

BETWEEN:

ELPHINSTONE MATHER RUSSELL.....APPELLANT;

1948  
Oct. 13 & 14  
Dec. 2

AND

THE MINISTER OF NATIONAL }  
REVENUE ..... } RESPONDENT.

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4 (t) (1), 9 (1) (a), 9 (1) (b)—Militia Act, R.S.C. 1927, c. 132, ss. 2 (e), 21, 69—Army Act, (British), s. 190 (4)—Orders in Council P.C. 16/1391 of April 10, 1940, P.C. 37/6070 of October 30, 1940, P.C. 1087 of February 21, 1944, P.C. 44/1555 of March 8, 1944, P.C. 3254 of March 2, 1944, P.C. 3228 of May 3, 1945—Pay and allowances—Auxiliary Service Supervisor with Armed Forces overseas not a member of the Military Forces of Canada—Exemption provided by s. 4 (t) (1) of the Income War Tax Act not applicable—Appellant residing or ordinarily resident in Canada—Member of the “personnel” or an “authorized field representative” of the Y.M.C.A. not a servant or employee of the Canadian Government—Appeal dismissed.*

Appellant was assessed for the years 1943, 1944 and 1945 in respect to pay and allowances received while overseas. Assessments were made and affirmed on the basis that he was there and then an Auxiliary Service Supervisor of the Y.M.C.A. with the Armed Forces and therefore entitled only to the exemption granted by Order in Council P.C. 1087 as amended by P.C. 3254, which is that one-fifth of the pay, including dependents' allowances, is not subject to taxation, and from such assessments he appealed.

*Held:* That appellant was not during the years in question a member of the Military Forces of Canada and therefore not entitled to the exemption provided by section 4 (t) (1) of the Income War Tax Act.

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2. That appellant was residing or ordinarily resident in Canada within section 9 (1) (a) of the Income War Tax Act during the period in question.
  3. That appellant being at all times one of the "personnel" or an "authorized field representative" of the Y.M.C.A. was not a servant or employee of the Government of Canada within the meaning of section 9 (1) (b) of the Income War Tax Act.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Vancouver, B.C.

*T. E. H. Ellis* for appellant;

*D. MacKenzie Brown* for respondent.

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

O'CONNOR J. now (December 2, 1948) delivered the following judgment:

These are appeals under the Income War Tax Act, R.S.C., 1927, Chap. 97, from assessments for the years 1943, 1944 and 1945.

The issue in these appeals is whether the appellant is wholly exempt from taxation in respect to pay and allowances received while overseas. The assessment was made in respect to such pay and allowances on the basis that the appellant was an Auxiliary Service Supervisor of the Y.M.C.A. and therefore entitled only to the exemption granted by Order in Council P.C. 1087 as amended by P.C. 3254, which is that one-fifth of the pay, including dependents' allowances, is not subject to taxation.

The appellant gave Notice of Appeal on the following grounds:—

1. That he was during the period in question a member of the Canadian Military Forces while in the Canadian Active Service Forces and overseas in the strength of an overseas unit outside of the Western Hemisphere, and therefore not liable to taxation in respect of service pay and allowances by reason of section 4 (t) (i).

2. That he did not reside, or was not ordinarily resident, in Canada at any time during the period in question and was not within section 9 (1) (a) of the Act.

The Minister affirmed the assessments on the grounds that the appellant had been allowed all proper exemptions as an Auxiliary Service Officer and that he, during the period of service outside the Western Hemisphere, was ordinarily resident in Canada. The appellant gave Notice of Dissatisfaction and the reply of the Minister affirmed the assessment. The appeals were heard together. On the hearing of the appeals, the appellant applied for leave to raise a third ground:—

3. In the alternative that if the appellant was not a member of the Forces while overseas, he was a servant of the Government of Canada within the meaning of section 9 (1) (f) and was not liable for taxation in respect to pay and allowances which were income received by way of salary from the said Government. The facts here are not in dispute and the question is whether on these facts the appellant comes within this subsection. In the circumstances, the amendment will be allowed.

