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July 18.

IN THE MATTER OF THE PETITION OF RIGHT OF

THE HAMBURG AMERICAN PACKET COMPANY *et al*..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Accident on a public work—Non-repair—Money voted by Parliament—Discretion of Minister—Jurisdiction of court—Improvement of navigation.

There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work.

2. In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

Semble:—Although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of section 7 of *The Public Works Act* (R. S. C. c. 36), it does not follow that once the Minister has expended public money for such purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages.

PETITION OF RIGHT to recover damages for injuries to the steamship *Arabia* alleged to have been received in a certain part of the channel of the River St. Lawrence.

The facts of the case are stated in the reasons for judgment.

C. Robinson, K.C., W. B. Raymond and *Leighton McCarthy* for the suppliants;

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The Solicitor General of Canada, N. W. Trenholme, K.C. and *J. E. O'Meara* for the respondent.

March 20th, 21st and 22nd, 1901.

This case came on for trial at Montreal.

April 30th and May 1st, 1901.

The case now came on for argument at Ottawa.

C. Robinson K.C. argued as follows: With regard to the liability of the Crown it is said to depend in such a case as this wholly upon the statute of 1887, 50 & 51 Vict., ch. 16, sec. 16. That is a section the provisions of which your lordship has had to consider in a very large number of cases. The cases to which I shall call attention are, first, *The City of Quebec* v. *The Queen* (1), of which we all know, and the case of *Martial* v. *The Queen* (2); but, it seems to me, that before we proceed to discuss the question as to the liability, and the question of the bearing of the evidence upon this claim, it is necessary to ascertain, if we can, exactly what statute is in force.

Your lordship will remember that the case of *The City of Quebec* v. *The Queen*, came up first on demurrer before your lordship, where the pleadings were defective, and the demurrer to the sufficiency of the petition of right succeeded. Then the pleadings were amended, and it came up before your lordship for trial, and a non-suit was granted. Then that was appealed to the Supreme Court of Canada, and, if I may venture to say so, the result there, merely as to those who are seeking for authority on the question, is unsatisfactory for this simple reason, that there was a very strong division of opinion in the court. While the result was that the petition of right was dismissed, and the suppliant did not recover compensation, the learned Chief Justice

(1) 3 Ex. C. R. 164; 24 S. C. R. 420. (2) 3 Ex. C. R. 118.

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delivered a judgment to which I shall have to call attention, and in which Mr. Justice Fournier concurred, in favour of the petitioner, while Taschereau, Gwynne and King JJ. were all of the contrary opinion, so that while the petition was dismissed unfortunately none of the learned judges who formed the majority of the court allude in any way to the ground taken by the learned Chief Justice, and do not decide the case upon any common ground at all. Taschereau J. went upon the ground that the work in question was not a public work. Gwynne J. went upon the ground that the injury suffered, which was there an injury to property, was not caused upon the work in question, but off and away from the same. Your lordship will remember that there was a landslide, and the injury was done to property in the street below. King J., as I understand it, agreed with Gwynne J. but gave no reasons. Well, these judgments are opposed to the judgment of your lordship in two respects, viz.: that I understand your lordship to have thought it was a public work, and that your lordship did not agree with the contention that the injury must be suffered upon the work in question. That is a matter which may come up again. If it does I venture to think that it will be held that it is a very narrow construction to give to the statute, because it would practically come to this, that if you have, say an explosion of an engine due to the negligence of some one in charge of a public work, and one man is killed on the public work, and another man across the street is injured, the representatives of the man who is on the property gets compensation, and the man on the other side of the street gets none. It is not necessary to go further into that question, because, of course, it does not arise here, and I do not know whether the question of whether it is a public work or not will arise here, although I noticed

in the pleadings it is denied, that this channel is a public work.

Now, in the first place, a public work is anything under the control of the Dominion Government, that is a definition given by statute, no matter who it belongs to so long as it is under their control. As to the harbour in question, the Government spends money on it year after year, treating it as a public work, and whether it is by any arrangement with the province that this money is expended is not our concern, for I take it that a public work means something artificially done at the public expense, for a public object. I suppose that is the intendment of the statute. That is the general definition of a public work. I do not understand that there is any objection to a public work being a well; it may be under water or above water.

The first question we have to ascertain with regard to the liability in this case, is whether a dictum by your lordship, perhaps more than a dictum, in the case of *McHugh* v. *The Queen* (1) is to be affirmed or not, and that is, that there can be no such thing as negligence on the part of the Minister. Perhaps I ought to say that if your lordship look upon that as a point upon which you have expressed a decided and final opinion, of course I have no desire whatever to spend time in attempting to discuss the question. On reading the *McHugh* case, it strikes one that there were other grounds upon which the case could have been decided, but it is quite clear your lordship did not decide upon such grounds. Your lordship expressed the opinion there was no negligence to be imputed to any one else, and that the Minister was not an officer or servant of the Crown to whom negligence could be imputed, and these are questions

(1) 6 Ex. C. R. 374.

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which I propose to discuss, but which, it seems to me right to say, I do not wish to discuss before your lordship, save subject to your lordship's approval.

[BY THE COURT: I came to the conclusion in the *McHugh* case that for what was alleged there to be the Minister's neglect, the Crown had not to answer in this court, although it might have to answer in Parliament. I never had any reason to change my mind as to that; but I would be very glad to hear argument, if you see fit to address argument to me on that point. I never thought the intention of the statute was to make the Crown answerable for the discretion of the Minister as to whether he would or would not spend money at a given place, and keep a given work in repair or not.]

