HER MAJESTY THE QUEEN .....PLAINTIFF; 1960

June 20, 21, 22, 29

AND

FOREST PROTECTION LIMITED .....DEFENDANT. 1961

Feb. 17

Crown—Action to recover damages for loss of fish caused by spraying operations to kill bud worms—Negligence of defendant's employees in carrying on spraying operations—Volenti non fit injuria—Crown not bound by estoppel—Consent of Minister lacking—No evidence to warrant application of doctrine of estoppel in equity—Damages—No direct damage to plaintiff though inconvenience to public—Agreement between Province and Dominion—The Fisheries Act, R.S.C. 1952, c. 119, s. 33(2).

The action is brought by the Crown to recover from the defendant damages in the sum of $5,674.01 alleged to have been caused by the negligence of employees or servants of the defendant in spraying from an aircraft the Miramichi hatchery located on property of the plaintiff, and the headwaters of a brook which runs through the owner's property, with a substance poisonous to fish, resulting in the poisoning and death of a number of small trout and salmon. Plaintiff also pleads contravention of the *Fisheries Act,* R.S.C. 1952, c. 119, s. 33(2) prohibiting the pollution of waters containing fish, or the escape of a dangerous thing.

The spraying was carried out in an endeavour to extinguish bud worms which were causing heavy damage to the timberlands of New Brunswick. The Government of New Brunswick and the Government of Canada entered into an agreement which provided for the allocation of certain expenditures for carrying out the spraying operations which were carried out by the defendant company, incorporated by the Province of New Brunswick, under the direction of its manager. The agreement also provided that the Province would indemnify and keep harmless the Dominion from all claims of whatsoever nature arising from and out of anything done under the agreement. It also provided that if any question arose as to whether the Province is entitled to payment of the whole or any part of an amount claimed by it under the agreement the Minister of Resources and Development of Canada shall determine the question.

The Court found that the fish had died as a result of eating food thrown in the pools which had become saturated with the insecticide used in the spraying operations.

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Held: That there was no evidence to indicate that the spraying of the area, including the hatchery and plaintiff's property had taken place with the knowledge and consent and the collaboration and support of the Dominion Minister, and in the absence of such consent given by the Dominion Minister with the full knowledge of the risk involved and the area to be sprayed the plaintiff cannot be bound.

2. That the Crown is not estopped from taking the action as asserted by defendant because it had paid the Province its share of the cost of the spraying operations as there is no evidence that payment had been made and on the facts disclosed there is no foundation for the application of the doctrine of estoppel in equity.

3. That since the fish lost had no commercial value and no loss of profit was involved, the destruction of the fish being a source of inconvenience to the public only and not to the plaintiff, the damages would consist only of the cost of the wasted food of the destroyed fish and a certain amount for the disturbance and inconvenience suffered by the plaintiff's employees resulting from the strong and disagreeable odor of the insecticide and the removal of the dead fish.

INFORMATION exhibited by the Attorney General of Canada to recover damages for loss of fish.

The action was tried before the Honourable Mr. Justice Kearney at Fredericton.

H. A. Hanson, Q.C. and *C. T. Gilbert* for plaintiff.

J. F. H. Teed, Q.C. and *A. B. Gilbert* for defendant.

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

KEARNEY J. now (February 17, 1961) delivered the following judgment:

This is an action in tort instituted by way of information wherein the Crown in the right of Canada seeks to recover damages amounting to $5,674.01. Allegedly these damages were caused by the negligence of the employees or servants of the defendant who, on June 9, 1956, while acting within the scope of their employment, sprayed from aircraft with a substance, which is poisonous to fish, the Miramichi hatchery, located on the property of the plaintiff, as well as its headwaters known as Stewart Brook which flows through the owner's property. As a result small trout and salmon were poisoned and died.

The plaintiff claims the above-mentioned damages on the alternative grounds of a contravention of the *Fisheries Act,* R.S.C. 1952, c. 119, s. 33(2), which prohibits the pollution of waters containing fish; or the escape of a dangerous thing.

The defendant denies that the spraying in question caused the damages sought and submits that, in any event, it was carried out as part of a program to control the infestation of budworms which were destroying timberlands, particularly in the northern counties of New Brunswick; and asserts that, by a contract which was later renewed, the plaintiff agreed to share with the Province the cost of carrying out the program, and that the defendant which was incorporated at the instance of the Province which, with the approval of the plaintiff, employed it to undertake and manage the operation. Allegedly, the plaintiff was also aware that these operations involved some risk of injury to fish; it assumed such risk and is thereby precluded from claiming damages; finally it is inconsequential whether the spraying caused the destruction of a certain number of fry, as such destruction entailed no monetary loss to the plaintiff, the only possible loss being sustained by a section of the public who in later years might have caught these fish.