The facts are set out in the evidence of the appellant who stated that:—

He resided at 4014 West 34th Street in the City of Vancouver, in the Province of British Columbia, and that during his absence overseas his wife and children continued to reside there, and on his return to Canada he lived at that address.

Until the 4th June, 1943, he was employed by the Y.M.C.A. in War Service work in Canada. He was selected as an Auxiliary Service Officer after a medical examination by the Army Medical Corps, and after passing certain tests required of Army personnel and an interview with the General Officer Commanding the Military District. He did not take the Militiamen's Oath set out in section 21 of the Militia Act, R.S.C., 1927, chap. 132. He was issued an officer type battle dress without the officer's insignia of rank. There was issued to him an officer's Record of Service which shows the unit to which he was attached and other information as to his service. He embarked for overseas on the 25th June, 1943, with Army personnel. He was posted to a number of units in England and then to the 5th Canadian Anti-tank Corps and he was with that unit both in England and on the continent until he was returned to Canada. He was the Welfare Officer responsible for the sports and entertainment of the men in the unit. He received his instructions from the Officer Commanding through the Adjutant. He received leave from time to time from the Officer Commanding in the same way as the others in the unit. On occasions he was posted for relief as Orderly Officer. He was billeted with the officers and a member of their Mess. He was assisted in his work by men chosen by the Adjutant from the ranks of the unit. It is admitted

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that throughout the whole period the appellant was under military discipline. He was paid in the same manner as the officers of the unit by the Department of National Defence. His wife received his assigned pay in the same manner as the wives of the officers of the unit. He was wounded and it was admitted that he served with distinction.

He had to have the required number of points on the same basis as the other Army personnel in order to return to Canada. On his return to Canada he received a War Service gratuity at the same rate as a Captain. He is entitled to wear War Service Badge, General Service class, the Defence Medal and the France Medal. He received a letter from the Officer Commanding, 11th Military District, stating that he had served on Active Service from 10th June, 1943, to 21st February, 1946, and was struck off strength on 21st February, 1946. He also received a certificate from Field Marshall Montgomery that he had performed outstanding good service and shown great devotion to duty.

The relevant Orders in Council are as follows:—

Order in Council, P.C. 16/1391 (Exhibit A), 10th April, 1940, sets out the report and recommendation of the Minister of National Defence as follows:—

That in order to provide certain facilities and comforts for the Active Militia on Active Service the Department of National Defence has created a Directorate of Auxiliary Services, whose duties are to co-ordinate the efforts of the National Organizations in Canada and to insure that the efforts of these Organizations are put to the best possible use.

That in order to enable them to provide a maximum of facilities for the personnel of the Canadian Active Service Force Overseas, these Organizations have requested the Department of National Defence to pay a limited number of the personnel of such Organizations who are employed outside of Canada.

That in the opinion of the undersigned, while it is not necessary that such personnel be appointed to the Active Militia, nevertheless the exigencies of the Service require that they wear some distinctive uniform and be deemed to be persons accompanying a Force on active service under the provisions of subsection (8) of Section 175 of the Army Act.

Accordingly, the undersigned has the honour to recommend that pay and allowances, transportation, rations, accommodation, medical treatment and hospitalization be provided by the Department of National Defence for personnel of the four major Organizations working in conjunction with the Department in such numbers as the Minister of National Defence may from time to time determine, namely:—

Canadian Legion War Services, Inc.  
 Young Men's Christian Association  
 Salvation Army  
 Knights of Columbus;

at the same rates as are prescribed for a Captain in Financial Regulations and Instructions for the Canadian Active Service Force Overseas, save and except, Dependents' Allowance and Outfit Allowance.

The undersigned has the honour further to recommend that the personnel aforesaid shall not be deemed to be members of the Naval, Military or Air Forces of Canada on active service, and that, in conse-

quence, the provisions of the Pension Act, to the extent that they are made applicable to said members of the Naval, Military or Air Forces of Canada, shall not apply to the personnel in question.

The undersigned has the honour further to recommend that the provisions of this Order apply to each of said personnel as of and from the date he embarks for service outside of Canada.

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The report and recommendation was approved by His Excellency, the Administrator in Council.