Every case depends upon its own circumstances. What I say is this: That this is a case in which a navigable channel was opened as a public work by the Dominion; the Dominion invited ships to use it. There was certain work which it was necessary to do in order that navigation might be made safe; there was money ready for that purpose, if it had been thought proper so to use it, and which a regular officer in charge might have used for the purpose if he had chosen. If such an officer had been appointed, and was negligent, and it would have been negligence in any one else not to sweep that channel and keep it clear of these obstacles, then I say there is no excuse here because the Department, instead of appointing a person who neglected his duty, did not appoint anybody to perform a necessary duty. I do not go further than that.

[BY THE COURT: Of course one might distinguish the case of an accident in the channel of the St. Lawrence from one which happened in a canal, as in the case of the *Acadia* (1), by the fact that the Dominion

(1) See *McKay's Sons* v. *The Queen* 6 Ex. C. R. 1.

takes a toll in the case of a canal. And with regard to the Government railways, one at once sees the reasonableness of the Government being liable in the same way that a company would be liable, because it is in a sense a commercial undertaking. I do not know whether you could say, properly, that the Crown invites people to use this channel of the St. Lawrence. They improve it for the purpose of navigation, and it is there to use or not to use as they see fit. Of course the Crown does invite a person to use the canal, it takes a toll for such use.]

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As I understand the law there is practically no difference in regard to the taking of a fee. I think the case of *Mersey Docks Trustees* v. *Gibbs* (1), says that practically makes no difference. If there is the charge of the work in question, there is the obligation to use reasonable care.

Our contention is in the first place that they never made the channel of the depth which they asserted it to be; in the next place, that they asserted it to be of a depth which it never was. Again, that if it ever were of that depth, they did not take the precaution which all the overwhelming mass of testimony says was necessary to be taken in order to keep it reasonably clear of obstacles which nature would bring there from time to time. In other words, every spring there was always a probability of obstacles dropping there and remaining there, and the engineers say that in their judgment, for the safety of navigation, it is necessary to sweep the channel every year. Now, our contention does not go further than that. The only point I am trying to direct my attention to now, is the distinction between a case where the Minister of the Department is liable because they have taken no trouble whatever to have this necessary work per-

(1) L. R. 1 H. L. 93.

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formed, and the case where they are liable because they did not appoint an officer whose duty it was to do the work. My present contention is, that if I have shown that the reason this accident happened was because the Department, under whose control and management this work was, did not appoint any one to take the necessary care, to do what was necessary to render it safe, and to prevent accidents and injury to persons or property, then the Crown is responsible. You may take, for instance, two public roads within a quarter of mile of each other. On each there is a bridge which requires to be kept in repair for safety. Both are public roads, both are roads kept open for the use of the public ostensibly. As regards one of the bridges, the Department of Government charged with their management appoints a person to see that such bridge is kept safe. He neglects his duty. A man is injured there, and he gets compensation. In the case of the other bridge they appoint nobody. A man is injured there, and he gets no compensation. Now, how can one reconcile the two propositions?

[BY THE COURT: That is an argument to be addressed to the law-making power. If the law is that no action will lie, and then Parliament comes and says an action will lie in a given case, you cannot ask the court to add to that and to do what Parliament has left undone.]

But if what is said to be the law leads to an inconsistent and unjust result, such a result must be presumed not to have been intended. I quite agree that, if it had been provided that the Department should not be liable unless they have appointed some one to do the duty, and he has neglected it, or that there should be no responsibility for any omission on the part of the Department, or Minister, then it could not be said that such an enactment would lead to unreason-

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able results. But, there is no stronger argument, as your lordship is aware, for benign interpretation, where construction is doubtful, than to show that a harsh interpretation leads to results that in all probability were never intended, because reason and justice are opposed to it.

A good deal of the reasoning for the narrow construction as it presents itself to my mind—though I cannot say to what extent it was the reasoning which operated upon your lordship's mind, but a good deal of the reasoning seems to be founded upon the apparent limitation of liability in sec. 16, sub-sec (*c*) of *The Exchequer Court Act.*

Now I understand the argument shortly to be, that a Minister is not an "officer or servant" of the Crown. It is said that unless you have an officer or servant of the Crown who, acting within the scope of his duties, neglected to do something, you cannot recover under the Act. Well, whether, as a matter of fact, those words: "resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment," are surplusage altogether, and really mean nothing, but are merely a sort of extended statement of the law as it stands, and would stand without them, may be a matter for argument. But, what I submit is, that according to the judgment of the learned Chief Justice, in the *Quebec* case (1), which I venture to think requires the most careful consideration, the provisions of the enactment in question are wide enough to include all actions of tort, whether arising from the negligence of some particular person or officer, or arising from negligence generally.

[BY THE COURT: It would not make any difference whether it was a public work, in the view the learned

(1) 24 S. C. R. 420.

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Chief Justice took. It would seem that Mr. Justice Taschereau did not agree with the Chief Justice's view of the law.]

I see no reason to think that Taschereau J. agreed with Gwynne J.'s view of the law. The Chief Justice certainly decided that the facts of the *Quebec* case did not come within section 16 (*c*), but that it did come within section 16 (*d*).

