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 Sept. 10, 11,
 12, 13, 14, 17,
 18 & 19.
 1952
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 Jan. 23

BETWEEN:

JAMES RAMSAY and ARTHUR }
 PENNO } SUPPLIANTS;

AND

HIS MAJESTY THE KING RESPONDENT.

Crown—Petition of Right—Claim for damage caused by flooding of lands as the result of construction and operation of dams on the Souris River by the Crown—No negligence in construction of dams—Transfer of ownership of dams—No liability on Crown for maintenance and operation of dams after transfer of ownership to Province of Manitoba—Petition dismissed.

Suppliants claim damages from the Crown (1) because their lands were flooded as the result of the construction by the Crown of certain dams on the Souris River in Manitoba, alleging that such dams were improperly, unskilfully, carelessly or negligently constructed and (2) because of the improper, careless and negligent supervision and operation of such dams by the agents and servants of the Crown.

Held: That engineers are expected to be possessed of reasonably competent skill in the exercise of their particular calling and the most that can be expected of them is the exercise of reasonable care and prudence in the light of scientific knowledge at the time, of which they should be aware.

2. That the engineers responsible in any way for the construction of the dam or dams in question were competent in their profession and exercised all reasonable care and prudence after ascertaining and investigating all available material factors appertaining to the river, surrounding country and watershed and the action fails on the allegation of negligence in design and construction of the dams.
3. That the respondent cannot be held liable for damage suffered through supervision and operation of the dams subsequent to April 1, 1945, the date on which ownership of all the dams was transferred to and taken over by the Government of the Province of Manitoba from respondent and were thereafter under the sole control, operation and supervision of officials of that Province. *Lessard v. Hull Electric Company* (1947) S.C.R. 22.

PETITION OF RIGHT to recover damages from the Crown for loss sustained by suppliants allegedly due to the negligence of respondent in the construction and operation of dams on the Souris River in Manitoba.

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Winnipeg.

W. P. Fillmore, K.C. and *C. W. Fillmore* for suppliants.

M. J. Finkelstein, K.C. and *K. E. Eaton* for respondent.

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

HYNDMAN D.J. now (January 23, 1952) delivered the following judgment:

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By Petition of Right, for which fiat was granted, and filed the 30th August, 1950, suppliants, James Ramsay, claimed to be the owner, and Arthur Penno, the lessee, of all of section 9 in township 5, range 25, west of the principal meridian north of the Souris river, of which 100 acres were under crop cultivation and 54 acres used for hay; and the southwest quarter of section 16 in the said township 5, excepting thereout the right-of-way of the Canadian Pacific Railway, of which 130 acres are under crop cultivation and 24 acres used for hay; which lands are adjacent to the said Souris river.

The Souris river rises in the province of Saskatchewan, follows a course through North Dakota, and thence through the province of Manitoba, and empties into the Assiniboine river.

Suppliants allege that in or about the year 1941, or prior thereto, His Majesty caused to be constructed, without the consent or permission of the suppliants, four dams or dykes at various points on the said river, in the province of Manitoba, one of them situate on section 16 in township 6, range 23, known as the Hartney; another situate on said section 9, known as the Napinka or Stewart dam; one on section 8, township 4, range 26, known as the Ross dam, and one on the northeast of section 33, township 2, range 27, known as the Snider dam; all for the purpose of impeding the waters of said river, or of stopping its natural flow, or raising the level there-in and above such dams, and/or, as it passed through certain of the lands above referred to.

It is claimed that such dams were improperly, unskillfully, carelessly or negligently constructed by His Majesty, as follows:

- (a) Said dams were of improper design and not fit to perform the function for which they were intended.
- (b) Were constructed in a manner to narrow natural bed of the river and so as to prevent the free passage along the surface of the said river, of trees and other floating material and so as to cause an obstruction to the ordinary flow in a manner which stopped and gathered debris and prevented it from passing such dam and which caused the said waters to rise above its natural course and flow into the lands of the suppliants.

