
BETWEEN:

JOHN R. BRODIE ..... SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

1945

Sept. 4 to 7
Oct. 10

1946

Jan. 30

Crown—Petition of Right—Damages to property by flooding of river through operation of control dams by Lake of the Woods Control Board—Statutory Powers—Negligence of Officer or Servant of the Crown—Section 19 (c) Exchequer Court Act—Independent Body created by two Legislative Bodies.

By the terms of a Convention entered into in 1925 between the Dominion of Canada and the United States of America for the purpose of regulating the level of the waters in the Lake of the Woods, the Dominion of Canada agreed to establish and maintain a Lake of the Woods Control Board, composed of engineers, to regulate and control the out-flow of the waters of the Lake of the Woods. By the said Convention the level of the Lake of the Woods was ordinarily to be maintained between 1056 and 1061·25 sea level datum, with certain permissible variations in times of low and high water, and the capacity of the outlets of the Lake was to be enlarged to permit discharge of not less than 47,000 cubic feet second when the Lake level was 1061, sea level datum. The outlets were so enlarged by the Dominion of Canada.

The Canadian Lake of the Woods Control Board was established by two similar acts of the Dominion of Canada and the Province of Ontario, each appointing two members; and the duties and powers were defined and included (1) the duty to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg River, and (2) to regulate and control the out-flow of waters from the Lake so as to maintain the level required by the Convention. In performance of their duties, the Board, when faced with unusual flood conditions in the Lake, increased

(1) (1944) Ex. C.R. 239. (2) (1946) S.C.R. 50.

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the out-flow at times to the maximum capacity of 47,000 c.f.s. and the suppliant's property in Sand Lake in the Winnipeg River was damaged.

Held: That the Lake of the Woods Control Board, acting in the execution of a public trust and for the public benefit, had statutory authority to do as they did (or at least implied authority as a necessary incident to the carrying out of the duties and powers entrusted to them) and not having exceeded this authority and having acted in a proper manner without negligence, that the suppliant (although he had sustained a special injury) could not succeed unless a remedy was provided by the Statute. There being no such remedy in the Statute, the suppliant's action fails. Halsbury 2nd ed., Vol. 26, paras. 571, 572, 574, and Vol. 23, para. 992; *Mayor and Councillors of East Freemantle* v. *Annois* (1902) A.C. 213, and *Geddes* v. *Proprietors of Bann Reservoir* (1877-78) 3 A.C. 430, at p. 448 and 455, followed.

2. That the Lake of the Woods Control Board was not the servant or officer of the Crown. *City of Halifax* v. *Halifax Harbour Commissioners* (1935) S.C.R. 215, applied. *Metropolitan Meat Industry Board* v. *Sheedy* (1927) A.C. 899 followed.

3. That the relief claimed must be limited to that disclosed in the Petition of Right.

PETITION OF RIGHT by the Suppliant seeking damages against the Crown for property injuriously affected by flooding of the Winnipeg River.

The action was tried before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court at Winnipeg, Manitoba.

A. E. Hoskin, K.C. and *O. S. Alsaker* for suppliant.

R. D. Guy, K.C. and *R. D. Guy, Jr.* for respondent.

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

CAMERON D.J., now (January 30, 1946) delivered the following judgment:

The Suppliant herein is the owner of Island S.655 in Sand Lake, in the Winnipeg River about two miles Northwest of the National Transcontinental Bridge crossing that river. The Island has an area of about two acres, and in the grant to the Suppliant in 1918 the reservation of the chain road allowance along the shore of the Island was dispensed with. The Suppliant has for many years used

the Island for a summer home, and has erected thereon a cottage and other buildings, and has expended additional amounts for improving the Island. Particulars of these will be referred to later. His claim arises out of flooding of portions of the said Island, said to have been caused by the actions or want of action by the Lake of the Woods Control Board (alleged to be the agent, servant or officer of the respondent) under the circumstances later to be mentioned.

Before dealing with the matters complained of by the Suppliant, it is necessary to consider briefly the origin of the Lake of the Woods Control Board (hereinafter to be called the Board).

The Lake of the Woods has an area of 1,485 square miles and drains an area of 27,170 square miles. It is partly in the United States of America and partly in Canada. Its main outlet to the North is the Winnipeg River. At or near the entrance to the Winnipeg River is the Norman Dam. The Dam was built by private interests and previously in 1887 there had been a rollerway dam. The Norman Dam as constructed in 1893 had a loose rockfill section in the centre and ten sluices on either side. About 1898 the Province of Ontario required the owner of the Dam to put in stop logs, and the operation of the Dam was vested in the Province of Ontario. That continued until 1912, but the operation was not very satisfactory to either the Americans on the Lake of the Woods, who were bothered with high and low water, or to the Canadian interests. In 1912 letters of reference by the two Governments were sent to the International Joint Commission, asking for investigation and report. That body since 1909 has had to do with all boundary matters. Extensive investigations followed and a report was made. Later a Convention and Protocol were signed in 1925 by representatives of the United States of America and Canada (Exhibit 11). The Convention was for the purpose of regulating the level of the Lake of the Woods.

It should be noted here that until 1919 the Dominion Government had not interfered in the regulation of the waters of the Lake; but in that year, following a serious flood in 1916, it acted by Order in Council to establish

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an interim Board, consisting of two engineers appointed by the Province of Ontario and two by the Dominion of Canada.

In 1921 the Dominion enacted the Lake of the Woods Control Board Act (Chapter 10), but it was not proclaimed until June 27th, 1928. In the meantime the Legislature of the Province of Ontario had passed an identical Act. The Board, therefore, actually came into being in 1928 and has had charge of the control and operations since that time.

