1954
Sept. 28, 29, 30
Oct. 1, 4
1956
Jan. 13

BETWEEN:

JOHN DAROWANY AND DMYTRO DAROWANY ..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Damages—R.C.A.F. aircraft flown over mink ranch at low altitudes during whelping season, mink kittens destroyed by terrified mothers—N.A.T.O. pilots—Onus of proof on suppliants—Exchequer Court Act, R.S.C. 1952, c. 98, ss. 19(1)(c), 50A—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1)(a), 25(2)—Visiting Forces (North Atlantic Treaty) Act, S. of C. 1951, 2nd Sess., c. 28, s. 16—Canadian Forces Act, S. of C., 1953-54, c. 13, s. 17.

The suppliants, mink ranchers, claimed damages from the Crown for the loss of mink kittens during the whelping seasons of 1951, 1952 and 1953 which they alleged was caused by aircraft from R.C.A.F. station Gimli flying over the ranch at low altitudes thereby terrifying the mother mink causing them to destroy their young. At the trial it was established that the whelping season ran from mid April to the end of May and that aircraft had been flown at the time and in the manner alleged by students undergoing instruction at courses conducted for North Atlantic Treaty Organization (NATO). The pilots comprised nationals of the United Kingdom, France, Belgium, the Netherlands, Norway and Italy as well as Canadian pilots.

Held: That the claims were made under ss. 19(1)(*c*) and 50A of the *Exchequer Court Act* as amended, as to the 1951, 1952 and 1953 flights up to May 14, 1953, and under s. 3(1)(*a*) of the *Crown Liability Act* thereafter.

2. That to support a claim against the Crown under either Act the onus of proof rests on a suppliant to establish not only negligence by an officer or servant of the Crown but that the negligence occurred while such officer or servant was acting within the scope of his duties or employment, that the alleged loss resulted therefrom and that he would be personally liable therefor. *The King* v. *Anthony,* [1946] S.C.R. 569 at 571.

3. That although it was established that there had been low flying at the place and times in question, even if it could be shown the acts complained of constituted negligence and that loss resulted therefrom, an onus rested on the suppliants to prove such acts were done by persons for whose acts the Crown was responsible, namely pilots of the R.C.A.F., and this was not done. The students, who were not Canadians, were not members of the air forces of Her Majesty in right of Canada within the meaning of s. 50A of the *Exchequer Court Act* and its successor and could not in the absence of appropriate legislation be deemed servants of the Crown. They became such only after enactment of s. 16 of *The Visiting Forces (North Atlantic Treaty) Act,* S. of C. 1951, 2nd Sess., c. 28, which did not come into force until September 27, 1953, after the date of the acts complained of. Furthermore when s. 16 of *The Visiting Forces Act* came into force, s. 19(1)(*c*) of the *Exchequer Court Act* had been repealed by

s. 25(2) of *The Crown Liability Act*, S. of C. 1952-53, c. 30 and it was not until *The Canadian Forces Act*, 1954, S. of C. 1953-54, c. 13, was assented to on March 4, 1954, that the Crown by s. 17 thereof became liable for a tort committed by a member of a visiting force.

4. That claims against the Crown under s. 19(1)(*c*) of the *Exchequer Court Act* or s. 3(1)(*a*) of the *Crown Liability Act* are statutory and would not exist apart from the statute by which liability was imposed upon the Crown, and the requirements of the statute by which it was imposed must be strictly met before the liability of the Crown can be engaged, (*The King* v. *Dubois* [1935] S.C.R. 378; *McArthur* v. *The King* [1943] Ex. C.R. 77) and the requirements of the statute must be shown by proof (*The King* v. *Moreau* [1950] S.C.R. 18 at 24; *Ginn et al.* v. *The King* [1950] Ex. C.R. 208 at 216).

PETITION OF RIGHT by suppliants seeking damages from the Crown for damages allegedly caused by negligence of servants of the Crown.

The action was tried before the President of the Court at Winnipeg.

L. St. G. Stubbs and *R. St. G. Stubbs* for suppliants.

G. R. Hunter and *D. S. Maxwell* for respondent.

THE PRESIDENT now (January 13, 1956), delivered the following judgment:

In their petition of right the suppliants claim damages in the sum of $25,507 for alleged losses of mink kittens in 1951, 1952 and 1953 as the result of the low flying of Royal Canadian Air Force aircraft over their mink ranch during the whelping season.

The suppliants' mink ranch is on their farm property prescribed as the south-west quarter of section 36 in township 18 and range 1 east of the principal meridian in Manitoba. It is near Dennis Lake, also called Russell Lake, about 5 miles west of Malonton and about 15 miles west of the Village of Gimli. A short distance west of Gimli the Royal Canadian Air Force operates an aircraft base and training station.