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- (c) Were not of sufficient dimensions to accommodate the natural flow of the waters and forced such water from its natural course on to the lands of the suppliants.
- (d) The Hartney dam, which is situate downstream from suppliants' lands, and the Napinka dam, which is adjacent to suppliants' lands, are on a higher level than the lands of the suppliants and were so constructed as to cause water, held back by the dam, to overflow its banks and to flow onto the lands of the suppliants and with no natural flow or outlet to the same, and to remain upon the said lands.
- (e) Insufficient or no protection is afforded to prevent the waters of said river, raised by the said dams, from flooding over the banks of said river onto the said lands.
- (f) No proper or adequate re-propping with rock was placed on the running water side of said dam.
- (g) Sufficient space was not provided between the pillars used in construction of said dam to permit debris to pass over the dams, and,
- (h) No proper method was used in the construction of the said dams to properly control the use thereof or the flow of water likely to be impeded thereby.

That as a result of the improper construction of the said dams, water rose above the natural or man-made banks of said river, and flooded valuable portions of agricultural and pasture lands and prevented suppliants from sowing, tilling or harvesting crops or using said lands in each of the years, 1942 to 1949, inclusive.

Furthermore, as a result of the said improper construction, and because of the water of said river overflowing, as aforesaid, the said water was not able to return or enter the river channel, but remained upon suppliants' land, and prevented them from sowing and harvesting crops therefrom, or, if sown, from harvesting the same, or tilling, or otherwise using the lands in proper season, and it is alleged that the suppliants would continue to suffer damage by reason of said flooding, and the lands materially depreciated in value.

It is also claimed that the said dams were improperly, carelessly and negligently supervised and operated by the agents or servants of His Majesty, in that logs placed in the said dams, to hold back the flow of water in the dry months of the year, were permitted to remain in the said dams when the spring floods were rising, and, in consequence, the lands were flooded, and suppliants were prevented from sowing and harvesting any crops therefrom during the years 1942 to 1949 inclusive, and in consequence, the suppliants have suffered damage thereby.

It is also alleged that the said works are of no possible benefit to suppliants but, on the contrary, have materially depreciated said lands, which is rich, river-bottom land, capable of producing heavy crops of wheat.

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At the opening of the trial, Counsel for the Crown, moved that clauses 3, 5, 6 and the words "construction or" in the first line of paragraph 7 of the Petition, and the words "construction or" on the seventh line of paragraph 7, be struck out, on the ground that the same do not disclose any cause of action against the respondent within the jurisdiction of the Exchequer Court, which entitles the suppliants to the relief sought, inasmuch as suppliants failed to allege that the damage resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, and cited the case of *Rawn v. The King*, (1), and *Ruffy-Arnell and Baumann Aviation Company Limited v. The King*, (2).

Mr. Fillmore, counsel for the suppliants, whilst contending that the omitted words were unnecessary, moved to amend the petition by adding such words. This was objected to by Crown counsel, on the ground that a Petition of Right for which a fiat had been granted, could not be amended in the absence of a new fiat. Undoubtedly, where a fresh cause of action would be the result of such an amendment, it should not be allowed without a new fiat. See dicta of the President of this Court in *Rawn v. The King*, above, (*supra*) and of McCardie, J. in *Ruffy-Arnell and Baumann Aviation Co. Ltd. v. The King* (*supra*). It is argued that by implication, these words should be considered as included in the pleading, but of this I am doubtful. However, with considerable doubt, as no new cause of action is alleged, other than that set out in the petition, I am inclined to allow such amendment. Since the amendment to the Petition of Right Act of 1951, there could be no objection to allowing such amendment. I propose, therefore, to deal with the case on the assumption that the pleadings are in order and valid.

During the course of the trial, counsel for the petitioners abandoned any claim for damages for the years 1942, 1943, 1944, by reason of the Statutes of Limitations, and the years 1946 and 1949, leaving for consideration only

(1) (1948) 4 D.L.R. 412.

(2) (1922) 1 K.B. 599.

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the years 1945, 1947 and 1948, the amount of damages claimed for these years being \$5,650; \$5,650 and \$5,650 respectively.

The respondent denied all material allegations of negligence in the petition and, in addition, pleaded that the respondent did not and does not maintain or operate the said dams; and that if said lands were flooded, such flooding was due to the low-lying nature of said lands which are "river bottom lands," and designated as marsh lands in the original survey of 1880; and that the extent and overflow of the waters of the Souris river depend entirely upon the extent, periodicity, and the rate of precipitation in the whole watershed of the river; and such flooding was caused by extraordinary rainfalls and floods in the said watershed.

