BETWEEN: 1953

JEAN LACROIX .....SUPPLIANT; Sept. 22, 23, 24, 25

AND Dec. 29

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Expropriation—The Expropriation Act, R.S.C. 1927, c. 64, s. 47—Expropriation of an easement over property close to an airport—Damages claimed by reason of establishment of an airport flightway over property—Article 414, Civil Code of Quebec— Article 552, Code Napoleon—Air and space not susceptible of ownership—Owner's right in air space over his property limited—Crown cannot expropriate that which is not susceptible of ownership.

Suppliant owned some vacant land close to the Dorval airport and used it intermittently for agricultural purposes. In 1942 the Crown expropriated an easement over it and adjoining lands for an underground cable and poles for the installation and maintenance of an approach lighting system to one of the runways of the airport. In his action suppliant, in addition to the claim for compensation for the expropriation of the easement over his property and the injurious affection of the remaining land as a result thereof, sought damages by reason of the establishment of what he described as a flightway over his property through which aircraft would fly to take off or land at the airport, the basis of this latter claim being that (1) the suppliant

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being the owner not only of the surface of his land but also of what is below and above, the establishment of this flightway and the flying of planes over his land was an interference with his rights of ownership and a disturbance of his full enjoyment of his property and (2) the Crown, having established this flightway and interfered with his rights of ownership, was liable for the damages claimed.

On the evidence the Court allowed certain amounts on the claim for the expropriation of the easement and for the injurious affection of the remaining land.

Held: That suppliant's claim for damages by reason of the so-called establishment of a flightway over his land fails.

2. That air and space are not susceptible of ownership and fall in the category of *res omnium communis*. This does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or in any way which is not prohibited by law or against the public interest.

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

4. That the Crown could not expropriate that which is not susceptible of possession. It is contrary to fact to say that by the so-called establishment of a flightway and the flying of planes it had taken any property belonging to the suppliant or interfered with his rights of ownership.

PETITION OF RIGHT claiming compensation from the Crown for the expropriation of an easement over suppliant's property and for damages by reason of the alleged establishment of an airport flightway over his property.

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

Jacques Decary and *Neil S. King* for suppliant.

Paul Dalmé and *Jean Provost* for respondent.

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

FOURNIER J. now (December 29, 1953) delivered the following judgment:

In this petition of right the suppliant combines two claims, one for compensation for the expropriation of an easement over his property and the injurious affection of his remaining land as a result of the easement and the other for damages by reason of the establishment of what he called or described a flightway over his land.

The facts relative to the claim for compensation for the expropriation may be set out first. On July 8, 1942, His late Majesty the King expropriated an easement over the suppliant's land, which was the north-east half of lot No. 172 of the parish of St. Laurent, County of Jacques Cartier, in the Province of Quebec, consisting of thirty-three arpents, and other lands for an underground cable and poles for a lighting system in connection with the Dorval airport. The expropriation was completed by depositing a plan and description of the lands and the easement taken in the office of the Registrar of Deeds for the registration division of Montreal, in which the lands are situate, on July 8, 1942, pursuant to section 9 of the Expropriation Act. Thereupon the said easement became vested in His late Majesty.

The first easement over the suppliant's land was for a length of 288 feet and a width of 15 feet. Subsequently, it was decided that this width was not necessary, and on December 21, 1944, there was a so-called abandonment of the easement, the width of the easement being changed from a width of 15 feet "to be of sufficient width to lay cables and erect poles and the right to maintain the same." The notice of the so-called partial abandonment of the easement and the alteration in the width taken was registered in the office of the Registrar of Deeds for the registration division of Montreal on December 21, 1944, pursuant to section 24 of the Act.

The amount of compensation money to which the suppliant is entitled for the expropriation consists of the value of the easement taken and the damages for injurious affection of the suppliant's remaining land by reason of the easement. The amount of such value and damages must, by virtue of section 47 of the Exchequer Court Act, be estimated by the Court as of the date of the expropriation.

