transferred to the Respondent on April 1, 1943, it had become a public work within s. 19 (*b*) of the Exchequer Court Act but as there was no construction of a public work on or after April 1, 1943, there could be no claim for relief under s. 19 (*b*) and since no land was taken from Suppliant he had no claim for injurious affection by reason of user.

7. That Defence Industries Limited was not an officer or servant of the Crown within the meaning of s. 19 (*c*) of the Exchequer Court Act.

PETITION OF RIGHT claiming damages from the Crown for the expropriation of certain leasehold lands and damages suffered by Suppliant allegedly due to the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor, at Toronto.

J. W. Carrick, K.C. for suppliant.

J. W. Pickup, K.C. for respondent.

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

O'CONNOR J. now (March 27, 1946) delivered the following judgment:

By a Petition of Right dated 3rd March, 1944, the Suppliant claims compensation for the expropriation by the Respondent of part of the lands held by the Suppliant under a lease, and damages for injuriously affecting the remainder of the leasehold lands, and adjoining freehold land owned by the Suppliant.

The Suppliant also claims for injury to his property, resulting from the negligence of the servants of the Respondent sustained;

(*a*) During the construction of a spur railroad on the expropriated land.

(*b*) From the flooding of his land.

The Suppliant owns a farm known as "50 acres", and he leased the "Lavine Farm" which lies to the south of "50 acres" from Isaac Lavine for a term of five years from the 1st of April, 1941, at an annual rental of $3.25 per acre (99 acres), plus payment of the annual taxes of $1.10

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per acre per year. Both farms were worked together. The buildings were on the south part of the Lavine farm. A dirt road known as the "base line" separated the farms. The Pickering Beach highway runs north and south on the west side of both farms.

The Respondent first expropriated certain lands *west* of the Pickering Beach highway and has been, at all times material, the owner thereof.

His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland entered into an agreement with Defence Industries Limited (Exhibit 13), dated March 22, 1941, to take effect as of the 1st of November, 1940, whereby Defence Industries Limited, on behalf of and as the agent of such Government, undertook to construct a plant for the filling of shells on the land, west of the Pickering Beach highway, expropriated by the Respondent. All shares of the capital stock of Defence Industries Limited were owned by Canadian Industries Limited.

His Majesty the King, in right of Canada, intervened as the owner or prospective owner of the land on which the plant was to be constructed, and consented to the construction and equipment of the plant on the said lands in accordance with the terms of the agreement, and agreed to lease the said land west of the Pickering Beach highway, or otherwise make it available to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland until such time as the plant ceased to be operated or maintained by the Government of the United Kingdom.

Pursuant to the said agreement Defence Industries Limited erected the plant and constructed a drainage system, shown in red on Exhibit 9, which drained the ditches on the roadways and railroad, and provided drainage for the buildings as shown on the plan. Water was used in the processing of the shells and then emptied into the drains.

An open ditch extended from the plant easterly to the Pickering Beach highway, and this ditch is marked "X" on Exhibit 9. An existing culvert under the Pickering Beach highway was moved 119 feet south and an additional culvert installed at the same point, which was opposite the end of the ditch "X".

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The evidence shows that the ditches and culverts were constructed by Carter-Hall Company, but there was no evidence as to who employed them. The evidence of the Suppliant was "whoever built the plant did the things I complain of".

These culverts carried the water under the highway to the ditch on the east side of the Pickering Beach road at a point on the Lavine farm where an old watercourse led eastward through the Lavine farm. This is marked "creek" on plan Exhibit "J". The trees along this watercourse are shown on the plan.

In addition to moving and installing the culverts, the Suppliant swore that the contractors had dug a ditch about 6 feet in length on the Lavine farm. This was on the old watercourse at the western boundary of the farm and at a point in line with the eastern end of the culverts.

The result was that surface water from a wide area, plus the water used in the plant, was drained onto the Lavine farm, and flowed along the old water course and spread out forming the marsh area thereon shown on Exhibit "J". The extent of the marsh area is shown by the fact that muskrats built houses in the area. The water flowed east until it reached a creek on the lands east of the Lavine farm.

The Suppliant stated that when he took the farm over in 1941 there was water in this creek, except during the spring run off, and he was able to farm all the land. This was also the evidence of the former tenants.