The dams in question were constructed under the authority of the Prairie Farms Rehabilitation Act, being ch. 23, 25-26 Geo. V. (1935). The Act provided in section 3(1) that the Governor in Council may establish a committee to be known as the Prairie Farm Rehabilitation Advisory Committee, the members of which were to hold office during pleasure and said Committee consisting of representatives of various organizations in Manitoba, Saskatchewan and Alberta. Section 4 of the Act reads:

4. The Committee shall consider and advise the Minister as to the best methods to be adopted to secure the rehabilitation of the drought and soil drifting areas in the Provinces of Manitoba, Saskatchewan and Alberta and to develop and promote within those areas systems of farm practice, tree culture and *water supply* that will afford greater economic security and to make such representations thereon to the Minister as the Committee may deem expedient.

The evidence discloses that farmers in the area depend largely on the river for water for their animals. In the so-called "dry years," the river in many places completely dried up, it being possible to walk across it, so that there would be no water available for livestock. Consequently, petitions from farmers and municipalities were forwarded to the Government of Canada, asking for the building of dams to hold and control the water of the river against the dry periods.

In consequence of these petitions, it was decided by the Government of Canada, that the dams hereinbefore mentioned should be constructed under the authority of the said Act.

The only expert witness for suppliants was Mr. Laughlin McLean, a professional engineer, graduate of McGill University in 1909 in civil engineering, with honours in electrical engineering; prior to graduation worked on the Grand Trunk Railway in Quebec and New Brunswick; the Canadian Pacific Railway in Maine and New Brunswick; and on Detroit River, Chaudiere Falls and other places; was Deputy Minister of Public Works in Manitoba from 1922 to 1927, and at present is superintendent and engineer for Greater Winnipeg Sanitary District. He is therefore an engineer of wide experience and to whose evidence I give every consideration.

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The gist of Mr. McLean's criticism of the dam is that it is "old fashioned" and he prefers a solid or weir dam. In 1947, he concluded that the dam caused the flooding of suppliants' land.

As opposed to Mr. McLean's opinion is the evidence of Messrs. Russell, Attwood and McKenzie, all engineers, with wide and varied experience.

Benjamin Russell is a civil engineer, graduated in 1909 from McGill University. He worked in Cranbrook in 1909; was City Engineer for Lethbridge for a year then worked with the Canadian Pacific Railway from 1911 to 1933; was in charge at Calgary of the Irrigation Branch for the Dominion Government, and in charge of reservoir services; was then engaged with Calgary Power Company from 1935 to 1944; was Chief Engineer under the P.F.R.A.; then Director of Water Courses for the province of Alberta, and chairman of the Water Power Commission; also secretary of the Irrigation and Drainage Council—which latter position he still occupies.

Mr. Russell testified that in his official capacity, he signed the plan or design of the "Napinka" dam, which was approved by the appropriate authorities; that he had had complete surveys made of the Souris Valley, with a close study of water supply all along the river, and used all available material and official records; also that he visited the places once or twice with McKenzie and consulted all persons with any information with regard to the river and surrounding country.

As the result of these enquiries, consultations and researches, with the concurrence of the other interested

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engineers, the design of the dam, later constructed, was considered the most suitable for the purpose for which it was intended.

Charles Hartley Attwood is a civil engineer, graduate of Queen's University 1911. In 1911 and 1912 was assistant on Bow River Investigation for the Department of Interior, Ottawa; from 1913 to 1919 was district engineer of the Dominion Water and Power Branch in Alberta; in 1919 was district chief engineer, Dominion Water and Power Branch for Manitoba dealing with collection of stream flow data; was supervising engineer for the Dominion Government at Great Falls on the Winnipeg river; in 1925 was engaged in connection with questions pertaining to Lake of the Woods; and in 1929 and 1930 at Seven Sisters' Falls; in 1930 to 1937 was Deputy Minister of Mines and Resources for Manitoba; and from 1937 to 1949, Director for Water Resources for Manitoba. He retired in 1949.

Prior to the construction of the dam and whilst he was Deputy Minister of Mines and Resources for Manitoba, he carefully considered the question of design for the "Napinka" dam, and concluded that the one subsequently built was the most desirable, and all the other engineers concerned with the matter, including Dagg, Russell and McKenzie, shared his opinion. He testified that of the thirteen other dams in the province, ten of them are of the same design and have been entirely satisfactory. He testified that the overflow dam, spoken of by Mr. McLean, was considered and rejected, as in his opinion, it would tend to dam the river worse than anything that could be expected from the one decided upon.