Then, I understand his lordship to have decided, what is perhaps more important, that it is by no means the law that the statute now is the only statute giving your lordship jurisdiction. The Chief Justice was very distinct and decided in his view that the old *Act respecting the Official Arbitrators* (1) is still in force; and that the jurisdiction which existed in the Official Arbitrators before the statute of 1887 is transferred to your lordship. In other words, that wherever there would have been a case which could be referred to the Official Arbitrators under the *Act respecting the Official Arbitrators* that same case can now be referred to the Exchequer Court, and that wherever the Official Arbitrators could have decided in favour of the petitioner, or suppliant, this court can now decide.

Now the *Act respecting the Official Arbitrators* was repealed by 50-51 Vict. c. 16 (*The Exchequer Court Act*), but the learned Chief Justice says that section 6 of the former Act still exists for the purpose of the jurisdiction of this court.

[BY THE COURT.—There is a clause in *The Exchequer Court Act* respecting the continuance of the jurisdiction exercised by the Official Arbitrators.]

Yes, section 58.

[BY THE COURT: That is not a saving clause of the statutes that are repealed.]

(1) R. S. C. ch. 40, sec. 6.

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The learned Chief Justice thinks it is. R. S. C. c. 40, sec. 6, enacts that "every claim against the Crown arising out of any death or injury to the person or to property on any public work" may be referred to the Official Arbitrators. There is nothing there about negligence, nothing about a servant or officer of the Crown acting within the scope of his duty. Now let me see if I am not quite right in saying that that section is still in force. Taking up the learned Chief Justice's judgment in the *Quebec case*, in 24 Supreme Court Reports, I read at page 430:

"Section 6 of *The Revised Statutes of Canada*, "chapter 40, before set forth, gives in the most "explicit terms a remedy to be attained by means "of the administrative procedure thereby prescribed, "for any direct or consequential damage to property "arising from or connected with the construction, 'repair, maintenance or working of any public work "or arising out of anything done by the Government "of Canada. If this enactment, or that particular "portion of it to which I have just referred, still "remains in force, it is clear that there is an existing "law of Canada which authorizes the claim against "the Crown made by the suppliant in this petition of "right. I now proceed to show how this section 6, of "chapter 40 is kept alive, notwithstanding the express "repeal of the whole chapter 40 by section 58 of "50 & 51 Vict., ch. 16. In the beginning of section "58 it is provided that the Acts and parts of Acts men-"tioned in schedule B to the Act are hereby repealed, "and in the schedule this chapter 40 is specified as "wholly repealed; such repeal is, however, expressly "made subject to the *Interpretation Act*. By the "subsequent part of section 58 it is declared that "wherever in any Act of Parliament it is provided "that any matter may be referred to "the Official

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"Arbitrators" or "that when any powers shall be "vested in or duty shall be performed by such arbitra- "tors" such matters shall be referred to the Exchequer "Court, and such powers shall be vested in and duties "performed by that court, and that wherever the "expression "Official Arbitrators" occurs in any such "Act it shall be construed as meaning the Exchequer "Court. It follows from this that claims provided "for by section 6 of *The Revised Statutes*, chapter 40, "which by that Act were to be referred to the arbi- "trators, are now, under this Act 50 & 51 Vict., ch. 16, "to be referred to the Exchequer Court, which neces- "sarily implies that all such claims against the Crown "are saved from the repeal and are therefore matters "in which parties are for the future to be entitled to "a remedy by the judicial procedure of the Exchequer "Court."

Now, I do not know how you are to get anything plainer than that. That is the clearest expression of opinion that section 6 of R S. C. c. 40, remains in force, and that the jurisdiction conferred by it upon the Official Arbitrators has been transferred to and is to be exercised by this court. His lordship proceeds to say:

"According to the section just quoted from, the "matters so saved from the repeal of chapter 40, are "to be referred to the Exchequer Court; from this, if "it stood alone, it would follow that the jurisdiction "of the Exchequer Court in such cases, could only be "exercised upon a reference by a Minister." And then he goes on to show that the same jurisdiction can be exercised by this court on a fiat for a petition of right: "The case made by the petition of right "must then, for the foregoing reasons, be considered a "claim against the Crown under sec. (*d*) of section 16 "of *The Exchequer Court Amendment Act* arising under

" that particular law of Canada which is embodied in " the reinstated section 6 of the repealed Act, Revised " Statutes, chapter 40. The claim is one within the " purview of that section, in as much as the suppliant " complains of, and claims damages for, a direct, and " also a consequential, injury to his property."

Now, I do not understand how you are to frame a plainer declaration of opinion on the part of the learned Chief Justice than we find there on these two questions.

First, that this is a case not within subsection (*c*) but within subsection (*d*) of *The Exchequer Court Act*. Next, that it is a case which comes within section 6 of R. S. C. c. 40, which is alive and in force for the purposes of the jurisdiction of this court.

Then, I proceed to treat this case entirely as if it came within that section, and this subsection (*d*) of *The Exchequer Court Act*. If it does, whatever effect may be given to the words "resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment," in subsection (*c*) of the last mentioned Act is eliminated, because it is unnecessary to invoke that provision.

In the *Quebec case* (1) which came up before your lordship, your lordship said that if there is anything in section 16 which differs from the previous jurisdiction, in your view it is rather a limitation (which perhaps would have been implied in section 6 of *The Official Arbitrators Act* (2)) upon the previous jurisdiction. I do not admit it for a moment, but I see the force of the objection, that when you say there shall be a claim against the Crown for any injury to person or property upon any public work, why of course that does not mean any injury to any person or property whenever it is suffered on any public work irrespective

(1) 3 Ex. C. R. 164. (2) R. S. C. c. 40.