By an agreement, Exhibit 14, dated 26th March, 1942, to take effect as of the 15th June, 1941, between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, and Defence Industries Limited, Defence Industries Limited undertook on behalf of and as the agent of His Majesty's Government in the United Kingdom, the operation, management and maintenance of the plant in consideration of a monthly fee fixed in the agreement.

On the 12th November, 1942, the Respondent filed a description and plan Exhibit 1 which expropriated *inter alia* 30·6 acres, part of the Lavine farm. Contractors entered upon the land and constructed a railroad spur from the plant west of the Pickering Beach road easterly across the north end of the Lavine farm to a storage depot,

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constructed on the lands east of the Lavine farm. The spur line was enclosed on both sides with a steel mesh fence. There is no evidence that these contractors were engaged by the Respondent. In constructing the spur line, these contractors caused damage. They entered on land, which had then been expropriated, with tractors and bulldozers and damaged the soil of an area. They also excavated the soil from another area, and used this soil in the construction of the railroad spur. They damaged a crop of 19 acres of the Suppliant, and by making breaches in his fence, allowed his cattle and horses to escape. They damaged certain timber which had been piled on the land. Because of the expropriation, the Suppliant did not fall plough any part of the 30·6 acres.

A natural watercourse, which ran across the Lavine farm about 300 feet from the northern boundary, was blocked by the spur line and the water was diverted south into the ditch "X" and onto the Lavine farm.

On January 11th, 1943, the Respondent filed a new description and plan, Exhibit 2, but this plan did not change the lands of the Respondent, expropriated by the filing of plan, Exhibit 1.

On the 5th April, 1943, the Respondent filed a Notice of Abandonment, Exhibit 3, of plans Exhibits 1 and 2, and on the same date filed a new plan Exhibit 4 and description, which expropriated an area from the Lavine farm of only 7·83 acres, but which was part of the area of 30·6 acres expropriated under plans Exhibits 1 and 2.

The land expropriated, 7·83 acres shown on Exhibit 4, is edged in green. The portion edged in yellow is a restricted area, into which only the Suppliant or his family or his employees were permitted to enter for the duration of the war and six months thereafter.

The portion expropriated extends right across the Lavine farm and contains the railroad spur. This completely cut off access between the Lavine farm, south of the expropriated land, from a strip at the north of the Lavine farm, containing approximately 6 acres, and from direct access to the "50 acres" farm over the base line.

By an assignment, Exhibit 15, dated the 27th day of May, 1942, the Government of the United Kingdom sold,

assigned and transferred as of March 31, 1943, all its right, title and interest in the said plant *inter alia* and in the said agreement, Exhibit 14, *inter alia*.

On and after the 1st of April, 1943, Defence Industries Limited, on behalf of and as the agent of the Respondent, continued the operation, management and maintenance of the plant.

The surface water from a large area, the water diverted by the spur line, and the water used in the plant, continued to drain through the ditch "X" onto the land of the Suppliant.

The claim of the Suppliant, as presented, can be divided into four parts:—

1. Compensation for his leasehold interest in 7·83 acres taken.
2. Compensation for injuriously affecting the remaining leasehold "Lavine Farm" and the freehold "Fifty Acres".
3. Damage to crop and lands done during the construction of the railroad spur across the "Lavine Farm".
4. Damages caused by flooding—
   (*a*) Before April 1, 1943.
   (*b*) On and after April 1st, 1943.

The Crown admits the Suppliant's right to compensation for claims 1 and 2 and denies liability for claims 3 and 4.

The Suppliant must bring his claims within subsections (*a*), (*b*) and (*c*) of section 19 of the Exchequer Court Act, R.S.C. 1927 chapter 34, as amended in 1938:—

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose.
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Counsel for the Suppliant contended that the damage done during the construction of the spur line (claim No. 3) resulted from the negligence of servants of the Crown and came within section 19 (*c*).

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The contractors who constructed the spur were not servants of the Respondent, but on the contrary were employed by Defence Industries Limited, the agents of the Government of the United Kingdom. Nor could the damage done on the expropriated lands, 30·6 acres, be said to result from negligence. The Suppliant's claim is clearly not within section 19 (*c*).

The Suppliant is, however, entitled to claim compensation which arose on the original expropriation of 30·6 acres. The claim still remains for adjustment and the revesting of 22·77 acres by the abandonment of the first plan; and the filing of plan No. 3 is an element to be considered in the settlement of the claim.

