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Feb. 1
May 22

JOHN F. SCHWELLA .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT;

AND

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, LAMBERT JOHN ROGERS AND RALPH EDWARD TORGALSON } THIRD PARTIES.

Practice—Third party notice—Exchequer Court Act, R.S.C. 1952, c. 98, s. 29(d)—Negligence Act, R.S.O. 1950, c. 252, ss. 2, 3, 4, 5 and 6—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3—Right of Crown to claim contribution and indemnity from third parties pursuant to the Negligence Act—Application to strike out third party notice dismissed —"Actions and suits of a civil nature at common law or equity".

Suppliant by his Petition of Right seeks damages from respondent for personal injuries sustained by him when an aeroplane owned by the Hydro-Electric Power Commission of Ontario, in which he was a passenger, crashed, it being alleged that such crash was caused by the negligence of the Department of Transport. Respondent pleads contributory negligence on part of suppliant and invokes the provisions of the *Negligence Act*, R.S.O. 1950, c. 252. Respondent also issued, pursuant to Rule 234 of the General Rules and Orders of the Exchequer Court, a third party notice directed to the Hydro-Electric Power Commission of Ontario and to two of the persons alleged to have operated the aircraft as servants of the Hydro-Electric Power Commission of Ontario. The Crown claimed contribution and indemnity from these third parties pursuant to the *Negligence Act*. The third parties now apply to the Court to strike out the third party notice on the ground, *inter alia*, that this Court has no jurisdiction to entertain the third party proceedings.

Held: That the right of the Crown to take advantage of the provisions of the *Negligence Act* does not depend on a statute of the Parliament of Canada but on a recognized right of the Crown to take advantage of a provincial enactment and if the *Negligence Act* by its terms is applicable in a certain situation the Crown may take advantage of it to recover the contribution or indemnity which it provides.

2. That the expression "actions and suits of a civil nature at common law or equity" as contained in s. 29(*d*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98 is wide enough to embrace any civil action for contribution or indemnity regardless of how such right to contribution or indemnity arose, and this Court has jurisdiction under s. 29(*d*) of the *Exchequer Court Act* to entertain and determine the claim asserted by the Crown.

3. That s. 6 of the *Negligence Act* couples with the right to indemnity or contribution under s. 2 of the Act a further right to have the other tort feasor made a party in the same action in which the first party is sued for damages and the right given by s. 6 may be pursued by the

Crown in the Exchequer Court when action is brought against the Crown and the Crown makes out an appropriate case for the application of s. 2(1) of the *Negligence Act*.

MOTION to have third party notice struck out.

The motions were argued before the Honourable Mr. Justice Thurlow at Toronto.

E. B. Jolliffe, Q.C. for suppliant.

W. B. Williston, Q.C. for respondent.

F. A. Brewin, Q.C. for third party Lambert John Rogers.

D. K. Laidlaw for third parties The Hydro-Electric Power Commission of Ontario and Ralph Edward Torgalson.

THURLOW J.:—These are applications on behalf of the third parties to strike out a third party notice by which the Crown asserts against them a claim for contribution and indemnity pursuant to the *Negligence Act,* R.S.O. 1950, c. 252. The proceedings were commenced by the suppliant by a petition of right claiming damages for personal injuries sustained by him when an aeroplane owned by The Hydro-Electric Power Commission of Ontario, in which he was a passenger, crashed near London in the Province of Ontario. In the petition it is alleged that the crash of the aircraft was caused by the negligence of the Department of Transport (Air Service Branch). By its defence the respondent denied the allegations above mentioned and pleaded contributory negligence on the part of the suppliant. In so doing, it referred to and invoked the provisions of the *Negligence Act*. At the same time, it issued pursuant to Rule 234 of the General Rules and Orders of the Exchequer Court a third party notice directed to The Hydro-Electric Power Commission of Ontario and to Lambert John Rogers and Ralph Edward Torgalson. The last two parties are alleged to have operated the aircraft as servants of The Hydro-Electric Power Commission of Ontario. By the third party notice, the Crown alleges that if the suppliant's injuries were caused by facts for which Her Majesty must respond said damages were caused or contributed to by the negligence of the third parties and, as previously mentioned, the Crown claims contribution and indemnity from them pursuant to the *Negligence Act*. The third parties entered appearances, that of Lambert John Rogers purporting to be without prejudice to his submission that this

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Court does not have jurisdiction in respect to the third party proceedings. No leave was obtained to enter a conditional appearance. The Hydro-Electric Power Commission of Ontario and Ralph Edward Torgalson now apply to strike out the third party notice as against them and by a separate motion, though on identical grounds, Lambert John Rogers also applies to have the third party notice struck out as against him. The motions were heard together. At the same time the respondent applied for an order for directions as to the trial of the third party proceedings and for an order joining The Hydro-Electric Power Commission of Ontario, Lambert John Rogers, and Ralph Edward Torgalson as third parties in case the third party notice is held to be improperly issued. It was agreed between counsel that if the applications to strike out the third party proceedings failed and an order for directions was made the particular directions could be agreed between counsel.