Routine Order 215 of the Canadian Active Service Force, (Overseas) (Exhibit 5) set out the provisions of P.C. 16/1391 (Exhibit A).

Routine Order 3660, part of Exhibit 5, authorized the appellant to receive the pay and allowances and transportation set out in Overseas Routine Order 215.

P.C. 37/6070 (Exhibit G), dated 30th October, 1940, provided that:—

The Board recommend that Order in Council of April 10, 1940, P.C. 16/1391 be amended to include authorization for payment or rail transportation by the Department of National Defence from station to point of embarkation for personnel of Canadian Legion War Services Inc., Young Men's Christian Association, Salvation Army and Knights of Columbus, who have already proceeded abroad or who may be detailed by the Minister of National Defence to proceed abroad for duty in conjunction with the Department of National Defence.

P.C. 1087 (Exhibit B), dated 21st February, 1944, is in part as follows:

WHEREAS the Minister of Finance reports that the Auxiliary Service Supervisors of the Department of National Defence, Adjutant General's Branch, are persons engaged in such like organizations as the Y.M.C.A., the Red Cross, the Salvation Army, the Knights of Columbus, and other organizations;

That in all there are something over three hundred such persons engaged in the Auxiliary Service serving in non-combatant capacities, with the Canadian Active Service Forces outside the Western Hemisphere;

That the members of the said Auxiliary Service are subject to Canadian Income Tax in respect of their pay and allowances, throughout the period of their service overseas;

That having regard to the character of their activities in conjunction with the Army, Navy and Air Forces aboard, it is deemed fair and expedient that they should not be required to pay income tax on the same basis as civilians, that is, be liable to tax on their total income from all sources, but rather that they should be dealt with in a manner more approximate to the exemption granted to members of the Armed Forces overseas, but, inasmuch as they are not members of the Canadian Armed Forces, that they should not receive complete exemption in respect of their pay for such services;

THEREFORE His Excellency the Governor General in Council, on the recommendation of the Minister of Finance and under and by virtue of the War Measures Act, Chapter 206, Revised Statutes of Canada, 1927,

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is pleased to order and doth hereby order that the following exemptions be provided under the Income War Tax Act, to be effective as and from the first day of January 1943;

1. One-fifth of the pay of such Auxiliary Service Supervisors be deemed not subject to taxation under the Income War Tax Act;

2. All subsistence allowances received by such Auxiliary Service Supervisors relative to their duties overseas shall not be subject to taxation under the said Act;

3. The Portion of the "taxes otherwise payable" as referred to in Section 7A of the Income War Tax Act, sometimes referred to as the Refundable Portion, shall not be payable in the case of such Supervisors.

P.C. 3254, 2nd May, 1944, (Exhibit 6), amended, P.C. 1087 (Exhibit B), is:

A. The first paragraph of the preamble is amended to read as follows:

"Whereas the Minister of Finance reports that the Auxiliary Service Supervisors are personnel of such organizations as Canadian Legion War Services, Inc., the National Council of the Y.M.C.A., Knights of Columbus Canadian Army Huts, Salvation Army Canadian War Services, who have been selected by the Royal Canadian Navy, the Army and Royal Canadian Air Force for service with the said forces;"

B. Paragraph numbered 1 is amended to read as follows:—

"1. One-fifth of the pay, including dependents' allowances, of such Auxiliary Service Supervisors be deemed not subject to taxation under the Income War Tax Act."

P.C. 44/1555, dated 8th March, 1944 (Exhibit D), cancelled prior Orders In Council and authorized an Order effective January 1, 1944, which provided in part:—

1. (b) "Supervisor" means an authorized field representative of  
 Canadian Legion War Services, Inc.,  
 The National Council of the Y.M.C.A.,  
 Knights of Columbus Canadian Army Huts,  
 Salvation Army Canadian War Services,

who directly provides services and recreational equipment to the forces and who is appointed as hereinafter provided.

2. The provisions of the Income War Tax Act, Revised Statutes of Canada, 1927, Chapter 97, as from time to time amended, and the schedules appended thereto, shall apply to Auxiliary Service personnel in such manner and to such extent as may be from time to time determined by the Governor-in-Council.