The relevant sections of the Convention are as follows:—

Article 2

The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

Article 3

The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of Lake of the Woods. There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada and one by the Government of the United States from their respective public services, and whenever the level of the lake rises above elevation 1061 sea-level datum or falls below elevation 1056 sea-level datum the rate of total discharge of water from the lake shall be subject to the approval of this Board.

Article 4

The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061·25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake. During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062·5 sea-level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea-level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

Article 6

Any disagreement between the members of the International Lake of the Woods Control Board as to the exercise of the functions of the Board under Articles 3, 4 and 5 shall be immediately referred by the Board to the International Joint Commission, whose decision shall be final.

Article 7

The outflow capacity of the outlets of Lake of the Woods shall be so enlarged as to permit the discharge of not less than forty-seven thousand cubic feet of water per second (47,000 c.f.s.) when the level of the lake is at elevation 1061 sea-level datum.

The necessary works for this purpose, as well as the necessary works and dams for controlling and regulating the outflow of the water, shall be provided for at the instance of the Government of Canada, either by the improvement of existing works and dams or by the construction of additional works.

Article 9

The Dominion of Canada and the United States shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention.

Article 4 of the accompanying Protocol states:—

In order to ensure the fullest measure of co-operation between the International Lake of the Woods Control Board and the Canadian Lake of the Woods Control Board provided for in Article 3 of the Convention, the Government of Canada will appoint one member of the Canadian Board as its representative on the International Board.

Pursuant to Article 7 of the Convention, the Government of Canada in 1925-26 caused the Norman Dam to be reconstructed so that it could discharge a maximum of 47,000 c.f.s. (cubic feet per second) when the level of the lake was 1061 s.l.d. (sea-level datum)—that being an increase of 11,000 c.f.s. beyond its previous maximum discharge capacity. At that time certain deepening of the channel near Norman Dam was also carried out. All this work was completed in 1926 before the Board took over its duties in 1928. The Norman Dam is owned by private interests.

As stated above the Board acts under the authority of identical Acts of the Dominion of Canada and of the Province of Ontario. The preamble recites that by agreement between the two Governments, the powers later

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mentioned are vested in the Board of four members, two to be appointed by each Government. By Section 2 the Board is to consist of four members who shall be duly qualified engineers appointed as previously mentioned, and to hold office during the pleasure of the Government appointing them, vacancies to be filled by the Government which had previously made the appointment then vacant.

The duties of the Board are defined in Section 3 as follows:—

3. It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of:—

(*a*) the waters of the Winnipeg River; and

(*b*) the waters of the English River, and

for these purposes the Board shall have power:—

(*a*) to regulate and control the outflow of the waters of the Lake of the Woods, so as to maintain the level of the Lake between the elevations that have been recommended by the International Joint Commission in their final report of 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada;

(*c*) to regulate and control the flow of the waters of the Winnipeg River between its junction with the English River and the Lake of the Woods, and also the flow of the water in the English river between its junction with the Winnipeg river and Lac Seul.

Certain other powers were conferred but are not relevant to this matter.

Section 4 provides penalties for enforcing the Board's orders.

Section 5 gives general powers as follows:—

The said Board shall have all the powers necessary for effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Legislature of the Province of Ontario, and any order made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the Court in which such proceeding is taken.

Section 6 gives the Board power to enforce its orders by taking possession and control of property.

Section 7 authorizes the Board to appoint officers, inspectors and employees as necessary, and provides for entry on property to make surveys and investigations.

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Section 8 is as follows:—

The Board and the members thereof, and its officers and employees, shall not be liable to any action for acts done by them or any of them under the authority of this Act.

The Board was duly established in accordance with the two Acts, each Government appointing two members. All were fully qualified engineers of great ability and wide experience, and the same comment may be made as to the present members, (who were also the members in 1944) who are Dr. K. M. Cameron, Chief Engineer, Department of Public Works of the Dominion; I. R. Strome, District Hydraulic Engineer for Ontario, in the Dominion Water and Power Bureau, Service and Engineering Branch of the Department of Mines and Resources, and the Dominion member of the International Lake of the Woods Control Board—both appointed by the Dominion Government; and Dr. T. H. Hogg, Chairman and Chief Engineer of the Hydro Electric Power Commission of Ontario, and C. H. Fullerton, Surveyor-General of Ontario—both appointed by the Ontario Government.

While the evidence led at the hearing indicated that serious flooding took place in 1938, 1941, 1943, 1944 and 1945, the claim of the Suppliant is based on what occurred in 1944, and consideration of the procedure followed in that year will, I think, be sufficient to indicate what took place in each of the years mentioned.

The Board has regular meetings in Ottawa where the Dominion representatives reside, and in Toronto where the Ontario members reside. Its office is in Ottawa and records are kept there. It has gauges and gauging stations throughout the area affected from some of which it receives daily or weekly reports. Meteorological reports of unusual precipitation are received. Paid observers send in daily reports by telegram in cases of emergency. All the necessary and available data are collected so that the Board can get the best information as to the run-off in the area and the inflow into the Lake. An annual snow-survey has been conducted for the last sixteen years. Priority is given to the work daily by Mr. Strome, who is the Board's engineer, and from the information received as to the Lake level

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and the discharge and the run-off, the Board computes what water should be let out at the Norman Dam into the Winnipeg River.

Its problems are both numerous and complex. It must maintain the reservoir between 1056 and 1061 s.l.d., or control passes to the International Board; and between these levels it must ensure the highest continuous uniform discharge from the Lake. During periods of excessive precipitation when the level in the Lake reaches 1061, it must regulate the discharge so that the level will never exceed 1062·5 s.l.d. It must never let the level go below 1056, except during periods of low precipitation, and then only upon the approval of the International Board. It must provide the most advantageous use of the waters of the Lake and of the outflow therefrom for domestic, sanitary, navigation and fishing purposes, and for power, irrigation and reclamation purposes; and in addition, secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg River as provided for in the Act.