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of the cause. I cannot go on a public work, injure myself, by my own fault, and say the Crown is liable. It must be an injury to person or property suffered on a public work without the fault of the suppliant or complainant; but it relieves us from the particular implication to which a good deal of force seems to have been given of an intention on the part of the legislature that the suppliant must point out some person within the scope of whose duties this particular thing came. We are relieved of that.

Beyond question here we have suffered an injury to our property upon a public work. The injury is within those words, beyond all doubt or question. But then it is said we cannot recover, because we have to prove the negligence of some officer whose duty it was to do this thing, the neglect of which we complain, and we cannot recover for the negligence of the Department or any one connected with the Department, apart from the officer I speak of. Now, if that is so, it must be because of some particular immunity attaching to the position of the Minister of the Crown which takes him out of the words of the statute: "An officer or servant of the Crown;" and which, notwithstanding the express words of the statute, shows that any omission or neglect on his part can never have been intended to be included. Referring to the *McHugh* case (1), there are two cases cited there to show that the Minister is not to be responsible under this section. One of them in the *McBeath* case (2), and the other is *Gidley* v. *Lord Palmerston* (3), both of them cases in which it was sought to make a Minister personally responsible.

(1) 6 Ex. C. R. 374.

(2) *McBeath* v. *Haldimund*, 1 T. R. 172.

(3) 3 Br. & B. at p. 286.

We are not seeking to do this. We are simply saying he is an officer or servant of the Crown for whose neglect the Crown, by this statute, has consented to be responsible. *McBeath* v. *Haldimund*, turned upon the law of agency. That was a case in which the Governor of a colony was sued for supplies furnished, and practically the case went off on the ground of agency; because they said people who dealt with persons in the position of Governor of a colony know perfectly well he is not acting on his own behalf, or in his personal capacity. The ordinary transaction by a public officer of that description is always assumed to be entered into by him in his official capacity. *Gidley* v. *Lord Palmerston* was a case in which a clerk in the War Office sought to recover from Lord Palmerston certain arrears of pension which he said was paid into Lord Palmerston's hands, and which it was claimed he should pay him; but it was decided that Lord Palmerston had no personal responsibility in the matter.

Then it was argued for the Crown in the *McHugh* case that section 27 of *The Public Works Act* renders an officer of that description criminally liable for injury to person or property on a public work through his negligence. But that has nothing whatever to do with the civil remedy against the Crown. The statute only makes criminally liable, as you would expect any statute to do, some officer of the Crown to whom a particular duty is assigned in writing by the Department, and who neglects that duty.

It was also argued for the Crown in the *McHugh* case that section 4 of *The Public Works Act* (1) makes the Deputy the chief officer of the Department; that in *The Revised Statutes of Canada*, c. 4, the ministers of the Crown are styled "public functionaries." But there is

(1) R. S. C. c. 36.

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nothing in the enactments to prevent the liability of the Crown arising upon the action or inaction of one of its ministers. On the contrary there is much to support the view we are putting forward. *The Public Works Act* (1) says, *inter alia*, that the minister shall have the management, charge and direction of work for improving the navigation of any water. Therefore the statute imposes upon him, or empowers him at all events to manage, to take charge of, and direct this work. But the statute goes further. Section 9 says "that the minister shall direct the construction, maintenance and repair of all harbours, roads and other public works maintained at the expense of Canada, and which are by this Act, or are hereafter placed under his management and control."

If that had been the chief engineer for example, I suppose nobody would have contended for an instant, that when the chief engineer was directed by statute to maintain a public work, and to have the charge and direction of it, that he was not a person upon whom the duty was expressly cast by statute of doing what was necessary to maintain it. But, they say, although the minister is expressly named, and although the minister is expressly directed to maintain this public work, nevertheless he can do it or not as he pleases; and for any injury suffered by his want of taking the necessary steps to maintain it, there is no compensation. I quite understand the exemption of the minister of the Crown from any personal responsibility. That is another thing. But, why when the Crown consents to be responsible for the neglect of one of its "officers or servants," why it should be said that the minister is not included, it is difficult to imagine, unless it were by reason of some constitutional principle, and there is none. The essential distinction

(1) Sec. 7.

between the law of England, and the law of continental countries on the subject is this, that there is for instance, in France what is called the "droit administratif" which applies to all persons in the public employment. You cannot sue Government officials in the ordinary courts of the country, but they have certain tribunals which are called administrative tribunals, constituted for the express purpose of settling their liability, where any claim is made against them; and as Mr. Dicey points out, while such a law would never be permitted in England for a moment, it nevertheless has its advantages, and he gives an example of where a person in a public office committed what in France would have been a very fatal error, and would have involved very serious punishment, but which in England there was no common law applying to, and they had to pass a statute covering it (1).

If this were a case between subject and subject, the liability of the respondent would be undoubted. In such a case all that you have to do is to show that you are injured upon the work, that there was no proper precaution taken to protect you from injury. As to who should have been appointed to take the precaution, as to whether anybody was appointed or not, is a matter of utter indifference.

Then I want to call your lordship's attention to other legislation and other decisions in point. *The Queen* v. *Williams* (2). The issue there was left to the jury. Was Her Majesty's said executives aware of the existence of danger? Did Her Majesty's said executive neglect? and so on. There seems to be no shrinking there from saying Her Majesty's Executive Government was capable of negligence. Could it be said that the Executive Government did not include

(1) *Anson's Law of the Constitution* (The Crown) 2nd ed. p. 43.
(2) 9 App. Cas. 418.