Section 24 (4) of the Expropriation Act, R.S.C., 1927 chapter 64, provides:—

> 24 (4). The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

Lord Buckmaster in *Gibb* v. *The King* (1) in considering the effect of this section said:—

> The claim for compensation arises on the original expropriation of the land. Nor is this claim defeated by the subsequent proceeding. Even after revesting, the claim for compensation still remains open for adjustment, for it has nowhere been taken away or satisfied and in its settlement the effect of the vesting is an element to be considered.

The Suppliant's claim for compensation should, therefore, be on a basis of 30·6 acres; and the revesting of 22·77 acres is an element to be considered in arriving at the amount.

Now, while the evidence on behalf of the Suppliant was, in part, as to the 7·83 acres finally taken and in part as to damages under section 19 (*c*), it is clear from the evidence that the 22·77 acres eventually revested had been damaged, and its value affected before it was revested.

The evidence of the Suppliant showed that in November, 1942, when the 30·6 acres were taken, he had a crop of soya beans growing on part of the 7·83 acres and on the land immediately adjoining on the south, and he valued this at $627.00. This crop was destroyed in the construction of the spur line. The Respondent admitted that the Suppliant is entitled to compensation for that portion of the crop on the 7·83 acres valued at $114.00.

(1) (1918) A.C. 915, at 922.

The Suppliant claimed that the topsoil of 3 acres had been removed and used in building the spur and that the tractors and construction machinery had so cut into $3\frac{1}{2}$ acres that the topsoil had been driven down and the subsoil brought to the top. He also claimed that gates and fences had been broken and that he had not been able to fall plough the area.

In order to show the value of his leasehold interest in the 7·83, he gave evidence of the gross amounts he would have received from crops and cattle which he would have been able to grow on this land if it had not been expropriated. Particulars are set out in Exhibit 8. While this evidence is admissible as tending to show the use for which the land is available, care must be taken to distinguish the income from the property and income from the farming business conducted upon the property—see Nichols on Eminent Domain, page 714.

Charles McNeil, Assistant Commissioner for Agricultural Loans for the Province of Ontario, gave evidence for the Respondent. Mr. McNeil had farmed for twenty-one years in Ontario, and has had long experience in evaluating farm land and in estimating damage.

Based on part being good working land, and part being pasture, he valued the 7·83 acres leasehold to the Suppliant as a farmer, at $50.00 per year. He was of the opinion that this would fully compensate the Suppliant for the taking of the 7·83 acres.

Sydney G. Smith, Ontario Land Surveyor, made a survey of the Lavine farm on December 15th, 1943, and prepared the plan Exhibit "J". He stated that the area damaged by the tractors was 0·74 acres and the area from which the topsoil had been removed was 1·23. This is a total of under 2 acres compared with the Suppliant's claim of $5\frac{1}{2}$ acres.

The plan Exhibit 2 shows the 30·6 acres originally taken. The same area can be ascertained on Exhibit "J" by using the measurements from Exhibit 2. Exhibit "J" will then show that part of the area originally taken which was work land (marked ploughed lands), and that part which was pasture, and it also shows the area damaged by tractors and the excavated area.

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The evidence showed that of the total area of the farm, approximately 40 acres were pasture and 60 acres work land.

It is clear from the evidence that the land 22·77 acres revested in the Suppliant was of less value when it was revested than it had been when it was originally expropriated. The crop had been destroyed and approximately 2 acres had been damaged. In addition, the work land had not been fall ploughed. The gates and fences had been broken.

Sir Charles Fitzpatrick, C.J., in *Gibb* v. *The King* (1) said:—

> The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates. The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co.*, v. *Lacoste*, (1914), A.C. 569, to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

In the Privy Council (2), Lord Buckmaster said:—

> Their Lordships think, therefore, that the judgment of Fitzpatrick, C.J., was accurate in all respects. . . .