Exhibit "A" is a list of persons and interests that the Board has to consider. It includes, among others, properties in Minnesota, Ontario and Manitoba; Indian reserves, Navigation, Milling and Power Companies, riparian owners, mining interests; water for the City of Winnipeg and power for the greater part of the City of Winnipeg and Province of Manitoba.

The Board cannot, of course, control the inflow into the reservoir, but merely the outflow. The uncertain factors—the inflow into and the level of the reservoir—are caused by such occurrences as the extent and duration of rain precipitation, the inflow from melting snow and adjacent streams, evaporation of snow and from the waters in the Lake, and to a certain extent by wind. It is clear from the evidence that the Board considers these as quite unpredictable factors, and I think they were quite entitled to do so. It is not possible at any time to predict with certainty the approach of either a rainy or dry season. Nor do they follow in cycles; a year of unusually heavy precipitation may be followed by one or more years of very low precipitation.

But the Board has available its long-term records from which it computes the average conditions to be anticipated in each month, and with this information as a guide and its knowledge of what water has to be discharged to meet this average condition, it prepares in advance its proposal for the operations for the ensuing months. Exhibit "G" is such a table prepared on April 1st, 1944, for the following months. Substantially the same procedure has been followed by the Board since 1928, and with the exception of the years 1938, 1941, 1943, 1944, flooding in the river had been avoided.

Having in mind the many interests that it has to protect against the possibility of continued dry weather (which it can accomplish to some extent by limiting the outflow) and that by the terms of the Convention, it has to provide for the *highest* continuous uniform discharge of water from the Lake, the Board considered it to be its duty to keep the Lake replete to a level of 1061 whenever possible to do so. And again I think they were right in so doing. Given average conditions of rainfall and weather including normal Spring floods as indicated by their records, no harm would befall any of the interests affected, and the largest possible reservoir would be maintained as an assurance against a prolonged dry period during which the various interests could be served, and the highest continuous uniform discharge maintained. Unless very unusual conditions occurred, the outflow could be regulated so that no flooding would take place.

The occurrences in 1944 may be stated briefly as follows:—On April 1st the Lake level was 1059·58. Exhibit "G" is a table giving the long term average inflow in the Lake for the next five months, the proposed outflow for each month in that period and the effect on the Lake level of such proposed operations under average conditions. Such a plan would have resulted in no flooding, because it is only after the outflow is above 21,000 c.f.s., that the Suppliant's property is affected. Exhibit "H" is the table indicating what actually occurred. It shows the actual precipitation in relation to the anticipated long term average precipitation to be as follows:—In April, 20 per cent; in May, 155 per cent (but well spread over the whole

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month as given in the evidence); in June, 157 per cent; in July, 128 per cent; in August, 205 per cent (most in the latter month falling in two days). For the five months' period, the precipitation was 20·40 being 144 per cent of the long term average. Table "I" shows the actual regulation of the controls for the same period, and the actual inflow into the reservoir. In June the actual inflow was 276 per cent of the long term average for that month. These figures indicate extraordinary flood conditions in the Lake.

As the figures indicate, the proposed outflow was greatly increased. In June it reached 47,400 c.f.s., which was about the maximum possible outflow. In July the inflow was 226 per cent of the average, and in August 601 per cent. In September it was 338 per cent. In each of the months of June to September, the level of the Lake was above 1061 and, due to the fact that the Board was required to keep the level below that figure if possible, the outflow was greatly increased—at times reaching a maximum of something over 48,000 c.f.s.

The Board gave flood warnings as soon as it became apparent that unusual conditions existed, and that the outflow would have to be increased greatly. It knew that riparian owners would be affected, and gave consideration to their difficulties. In view of the level of the Lake at the commencement of a period of unusual and heavy precipitation, about June 1st, there was nothing else the Board could do except to step up the outflow; otherwise the level of the Lake would have risen rapidly and great loss would have been occasioned to the property owners adjacent to the Lake of the Woods. The American member of the International Board—that Board having power as the level exceeded 1061—requested the maximum outflow.

In the result the water in the Winnipeg River, of which Sand Lake is a part, rose and part of the Suppliant's Island was flooded. He says that in the light of the floods which had occurred in 1938, 1941 and 1943 and for the same reasons, the Board should have foreseen the conditions and emptied the reservoir in the early Spring in anticipation of another heavy rainfall. Looking back upon the event, it is clear that if that had been done the flooding

in the Winnipeg River would have been minimized. Reference will be made later to what the result would have been to residents on the Lake of the Woods. But after the event it is a simple matter to point out what could have been done when all doubtful factors have been ascertained. Had they done so and a long period of dry weather followed, the results would have been disastrous to the many interests I have referred to. In 1930 and 1931 and on some other occasions when the outflow was reduced to a minimum to preserve the level of 1056, power users and others were seriously affected.

In this connection several answers of Mr. MacLean, an engineer called by the Suppliant, are interesting. At page 130:—

Q. You don't know of anything that the Board did that was outside its powers, or that they failed to do anything which they were required to do?—A. That would be correct; they have almost unlimited power.

Q. You are familiar with the powers of the Board?—A. As I just interpret them as an engineer I think they have almost unlimited power.

Q. You did make a statement that the two floods in 1944 could have been eliminated, could have been avoided, I think you said. I presume you mean—well, you had better tell us?—A. If from wet season to wet season they had produced a uniform flow that would have used up just about the five feet or five and one-quarter feet of storage on the Lake of the Woods. They could have done that, but I will agree that it would have been almost a miracle if they had.

Q. If what?—A. If they had been able to do that one hundred per cent.

Q. Your opinion is that it might have been done?—A. It is very easy after a thing is past, very easy to criticize and say if this thing had been done theoretically it could have been done. I think it would be very hard to do.