Before I make this estimate, I should deal with the other claim put forward by the suppliant. This depends in part on an expropriation of an easement in perpetuity over lands not belonging to the suppliant, that is to say over lots 174, 175 and 176 of the parish of St. Laurent. These lie to the north-east of the suppliant's land. The easement over these lands was an easement in perpetuity for the installation and maintenance of an approach lighting system to

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runway No. 24 in connection with the Dorval airport. The plan and description of these lands and the easement taken was deposited of record in the office of the Registrar of Deeds for the registration division of Montreal on November 30, 1951.

The grounds for this claim were set forth by the suppliant's counsel as follows:

(1) The expropriation of an easement on the suppliant's land and on the adjoining properties for a lighting system had established a flightway over his land through which aircraft would fly to take off or land at Dorval airport;

(2) The suppliant being the owner not only of the surface of his land but also of what is below and above, the establishment of this flightway and the flying of planes over his land was an interference with his rights of ownership and a disturbance of his full enjoyment of his property and

(3) The Crown, having established this flightway and interfered with his rights of ownership, was liable for the damages claimed.

Let us examine these three propositions, keeping in mind that the claim is against the Crown and that the burden of proof rested on the suppliant.

Before the taking of the easement and the partial abandonment, planes landed at and took off from Dorval airport. The easement was taken and the lighting system installed as an aid to aerial navigation. What was done in reality was to lay an underground cable and erect a pole surmounted by lights. Nothing in the evidence or in the plans and descriptions filed by the suppliant could be construed as an indication that anything was being taken from the suppliant outside of the easement. Furthermore, the expropriation of an easement on the adjoining lots in 1951 could not give rise to the suppliant to a claim against the respondent. These acts had nothing to do with the expropriation of any interest in his land and were independent of his rights in respect of what was taken from him in 1942 and 1944. Planes, I assume, could fly in and out of the airport without this lighting system. This was done before this easement was taken.

A device to help aerial navigation, say a lighting system in the vicinity of an airport as in this case, cannot be considered as establishing a flightway to or from the airport. Even if this view were not agreed to, could the suppliant's second proposition be concurred in?

Most of his argument is predicated on the assumption that the soil carries with it the ownership of what is above and below and that the flying of planes in the air space or flightway over private property disturbs the owner in the enjoyment of his land and gives redress before the Court. He insists that by reason of the flightway his property became and was, either for sale or occupation, permanently damaged and diminished in value because of the appropriation for exclusive use by the Crown of the air space over his land.

What is the suppliant's interest in the air space above his land and what are his rights in cases where aircraft fly over his property are important questions.

Though section 414 of the civil code of the Province of Quebec states "that the owner of the soil is also the owner of what is above and what is below", it is useful to recall that this section of the civil code is a repetition, not in words but in thought, of what is said in section 552 of the Code Napoleon—which, if it did not repeat the same words, expressed the principle enunciated in the "Coutume de Paris":

> Quiconque a le sol, appelé l'étage du rez-de-chaussée, d'aucun héritage, peut et doit avoir le dessus et le dessous de son sol et peut faire édifier par dessus et par dessous et y faire fruits et autres chose licites, s'il n'y a titre au contraire.

This could be related to the maxim *cujus est solum, ejus est solum, ejus est usque ad coelum* of the Middle Ages.

This principle was admitted at a time when nobody could foresee our modern inventions and developments. It would be difficult to apply rules of law of a past period which had no idea of the sets of facts and circumstances that exist at the present time. So in France, the United Kingdom and the United States the tendency has been to restrict the interpretation of the above maxim and rule of law, always keeping in mind that the owner is entitled to full enjoyment of his property.

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In a study entitled "A qui appartient le milieu aérien?", by Nicolas Mateesco, published in the May 1952 issue of La Revue du Barreau de la Province de Québec, the author arrives at certain conclusions useful to our purpose and worth quoting:

I. L'abandon de l'expression 'espace aérien', inadéquate à l'ordre juridique et son remplacement par celle de 'milieu aérien', notion qui représente substantiellement, et sur le plan phénoménologique, un corps matériel, et dans l'ordre juridique un bien commun (res omnium communis).

II. Juridiquement, le milieu aérien ne peut être approprié ou devenir domaine privé, de même qu'il ne peut être catalogué parmi les 'res nullius', biens qui ont l'aptitude—par leur autonomie, distinction et individualisation,—de devenir propriété privée.