It is difficult to apply the test of market value to leasehold interest in Canada. This is particularly true when only a portion of the leasehold interest is taken. Audette, J., stated this very clearly in *Rex* v. *Goldstein* (3):—

> However, as Nichols on Eminent Domain, page 714, says it is no simple matter to fix the market value of an unexpired term of a lease; it is almost impossible to apply the customary test of market value to a leasehold interest. It is really no test at all, because a lease rarely has any market value. It would seem that a lease in this country—contrary to custom of trade in France in that respect—might well be held to fall within the class of property not commonly bought and sold, and that consequently the intrinsic value or the value to the owner might be taken as the best and only available test of market value.

While the difficulty is there, I am of the opinion that value to the owner cannot exceed the highest price that a purchaser would be willing to pay:—

(1) (1915) 52 S.C.R., at 407.
(2) (1918) A.C. 915, at 922.
(3) (1924) Ex. C.R. at 59.

The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to. *Sidney* v. *North Eastern Railway Company* (1).

Compensation payable to a tenant when land subject to a lease is expropriated, is determined in the manner described in the 8th edition of *Cripps on Compensation* at page 189:—

> The purchase-money payable to a lessee or tenant, as the value of his term or tenancy, depends on the difference between the actual rental paid by him and the improved annual rental that the property is worth. This difference must be multiplied by the number of years' purchase at which the tenant's interest should be valued. This will be determined by the character of the property and by the length of the term or tenancy. If the actual rental of property is 90l., and its improved annual rental is 100l., and the property is such that it should be purchased to pay six per cent., and the length of the term is ten years, then the recognized tables would give 7·360 as the number of years' purchase to be taken, and the capitalized value of the tenant's interest would be ascertained by multiplying 101, by 7·360.

This method was approved by the Court of Appeal in Ontario in *City of Toronto* v. *McPhedran,* (2), and Middleton, J., said:—

> The true solution of the problem is that indicated in cases where land subject to a lease is expropriated. There the value of the tenancy is always considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease.

In the same case Riddell J., at pp., 90-91 said:—

> But the simpler method is obvious—for any one year the value for that year to the tenant is the difference between what he should pay on a rack-rent basis and what he does pay—here $120. Capitalize this $120 for the length of time he has the right to occupy at that rental—and there will be found (for practical purposes) the value of his interest.
>
> It is quite impossible to determine with mathematical precision the actual value—that will depend upon the rate of interest on money, the probability of its rise or fall, the probability of rise or fall of the value of land, the probability of the tenant requiring renewal of lease, etc., etc. —all being elements of uncertainty. Mathematically speaking, the value of the interest is a function of three known quantities—the actual known rental value, the actual rent, the present rate of interest—and of several unknown and highly speculative quantities.

The value is determined in this manner (with other considerations) because it is that value which one could reasonably expect a purchaser would pay. Certainly it could not be reasonably expected that a purchaser would pay more than that value.

(1) (1914) 3 K.B., at 641.

(2) (1923) 54, O.L.R., at 92.

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The difficulty of ascertaining the compensation in the manner indicated and, in doing so, to take into account the abandonment in the manner laid down by Lord Buckmaster, *ante,* arises from the fact that all the evidence was directed to the question of damages for negligence and of compensation for 7·83 acres.

However, the whole of the evidence tendered, including that of the Suppliant, his neighbours and former tenants, and the witnesses for the Respondent, gives a fairly complete picture of the farm in all its phases, and from this I am able to estimate the rental value that the farm was worth. The rent paid by the Suppliant during the period in question was the same rent as that paid by the former tenant prior to the war. Because the length of the remaining term is so short, 2½ years, the rate on which the difference is capitalized is not material, amounting to only a few dollars either way.

And from the evidence before me I have reached the conclusion that for all practical purposes, the sum of $125.00, which would be Mr. McNeil's estimate on a 2½ year basis, is correct. This, of course, covered only 7·83 acres and did not take into account the expropriation of the 30·6 acres and the subsequent abandonment of the 22·77 acres.

I find, therefore, that the value of the expropriated property at November 12th, 1942, was $750.00.. In assessing this amount I have taken into account the revesting of the 22·77 acres in connection with all the other circumstances of the case.

Claim No. 2 is for injurious affection due to severance. The Suppliant in his evidence made no claim for damage by reason of the severance of the 6 acres at the north end of the Lavine farm, but Mr. McNeil very fairly stated that the leasehold had been injuriously affected by severance, which he estimated at $25.00 per year. I fix the sum of $75.00 for this item for the years 1943 to 1945, both inclusive.