At page 132:—

Q. But you don't expect them to foresee what the future is going to be?—A. No.

I have not endeavoured to set out in detail all that took place in 1944, but merely to indicate the nature of the problems before the Board, the basis on which they planned, how they carried out the operations and the result thereof.

The claim here is based on the acts or omissions of the Board, but by reason of Section 8 of the Act of 1921, no claim may be brought against the Board or its mem-

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bers for anything done under the authority of the Act, and I assume that is one of the reasons why the claim is made against the Crown. Before dealing with the question as to whether the Crown is liable for the acts of the Board, I propose to consider the law applicable if the claim had been made against the Board, and as if the protection afforded to the Board by Section 8 did not exist; for I consider that if under those circumstances the Suppliant could not succeed, then the Crown would not be liable.

In essence, the claim of the Suppliant is that the Board should have so regulated the flow of the waters from the Lake, that at no time would the water in Sand Lake rise above a level of 1036·14 s.l.d., a level which he considered the normal high water mark, and at which level he had constructed certain of his facilities. To bring about that condition of affairs—no doubt desirable from the point of view of one or more individuals—would have meant that at no time and under no circumstances could the Board let out more than 21,000 c.f.s. When the Board took over its duties, facilities were supplied to it, pursuant to the Convention, to drain off a maximum of 47,000 c.f.s., when the Lake reached 1061 s.l.d., and, in my view, not to have used those facilities under the named conditions, would have been a breach of the duty imposed on the Board.

The principles applicable hereto have been discussed in many cases, to some of which I will later refer. In the 2nd. Ed., Halsbury, Vol. 26, p. 257, under the heading of "Statutory Powers and Duties" of public authorities and officers, it is stated:—

571. The doing of an act authorized by statute cannot, of itself, be wrongful, whether the act be authorized for a public purpose or for private profit; and no action will lie at common law for damage inevitably caused by the proper exercise of statutory powers or duties, including acts reasonably necessary for such exercise.

572. Whether the statute authorizes the exercise of powers to the injury of other persons is a question of interpretation, wherein the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that, by express words or by necessary implication, such an intention appears. If no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the legislature is that the thing shall only be done if it can be done without injury to others. But where the legislature directs that a thing shall at all events be done or authorizes certain works at a particular place for a specific purpose or grants powers with the

intention that they shall be exercised, although leaving some discretion as to the mode of exercise, no action will lie for nuisance or damage which is the inevitable result of carrying out the statutory powers so conferred. The onus of proving that the result is inevitable lies upon those who seek to escape liability. The criterion of inevitability is what is possible according to the state of scientific knowledge at the time, having regard to practical feasibility in view of situation and expense.

574. In all cases, those exercising statutory powers or duties must use all reasonable diligence to prevent their operations from causing damage to others. Their liability in this respect must be determined upon a true interpretation of the statute in question, but, in the absence of something to show a contrary intention, they have the same duties and their funds are rendered subject to the same liabilities as the general law would impose upon a private person doing the same things, including liability for the acts of their servants. The diligence to be exercised must be reasonable according to all the circumstances, regard being had not only to the interest of those exercising the powers, but also to that of those suffering, or threatened with, injury; and reasonableness applies not only to construction of works, but also to improvement.

And in Vol. 23, p. 703, under the heading of "Negligence":—

992. The particular act may be held to be authorized by statute where it is one which is a natural incident or effect of the operation legalized under the statute, or is ordinarily necessary for carrying out the powers conferred by the statute in question.

Many of the cases cited to me have established the principles above mentioned and it is not necessary to refer to most of them.

The judgment of the Privy Council in the case of *Mayor and Councillors of East Freemantle* v. *Annois* (1) is of interest. In that case the municipality in the exercise of statutory authority reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road. It was held that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred. At page 217, Lord MacNaghten stated:—

The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller J., and their view was approved by Abbott C.J., and the Court of King's Bench.

(1) (1902) A.C. 213.

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At the same time, Abbott C.J., observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of Gibbs C.J., in *Sutton* v. *Clarke,* (1815) 6 Taunt. 34; 16 R.R. 563, decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language Turner L.J., (*Galloway* v. *Corporation of London* (1864) 2 D.J. & S. 213, 229) observed in a somewhat similar case that "such powers are at all times to be exercised bona fide and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present Master of the Rolls, then Collins L.J. (1898) 2 Ch. 613 observed that "the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess.

The problem was considered by Rose C.J.H.C., in *Aikman* v. *George Mills & Co., Ltd.,* (1) and at page 605, he states:—

Sometimes in the cases the rule as to the immunity is said to be that the statutory authorization of the work relieves from liability unless negligence be shown; for example, it is so stated in *Roberts* v. *Bell Telephone Co.,* (1913), 10 D.L.R., 459; but I do not think that those who use this form of expression intend to be understood as meaning that when there is created what but for the statutory authority would be a nuisance, or where but for the Statute there would be liability under the doctrine of *Rylands* v. *Fletcher* (1868), L.R., 3 H.L., 330, a person whose property is damaged and who brings action must assume the burden of proving "negligence" as part of his case. Indeed, the contrary seems to be established by *Manchester Corporation* v. *Farnworth,* (1930) A.C. 171. In that case Viscount Dunedin said, at p. 183, "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance . . ." And Lord Blanesburgh said, at p. 203, "It (the fact that there was no 'nuisance-clause' in the Statute under which the defendants were acting) means also that so soon as the Corporation are in a position to establish that in the working of their power station . . . they are acting without negligence in the sense in which in such a connection these words are used, they are relieved of all further liability to the plaintiff for nuisance."