Gordon Leslie McKenzie is a civil engineer, graduate of Queen's University; member of the Engineering Institute of Canada; registered Professional Engineer of Saskatchewan and a Dominion Land Surveyor. In 1934, he worked on the South Saskatchewan and North Saskatchewan rivers for the Department of Public Works, Ottawa. In 1937, he joined the staff of the P.F.R.A. as district engineer and was official engineer in charge of design. In 1945, he succeeded Russell as chief engineer, which position he now holds. He is presently in charge of flood relief on the Red river. In 1949, was a delegate

to the United Nations meeting in connection with conservation of resources. He is also on three international boards under the International Joint Commission.

He testified that the "Napinka" dam was designed by a staff under his direction; that he visited the "locus" several times in 1937; that the river bed was dry in several spots, and he was able to walk across it; examined all available data over many years including that of floods and precipitation. He disagreed with McLean's idea of an overflow or weir dam which he regarded as hazardous in case of floods. In general, his opinion as to the desirability of the dam coincides with that of Russell and Attwood with whom he collaborated. He also testified that several other dams of the same design had been constructed in other localities and have proved entirely satisfactory.

I am satisfied that all reasonable investigations and considerations were given to all material factors with regard to the project prior to the type of dam decided upon.

A good deal was said about the accumulation of brush at the dam as being something that should have been anticipated, but in view of the fact that no trouble in that regard had occurred previously in other dams, I do not consider that any negligence can be imputed on that score. At any rate, on the evidence, I do not believe the presence of brush at the dam had any appreciable effect on the runoff or flow of water.

As above mentioned, the dam was reconstructed in 1948, by removing every second pier, thus widening the spaces between the piers and also raising the "catwalk" some 6 feet. A possible inference from this fact might be that the original dam was defective, and imputed as evidence of negligence on the part of the engineers who originally designed it. However, I am of opinion, that no such inference should be drawn, but that on account of some of the complaints of farmers who believed that accumulation of brush was a cause of flooding, it was more or less a gesture to satisfy their complaints. The fact is that after this change was made, in the year 1949, there was a flood as great as any before, which, in itself, is some, if not strong evidence that the original structure was not the cause of former floods.

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Whether or not there was negligence in regard to design and construction of the dam is a question of fact. Engineers are expected to be possessed of reasonably competent skill in the exercise of their particular calling, but not infallible, nor is perfection expected, and the most that can be required of them is the exercise of reasonable care and prudence in the light of scientific knowledge at the time, of which they should be aware. Every one of the engineers responsible in any way for this project is a man of good education, and I think, can be said to be competent, and even eminent, in his profession, with long experience in cognate matters. I have no hesitation in finding on the evidence that they exercised all reasonable care and prudence after ascertaining and investigating all available material factors appertaining to the river, surrounding country, and watershed. So far therefore as negligence in design and construction is concerned, the action fails.

In addition to the allegation of negligence in design and construction of the "Napinka" dam, as hereinbefore stated, there is the further claim that the dam was improperly, carelessly and negligently supervised and operated by the agents and servants of His Majesty, in that stop-logs were not removed at or before the period of floods, or run-off in the valley, and that debris was allowed to accumulate and was not removed, thus impeding the natural flow of the water.

As any claim for damages for the years preceding 1945 and the years 1946 and 1949 was abandoned, as far as this branch of the claim is concerned, it is necessary to consider only the years 1945, 1947 and 1948.

Evidence adduced by suppliants with regard to removal or non-removal of logs, and the effect of debris was to say the least, vague and uncertain. On the other hand, the witness, Mrs. James Stewart, gave convincing evidence that prior to the first of April, 1945, all stop-logs were removed; and in February and March 1947, at least 30. Mrs. Stewart's particular duty was to visit the dam every day, read the gauge, and at the end of every week, report the gauge readings to the Water Resources Branch, Department of Mines and Resources of Manitoba at Winnipeg, and including any remarks with reference to stop-logs,

condition of the river, and rainfall, et cetera. These weekly cards, for the years 1945 and 1947, were produced and filed as exhibits T and U.