The substance of the suppliants' claim is that during the whelping seasons of 1951, 1952 and 1953 aircraft from the Gimli station flew over their ranch and terrified the minks causing some of the mother minks to devour the kittens to which they had given birth. It was alleged that the loss of

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kittens thus caused was the result of negligence on the part of the pilots or other operators of the low-flying aircraft while acting within the scope of their employment.

The claim is made under s. 19(1)(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34, as amended in 1938, which reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
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> * * *
>
> (*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;

and under s. 50A of the said Act, as enacted in 1943 by s. 1, S. of C. 1943-44, c. 25, as amended by s. 7, S. of C. 1951, 2nd Session, c. 7, reading as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, army or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

and also under s. 3(1)(*a*) of the *Crown Liability Act*, S. of C. 1952-53, c. 30, which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or . . .

for the period after May 14, 1953, when this provision came into force.

It is established that in a claim under s. 19(1)(*c*) of the *Exchequer Court Act* the onus of proof that the claim is within the ambit of the section lies on the suppliant. He must establish that every condition of liability prescribed by the section has been met. Thus the suppliants in the present case must prove that some officer or servant of the Crown was guilty of negligence, that such negligence occurred while the officer or servant was acting within the scope of his duties or employment and that the losses of mink kittens of which the suppliants complain resulted from such negligence. If the suppliants fail to discharge the onus of proof that the law casts on them in respect of any of these matters their claim falls.

It is also established that the liability of the Crown under this section is only a vicarious one and that before it can be engaged it must appear that some officer or servant of the Crown would himself have been personally liable if he had been sued: *vide The King* v. *Anthony* (1) where Rand J., delivering the majority judgment of the Supreme Court of Canada, said:

> I think it must be taken that what paragraph (*c*) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois* (2); *Salmo Investments Ltd.* v. *The King* (3). It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

Thus if the facts would not support a cause of action against some individual servant or servants of the Crown, there cannot be a valid claim against the Crown.

In my opinion, the law in this respect is the same under s. 3(1)(*a*) of the *Crown Liability Act* as under s. 19(1)(*c*) of the *Exchequer Court Act.* In each case the liability of the Crown is vicarious only and the onus of proof that the conditions of liability fixed by the statute are present rests on the suppliant.

In support of the allegation that there was low flying by planes from the R.C.A.F. station near Gimli during the whelping seasons in 1951, 1952 and 1953 counsel for the suppliants called four of the suppliants' neighbours as witnesses, Peter Monaster, Harry Yecenko, Metro Dmytro Schkolny and Philip Senga. It is not necessary to review their evidence in detail. While a great deal of it was plainly exaggerated and there were several inaccuracies in their statements I am satisfied that in the months of April and May of 1951, 1952 and 1953, as well as in other months of these years, planes from the Gimli station frequently flew at low altitudes near and over the suppliants' mink ranch, that such planes engaged in aerobatics not far from the ranch, coming down low, rising, looping, circling and other manoeuvres and that in the course of their activities they caused noises near and over the suppliants' mink

(1) [1946] S.C.R. 569 at 571. (2) [1935] S.C.R. 378 at 394 and 398.
(3) [1940] S.C.R. 263 at 272 and 273.

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ranch. In addition to single planes flying in the area there were also planes flying in formations which flew at higher altitudes. In addition to the evidence of these neighbours there were the statements of the suppliants themselves that there was low flying over their ranch during the whelping seasons and that it terrified the minks. While I am convinced that the neighbours and the suppliants exaggerated the lowness of the planes I am also satisfied that there was a great deal of plane activity in the area with some low flying with its resulting noise which in the case of Harvard planes was very considerable.

Unfortunately for the suppliants, there is, in my opinion, an insuperable obstacle in their way. Even if it could be shown that the pilots of the low-flying planes were guilty of negligence and that the losses of which the suppliants complain resulted therefrom the suppliants' claim would fail for they did not prove that the pilots of the low flying planes that caused the losses were officers or servants of the Crown. It was disclosed during the trial that the pilots of the planes flying from the R.C.A.F. station near Gimli were students undergoing flying instruction at a school for North Atlantic Treaty Organization (NATO) pilots conducted by the Royal Canadian Air Force at its Gimli station. They came from various countries that were members of the North Atlantic Treaty Organization. Thus there were students from the United Kingdom, France, Belgium, Norway, The Netherlands and Italy as well as from Canada. These students were the nationals of the countries from which they came. Thus, even if the students who were not Canadians were subject to the discipline of the school, they were not members of the air forces of Her Majesty in right of Canada within the meaning of s. 50A of the *Exchequer Court Act* and its successor and could not, therefore, in the absence of appropriate legislation, be deemed to be servants of the Crown. The difficulty involved in this fact was realized by Parliament when it enacted *The Visiting Forces (North Atlantic Treaty) Act,* S. of C. 1951, 2nd Session, c. 28. S. 16 of this Act provided as follows:

> 16. For the purposes of paragraph (c) of subsection one of section nineteen of the *Exchequer Court Act,* negligence in Canada of a member of a visiting force while acting within the scope of his duties or employment shall be deemed to be negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

The Act referred to was assented to on December 21, 1951, but s. 28 provided:

28. This Act or any portion thereof shall come into force on a day or days to be fixed by Proclamation of the Governor in Council.