In the case of *Greenock Corporation* v. *Caledonian Railway Company* (2) Lord Finlay L.C., said at page 572:—

It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel

(1) (1934) O.R. 597. (2) (1917) A.C. 556.

provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of damnum fatale, but is the direct result of the obstruction of a natural water-course by the defenders' works followed by heavy rain.

In that case, however, the question of statutory duty or power did not arise.

In the case of *Manchester Corporation* v. *Farnworth* (*supra*), Viscount Dunedin further said (p. 183):—

> The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

Lord Blackburn considered the question in the House of Lords in the case of *Geddis* v. *Proprietors of Bann Reservoir,* (1) and at page 455 he said:—

> For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law . . . The whole question, therefore, comes around to this, was such a power given or was it not?

In that case the plaintiff succeeded on the ground that, having constructed a reservoir, it was the defendant's duty to exercise the powers conferred in the Act to cleanse the bed or channel of the stream and keep it in proper state for the flow and reflow of the waters that had to pass through it, and that such action would have prevented the damage complained of.

The latest decision I have been able to find is that of *Provender Millers (Winchester), Ltd.,* v. *Southampton County Council* (2) where at page 162 Sir Wilfrid Greene, M.R., said:—

> The other branch of the argument dealt with the point of statutory duty. It was suggested that Farwell, J., had misdirected himself and that he had taken a view of the evidence which could not be supported.

(1) (1877-78) 3 A.C. 430. (2) (1939) 4 A.E.R. 157.

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On this branch of the case, without attempting to put my language with exact precision, the position may be stated thus. The appellants, being under a statutory duty to repair bridges carried by county highways and to keep the county highway in repair, and in particular to protect it against flooding, set themselves to perform that task, which was admittedly necessary. That being the task, what they have actually done is something beyond what their duty imposed upon them, because they have not only rebuilt the bridge—that is right—they have not only protected the highway against flood water—that is right—but they have also gone further and effected a permanent alteration in the natural flow of the stream. Having, therefore, done something which goes beyond their duty, it is for them, and admittedly it is for them, to justify that excess. If the statutory duty could only have been performed (and when I say that I mean from a reasonable point of view, and without calling in the aid of extravagant devices, or anything of that kind) by going to that excess, the appellants would have been under no liability, because then they could truly have said that what they had done was the only reasonable thing that they could have done in the performance of their duty, and that, if, in order to perform that duty, they had at the same time to go beyond its exact limits, that would be a matter of which the respondents could not complain. Farwell, J., in my opinion, correctly stated the law, and appreciated the facts correctly. He found that the appellants had really made no attempt to discharge the burden upon them of showing that the statutory object of repairing the bridge and protecting the highway against flooding could not reasonably have been achieved without going to the further point of permanently altering the normal flow of the river to the prejudice of persons interested in the water flowing down the River Itchen.

In applying these principles to the facts of the case, several questions arise. Did the Board have statutory powers to do what it did or as a necessary incident to such powers as were granted to it? Did the Board act negligently in carrying out its powers either in what it did or in what it failed to do? In the true interpretation of the statute, does it authorize the exercise of powers to the injury of the Suppliant and has the Respondent shown that the Act intended to take away the private rights of the individuals either by express words or necessary implication?

On the first question I am quite satisfied that the Board had the necessary powers conferred on it by the Act to do as it did, or at least as a necessary incident to such powers. I will not repeat what I have previously said as to all the provisions of the Convention and the Act. Its duty was to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters in the Winnipeg River: it had the duty of

regulating and controlling the outflow from the Lake, so as to maintain its level between the limits laid down. To secure the most dependable flow in the River and the highest continuous uniform discharge from the Lake, it had to keep its reservoir at as high a level as was consistent with safety, keeping in mind its long-term records, and to secure the most advantageous and beneficial use it had to take into consideration the advantages of all parties who would be affected by its operations—not merely one or more individuals who might be adversely affected. It was supplied with facilities which permitted it to discharge 47,000 c.f.s., and in my opinion it was its duty to use these facilities to the limit in times of crises, even though it well knew that flooding of individual properties was inevitable.

And I believe also that in the exercise of its statutory powers, the Board did not act negligently in what it did. It was composed of engineers of very wide experience and all holding important positions in the public service of Canada and the Province of Ontario. It made use of all available information, planned to take care of all such conditions as it could reasonably anticipate, including normal Spring freshets; gave consideration to all the interests that would be affected (not overlooking those of the Suppliant) and applied its best judgment to the whole situation. The Board appreciated the fact that if the flood flow in the river was above 21,000 c.f.s., the riparian owners would suffer some damage and make every effort to avoid it, consistent with its overall duty.

Mr. S. S. Scovil, called as a witness for the Respondent, said that what the Board did was in his opinion what should have been done and what he in similar circumstances would have done himself; and that to have done as the Suppliant suggested should have been done (namely to empty the Lake in the early Spring) would have been contrary to everything that his long experience has shown him to be the correct procedure. Since 1925 he has been a consulting hydraulic engineer, and prior to that was employed by the Dominion Government. He collected data for submission to the International Joint Commission in connection with the control of the Lake of the Woods;

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was engineer from 1914 to 1919 for the Lake of the Woods Technical Board. In 1919 he was appointed engineer of the interim Lake of the Woods Control Board and remained as such until 1925. All his professional life has been devoted to the control and conservation of water and water power, and he has been retained as consultant in many of the largest developments in Canada. He is undoubtedly an expert in his field and I do not think that his former connection with Government Boards, and his extensive experience in the Lake of the Woods area, minimizes in any degree the importance of his evidence. As stated by this witness, and the other Crown witnesses, a proper regard for their duties impelled the Board to act as it did, and to have acted otherwise, in the light of the then known conditions, would have nullified the whole functions of the Board. As stated by Mr. Scovil, in order to provide a uniform flow "you must always have a reservoir on which to draw".