#### PART I

4. Supervisors attached to the Royal Canadian Navy shall be selected and approved by the Chief of Naval Personnel. Supervisors attached to the active units and formations of the Canadian Army shall be selected and approved by the Adjutant-General. Supervisors attached to the Royal Canadian Air Force shall be selected and approved by the Air Member for Personnel.

6. Supervisors serving with active units and formations of the Canadian Army shall be deemed to be members of the military forces of Canada on Active Service for all purposes except engaging in combat with the enemy and be subject to the military law in all respects as though they were officers holding the rank of Captain, and shall be

entitled to the pay and allowances, pensions and all other benefits (except income tax benefits) applicable or pertaining to such rank as and from the date they embark for service outside of Canada, until their services are terminated by the Adjutant-General.

9. Supervisors will wear an officer type uniform with the insignia of their organization, of such pattern as may be designated from time to time by the appropriate Minister, but will not wear badges of rank.

**P.C. 3228, dated 3rd May, 1945 (Exhibit L), set out:—**

Whereas the Minister of Veterans Affairs reports that Auxiliary Services Supervisors serving with the Armed Forces overseas undertake to serve for the duration of the war and, although non-combatant, are required, in the performance of their duty, to accompany the Forces wherever they may go in active theatres of war and are subject to Military, Naval or Air Force Law as the case may be;

That such Supervisors are paid, while serving, pay and allowances and granted certain other benefits applicable or pertaining to officers holding the rank of Lieutenant in the Navy, or of Captain in the Army, or of Flight-Lieutenant, non-flying list, in the Air Force with respect to the period of their service overseas;

That such Supervisors are now entitled to rehabilitation grant, civilian clothing allowance and transportation home on ceasing to serve and are eligible for pension, in respect of disability or death, on the same terms as a member of the Forces, and hospitalization and treatment for a pensionable disability; and

That, while it is considered that no group or class of persons serving as civilians could, in fairness to the members of the Armed Forces, be granted benefits on the scale provided such members of the Armed Forces, it is believed justifiable and advisable, in view of the conditions of service, terms of engagement and basis of remuneration of Auxiliary Services Supervisors, which are in many respects similar to those of members of the Armed Forces, to make available to them certain additional benefits on termination of their services.

**And ordered (inter alia):—**

1. This Order may be cited as the "Auxiliary Services Supervisors War Service Order."
2. In this Order unless the context otherwise requires—
  - (a) "discharge," with reference to a Supervisor, means ceasing to serve as a Supervisor and "discharged" shall have a corresponding meaning.
  - (b) "Supervisor" means an authorized field representative of—
    - Canadian Legion War Services Inc ,
    - The National Council of the Y.M.C.A.
    - Knights of Columbus Canadian Army Huts, or
    - Salvation Army Canadian War Services

who has been appointed to serve and has served pursuant to the provisions of Part I of Order in Council, P.C. 44/1555, of the 8th day of March, 1944.

And the Order then provided that every Supervisor shall upon discharge be entitled to gratuities and to benefits under the Veterans' Insurance Act, the Civil Employment Act, 1942, the Veterans' Land Act, 1942, and under the Post Discharge Re-Establishment Order.

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The first contention of the appellant is that during the period in question he was a member of the Forces and therefore not liable to taxation in respect of service pay and allowances by reason of section 4 (t) (i) on the following grounds:—

(a) That having been attached to a unit and having served with that unit in the circumstances and to the extent disclosed by his evidence that he was in fact a member of the Forces.

It is clear from the evidence of the appellant and P.C. 16/1391, and Routine Orders 215 and 3660, that the appellant was one of the "personnel" of the Y.M.C.A. mentioned in P.C. 16/1391.