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a Minister? Their Lordships of the Privy Council did not seem to think that there was any incongruity in saying there was negligence in the case.

I look upon the *Williams* case (1) as very like this. The Privy Council did not seem to see the slightest incongruity in asserting that the Executive Government was liable for negligence, and they have asserted, in the strongest language, their sense of the propriety of making them responsible. They say, instead of there being any presumption under the statute in question that it was not intended to make them responsible, just to the same extent as individuals, the presumption is very much the reverse. See also *Farnell* v *Bowman* (2).

Then there is the point arising under the Act 45 Vict. c. 45. Now, the Port Warden is a Dominion officer, he is appointed by order in council, on the recommendation of the Board of Trade, after an examination. One of his duties is that he shall not allow any vessel to clear, unless under certain circumstances. Sec. 16 of that Act prohibits any vessel from obtaining clearance from the Custom-House, until she has a certificate from the Port Warden. That is to say, no vessel on her outward voyage is allowed to get the necessary clearance unless she is examined, and if she is found unfit he is to state in what particular, and on what condition only she will be deemed in a fit state to leave, and shall notify the master not to leave the port, and so on. Then, certain rules have been made under that for his guidance, which are to be found in the statute 59 Vict. ch. 96. The 15th and 16th rules bear upon this question. The Port Warden is to examine and see whether the vessel is drawing too much water to make it safe for her to proceed on her voyage. He does that upon the faith of a gauge, as it

(1) 9 App. Cas. 418. (2) 12 App. Cas. 643.

is called, which is kept at Sorel, under the supervision of the superintendent of dredging on this channel, and relying upon that the Port Warden is induced to think there is 27·6 of clear water, and he says you can safely go.

Now, how can you say in face of that we are not invited by the Government to use this channel? The Government say: "You cannot use it until we give you leave, and we have given you leave. We will appoint an officer, and prevent your using this channel except under the authority of our certificate that it is safe. Our officer gives that certificate to you, you telling us you want to use it." Is it possible to say that the channel is not held out by the Government for use by vessels proceeding to sea? Supposing there is a boulder, or a vessel had been sunk there a week before, and the Government had knowledge of it, and had said, we do not care to remove that, but their officer, nevertheless, gives us a certificate, and says, you can go safely to sea, and we run against that obstacle, and lose our property, how is any one to say the Government did not hold that channel out as a channel which we might use, not that we might use in general, but which this particular ship, having this particular depth of water at that particular time, might safely undertake to use? Then, having used that channel under all those safeguards, complying with the request which they impose upon us, we are told, although that channel may have been choked up by their negligence, even if our property is destroyed by acting upon the Port Warden's misleading certificate, they have no responsibility. The Port Warden, a Dominion officer relies upon the information of the other Dominion officer, and the result is that we suffer. I say either the Port Warden was negligent, either he should not have taken that report of the superintendent and given

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us a certificate upon it, or if he was justified in doing that then the superintendent at Sorel was negligent.

It was a matter which we could not ascertain for ourselves. It was a matter about which the Government had the knowledge. The negligence consists in the omission to take reasonable precautions to keep the work in question safe.

L. McCarthy followed for the suppliants, and reviewed the evidence in detail. He claimed that the evidence warranted a finding by the court that there had been negligence under the statute for which the Crown was liable.

The Solicitor-General of Canada: The learned counsel for the suppliants (Mr. *Robinson*) seems to base his argument for the liability of the Crown in this case wholly upon the views of the learned Chief Justice as expressed in his dissentient opinion in *The City of Quebec* v. *The Queen* (1). That opinion he claims to be wide enough to support the proposition that subsection (*d*) of section 16 of *The Exchequer Court Act* gives a right of action against the Crown in every claim of tort where an action would lie between subject and subject. My answer to that contention is that before one can acquiesce in such a view it is necessary to concede that subsection (*c*) of the statute in question is quite meaningless and useless, because if in all cases of tort there is a claim against the Crown, to what purpose is it to expressly say that in a particular case there would be a claim?

[BY THE COURT: In that view the provisions of subsection (*c*) are superfluous.]

Yes, quite so. But further than that it is necessary to hold that chapter 40 of *The Revised Statutes of Canada*, notwithstanding the express terms used by the repealing statute, 50-51 Vict. c. 16, sec. 58 is in force. The

(1) 24 S. C. R. 640.

argument for the suppliants must be carried this far, namely, that where a statute is expressly repealed it may be said for the purposes of a particular case to be revived by implication. I am extremely doubtful if any authority can be found for that proposition.

Counsel for the suppliants particularly contend that it is not necessary to show that the negligence complained of is the negligence of any officer or servant of the Crown. In short, their argument is that the accident having occurred, negligence arises upon the theory of *res ipsa loquitur*, and the Crown is liable therefor. This argument is rested solely upon the view that subsection (*d*) of section 16 of *The Exchequer Court Act* overlaps subsection (*c*). Now, clearly, the latter provision was merely intended to give the court in a modified form the jurisdiction the Official Arbitrators had. Section (*d*), on the other hand, simply confers jurisdiction to try claims arising under any particular statute passed by the Dominion Parliament to further the ends of justice. The phrase, "any law of Canada" is not to be taken to include the "common law," nor the specific statute law of one of the provinces. (Cites *Alliance Assurance Co.* v. *The Queen* (1); *McHugh* v. *The Queen* (2); *Filion* v. *The Queen* (3); *LaRose* v. *The Queen* (4).