As further evidence that a policy of limiting the outflow to an amount that would never flood the property of the Suppliant (21,000 c.f.s.,) would have been unwise and unsuccessful,—reference may be made to Exhibit "K". This is a table prepared by Mr. Scovil and indicates the depth in feet of storage capacity required in the Lake for actual maximum flood inflows if the outflow were limited to 27,000, 30,000, 35,000 and 40,000 c.f.s., in the periods of high inflows from 1892 to 1944. For example in the year 1927, a depth of 6·48 for storage would have been required with an outflow of 27,000 c.f.s., and obviously more than that if the outflow were limited to 21,000 c.f.s. So that even if the reservoir had been lowered on April 1st to 1056 s.l.d., the result would have been that the Lake would have risen to 1062·48, well beyond the authorized limit. It follows that it was necessary for the Board to increase the outflow to a point where flooding of the Suppliant's property would be the inevitable result of the Board performing its duty.

The two expert witnesses called for the Suppliant—Mr. McLean and Mr. McGillivray, stated that the flooding in Sand Lake at times of excess outflow was caused by a bottle neck further North at White Dog Falls (which, as

I understood the evidence, are still in their natural state). These witnesses said that had these Falls been widened or deepened, the waters would have been able to flow more rapidly without back-up to Sand Lake. With that statement the Crown witnesses agreed, but they point out that if it were done without further controls, then in dry periods, most, if not all, of the water in the Winnipeg River in the South would be drained off to the great detriment of all the residents and water users. It would, therefore, be necessary to install controls and the cost of the whole suggested and necessary development was estimated at $1,000,000. In some of the cases which I have cited, it is pointed out that such unreasonable expenses are not warranted to accomplish a very limited objective. It should be observed in any event that the Board had no funds to carry out such a project; was never required to do so by the Crown, and, in my view, it had no duty and no power under the Act to do so.

While section 3(c) of the Act confers powers on the Board to regulate and control the flow of waters of the Winnipeg River between its junction with the English River and the Lake of the Woods, and section 5 confers on it all powers necessary for effectively carrying out the authority and control vested in it by the two Acts of the Dominion and the Province of Ontario, the Board has not exercised any such power except by controlling the outflow from the Lake of the Woods into the Winnipeg River through the Norman Dam. The Board has no specific power of expropriation, or to purchase land, or construct controls, and has no assets or revenue to defray such costs. In fact the whole tenor of the Act seems to be that the Board shall act only by issuing orders. Only the expenses of the Board are to be provided for and the Crown has at no time provided any funds beyond the expenses of the Board and its servants. The Board has to deal only with the facilities supplied to it and to operate them to the best of its ability. Unless, therefore, the Dominion of Canada or the Province of Ontario were to supply additional facilities for the purpose of more completely controlling the waters of the Winnipeg River or supply funds

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for that purpose to the Board, the latter cannot effectively control the water in the Winnipeg River. It is limited to the operation of the Norman Dam.

In the *Geddis* v. *Bann Reservoir* case (1) referred to by counsel for both parties, Lord Hatherley summarized the law as follows, at p. 448:—

> In that case, which has been followed by several others, it seems to have been laid down that persons having powers to execute certain works, and executing those works in such a manner as to perform that duty in compliance with an Act of Parliament, and being utterly guiltless of any negligence, cannot be liable to an action. If the person injuriously affected cannot find any clause in the Act of Parliament, giving him compensation for the damage which he has received, he cannot obtain compensation for such damage by way of action against the parties who have done no wrong. That is the simple proposition which is laid down in that case, and when it is expressed in those terms it is impossible for anybody to find fault with it.

I am of the opinion that the Acts by which it was appointed and the Convention under which it was to control the level of the Lake gave the Board express powers to raise the outflow up to 47,000 c.f.s., when in their judgment it was necessary to do so; and in any event such powers should be implied in order that the duties and powers given by the Acts and the Convention should be reasonably and efficiently carried out and that without such powers the duties could not have been so exercised.

I also find that it did not act negligently, but that its members, all professional engineers of wide experience, brought to the problems involved all knowledge available to them and exercised the skill of their profession. There was no such lack of care, under all the circumstances, as is necessary to create negligence, and there is nothing in the act which gives the Suppliant a remedy against the Crown. The standards to be applied are not standards of perfection. See *McMillan* v. *Murray* (2); *McLean* v. *Y.M.C.A.*, (3) and *Hughston* v. *Jost* (4).

I think it should be noted also that the Board was not established as a Flood Control Board but was brought into existence pursuant to the Convention with the primary purpose of controlling the waters in the Lake of the Woods. It is interesting also to note from the evidence of Mr.

(1) (1877-8) 3 A.C. 430.
(2) (1935) S.C.R. 572 at 574.
(3) (1918) 3 W.W.R. 522.
(4) (1943) O.W.N. 3.

McLean, a witness of the Suppliant, that the International Joint Commission (which made the investigation leading up to the Convention and whose recommendations as to the water level in the Lake of the Woods and as to the necessity of increasing the outflow up to 47,000 c.f.s., were adopted) clearly anticipated that damage could result to those having property in the Winnipeg River. Part of the recommendation of the International Joint Commission was that compensation be provided for those who would suffer damage by reason of such increase in the level of the waters in the Winnipeg River. As stated by Mr. McLean—"They were going to flood". That recommendation was not carried out.