Ce qui oblige à la constatation que l'art. 552 C.N. (et les articles respectifs d'autres codes civils qui ont reproduit, en grande partie, le Code Napoléon), l'art. 637 C.N., de même que la première partie de l'art 714 C.N., ne sont pas les vrais sièges légaux du milieu aérien.

III. L'application de l'art. 552 C.N. quant à la propriété sur 'l'espace aérien' en fonction de l'intérêt concret du propriétaire, n'est, non plus, soutenable; car, dès qu'on construit ou on plante, le volume occupé *en espace* cesse d'être *aérien;* même si on pouvait parler, avant la construction ou la plantation respective, d'un milieu aérien, celui-ci perd cette nature, au moment où un volume quelconque est borné au profit de l'homme; cela ne veut aucunement dire qu'on a pris propriété de 'l'espace aérien'.

IV. Le milieu aérien est *res communis* et, à l'étape actuelle des inventions, ce milieu est constitué par 'l'atmosphère' de la façon que la mer constitue le milieu de la navigation maritime.

. . .

Le milieu aérien reste, donc, un bien commun, à l'usage de tous.

. . .

VII. Sur le plan public, comme sur le plan privé,—et en remplaçant la discussion de la notion de propriété par celle de souveraineté—la situation est pareille: le milieu aérien, au-delà des intérêts immédiats et parfois égoïstes des Etats, est un bien commun mis à l'usage pacifique de l'humanité, sans conditions et sans restrictions.

Another article of great interest and of assistance in the preparation of these reasons for judgment appeared in The Canadian Bar Review of February 1953, entitled "Private Property Rights in the Air Space at Common Law", by Jack E. Richardson.

I will cite the following:

1. It has not been necessary for an English court to give literal effect to the maxim *cujus est solum, ejus est usque ad coelum,* and no court has done so. . . .

2. English courts have always accepted the general right of the landowner to the uninterrupted use and enjoyment of his property. When the right is threatened or has been infringed, the courts will find an appropriate legal remedy to ensure his protection. . . .

3. As a corollary of the owner's right of full enjoyment, no one has the right in normal circumstances to prevent him building upwards from his land. He can, therefore, object to anyone who purports to occupy the column of air, or a part of it, which is above his land. . . .

4. There is an underlying assumption in the cases that use and enjoyment of land are meaningless without the ability to use the space above it, but the courts have not pronounced upon ownership of space. . . .

5. The decisions do not inhibit persons from making transient use of air space above private property in circumstances having no bearing on an occupier's use and enjoyment of the subjacent soil. . . .

Then the author continues and examines the decisions of the United States Courts in cases where the flying of aircraft over private property is the cause of damage claims. The following principles underline the cases reviewed, which are hereinafter quoted:

(1) The property owner has a right to the continuous useful enjoyment and occupation of his property without interference by the intrusions of aircraft in the flight space above him:

(2) United States courts recognize that a landowner has an interest in the air above his property, which is of a possessory character and may be proprietary as well, to the extent he is able to occupy or make use of it;

(3) the courts have, without exception, afforded adequate protection to the landowner in the use and enjoyment of his land, but they have, at the same time, declined to enjoin air operations unless the landowner's interest is affected or threatened;

(4) a landowner in the United States may occupy or otherwise make use of the air space above his property as incidental to his lawful use and enjoyment of the soil and no one may occupy the space or otherwise interfere with his rights;

(5) the maxim, *cujus est solum, ejus est usque ad coelum,* has not been applied literally and today almost certainly does not form part of United States law; and

(6) an aircraft may fly above private property in the United States provided the flight does not interfere with the occupier's use and enjoyment of the land.

The principles submitted and the conclusions arrived at by these two authors may be in part applied to the present case.

The principle that the suppliant has the right to the uninterrupted use and enjoyment of his land is sound; but has the use and enjoyment of his property been interrupted? If so, when, how and by whom were his rights interfered with?

At the time of the expropriation, the suppliant and his authors used intermittently the land in question for agricultural purposes. They did not live on the property and

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there were no buildings on the suppliant's land. It was close to the Dorval airport and planes flew over his property in and out of the airport. An easement was taken to provide a lighting system and for no other purpose. In 1942, no doubt the use and enjoyment of the property was interrupted by the taking of the easement by the Crown, but by nothing else. I will deal with this later.