Counsel for the suppliants will not extract much support for their argument from *Attorney-General of Straits Settlement* v. *Wemyss* (5), or from *The Queen* v. *Williams* (6), for the local enactments under which those cases arose are in quite different terms from the provisions relied upon here. The very widest phraseology is used to create a liability on the part of the

(1) 6 Ex. C. R. 76.
(2) 6 Ex. C. R. 374.
(3) 4 Ex. C. R. 134; 24 S. C. R. 482.
(4) 6 Ex. C. R. 425.
(5) 13 App. Cas. 192.
(6) 9 App. Cas. 418.

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Crown in the two cases just mentioned. On the other hand, our statute only provides for specific cases.

It is conceded, however, by the suppliants that the accident must occur on a "public work" before the Crown can be made liable. Very well, then, the accident occurred here in the bed of a river—the river St. Lawrence. Now the soil or bed of a river belongs to the Crown. *Lord Advocate* v. *Hamilton* (1). But the soil or bed belongs not to the Crown in right of the Dominion but in right of the province. (*Attorney-General of Ontario, &c.* v. *Attorney-General of Canada* (2). The right of the province, however, is subject to the legislative power of the Dominion Parliament to regulate navigation and shipping. But the Crown in right of the Dominion has no right of property in the river, and so by no ingenious argument can it be demonstrated that the *locus* of the accident should be treated as a "public work" within the meaning of section 16 of *The Exchequer Court Act.* In relation to the distinction between property in a river and the right to improve the navigation thereof, I would refer to *Cracknell* v. *Mayor of Thetford* (3).

As to the point that money had been voted by Parliament for the purpose of improving the navigation of the channel in question here, I contend that the courts have no power to review the discretion of the minister in such matters. The mere fact that he has the money to do so, does not create a legal obligation on the part of the Crown to make improvements. *Wakely* v. *Lackey* (4); *Colpitts* v. *The Queen* (5).

N. W. Trenholme, K.C. followed for the respondent:

With reference to the cases of *The Queen* v. *Williams and The Attorney-General of the Straits Settlement* v.

(1) 1 McQueen H. L. 46.
(2) [1898] A. C. 700.
(3) L. R. 4 C. P. at p. 634.
(4) 1 N. S. W. L. R. 274.
(5) 6 Ex. C. R. 254.

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Wemyss, upon which counsel for the suppliants so strongly rely, I submit that the principle upon which the Privy Council seem to have based their judgments in those cases does not exist in the present case. The Privy Council seem to have been very considerably influenced by the idea that in the cases above mentioned the colonial governments had entered into the field of private enterprise, that is, had undertaken enterprises that were ordinarily conducted for profit by private individuals, and that they should not share the benefits without sharing the burdens of such enterprises.

Now, the present case is the furthest possible from that class of cases. Not only has the Government done this deepening and improving of the channel of the St. Lawrence without expecting profit, but it is not even collecting tolls for using that work. It is purely in the public interest of the whole country that this work has been done. It is an exceptional case, as being exclusively done in the public interest, and not in the field of private enterprise in any respect whatever.

We submit, also, that it was not a public work within the meaning of the statute at the time of the accident. Perhaps it was so, as regards the period of time while the operations were being carried on. Probably if an accident occurred while these operations were being carried on we would fall within the statute. Probably if an accident occurred while these operations were being carried on, your lordship would hold that the accident occurred on a public work of the Dominion. But, after that work is done, we contend that it is not public work. It is an ancient public highway improved. That is all it is. The idea of the public highway predominates over any work done in the way of improvement; but it is more than a public

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highway, it is really an international highway now, and if a part of this channel between Montreal and Quebec is a public work, and in charge of the Minister of Public Works, then the whole channel is, because the Government practically have discharged the same duties, or have done the same work, in respect of the entire channel, purely in the public interest.

Now counsel for the suppliants admit that unless they can show some obligation imposed upon the Minister of Public Works to maintain this channel, and keep it clear, that they have no case. They sought to invoke sections 7 and 9 of *The Public Works Act*, chap. 36, in support of that view, especially section 9.

Your lordship will see that in section 8 it is stated that if at any time a doubt arises whether the management, charge and direction of any public work belongs to the Minister of Public Works, or to the Minister of Railways and Canals, the question shall be decided by the Governor in Council, and the works and property shall be under the management, charge and direction of either Minister from time to time. Then again a question might arise whether the work was within the jurisdiction of the Minister of Marine, or the Minister of Public Works. Your lordship sees that the question might arise in this very case, with regard to this ship channel. It appears that when this ship channel has been dredged to the depth of 27½ feet, the Department of Public Works steps out, and the lighting of the channel is taken in hand by another Department, the Department of Marine and Fisheries. Your lordship can see from the statute, and from the nature of the case, that there might be many instances where it is doubtful to which of the Ministers certain public works belonged, and in order to determine that, the statute, section 9, has picked out certain

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public works which it definitely places under the control of the Minister of Public Works. I think that is the meaning of section 9. It is to make it clear and beyond doubt that the work contemplated or referred to in section 9 shall be in the hands of the Minister of Public Works. I think that is a rational interpretation to put upon that section. These are works that the Minister shall have direction of. Not that he shall be under the obligation of maintaining these works. If the statute had intended to impose the absolute obligation upon the Minister of Public Works of maintaining these, it would have used, I think, very different language from this. It would have left no room for doubt or interpretation, if the intention was to impose the obligation, but that obviously is not the object of the statute.