It is also to be noted that prior to the establishment of the new peak level in the Lake of the Woods by the terms of the Convention at 1061 s.l.d., there was a range in the Lake of the Woods of nine feet and by the terms of the Convention this range was reduced to an overall range of 5·25 feet. The evidence of Mr. Strome is very clear that it was computed by the engineers in charge that it would be necessary to increase the discharge capacity of the Lake of the Woods up to 47,000 c.f.s., at an elevation of 1061 s.l.d., and that within a range of 5·25 feet the Board had to handle the same amount of water under the new control with about two-thirds of its former capacity for that purpose. Unless the level of the Lake is at 1061 s.l.d., it is not possible to secure a maximum outflow of 47,000 c.f.s., as provided by the Convention.

The evidence of Mr. Strome establishes that the Board cannot get the most advantageous and beneficial use of the waters in the reservoir unless it has the storage as full as possible over the period that the inflow is sufficient to fill up the Lake, as against the outflow being used for power purposes. And his statement also proves that the Board has found that for the purpose of controlling the flood in the Lake with the discharge facilities supplied to it, it is not necessary to draw the Lake down below 1060·59 s.l.d., to provide for any later Lake flood at or below 1062·50 s.l.d. The Suppliant complained also that there was some delay in June, 1944, in stepping up the

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outflow, alleging that had the Board acted more promptly, the flood in the river would not have been so serious. I accept the evidence of Mr. Strome in this regard, when he says that the lag was not important and that the difference in the water level in the river could hardly have been measured. He says the step up in outflow should be gradual, and not immediate; and that the delay of a few days does not eliminate, but merely postpones the flooding. I also accept his statement that as the inflow into the Lake between May 1st and September 30th, 1944, was 488 billion cu. ft., and the total capacity of the reservoir between 1056 s.l.d.,—1061·25 was 217 billion cu. ft.,—it was quite impossible, even had the reservoir been lowered to 1056 on May 1st, to keep the outflow below 21,000 c.f.s., at all times and at the same time prevent the level of the Lake going above 106·25 or even above 1062·50.

The witnesses, McLean and McGillivray, called by the Suppliant, are men of considerable experience in their own field, but neither has had actual experience in the regulation and control of lakes and reservoirs. On the other hand Strome and Cameron (both members of the Board) and Scovil, all of whom gave evidence for the Respondent, are men of very wide experience in their field—not only at the Lake of the Woods, but in many other very important similar projects throughout Canada. Their evidence is based on information obtained from practical experience, and not on any theory arrived at after the event, and I prefer their evidence to that of the Suppliant's witnesses.

Finally, I think that in the true interpretation of the Act, it must be found that the Parliament of Canada took into consideration the fact that the Board in carrying out its duties, might at times interfere with private rights by causing flood damage. The records were all in Government departments; provisions had been made for an outflow up to 47,000 c.f.s., and such an outflow was bound to cause flooding in the Winnipeg River. Inasmuch as Section 8 of the Act bars any remedy against the Board or its officers, Parliament must have anticipated the possibility of such damage arising.

Moreover, Article 9 of the Convention clearly indicates that the contracting parties had in mind the possibility, if not the probability, that private rights would be interfered with. But that Article, in my opinion, did not create any liability for damages, but merely indicated that the inhabitants of one country could not make any claim for damages against the other country.

My findings, therefore, on this point are that the Board had statutory powers to do as it has done—that it did not exceed these powers, or act negligently in carrying them out.

The Suppliant's claim is based on the alleged negligence of the Board and must, I think, be considered under Section 19(c) of the Exchequer Court Act. To succeed, therefore, the Suppliant must prove that the damage complained of resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. I have already found that there was no negligence on the part of the Board, and there is no question that what it did was within the scope of its duties. Was the Board the officer or servant of the Crown?

Whether or not in any given case the relation of master and servant exists is a question of fact, but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which it is to be done. (See Halsbury (1) and Umpherstone on Master and Servant p. 216 and cases therein referred to).

The Board, as previously mentioned, was created by the Acts of two governments, the Dominion of Canada and the Province of Ontario. Each appointed two members. The expenses are borne jointly by the two Governments and no report is made to either as to the Board's activities. It is given certain powers, the carrying out of which is not subject to the control of either Government, full discretion being given to the Board itself. The Acts do not reserve to the Crown the right of control over the activities of the Board in the performance of its duties. Apparently the only authority of the Crown is to appoint its representa-

(1) 2nd. Ed. Vol. 22 p. 112.

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tives to the Board, and as the appointments are during pleasure, to revoke such appointments. The evidence indicates that the Respondent has never interfered in any way with the activities of the Board since its establishment in 1928. The Board acts as a unit and not through its individual members. Its decisions are those of the Board and not of its members appointed by the Respondent. The latter has nothing to do with the appointment of the other two members, who are appointed by the Province of Ontario and can exercise no control whatever over their actions.

By the terms of the Convention the Dominion of Canada was to establish and appoint a Lake of the Woods Control Board consisting of engineers, which Board would regulate and control the outflow from the Lake of the Woods. And having provided for the establishment of such Board of competent engineers, the full discretion as to the method of regulating and controlling the outflow was left to the Board. The latest decision bearing on this question is the judgment of the Court of Appeal of Manitoba in *Oatway* v. *Canadian Wheat Board* (1). Many authorities are discussed therein but it will, I think, be sufficient to refer only to a few of them to ascertain the tests to be applied.

In *Fox* v. *Government of Newfoundland* (2), it was held by the Judicial Committee of the Privy Council that certain balances in the books of a bank to the credit of various Boards of Education were not debts or claims due to the Crown. Sir Richard Couch said at page 672:—

> The appointment of boards for each of the three religious denominations, and the constitution of the Board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government.

This statement was approved by the Judicial Committee of the Privy Council in *Metropolitan Meat Industry Board* v. *Sheedy* (3). The question for determination was whether a debt due to the Board was a debt due to the Crown and in holding that it was not, Viscount Haldane stated his reasons at page 905, as follows:—

(1) (1945) 52 M.R. 283. (2) (1898) A.C. 667.
(3) (1927) A.C. 899.