According to the evidence, lumbering is the main industry of the province of New Brunswick, rich in timberlands largely consisting of spruce and fir trees which are manufactured by various corporations into pulp, paper and lumber. About 1949 several such corporations within the province observed that their timber holdings were suffering from insects known as the spruce budworms, which destroyed the trees by feeding on their foliage.

In the course of the year 1952, one or more of the corporations, with a view to controlling the infestation, conducted apparently with success experimental spraying of the infested portions of their timber limits with an oil solution of DDT. The Province which owns some 10,000 square miles of timberlands later agreed to join the pulp and paper companies in a more extensive spraying project. The federal government was requested to lend aid and, after an exchange of correspondence between the then Minister of Resources and Development of Canada and the then Minister of Lands and Mines of the province of New Brunswick, the Government of Canada, subject to the conclusion of a mutually satisfactory written agreement, consented to lend financial assistance to the extent of one third of the cost of the operation on the understanding

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that the Province, which was assured of assistance from interested pulp and paper companies, would assume the other two thirds of the cost. The two Ministers concerned, being duly authorized by appropriate Orders in Council, signed a memorandum of agreement (Ex. B), dated April 28, 1953, wherein the Government of Canada was referred to as "Canada," and the Government of the province of New Brunswick as the "Province." This agreement provided *inter alia* that the contribution of Canada, not exceeding $3,000,000, applied to spraying expenditures between September 13, 1952, and March 31, 1956, both dates inclusive; that in connection with the spraying the Province was to furnish the federal Minister with such plans, programs and other information as he might require and afford him every facility for inspection and examination of work.

The concluding paragraphs of the agreement read as follows:

> 4. Where any question arises as to whether the Province is entitled to payment of the whole or any part of an amount claimed by it under this Agreement, the Minister shall determine the question.
>
> 5. This Agreement shall not be construed so as to vest in Canada any proprietary interest in any project.
>
> 6. The Province will indemnify and save harmless Canada of, from and against all claims of whatsoever nature arising from and out of anything done under this Agreement.

In September 1952 the Province proceeded to incorporate the defendant company under the *New Brunswick Companies Act*, R.S.N.B. 1952, c. 33, for the purpose of undertaking and managing thereafter the proposed aerial spraying operations. Of the 100 shares of the defendant's capital stock, 92 were issued to Her Majesty in the right of the Province or to nominees in her employ in order to qualify them as directors, and the remaining 8 shares were issued to the nominees of certain corporations interested in the operation.

During the years 1953, 1954, 1955 and a short period in 1956, the defendant caused spraying and respraying operations to be carried out in the northern sector of New Brunswick, over an area of approximately 4,000 square miles, as appears in color on a hazard map (Ex. G) and a later edition thereof filed as exhibit 17.

During these spraying seasons no controversy arose between the plaintiff and the defendant or the Province. In the summer of 1955 it was observed that the infestation had spread south beyond the limits of the area covered by the 1953 agreement, and the Province requested the plaintiff to extend the limits of the area to be sprayed, as well as the expiry date of the said agreement which would otherwise have been terminated on March 31, 1956.

In a letter dated May 3, 1955, included in exhibit F, and addressed to then Minister of Lands and Mines, Fredericton, N.B., the then Minister of Northern Affairs and National Resources stated that, subject to cabinet approval, he was favourably disposed to extend the agreement for a period of three years, provided the total cost to the federal government for past and future spraying did not exceed the original amount of $3,000,000. As appears by further letters exchanged between the two above-mentioned Ministers, the federal cabinet approved the proposed extension and it was mutually agreed to set no limits on the area to be sprayed, on the understanding that the program for each year would be subject from time to time to the approval of representatives of the two governments concerned.

The new agreement dated August 24, 1955, was filed as exhibit D, and it is on this agreement that the defendant relies. There is an essential difference, expressed it is true in very few words, between the two contracts: the second contains a provision to the effect that the aerial spraying operation was to be carried out "on such areas in New Brunswick as may be agreed upon from time to time by Canada and the Province."

The defendant also raised the question whether the death of the fish was due to their contact with the insecticide or to such other factors as overcrowding and natural causes. I will deal with this question before examining the defence of prior consent and knowledge which I regard as the main issue.