S. 16 did not come into force until September 27, 1953: *vide Canada Gazette,* vol. 87, October 10, 1953, at pages 2957 and 2958; so that the suppliants cannot avail themselves of this statutory provision in respect of their claims for losses incurred in 1951, 1952 and 1953. There is the further interesting fact, which is not material to this case, that when s. 16 of *The Visiting Forces Act* came into force by proclamation on September 27, 1953, s. 19(1)(*c*) of the *Exchequer Court Act,* to which it specifically referred, was no longer in existence, it having been repealed by s-s. (2) of s. 25 of the *Crown Liability Act* on May 14, 1953. This Act also provided in advance for the repeal of paragraph (*c*) of s-s. (1) of s. 18 of the *Exchequer Court Act,* R.S.C. 1952, c. 98, upon its coming into force which occurred on September 15, 1953.

Thus there was the anomalous situation that when s. 16 of *The Visiting Forces Act* came into force it referred to a statutory provision that was no longer in existence and it was, therefore, of no effect. This was recognized by Parliament when it enacted the *Canadian Forces Act, 1954,* S. of C. 1953-1954, c. 13. S. 17 of that Act repealed s. 16 of *The Visiting Forces (North Atlantic Treaty) Act* and substituted therefor a section which read in part as follows:

16. For the purposes of subsection (1) of section 3 of the *Crown Liability Act*

(*a*) a tort committed by a member of a visiting force while acting within the scope of his duties or employment shall be deemed to have been committed by a servant of the Crown while acting within the scope of his duties or employment; . . .

* * *

The *Canadian Forces Act, 1954* was assented to on March 4, 1954, so that it was not until that date that the Crown became liable for a tort committed by a member of a visiting force. This state of the law puts the suppliants in a difficult position. If the low flying was negligent and if such negligence was the cause of the suppliants' losses they must, if they are to succeed, prove that the negligent low flying was done by pilots for whose negligence the Crown is

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responsible, that is to say, by pilots who were members of the Royal Canadian Air Force. This they have not done. If the actionable low flying was by pilots who were not members of the Royal Canadian Air Force, as might be the case if there was any actionable low flying at all, the Crown is not responsible for it. It is responsible only for the negligence or torts of its own servants. Nor, in the absence of proof, will the Court assume any actionable low flying on the part of Canadian pilots.

It may appear, at first glance, that this is a narrow ground for disallowing the suppliants' claims but it must be kept in mind that claims against the Crown under s. 19(1)(*c*) of the *Exchequer Court Act* or 3(1)(*a*) of the *Crown Liability Act* are statutory and would not exist apart from the statute by which liability was imposed upon the Crown. Consequently, it has been consistently held, ever since liability was first imposed on the Crown, that the requirements of the statute by which it was imposed must be strictly met in every particular before the liability of the Crown could be engaged. The review of the cases by the Supreme Court of Canada in *The King* v. *Dubois* (1) and by this Court in *McArthur* v. *The King* (2), demonstrates this beyond dispute. And it is also settled that compliance with the requirements of the statute must be shown by proof and that conjecture or surmise cannot take its place: *vide The King* v. *Moreau* (3); *Ginn et al* v. *The King* (4). Thus since the suppliants have not proved that the low flying which they claim was the cause of their losses was done by persons for whose acts the Crown is responsible they have failed to establish one of the conditions of the Crown's liability and have thus failed to discharge the onus which the law casts on them. On this ground alone, their claim must fail.

If I were required to deal with their claim apart from the ground on which I have disallowed it I would find myself in great difficulty by reason of the unsatisfactory nature of the suppliants' evidence and the lack of reliable records. Certainly, the claim as they put it cannot be supported. Their contention was that in 1951 they mated 260 females, that at counting time there were 92 boxes in which

(1) [1935] S.C.R. 378.
(2) [1943] Ex. C.R. 77.
(3) [1950] S.C.R. 18 at 24.
(4) [1950] Ex. C.R. 208 at 216.

they did not find any kittens; that in 1952 they mated 207 females and 58 were found to be without kittens; and that in 1953 they mated 238 females and 74 were without kittens. The statement was made that in each case the absence of kittens was due to the fact that the mothers were thrown into a panic by the noise from the low-flying planes and ate the kittens to which they had given birth. While the suppliants did say that all the females that did not show any kittens when their boxes were opened ate their young I think it would be fair to say that they put their statement forward as an assumption rather than as a positive statement of fact. But there is no foundation for the assumption and there were no reliable records to support it. The figures put forward in their petition were all put together some time in June, 1953, after it had been suggested to them that they should put in a claim against the Crown. Up to that time they had not intended to do so.