They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

From these cases it would appear that the test as to whether a body performing functions of a public nature is a servant of the Crown, or is a separate entity, is, in the main, whether it has discretionary powers of its own which it can exercise independently without consulting any representative of the Crown. This test was applied by the Supreme Court of Canada in the *City of Halifax* v. *Halifax Harbour Commissioners* (1). In that case Duff C.J., delivering the judgment of the Court found that the Commissioners were subject to the control of the Crown, and after summarizing the controls and supervision to which they were subject concluded that they were performing Government services and were occupying the property in question for the Crown. He distinguished the facts in that case from *Fox* v. *Government of Newfoundland* (*supra*) and *Metropolitan Meat Industry Board* v. *Sheedy* (*supra*).

I have been unable to find any reported case which has to do with the status of a board established by two authorities, but inasmuch as the deciding factor in negligence cases seems to be the control by the master over the manner in which the work is to be done by the servant—an element which is entirely lacking here—I have reached the conclusion that the Board in this case is an independent body and not the officer or servant of the Respondent. For that reason also the action must fail.

The question of damages presents some difficulty. Damages are claimed in two ways:—

(1) A specific claim for "damage and expense" of $7,900.

(2) Unascertained damages or alternatively $10,000.

(1) (1935) S.C.R. 215.

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While a good deal of the evidence at the trial had to do with the actions of the Board prior to 1944, and certain floodings that took place prior to that date, the Petition of Right (sections 16 and 17) claimed damages as a result of flooding in 1944 only. The fiat, permitting the claim to proceed, was based on the Petition of Right as so framed and, in my opinion, I must confine the matter to the damages sustained in that year.

Exhibit 4 is a sketch of the Suppliant's Island and indicates the elevations of the various buildings he constructed. He erected buildings thereon at what he thought were convenient places on the assumption that the ordinary high water mark was 1036·14 s.l.d., as indicated by the level of the Government dock at Minaki. He made no inquiries as to previous floods or extraordinary high water marks and completely disregarded the knowledge he had of an extraordinary high flood in 1916 when, as the evidence clearly shows, the level of the river reached almost 1040 s.l.d. Exhibit 14 shows the levels from 1893 to 1944, and had he made inquiries, he could have secured the data then existing. In eight of the years, 1893 to 1905, the level exceeded 1036·14 as it did also in 1916, 1919, 1920, 1922 and 1923. In 1927 with an outflow from the Lake of 55,400 c.f.s., the level in the river reached 1042·04 s.l.d. He anticipated that the proposed controls would entirely eliminate all flooding in the river. His witness, McLean, stated that the official records showed that in the last century there had been a high water mark of 1041·3 and that such an unusual occurrence would happen once in a great many years.

It was suggested that the Suppliant was entitled to have the flow of water continued as in a state of nature. But even if there were any clear evidence as to what conditions were in a state of nature—and there is not—I think he is wrong in that contention. Controls of various sorts have been in effect for 75 years. He bought his property long after the state of nature no longer existed and, in my view, the most that he could expect so far as the Board is concerned, would be the continuance of conditions such as existed in 1928 when the Board took over the control, for the Board was not responsible for what had happened

prior to that date. And it is to be remembered that the whole claim is based on the action, or want of action, of the Board. The Suppliant was unwise in his assumption, when erecting his buildings, that the proposed new Control Board could always and under all circumstances keep the level below 1036·14 s.l.d., and to that extent is the author of his own difficulties.

The claim for $7,900 is made up as follows:—

Building 7 foot rock and concrete wall in two sections to protect Island from being totally destroyed—$2.00 per sq. ft.	$6,400
Repairing cavities created by flood waters washing out rock and earth	400
Moving power plant and building to higher ground (completed)	600
Moving refrigerator ice house to higher ground (estimate)	500
	$7,900

The first item is in relation to a protective wall built to prevent further erosion. It is about 65 per cent completed and the amount claimed covers the total cost including the part not yet completed. Work on it was started in 1938 as a result of the flood in that year and was discontinued in 1942. It was not built as a result of the 1944 flood and, in my opinion, it is not a proper item of damages, in any event. If entitled to anything, the Suppliant is entitled to the damages sustained by lessening in value of his property due to the 1944 flood and not to the cost of the protective works. If the damages recur, and there is entitlement, he could claim for the damage so sustained in subsequent years.

The item of $400 for repairing cavities created by a flood water was done in the Fall of 1944, and was attributable to the flood in that year. The amount of this item was not questioned and I accept it as having been made.

The power plant and its buildings were moved to higher ground in 1942 and that expense was not therefore incurred as the result of the 1944 flood. The amount of disbursements was not questioned.

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The ice house has not as yet been removed but the amount claimed as a reasonable cost ($500) is not questioned. There is no evidence as to the extent to which it was damaged by the 1944 flood.

As to the claim for general damages, the evidence is very unsatisfactory, and in my opinion quite insufficient to reach any conclusion. It is based on the destruction of trees and erosion of the Island, but there is nothing to indicate what part of the damage was caused in 1944. The evidence of Mr. McGillivray would seem to indicate that most of the damage was done prior to 1944. There can be no doubt that the floodings over a period of years did cause erosion and the loss of some trees. (The Suppliant estimates the number at over 750). But in the absence of information as to what losses were caused in 1944, and the lessening in value of the Island by reason of such losses, I cannot find any evidence on which to determine the amount of general damages caused by that year's flood. It is the duty of the Suppliant to establish his claim in this regard, and having failed to do so, I decline to guess as to what the damage actually was.

For the reasons which I have set forth, the action fails, and I find that the Suppliant is not entitled to any of the relief claimed in the Petition of Right. The Suppliant will pay the Respondent's costs forthwith after taxation.

Judgment accordingly.