From a study of the cards, together with Mrs. Stewart's evidence, and data in the official government reports, I am clearly of the opinion that there was in fact no flood in the year 1945 and that witnesses for the suppliants in that regard were mistaken.

It is also in evidence that in June 1945, as well as in 1947, rainfall was above normal in the valley and, in my opinion, it was the rain and seepage from the higher ground, lodging on this low-lying land that brought about the condition complained of, and which affected or prevented cultivation in those years.

In April, 1947, there was a flood throughout the whole valley from purely natural causes, but the data discloses that it lasted about three weeks and then receded.

Edward Kniper, an official of P.F.R.A., and an efficient Hydro engineer, testified that the dam itself or brush had no appreciable effect on the run-off from suppliants' land; also, that close to the river said land is higher than that further back, which would have the effect of retaining at least some of the flood as well as rainwater. Furthermore, he testified that from the official records, the rainfall in June 1945, and 1947, was above normal, and would necessarily have considerable effect on the lands in question, rendering it difficult of cultivation. Mr. Kniper's opinion was based on a most thorough study and examination of the "locus," and official government records.

In 1948, there was again a flood in the whole valley which covered the lands for a distance of about half a mile from the river and, according to the evidence, remaining on the land for about three weeks, after which it receded as it did in 1947. My remarks with regard to the effect of the dam and brush for the year 1947 apply equally to 1948.

George T. Simpson, a witness for the Crown, who heads the land division of P.F.R.A. for the Dominion Government, an experienced valuator of farm lands, and a graduate in agriculture of the Manitoba University, testified that he had made a close examination and detailed study of suppliants' land, and found that it was very heavy alluvial soil due to flood conditions; classified it as "coulter" clay,

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and that it was not "mature" for crop growth. It is underlaid with bluish clay into which water cannot penetrate, and he found a very high water state or condition; in dry years this land will produce abundant crops, but in wet years, plant roots cannot penetrate owing to too great moisture and there would be little or no crop; is good for grass but not for grain; there was evidence of a good many old river channels throughout the property; and he states that there was no grain cultivation of section 9 in 1950; that water was struck at one foot below surface. He found that in the sandhills, fifty feet above Ramsey's land, farmers could not cut hay owing to water which seeped to the lower ground, and that such water could not have come from the river. That between 1939 and 1949, rain averaged 21 inches and varied from 15 inches in 1939 to 25 inches in 1948. Only three years in the period 1883 to 1938 exceeded the average of the last ten year period, and that in 1945, 7.8 inches was the lowest of the eleven year period. In general, Simpson's opinion was that the trouble was due mostly to rains and not flooding.

I have gone into considerable detail as to the facts in regard to the operation and supervision of the dam, and the effect of debris which probably was entirely unnecessary, in view of what I am now about to say.

The evidence is that as of the first day of April, 1945, all four dams were transferred to, and taken over by, the Government of the province of Manitoba from the Dominion Government and were thereafter under the sole control of, and operated and supervised by, officials of that province.

It therefore seems clear, on that ground alone, that under no circumstances can the Federal Government be held liable for damage which may or might have resulted from negligence in the operation of the dams during 1945 and subsequent years. The Dominion Government had nothing further to do with them after that date, and took no part in their operation or supervision, it falling entirely within the jurisdiction of the province of Manitoba. From that time onward, all expenses with regard to operation and supervision were paid entirely by the province of Manitoba, and those operating it were employees of said province, and not of the Dominion.

In *Lessard v. Hull Electric Company*, (1), the headnote reads:

Upon the evidence and the proper construction of a deed of sale by the respondent company of its light and power system to another electric company, not only was it established that the respondent company, at the time of the accident, was neither the owner of the wire nor had it under its care, control or supervision, but that, on the contrary, the ownership was proved to have been transferred to that other company.—The respondent company, having disposed of the ownership of the wire and not having afterwards assumed or undertaken any supervision or control over it, cannot be held liable.

It seems to me, therefore, that on the authority of the above decision alone, the conclusion must be that the respondent in the action herein, cannot be held liable for damage under the second branch of the case.

There are other grounds in the defence which I might mention and which, in my opinion, are fatal to the suppliants' claim, but which I do not think it necessary to refer to in view of the above findings.

The suppliants, having failed on both branches of the claim, the Petition, therefore, must be dismissed with costs.

Judgment accordingly.

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