Then, again, it is said that the Government, if they did not invite, did something very like inviting shipowners to make use of this channel, that there was an intimation at least to them to come into the channel, and make use of it; and having done that the Government was bound to see that it was kept in a state of safety, that the Government was bound to exercise reasonable care for the purpose of giving notice of danger.

Your lordship laid down in the case of *Leprohon* v. *The Queen* (1) that a man going to the post office was not going there on the business of the Crown. That principle obtains here.

Then with regard to the notice of the danger. In this case the evidence is that the public knew just as much about the likelihood of danger in this channel as the Government did. The Government were in no better position to know whether there were anchors or boulders in the channel than outsiders.

(1) 4 Ex. C. R. 100.

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Now, it is not like the New Zealand case (1) where the Government, through its employees, through its servants, actually knew of the danger, or what was the same thing, they knew of the dangerous snag in the water, and if they had removed that they would have removed what actually caused the damage in that case. They were held to have practically known of the danger, and to have neglected to remove it.

The fact that there was latent danger, unknown danger, is not a proof that there was culpability. So in this case, the fact that there were anchors in that channel is not proof that the Government was culpably negligent in not knowing of the existence of such anchors.

He cites *Brown* v. *The Queen* (2); *Leprohon* v. *The Queen* (3); *The Queen* v. *McFarlane* (4); *City of Quebec* v. *The Queen* (5); *Maybury* v. *Madison* (6); *Forbes* v. *The Lee Conservancy Board* (7); *Davies* v. *The Queen* (8); *McHugh* v. *The Queen* (9); *The Sanitary Commissioners of Gibraltar* v. *Orfila* (10); *Castor* v. *Corporation of Uxbridge* (11); *Encyclopedia of Laws of England* (12); *Pollock on Torts* (13); *Radley* v. *The London & North Western Railway Co.* (14); *Butterfield* v. *Forrester* (15); *Sindlinger* v. *City of Kansas* (16); *Casey* v. *City of Fitchburg* (17).

C. Robinson, K.C. replied, citing: *Farnell* v. *Bowman* (18); *Sherman & Redfield on Negligence* (19); *Todd's Parliamentary Government in England* (20); *Audette's Prac. Exch. Ct.* (21).

(1) *The Queen* v. *Williams* 9 Ap. Cas. 418.
(2) 3 Ex. C. R. 79.
(3) 4 Ex. C. R. 100.
(4) 7 S. C. R. at p. 238.
(5) 2 Ex. C. R. 252.
(6) 1 Cranch at p. 170.
(7) 4 Ex. D. 116.
(8) 6 Ex C. R. 344.
(9) 6 Ex. C. R. 374.
(10) 15 App. Cas. 400.
(11) 39 U. C. Q. B. 113.
(12) Vol. 9, p. 97.
(13) 5th ed., p. 431.
(14) 1 App. Cas. 754.
(15) 11 East 60.
(16) 126 Mo. 315.
(17) 162 Mass. 321.
(18) 12 App. Cas. 643.
(19) 5 ed. secs. 249, 250, 251, 313.
(20) 2nd ed. p. 49.
(21) Pp. 81, 104.

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THE JUDGE OF THE EXCHEQUER COURT now (July 18th, 1901), delivered judgment.

This action is brought to recover damages for injuries to the steam-packet *Arabia* and to her cargo. On the 26th of September, 1897, the *Arabia*, on a voyage outward from the port of Montreal, and while passing through the ship channel at Cap à la Roche, in the St. Lawrence River, took the ground or struck against some obstruction and was badly injured and the cargo damaged. The work of making a ship channel between Montreal and Quebec with a depth of twenty-seven and one-half feet of water was commenced by the Harbour Commissioners of Montreal and continued by the Government of Canada. This work, after the Government took it over in 1889, was carried on under the direction of the Minister of Public Works. The portion of the channel where the accident to the *Arabia* occurred was finished in the year 1894. During the construction of the channel, the work of excavation was tested from time to time by sweeping the channel to see if the required depth had been obtained. But after the work was finished no further tests were made and no sweeping took place prior to the accident referred to. After the accident the Minister of Public Works caused the channel at Cap à la Roche to be swept, when two anchors and a boulder were found in the channel.

Having regard to the evidence as to the marks left on the vessel's bottom, and the position in which the anchors and boulder were found it is not probable, I think, that the injuries to the *Arabia* were caused by either of the anchors or by the boulder. But it is obvious of course that either she came in contact with some obstruction in the channel or that she took the ground or bottom, her draught having been by accident or inadvertence unduly increased after leaving

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Montreal. In the view I take of the case it is not necessary to come to any conclusion as to which of the two things suggested is the more likely to have occurred, or as to whether or not the master and pilot did not by imprudent navigation of the vessel contribute to the accident.

It is conceded, and if it were not, it is clear and well-settled that the petition in this case cannot be maintained unless there is some statute giving the suppliants the remedy which they seek.