The Miramichi hatchery is located on a relatively long and narrow strip of land consisting of some 275 acres, owned and occupied by the plaintiff in the name of the Minister of Fisheries. It is situated in the parish of South

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Esk, Northumberland County, and fronts on the Northwest Miramichi River, at a point where Stewart Brook running through the property from south to north empties into the river. The property is shown between red lines on an aerial photograph (Ex. 11) and on an enlargement thereof (Ex. 15). The large photograph also shows clearly the hatchery dam which creates a pond, twelve feet deep, from which a fourteen inch intake pipe and smaller separate pipes run to the hatchery proper and rearing ponds. A large salmon pond, in which no loss of fish occurred, may be seen near the mouth of the brook. A close-up of the dam is shown on exhibit H-1; and the rearing ponds, the hatchery and other buildings are similarly shown on exhibit H.

The defendant had by contract (Ex. 5) engaged the services of Wheeler Airlines Ltd., including planes and pilots, but the operation was under the direct supervision and control of Mr. B. W. Flieger, manager of the defendant company. Since the operation in issue involved new territory, it was necessary to construct a new airstrip called Dunphy (Ex. 3). The spraying on June 9 which was a continuation of the operation commenced on June 6 was carried out by a fleet of 16 to 18 airplanes working in pairs. The blocks sprayed on June 9, numbered 455 to 460 inclusive, are shown on a large scale detailed map filed as exhibit 4. The areas marked in yellow, one of which was immediately east and another immediately west of the hatchery, were not to be sprayed. It will be seen that the Miramichi hatchery, designated by the words "Fish Hatchery," and a section of Stewart Brook constitute the dividing line between blocks 459 and 460 and fall within the area to be sprayed. In each of the four blocks two spray planes operated simultaneously during the course of a single morning, spreading a mixture of one pound of DDT to one gallon of heavy lubricating oil. Consequently Stewart Brook, from where it takes its rise at Crocker Lake to its mouth at the hatchery, including that part of the course which lies within the 275 acres belonging to the plaintiff, was subjected to concentrated spraying of a mixture which the evidence shows was unquestionably deleterious. The team in block 460 testified that they sprayed the

headwaters right up to the hatchery but that they refrained from flying directly over the hatchery. There is proof that a film of oil lay on the pond above the dam.

According to the evidence a strong wind can cause the spray to drift up to two or three miles. It is true that on June 9 the wind was light but it was sufficient to waft the spray onto the roofs of automobiles stationed at the hatchery and the surface of the outdoor pools notwithstanding that these were partly covered by wooden sun shades. Rain which fell later in the day washed the insecticide off the sun shades and it dripped into the pools. It is proved that prior to the spraying fish food had been thrown into the pools and, as it floated on the water, it became saturated with insecticide, and that the fish then fed upon it and died in great numbers. The casualties among fish a year old, or more, were light. The younger the fry, the heavier was the loss. The hatchery was completely enclosed and no spray fell on its waters, but contaminated water reached it through the intake pipe.

Mr. M. N. Jordan, superintendent of the hatchery for twelve years, and his assistant, Mr. T. I. Mullin, Dr. Miles Keenleyside and Dr. C. J. Kerswill, scientists with the Fishery Research Board of Canada, described the method employed in counting the casualties and they attributed the cause of death to insecticide poisoning.

I have no hesitancy in concluding that the spraying operation carried out by the defendant on June 9 caused the death of a large number of fingerlings. As a matter of fact counsel for the defendant, while claiming that other causes played their part, conceded that a considerable number of small fry died as a result of the spraying.

I will now deal with the defence that the spraying took place with the knowledge and consent, and indeed with the collaboration and support of the plaintiff which was aware of the risks and dangers involved. If there is sufficient evidence to substantiate this defence, then in my opinion the maxim *volenti non fit injuria* is applicable and the information should be dismissed.

The plaintiff submitted that any consent given by anyone except the Minister of Northern Affairs and National Resources who signed the agreement (Ex. D) would not suffice to bind Canada. Certainly there is no suggestion in

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the evidence that the Minister of Lands and Mines who signed exhibit D for the Province sought in writing or otherwise the consent of the first mentioned Minister to spray the area including the plaintiff's property; and Mr. Flieger admitted that he never sought or attempted to seek such consent. Evidence is also lacking that the Minister of Northern Affairs and National Resources knew what particular areas were to be sprayed and that, included therein, were Stewart Brook and the hatchery.