The Y.M.C.A. requested the Department of National Defence to pay and furnish transportation for the appellant. It could not be otherwise. He was with the Y.M.C.A. in Canada. Then Routine Order 3660, based on P.C. 16/1391 as amended, and Routine Order 215 authorized his pay and allowances and transportation from Vancouver to the point of embarkation and from there to England, as one of the "personnel" described in P.C. 16/1391. The medical examination and tests were made by the Army for the purpose of ensuring that he could do the work required, i.e., to provide certain facilities and comforts for the personnel of the Forces overseas. Then, by P.C. 44/1555, a Supervisor was defined to mean "an authorized field representative of the Y.M.C.A." or the other organizations. If he had not been one of the "personnel" or "an authorized field representative" of the Y.M.C.A., he would not have been sent overseas. It was in that capacity that he was attached to and served with a unit of the Forces. He wore a uniform and was under military discipline because the exigencies of the Service required this. His Service as stated in his evidence did not, in my opinion, make him a member of the Forces. P.C. 16/1391 provided that such personnel shall not be deemed to be members of the Military Forces of Canada. In addition, he did not take the oath required by section 21 of the Militia Act, R.S.C., 1927, chap. 132.

21. The following oath shall be taken and subscribed before one of such commissioned officers of the Militia as are authorized for that purpose by any general order or by regulation, or before a justice of the peace, by every person upon engaging to serve in the Active Militia:—



"I, A. B., do sincerely promise and swear (or solemnly declare) that I will be faithful and bear true allegiance to His Majesty."

2. Such oath shall have the effect of a written engagement with the King, binding the person subscribing it to serve in the Militia until he is legally discharged, dismissed or removed, or until his resignation is accepted.

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And by section 2 (e) "Militia" is defined:—

2 (e) "Militia" means all the military forces of Canada.

There was, therefore, no written engagement with the King, binding him to serve in the Military Forces of Canada and he was not, therefore, in my opinion, a member of the Military Forces of Canada.

(b) That he was "in pay as an officer" within the definition of officer set out in section 190(4) of the Army Act, in force in Canada by virtue of section 69 of the Militia Act, R.S.C., 1927, chap. 132:—

190 (4). The expression "officer" means an officer commissioned or in pay as an officer in His Majesty's forces, or any arm, branch, or part thereof . . .

Nor was the appellant an officer within the meaning of section 190(4) of the Army Act. He was not "in pay as an officer." He was "in pay" as one of the personnel or as an authorized field representative of the Y.M.C.A. at the "same rates as are prescribed for a Captain . . ." under P.C. 16/1391, or "entitled to the pay and allowances . . . applicable or pertaining to such (Captain) rank . . ." under P.C. 44/1555.

(c) That by section 6 of P.C. 44/1555 (Exhibit D):—

6. Supervisors serving with active units and formations of the Canadian Army shall be deemed to be members of the military forces of Canada on Active Service for all purposes except engaging in combat with the enemy and be subject to the military law in all respects as though they were officers holding the rank of Captain, and shall be entitled to the pay and allowances, pensions and all other benefits (except income tax benefits) applicable or pertaining to such rank as and from the date they embark for service outside of Canada, until their services are terminated by the Adjutant-General.

he was deemed to be a member of the Military Forces of Canada on Active Service for all purposes except engaging in conflict with the enemy and is, therefore, entitled to the exemption from taxation as to pay and allowances provided for such members by section 4 (t) of the Act. And that the subsequent exception "without income tax benefits" in the provision for "pay and allowances, pensions and all

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other benefits" is an attempt to impose taxation by removing an exemption to which all members were entitled. And that to the extent the Order in Council purports to do so, it is ultra vires.

Counsel for the respondent informed the Court that the respondent was not contending that there was power to impose taxation by Orders in Council under the War Measures Act, or to do so by the removal of an exemption to which such members of the Forces were entitled.

The question, then, is this. Does section 6 deem him a member for all purposes which would include a member within section 4 (t) of the Act and would exempt his pay and allowances for taxation and then, by the subsequent exception, "without income tax benefits," remove that exemption; or is the effect of the whole section to deem him to be a member without income tax benefits. That the intention was to deem them members without income tax benefits is clear from an examination of the Orders P.C. 1087 (Exhibit B) and P.C. 3228 (Exhibit L).