The Suppliant also claims for injurious affection by severance to the freehold "50 acres". This is made up in two items. First, the sum of $330.00 estimated loss in

cattle which he could not raise on "50 acres" without being able to water the cattle on the Lavine farm during the summer when the water supply on "50 acres" fails. Second, the additional cost of $396.80 of working "50 acres" from the Lavine farm due to the severance, which necessitated driving from the buildings up the Pickering Beach highway, and back into "50 acres", instead of proceeding north through the Lavine farm and over the base line.

Mr. McNeil stated that there was an injurious affection by reason of the severance, which he estimated at $50.00 per year, but only because the Suppliant would be unable to raise cattle there. He stated that there would be no additional cost of working "50 acres" because of the severance.

The evidence showed that during the summer there was very heavy traffic on the Pickering Beach highway, between Toronto and the large summer resort, known as Pickering Beach, and I am of the opinion that this would render the farming of "50 acres" via this road much more difficult. I find that there would be an additional cost of working "50 acres" due to the severance.

I fix the compensation for injuriously affecting the freehold by reason of severance at $100.00 per year for each of the years, 1943, 1944, and 1945.

The Suppliant claims (No. 4), damage caused by the flooding of his land.

Water came from three sources through the ditch marked "X" on the plan Exhibit 9 to the Lavine farm:—

(*a*) From the drainage system installed during the construction of the plant which drained surface water from a large area.

(*b*) Water brought on the land, used in the process of filling shells and emptied into the drainage system.

(*c*) Water diverted south when the natural watercourse was blocked by the construction of the spur line (after November 12th, 1942).

First, as to the period prior to April 1st, 1943.

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It is clear from the agreements (Exhibits 13 and 14) that Defence Industries Limited constructed and operated the plant on behalf of and as agent for His Majesty's Government in the United Kingdom and that the Respondent had only intervened in agreement (Exhibit 13) to consent to the construction of the plant and to agree to lease the land or otherwise to make it available. Under these circumstances it is clear that the Suppliant has no claim under 19 (c) against the Respondent during this period.

The Suppliant is only entitled to claim under section 19 (b) if the plant and spur railroad were "public works" within the meaning of the term in that section.

Section 23 of the Expropriation Act authorizes the payment for property injuriously affected by the construction of any public works, and 19 (b) of the Exchequer Court Act gives this Court jurisdiction to determine those claims:—

> 19 (b). Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

"Public work" in subsection 19 (b) of the Exchequer Court Act is a public work coming within the definition of "public work" and "public works" in section 2 (g) of the Expropriation Act.

Mignault, J., in *The Wolfe Company* v. *The King* (1), said:—

> It appears obvious that the "public work" mentioned in subsection (b)—the construction of which might injuriously affect property and thereby cause damage—is a public work coming within the definition of "public work" and "public works" in section 2 of the Expropriation Act (R.S.C. ch. 143), to which Act subsections (a) and (b) of section 20 of the Exchequer Court Act are properly referable. It is noticeable that no definition of a public work is contained in the latter statute, and I cannot doubt that the public work referred to in subsection (b) is the public work contemplated in the Expropriation Act, for we find, in sections 22, 25, 26 and 30 of the Expropriation Act, the very words, *property injuriously affected by the construction of any public work,* which are in subsection (b), which property, so affected, is a subject for compensation.

In *The King* v. *Dubois* (2), Duff C.J., in quoting the judgment of Mignault, J., in *Wolfe* v. *The King* (*supra*), said:—

> Indeed, he (Mr. Justice Mignault) expressly holds that its (public work) scope is limited by the definition in the Expropriation Act.

(1) (1921) 63 S.C.R., at 155. (2) (1935) S.C.R., at 396.

"Public works" are defined in the Expropriation Act as follows:—

2. (g). "Public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the light-houses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines. Government railways, canals, locks, dry-docks, fortifications and 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, or for the acquisition, construction repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which the money is appropriated as a subsidy only.

The plant and spur did not "belong to Canada" and were not acquired or constructed at the expense of Canada, nor for the acquisition or construction of them was any public money voted and appropriated by Parliament until April 1st, 1943.

I hold that neither the plant nor the spur railroad were, prior to April 1st, 1943, "public works" within the meaning of that term in subsection 19 (b) and that the Suppliant is not entitled to the relief claimed (4) for damages during that period.