Leaving aside the question of consent at ministerial level, I think that, even if it were proved that a lesser official such as Dr. Webb had power to give a binding consent, the defendant would have to establish that such official did so with full knowledge of the risk and danger entailed. It is stated in *Clerk and Lindsell on Torts*, 11th edition, p. 57, with respect to the doctrine *volenti non fit injuria*:

> The maxim must not be taken literally, and like other Latin maxims is apt to mislead. The question primarily is whether the plaintiff knew of a risk and then submitted himself to it. The emphasis, therefore, is upon the knowledge of the plantiff: "if the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable they must obtain a finding of fact that the plaintiff voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it." Therefore, there must be both knowledge and consent.

The defendant submitted that the spraying operation of June 9 was not exclusively under its control and that representatives of the plaintiff, more particularly Dr. Webb and Mr. Elwin Doyle who is attached to the Department of Northern Affairs and National Resources, agreed to the spraying in issue. Chief among the witnesses called by the defendant in support of this submission were Mr. Kenneth B. Brown, acting Deputy Minister of Lands and Mines of New Brunswick, Dr. Webb (Mr. Doyle was ill and was not called) and Mr. Flieger. Mr. Brown testified that prior to 1956 it was the custom of the Province to accept the recommendations of officers of the Department of Agriculture as to the areas which were to be sprayed; and that at a meeting of officials of the defendant held in Fredericton on August 17, 1955, and called for the purpose of discussing the spraying program for 1956, Dr. Webb recommended that it should include new scattered high hazard areas south of the Northwest Miramichi, the limits of

which are indicated by a pencilled red line extending from Bramsfield to the figure 66-00 on exhibit G which had been prepared under the direction of Dr. Webb. The locations of Stewart Brook and the hatchery are not indicated by name on exhibit G, but they appear clearly on exhibit 4 which was prepared by the defendant company and used on June 9, 1956. Dr. Webb, in his capacity of entymologist and research officer, testified in substance that each year his department carries out surveys of forest insect conditions across Canada, and that extra work and extra attention were given to the outbreak of budworm infestation in New Brunswick; that his department voluntarily furnished to the Province and the defendant company the results of his observations of the intensity of the infestation; that neither he nor anyone in his department was in a position to give any permission or consent to spray the plaintiff's property and, as might be expected, he was never asked for such consent. He acknowledged that at the meeting of August 17, in the course of a verbal report, he informed those present that there were high hazard stands of timber south of the Northwest Miramichi which, he suggested, should be sprayed in 1956; but that at the time the large scale map (Ex. G), on which were later marked the boundary lines of light hazard patches in the new area beginning on the south shore of the Northwest Miramichi, the South Esk area, Stewart Brook, and the hatchery, was not available, much less a detailed map such as exhibit 4 which included such information; that although he expected to receive it, at no time, save immediately prior to the spraying on June 9, 1956, did he see any map such as exhibit G; and that until then he was unaware of the existence of the hatchery.

Laches cannot be set up against the Crown and, even if Dr. Webb should have known, or did know, that the hatchery lay within the new area to be sprayed, as indicated on exhibit G, and consented to its spraying, in my opinion such consent could not bind the plaintiff. Ritchie, C.J., in *The Queen v. Bank of Nova Scotia*[1], said:

> As the Crown cannot be prejudiced by the misconduct or negligence of any of its officers, so neither can an officer give consent that shall prejudice the rights of the Crown.

[1] (1885) 11 Can. S.C.R. 1, 11.

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I think that the defendant has failed to prove that any representative, whether qualified to do so or not, gave a consent, with knowledge of the risk entailed, to spray an area which included the plaintiff's property. I consider it was an act of negligence on the part of the defendant to carry out, in the absence of this consent, such heavy and concentrated spraying on a narrow stream like Stewart Brook, near such a vulnerable object as a hatchery. Mr. Flieger failed to procure the prior consent of the Minister of Northern Affairs and National Resources to spray Crown property possibly because he did not realize that exhibit D, unlike exhibit B, contained a provision requiring the prior consent of Canada; or because he thought such consent unnecessary, being convinced that the operation could be carried out with impunity. He testified in this respect, both on discovery and at trial, that according to his experience the spraying of the plaintiff's property could be done without appreciable damage to fish at the hatchery or in the brook. While Mr. Flieger's lack of knowledge, or mistake, would negative any suggestion that mischievous "buzzing" of the hatchery took place, yet it could not serve to exculpate the defendant.