By the 16th section of *The Exchequer Court Act* (1) it is among other things provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine "(*c*) every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;" and "(*d*) every claim against the Crown arising under any law of Canada." I refer to the latter provision in respect to claims arising under any law of Canada only to add that it does not in my view come in question here, as there is no law of Canada making the Crown liable in a case such as this, unless it be that which is recognized in the earlier provision of the section that I have cited. There is no law under which the Crown is liable for the mere non-repair of a public work, or for not using, to keep it in a safe condition, money voted by Parliament for a public work. Whether in any such case the repair shall be made or the money expended is within the discretion of the Governor in Council, or of the Minister of the Crown under whose charge the work is, and for the exercise of that discretion he and they are responsible to Parliament alone, and not to any court. As has been

(1) 50-51 Vict. c. 16.

frequently pointed out there is no remedy in any such case unless the claim arises out of a death or injury to the person or to the property on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. I have had occasion in a number of cases to refer to this provision and to discuss its origin, scope and object, and I do not see that I can now on these subjects usefully add anything to what I stated in *The City of Quebec* v. *The Queen* (1); and in *Lavoie* v. *The Queen* (2). On the general question of the liability of the Crown for torts I have nothing to add to what I stated in the cases referred to.

The first question in all these cases is as to whether or not the accident occurred on a public work. *The Exchequer Court Act* contains no definition of the expression "public work," but the Act from which the provision in question, clause (*c*) of section 16, was adopted, contained such a definition. It will be found in *The Revised Statutes of Canada*, chapter 40, section 1 (*c*) and is re-enacted in *The Expropriation Act* (3). With the exception of some works that are under the charge of other ministers, the Minister of Public Works is by the 7th section of *The Public Works Act* given the management, charge and direction of the public works so enumerated. Among them we find "the "construction and repair of * * works for improv- "ing the navigation of any water." Now it cannot be doubted that the ship channel between Montreal and Quebec is a work for improving the navigation of the St. Lawrence River; and that while the work was in the course of construction or under repair it was a public work under the management, charge and direction of the Minister of Public Works. The same may

(1) 2 Ex. C. R. 252; 3 Ex. C. R. 164.
(2) 3 Ex. C. R. 96.
(3) 52 Vict. c. 13 s. 2 (*d*).

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be said of any work of dredging or excavation to deepen or widen the channel of any navigable water in Canada. But it does not follow that once the Minister has expended public money for such a purpose the Crown is for all time bound to keep such channel clear and safe for navigation; and that for any failure to do so it must answer in damages. It is argued that the section of *The Public Works Act* to which reference has been made, and the 9th section of the same Act, which provides that the minister shall direct the construction, maintenance and repair of all harbours, roads or parts of roads, bridges, slides and other public works and buildings constructed or maintained at the expense of Canada, impose that duty and responsibility on the Minister, and that the Crown is liable for his failure to maintain any public work and to keep it in repair. With that view I do not agree. I do not think it was the intention of Parliament in enacting *The Public Works Act* to impose any such obligation or responsibility on the minister and through him on the Crown. There is an evident intention to provide that when any work of the kind was to be done, it should, in respect of the enumerated works, be done under the direction of the Minister of Public Works; but I do not think there was any intention to make any such marked and striking departure from well understood rules and principles of government as that contended for. *The Public Works Act* was passed long before *The Exchequer Court Act*, and it cannot be doubted that it was never intended by any provision occurring therein to subject the Minister in respect of his political action or his discretion, or the Crown's as to the expenditure of public money, to the jurisdiction of any court.

On the broad question as to whether or not the Crown was under a legal obligation to keep the ship

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channel at Cap à la Roche in repair, and to sweep it and see that no obstruction had occurred therein, my opinion is that no such obligation existed. The importance of such precautionary measures is not questioned, and the expenditure necessary for the purpose is small and trifling compared with the great commercial interests involved. But the question as to whether the public money should be so expended or not was for the Governor in Council, or the responsible minister to determine, and it is not for the court to review the exercise of that discretion. On this question I adhere, without repeating them, to the views that I expressed in *McHugh* v. *The Queen* (1).

As for the Chief Engineer of the Department of Public Works, and the officers under him, it is clear that it was no part of their duties, without instructions and directions from the Minister, to undertake the sweeping of this channel, or to take any steps to keep it free from obstructions. Having no such duty they could not of course neglect it; and there is nothing in what they did or omitted to do to sustain the present petition.

Some reliance is placed by the suppliants on the fact that the *Arabia* was duly cleared by the Port Warden of Montreal, and that it is one of the regulations of the port that he shall not issue his certificate of clearance to any vessel which in his judgment is too deeply laden to pass with safety through the ship channel between Montreal and Quebec. This it is said is a representation that the *Arabia* might at the date of the accident pass through the channel safely, and that there were no obstructions in it to render its navigation dangerous. To that branch of the suppliants' case there are several answers which, it seems to me, dispose of it. First, there is no statute that makes the

(1) 6 Ex. C. R. 374.

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Crown liable for any misrepresentation of its officers, unless such misrepresentation should amount to negligence within clause (*c*) of the 16th section of *The Exchequer Court Act*; and without some such statute the Crown is not liable. Then the port warden and deputy port wardens of Montreal are not officers and servants of the Crown within the meaning of the provision cited from *The Exchequer Court Act*; and they had no duty to see that the ship channel at Cap à la Roche was kept in repair and free from obstruction or that it was swept. They had in the clearing of vessels to act upon the information given them from day to day as to the depth of water in the channel, and there is not the slightest ground for holding that the accident was due to any negligence or default on their part.

There will be judgment that the suppliants are not entitled to any portion of the relief sought by their petition; and the costs, as usual, will follow the event.

Judgment accordingly.

Solicitors for suppliants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitor for respondent: *J. J. O'Meara.*