Nor can the Suppliant succeed in a claim for injurious affection by reason of user in that the water was brought on artificially, and, after being used in processing of shells, was allowed to drain onto the Lavine farm.

When the plant was constructed no part of the Suppliant's leasehold was taken. And it is clear that when no land is taken a claim for injurious affection by reason of user cannot be made. See 8th edition Cripps on Compensation, p. 221.

While part of the Suppliant's leasehold was taken for the spur line, no claim is made for injurious affection by reason of user, i.e., the operation of the railroad which took place on the leasehold taken.

Second, as to the period on or after the 1st April, 1943.

The plant had been transferred to the Respondent and was a "public work" within subsection 19 (b) because it had been acquired at the "expense of Canada".

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It was being operated by Defence Industries limited on behalf of and as the agent of the Respondent.

Water from all three sources flowed through the ditch "X" onto the land of the Suppliant. The flooding undoubtedly caused damage, not to the extent claimed by the Suppliant, but in the sum of $100.00 per year according to the evidence of Mr. McNeil, which I accept.

There was no construction of public works on or after that date so there can be no claim under subsection 19 (b).

And as no land was then taken from the Suppliant, he cannot claim for injurious affection by reason of user.

This leaves only one further question as to whether the damage to his property resulted from the negligence of an officer or servant of the Crown while acting within the scope of his employment under subsection 19 (c).

This, in turn, depends on whether Defence Industries Limited was a servant of the Crown within the meaning of that term in subsection 19 (c).

In the preamble to the agreement (Exhibit 14) there is set out:—

> Whereas the Government desires the Company to undertake on behalf of and as the agent of the Government, the operation, management and maintenance of the plant and the Company is willing so to do.

And the agreement then provides:—

> 4. *OPERATION OF PLANT.* It is hereby agreed that the Company shall operate, manage and maintain the plant for and on behalf of the Government, and that the Company shall commence operation of the plant as soon as possible.
>
> 5. *SUPERVISION, MANAGEMENT, ETC.* The Company shall, subject to such supervision, direction and control as the Minister may from time to time in writing advise the Company that he desires to exercise, be at liberty to adopt all methods and to do all acts and things that it shall consider necessary or advisable in connection with the proper operation, management and maintenance of the plant, including the hiring and discharging of all employees and the purchase of all necessary materials except such materials as may be supplied by the Government; provided always that the Company shall not, without the prior approval of the Minister, make advance purchases of materials in excess of the quantities fairly estimated to be necessary for the full operation of the plant during any three months' period. The Company shall furnish to the Minister such reports as the Minister may request from time to time in connection with the operation, management and maintenance of the plant.

It is quite clear from the agreement that Defence Industries Limited was the agent of the Respondent.

It was at liberty to adopt all methods and to do all acts and things that it considered necessary and advisable in connection with the proper operation, management and maintenance of the plant, and it was paid under the agreement a fixed fee for its services. It was subject, however, to such supervision, direction and control as the Minister (as agent of the Government) desired to exercise. Therefore, at any moment the Government could exercise complete supervision, direction and control.

The test to be generally applied in deciding whether a man is a servant or an independent contractor is laid down in *Performing Right Society* v. *Mitchell & Booker (Palais de Danse), Ltd.* (1):—

> It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is of course one only of several to be considered, but it is usually of vital importance. The point is put well in Sir Frederick Pollock's *Law of Torts*, 12th ed., pp., 79 and 80: "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or any moment may direct, the means also, or, as it has been put, 'retains the power of controlling the work'"—see *per* Crompton, J., in *Sadler* v. *Henlock* ((1855) 24 L.J.Q.B. 138).

Under this agreement the Government retained the power of controlling the work and could at any moment direct the "means also".

The same test is also the proper one as to when a man is that particular class of agent defined as servant:—

> But while the appellant had the right to take the work out of Sinclair's hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. In thus paraphrasing another extract from the judgment in the *Performing Rights* case ((1924) 1 K.B., 762), I have not overlooked the fact that McCardie, J., was there considering the test to be applied in deciding whether a man is a servant or an independent contractor, but I think the test is also the proper one as to when a man is that particular class of agent defined as servant. Kerwin, J., in *T. G. Bright & Company Limited* v. *Kerr* (2).