To maintain that the owner of land could claim compensation against the Crown because aircraft fly or will fly over his property in a way permitted by law and regulations would be exorbitant and contrary to decisions in the Courts of England, the United States and France. To agree with the position taken by the suppliant that the Crown, by expropriating an easement for a lighting system, had created a flightway and appropriated air space over his land would be admitting that air and space may be appropriated or possessed.

In my view, air and space are not susceptible of ownership and fall in the category of *res omnium communis,* which does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or in any way which is not prohibited by law or against the public interest.

It seems to me that the owner of land has a limited right in the air space over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.

The Crown could not expropriate that which is not susceptible of possession. It is contrary to fact to say that by the so-called establishment of a flightway and the flying of planes it had taken any property belonging to the suppliant or interfered with his rights of ownership.

In this instance it did not appropriate any air or space over his land and did not interfere with his rights. I need go only so far as to say that the owner of land is not and cannot be the owner of the unlimited air space over his land, because air and space fall in the category of *res*

omnium communis. For these reasons the suppliant's claim for damages by reason of the so-called establishment of a flightway over his land fails.

This leaves the claim for compensation for the expropriation of the easement and the injurious affection of his remaining land as a result of the easement. The suppliant is undoubtedly entitled to compensation for the value of the easement taken.

The evidence revealed that the suppliant's property consisted of 33 arpents of farm land on which there were no buildings. It was agreed by the parties that $200 per arpent in 1942 and 1944 would be a fair valuation of the land and that $6,600 was the total value of the property. It was unutilized land, only small portions had been cultivated at different periods. This property is situated at about 1,500 feet, more or less, to the east of Dorval airport. The easement was for the laying of an underground cable across the width of the property, a length of 288 feet, the erection of one pole with lights at the top and the maintenance of this public work.

The suppliant's expert witnesses assessed at $128.80 the value of the easement at the time of the expropriation and the notice of partial abandonment, being $100 for the pole and lights and the maintenance of same and $28.80 for the underground cable and maintenance.

The respondent by his witnesses assessed the easement in two ways. One giving a valuation of $25 for the pole and $28.80 for the cable, the other by stating that the value should cover 25 feet on each side of the cable on a length of 288 feet or a total of 14,400 square feet valued at .00543 cents per square foot or $78.19.

It seems that there was no difference in the value of the lands in question as between 1944 when the notice of abandonment was filed and the date of the expropriation in 1942.

After perusing the evidence, I came to the conclusion that the second method of assessing the value should apply in this case because the maintenance of a lighting system needs far more travelling over the grounds than the maintenance of a telephone or power line. Furthermore and for the above reason, I would fix a value for 50 feet on each side

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of the cable or 100 feet in width by 288 feet in length or a total of 28,800 square feet at ·00542 cents per square foot or $156.39.

Having disposed of the claim for the easement, there remains the claim for the injurious affection of the remaining land. Though the suppliant will be compensated for the easement taken, he will not have full enjoyment of all portions of the balance of his land. I do not believe the front part affected, because the access is from the roadway. But there will be severance of the land by the cable and pole. The use of the land to a certain extent will be restricted. The plowing, sowing of the crops and the other operations on farm land will be affected. Having people in and out of the property to maintain the works will interfere in some degree with the use and enjoyment of the property.

For these reasons I would allow an amount of $150 for the injurious affection of the suppliant's remaining land. The total compensation to which the suppliant is entitled is $306.39. Since this amount exceeds the amount offered by the respondent, the suppliant is entitled to interest at the rate of 5 per cent per annum from July 8, 1942, to date. The suppliant is also entitled to costs.

There will be the usual declaration that the easement over the suppliant's land taken on July 8, 1942, and modified in 1944 is vested in Her Majesty the Queen.

There will, therefore, be judgment that the easement taken over the suppliant's land on July 8, 1942, and modified in 1944, is vested in Her Majesty the Queen; 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 $306.39, with interest thereon at the rate of 5 per cent per annum from July 8, 1942, to this date, and that the suppliant is entitled to costs to be taxed in the usual way.

Judgment accordingly.