I might here interpose that, in my opinion, the evidence indicates that there was a lack of coordination and foresight on the part of various officers of the plaintiff who usually attended directors' meetings of the defendant company. It is noteworthy that in 1954 it was well known (Ex. 12) that a fishery belonging to the Crown was sprayed by the defendant with ensuing heavy fish mortality, yet it was not until after the June 9, 1956, spraying that the plaintiff required from the Province an undertaking that thenceforth spraying of hatcheries and their headwaters would be discontinued. I think the plaintiff was entitled to rely on the provision in exhibit D, which required the Province to seek the plaintiff's prior approval from time to time to spray certain areas; but, had the plaintiff taken the same precaution in 1955 as was taken two years later, it is unlikely that the damages now claimed would have arisen.

In argument, counsel for the defence raised the plea of estoppel, based on the fact that the plaintiff paid the Province for its share of the South Esk spraying operation.

There is no evidence as to when payment was made; but if it took place after November 2, 1956 when the present information was filed the defence of estoppel could not be raised. Paragraph 4 of exhibit D unquestionably gave to the plaintiff a very wide discretionary power to pay only such part of any spraying bill as it might determine. I think it could have refused to contribute anything towards the cost (which must have been considerable) of the June 9 spraying operation. Because the plaintiff refrained from using this very wide power, I do not think the defendant suffered any prejudice and that the reverse is probably true. In any event, there is no evidence of prejudice before me. It is well established that estoppel by deed cannot be invoked against the Crown; and I do not think that on the facts of the case there is any foundation for the application of the doctrine of estoppel in equity, or in pais as it is often called.

The *quantum* of damages remains to be assessed. Mr. F. Stapleton, administrative officer of the Department of Fisheries, testified (Ex. 10) that the stock of fish on hand June 9, 1956, totalled 3,638,137; that 979,179 deaths were recorded between June 10 and June 17, of which 7,179 can be ascribed to natural causes; that therefore 972,000 fish, or 26.7% of the total number, died because of the budworm spraying. The witness then stated that the plaintiff's total 1955-56 expenditures at the hatchery, less $4,274.13 spent in connection with the salmon pond where no losses had occurred, amounted to $20,368.96; and that by taking 26.7% of this amount, he arrived at the figure of $5,438.51 which in his opinion, represented the monetary loss suffered by the plaintiff.

By their very nature the circumstances of this case are, in my view, such that they limit the extent of any monetary loss suffered by the plaintiff to a relatively negligible amount. The fish that were lost had no commercial value to the plaintiff : they were not for sale and there could be no loss or profit involved. The small fry serve to restock the streams and rivers, and the destruction of nearly one million of them could cause loss or inconvenience, not to the plaintiff, but to the public, and only to those persons who years later might have caught them.

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The reasoning applied in *Gartland Steamship Co.* v. *The Queen*[1] is, I think, applicable in this case. Judson, J., in delivering the judgment of the majority, said:

> To me this item of damage for which the Crown seeks compensation is better described as public inconvenience rather than loss of use. For a short time, until the so-called temporary span was put in, pedestrian and vehicular traffic suffered inconvenience but the Crown *suffered no monetary loss.* The same may be said of loss of use of the north channel. If it had been thought wise to replace the span, the work would have taken one year. There was, therefore, a theoretical loss of use of the north channel for shipping during this period. But the loss of use is again really *public inconvenience and not monetary loss to the Crown.* .....
> The Crown has been fully compensated for all its loss without this item. (Emphasis supplied)

The plaintiff does not claim the replacement value of the stock which was allegedly lost and there is no evidence in the record which would support such a claim. The plaintiff's entitlement to the amount claimed depends on the proof that less expenditure would have been entailed with 900,000 fewer fry at the hatchery. There is no suggestion that fewer men would have been employed or that employees would have been paid less. I consider that, had there been approximately one million fewer fingerlings to feed, there would have been a saving on food costs; and Mr. Stapleton filed as exhibit 9 reports showing the age of the young fish, and the weekly cost of feeding as $28. I have calculated that the average age is 7.26 weeks and that wasted food represents some $120 in round figures.

There is also proof that during a fortnight the strong and disagreeable odor of the insecticide and the removal of dead fish in large quantities imposed a messy task and an unusual burden on the plaintiff's employees, and as compensation for the disturbance and inconvenience thus suffered I would allow $380.

I think that the two above-mentioned sums constitute the only monetary losses which the plaintiff has proved, and for the foregoing reasons I consider that the defendant should be required to pay to the plaintiff $500 and costs.

Judgment accordingly.

[1] [1960] S.C.R. 315, 327.