After applying this test I reach the conclusion that Defence Industries Limited was that particular class of agent defined as a servant.

(1) (1924) 93 L.J.K.B., at 306. (2) (1939) S.C.R., at 73.

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But is that particular class of agent defined as a servant, a servant within the meaning of that term in section 19 (c)?

The term "officer or servant of the Crown" in section 19 (c) was considered in *McArthur* v. *The King* (1). Thorson, P., held that the term must not be construed apart from its context or without regard to the origin of the statutory enactment in which it appears and the judicial history of such enactment. After reviewing the judicial history of the enactment, he reached this conclusion, page 113:—

> While the doctrine of employer's liability became thus fully applicable to the Crown in respect of the tort of negligence, by virtue of the 1938 amendment of the statute, and a great extension of the field of the liability of the Crown for the negligence of its officers or servants resulted in consequence thereof, the amendment had no further effect. The officers or servants for whose negligence the Crown was made responsible were still the kind or class of officers or servants to whom the doctrine of employer's liability would apply if the employer were some person other than the Crown, that is to say, employees of the Government in the real sense of the term, coming within the general concept of the relationship of master and servant as it is ordinarily understood, with full freedom of action to each party to the relationship, persons of the same kind or class as public companies or individuals could have as their officers or servants, in other words, civilian servants or employees of the government appointed or hired by it to carry out the regular purposes of government.

Page 114:—

> Before the Crown should be held responsible for the negligence of such persons to whom the doctrine of employer's liability, as understood between subject and subject, would not apply, and where the relationship of the parties is so different from that of master and servant or employer and employee, would require language in the statute of the clearest and most explicit kind. Any such far reaching extension of the liability of the Crown would have to be stated in the statute in express terms. In the absence of such express statutory terms, the Court is not justified in including within the term "officer or servant of the Crown", which by judicial definition has become synonymous with the term "servant or employee of the government", persons whose status is fundamentally different from that of government servants or employees.

In this case the relationship between the Respondent and Defence Industries Limited is so different from that of master and servant or employer and employee that it would require language in the statute of the clearest and most explicit kind before the Respondent should be held responsible.

(1) (1943) Ex. C.R. 77.

To include that particular class of agent defined as a servant within the term "officer or servant" in section 19 (c) would be to enlarge the statutory term without justification. If Parliament had intended this, the wording of the section would have been similar to that of section (26) (1) of the Minister of Transport Act (1919) 9 and 10, George V, (United Kingdom) chapter 50:—

> 26(1). The Minister may sue and be sued in respect of matters, whether relating to contract, tort or otherwise . . . . . and shall be responsible for the acts and defaults of the officers and servants *and agents* of the Ministry in like manner and to the like extent *as if they were his servants,* and costs may be awarded to or against the Minister.

The rules of construction do not permit any expansion of the term "officer or servant of the Crown" and as Thorson, P., pointed out in *McArthur* v. *The King supra,* an examination of the judicial decisions of section 19 (c) show how essential it is to determine and keep within the precise limits of the jurisdiction conferred upon the Court by this section.

I hold that Defence Industries Limited was not a servant of Respondent, within the meaning of that term in section 19 (c), and that the Suppliant is not entitled to the relief claimed from the Respondent for damage caused by flooding on or after the 1st of April, 1943.

I find the total compensation to which the Suppliant is entitled is the sum of $1,125.00 as follows:

Value of the expropriated property as at Nov. 12, 1942.	$ 750.00
Injurious affection due to severance—	
(*a*) leasehold	75.00
(*b*) freehold	300.00
	$1,125.00

And I adjudge that this is the amount of compensation money to which the Suppliant is entitled.

Since the amount of the award exceeds that of the tender by the Respondent, the Suppliant is entitled to interest on this sum at 5% per annum from the 12th November, 1942, to the date of judgment.

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There will be the usual judgment declaring the interest of the Suppliant in the expropriated property, as set out and shown in the description and plan (Exhibit 4), is vested in His Majesty the King.

There will be a declaration that the amount of compensation money to which the Suppliant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $1,125.00, together with interest at 5% per annum, from the 12th of November, 1942.

As to the remainder of the claims of the Suppliant, there will be judgment that he is not entitled to the relief sought by him.

The Suppliant will be entitled to his costs to be taxed.

Judgment accordingly.