The evidence of how they kept track of their mink during the mating and whelping season which began in March and ended in May was sketchy. It was stated that after a female was mated she was put into her own pen and it was marked on her card that she was pregnant when one or other of the suppliants thought that she was. Then when one of them heard a squeaking noise in the nest box the fact of birth of a litter was marked on the card. The box was not opened until about 12 days after the assumed birth of the litter. When the boxes were opened it was found that there were no kittens in the boxes of 92 females in 1951, 58 in 1952 and 74 in 1953. It was on this finding that the assumption was made and the contention put forward that all these females had been thrown into a panic because of the noise from low-flying planes over the ranch and because of such panic had eaten all their young.

These contentions are unwarranted. The statement that all the females referred to had become pregnant and given birth to live litters cannot be accepted. While there is a possibility of an occasional 100 per cent pregnancy in a mink farm it rarely happens and it is most unlikely that it happened on the suppliants' ranch and it certainly did not happen three years in a row.

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And there is also the fact that even if the females had produced live litters there were many possible causes of death of kittens other than the one stated by the suppliants. Indeed, that was recognized by the suppliants for in making their claim they made an allowance for loss from natural causes and reduced their claims for loss of litters due to the noise of low-flying planes accordingly, that is to say, in 1951 from 92 litters to 83, in 1952 from 58 to 50 and in 1953 from 74 to 62. In their claims for lost litters they assumed the same average of kittens per female as in the case of the females that had produced live litters without making any allowances for subsequent deaths.

The percentages of lost litters thus claimed of the total of females mated came to approximately 32 per cent in 1951, 24 per cent in 1952 and 27 per cent in 1953. These percentages of misses are somewhat, but not greatly, higher than those shown by Dr. R. J. Kirk, the superintendent of the Manitoba Fur and Game Station of the Game and Fisheries Branch of the Department of Mines and Natural Resources of Manitoba of misses of 26 per cent in 1950, 28 per cent in 1953 and 14·1 per cent in 1954 or an over all average of 22·8 per cent, as shown by Exhibit C, and also higher than the percentages of misses shown on Exhibit F, which ran from 18·8 per cent to 23·3 per cent.

While it is incumbent on the suppliants to show specifically that they suffered loss as the result of such low flying of planes as amounted to negligence on the part of the fliers of the planes and they were not able to give particulars of such specific losses I am satisfied from their evidence that it would be unfair to find that their complaints were wholly groundless. While their evidence is full of inaccuracies and exaggeration I must say that, in my opinion, their complaints were not wholly devoid of justification. While Dr. Kirk gave his opinion that minks were good mothers and did not consider them predisposed to eat their young on being disturbed I was impressed with his statement that low-flying aircraft in numbers flying over a period of time in a day might possibly be upsetting to female minks during the whelping season and that sustained noise might disturb them. There was also the opinion

of E. J. Washington that mink would be disturbed by low-flying and might possibly destroy their young if the noise of the planes was sustained.

Under the circumstances, I am of the view, after making allowances for exaggeration in the evidence of the suppliants and for lack of records, that some of their losses were in excess of what was normal and did result from negligent low flying of planes from the Gimli Air Station over their ranch. Obviously, the estimation of the amount of the damages so caused is difficult and cannot be made with precision. Perhaps, it would not be unreasonable to take 21 per cent of misses as the normal and attribute the excess over that amount as due to disturbance by the noise of low-flying planes negligently flown by their pilots. In that connection I would not make any allowance for losses in 1951 for in that year there was no indication that could be seen from the air that there was a mink ranch on the suppliants' farm and it would be quite improper to attribute negligent low flying to any pilots in that year. But in 1952 there was some indication of the need for care in the form of a yellow pole and fluorescent red flag on the suppliants' barn and in May of 1953 the barn was painted in checkerboard fashion and there was a yellow pole with a fluorescent red flag on it and also a pole near the road.

In 1952 the suppliants claimed $3,312 damages. If I allowed the excess of 24 per cent over, say, 21 per cent, $500 would be ample. In 1953 the suppliants claimed $16,915 but this was on the basis of 5 kittens per female. This is unwarranted and should be reduced to approximately 4. If for this year I were to allow the excess of 27 per cent over 21 per cent an allowance of $3,000 would be ample. Thus, if I were required to assess the suppliants' damages I would put them at $3,500. This, in my opinion, would be the highest amount which the evidence would warrant.

But for the reason which I have stated the suppliants have failed to establish any claim and the judgment of the Court must be that they are not entitled to any of the relief sought by them and that the respondent is entitled to costs.

Judgment accordingly.