P.C. 1087 sets out in the preamble that having regard to the character of the activities of the supervisors, it is deemed fair and expedient that they should not pay income tax on the same basis as civilians, but should be dealt with in a manner more approximate to the exemptions granted to members of the Armed Forces overseas; but, inasmuch as they are not members, they should not receive complete exemption in respect of their pay for such services. It then provides that one-fifth of the pay be deemed not subject to taxation. P.C. 1087 was made on the 21st February, 1944, and approximately only two weeks after the Order in question, P.C. 44/1555, was made (8th March, 1944) with the provisions already quoted, "except income tax benefits." In addition, P.C. 1087 was amended on 2nd May, 1944, approximately two months after P.C. 44/1555 by P.C. 3254 (Exhibit C), to increase the exemption for supervisors so that one-fifth of the pay, including dependents' allowances, be not subject to taxation. Then P.C. 3228, made on 3rd May, 1945 (Exhibit L), sets out in the preamble, "That, while it is considered that no group or class of persons serving as civilians could, in fairness to the members of the Armed Forces, be granted benefits on the scale provided such members of the Armed Forces . . .," and then, after

defining "Supervisors" as meaning an authorized field representative of the Y.M.C.A. and other like organizations, orders they then be entitled to certain gratuities and benefits.

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The intention, however, must be ascertained from the language used in the section. The section should not be divided into two parts, but its meaning should be ascertained by reading it in its entirety. When so read the intention, in my opinion, is to deem the supervisors members of the Armed Forces without income tax benefits. For these reasons, I am of the opinion that the appellant is not entitled to the exemption provided by section 4 (t) (i).

The next question to be determined is whether the appellant was a person residing or ordinarily resident within section 9 (1) (a):—

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company,

(a) residing or ordinarily resident in Canada at any time in such year.

There is no definition of these terms in the Act. The Concise Oxford Dictionary gives the meanings of "reside" as:—

Reside—(Of persons) have one's home, dwell permanently, *at, in, abroad*, etc.; (of officials) be in residence; (of power, rights etc.) rest or be vested *in* person etc; (of qualities) be present or inherent *in*.

The question is a question of fact and not a question of law. (*Lysaght v. The Commissioners of Inland Revenue* (1)). The cases, therefore, are, as Thorson, P. said in *Thomson v. The Minister of National Revenue* (2) but useful illustrations of the circumstances under which a person may be considered as residing or ordinarily resident in a place or country. No cases were cited which had been decided on facts that were in any way comparable to the facts here.

In this case the appellant established a home where he resided with his family. He describes it in his Officer's Service Record (Exhibit 1) as his "permanent home address." While he was never in Canada during the period in question, yet his wife and children remained in this home during his absence and on his return to Canada he returned there. While he was in England and in the countries on

(1) (1928) 13 T.C. 511.

(2) (1945) Ex C.R. 17 at 24.

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the continent he was not residing or ordinarily resident in those countries. His residence there was casual. Or, if he resided in any of them, then he had two residences.

On the facts here I am of the opinion that the appellant was residing or ordinarily resident in Canada during the period in question.

The last contention of the appellant is that in the alternative, if the appellant was not a member of the Forces while overseas, he was in the circumstances a servant or employee of the Government of Canada within the meaning of section 9 (1) (f):—

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company,

(f) who, before his appointment was a resident of Canada and is now or hereafter becomes a Minister, High Commissioner, officer, servant or employee of the Government of Canada, or an agent general for any of the provinces of Canada, or any officer, servant or employee thereof, resident outside of Canada, except upon income received by way of salary from the said government.

The contention is based on the facts already set out that the appellant was paid by the Department of National Defence and sent overseas at the request of the Y.M.C.A. as set out in the preamble in P.C. 16/1391. That he was attached to the Forces to carry out the duties of a supervisor, i.e., look after the welfare and recreational activities of the members of the Forces. He wore a uniform, was under military discipline, and he took his orders from the Officer commanding the unit. But all that did not alter the fact that he was at all times one of the "personnel" or an "authorized field representative" of the Y.M.C.A.

In my opinion, the appellant in these circumstances was not a servant or employee of the Government of Canada within the meaning of section 9 (1) (f).

Counsel for the appellant did not contend, in view of the decision in *McArthur v. The King* (1), that a member of the Forces was a servant within section 9 (1) (f).

For the reasons given the appeal will be dismissed, but in the circumstances without costs.

*Judgment accordingly.*