The applications to strike out the third party notice are made on three grounds:

(a) that this Court has no jurisdiction to entertain the third party proceedings herein,

(b) that the third party notice is not in accordance with or authorized by the *Exchequer Court Act* or the rules of the Exchequer Court passed in pursuance of the said Act,

(c) that assuming that the Exchequer Court has jurisdiction to grant the relief claimed in the third party notice as against the third parties pursuant to the *Negligence Act,* then no leave to issue the third party notice has been obtained from the Exchequer Court or from any other court if any other court has jurisdiction to grant such leave.

In support of ground (a), it is argued (1) that no right to contribution or indemnity exists between tort feasors at common law and that no such right is conferred on the Crown by the *Negligence Act* or by any other statute; (2) that as the cause of action asserted in the third party notice is a purely statutory right created by provincial law it is not within the matters over which jurisdiction is conferred on this Court, the right of the Parliament of Canada to confer

jurisdiction upon this Court being restricted by s. 101 of the *British North America Act* to the setting up of courts for the administration of "the laws of Canada"; (3) that the right of contribution and indemnity created by the *Negligence Act* is coupled with a procedure for enforcing it, that the procedure so provided is the only method for enforcing the right and that, as such procedural provisions are not applicable in or binding on this Court, this Court is without jurisdiction to entertain the claim.

The argument in support of grounds (b) and (c) is that the provisions of Rule 234 do not apply to third party proceedings to enforce the right of contribution and indemnity arising under the *Negligence Act* and that leave to join a third party is necessary under s. 6 of that Act.

The *Negligence Act* provides as follows:

2. (1) Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2 and 3, where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

[Subsections (2) and (3) are not applicable.]

3. A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tort feasor, in which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

6. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant or may be made a third party to the action upon such terms as may be deemed just.

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The applicants' contention that no right to contribution or indemnity is conferred on the Crown by the *Negligence Act* is that the legislature of a province cannot confer rights or impose obligations on the Crown, that the rights and obligations created by s. 2(1) of the *Negligence Act* are reciprocal, and that, as the Crown is not bound by the obligation, it is not entitled to take the benefit of the right.

The *Crown Liability Act*, S. of C. 1952-53, c. 30, provides as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Under this section, the law applicable for determining when the Crown is liable in the case of tort committed in the province of Ontario is the law of that province and includes the provisions of the *Negligence Act*, which was in force when the *Crown Liability Act* came into effect. When, pursuant to the *Crown Liability Act*, the Crown is sued in respect of a tort occurring in Ontario, it cannot set up contributory negligence of the suppliant as a complete defence as it was at common law but must raise that defence subject to the provisions of the *Negligence Act* requiring an apportionment. See *The King v. Murphy* (1), a case decided under s. 19(*c*) of the *Exchequer Court Act*. But when the Crown is affected by the provincial statute as above mentioned it is so affected by virtue of the provisions of a statute of the Parliament of Canada, rather than by virtue of the provincial enactment. On the other hand, when the Crown in exercise of the same rights possessed by any individual sues to recover damages caused by negligence, the *Negligence Act* may apply to afford to the Crown a claim where, but for the provisions of the *Negligence Act*, the Crown would have no claim at all. But in such a case the Crown can claim "only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown". *Toronto Transportation Commission v. The King* (2). See the judgment of Kerwin J. as he then was, at p. 515. While it may be that no pro-

(1) [1948] S.C.R. 357. (2) [1949] S.C.R. 510.

vision has been made in the *Crown Liability Act* or any other statute for recovery by a tort feasor of contribution or indemnity from the Crown, the right of the Crown to take advantage of the provisions of the *Negligence Act* does not depend on a statute of the Parliament of Canada but on a recognized right of the Crown to take advantage of a provincial enactment, and if the situation established is one to which the *Negligence Act* by its plain terms is applicable, in my opinion the Crown can take advantage of it to recover the contribution or indemnity which it provides. The right of the Crown to take advantage of s. 4 of the same statute was upheld in *Toronto Transportation Commission v. The King* (*supra*), and it was so upheld quite independently of any provision of any federal statute rendering the same section of the *Negligence Act* applicable to bind the Crown in the opposite situation.

Moreover, while, apart from statute, the Crown is not liable at all in tort, when Parliament enacted that the Crown should be liable in tort under the law of the province the Crown, in my opinion, became entitled to exercise any right which an ordinary person so liable might exert under the general law of the province. By the terms of the *Negligence Act* a person *found* liable becomes entitled to the contribution and indemnity provided by the Act and when, pursuant to the *Crown Liability Act,* the Crown is *found* liable, I see no reason why it should not have the same right as any other person in the like situation.

The second contention involves the interpretation of s. 29(*d*) of the *Exchequer Court Act,* and one of the objections taken is similar to that taken in *Consolidated Distilleries Ltd. v. The King* (1). In that case the right sought to be enforced arose on certain bonds given to secure the payment of excise taxes, and in delivering the judgment of the Judicial Committee Lord Russell of Killowen said at p. 520:

> The question of jurisdiction depends upon a consideration of the British North America Act, 1867, and the Exchequer Court Act (R.S. Can., 1927, c. 34). The matters in regard to which the Provincial legislatures have exclusive power to make laws include, under the British North America Act, s. 92, head 13—"Property and civil rights in the province"—and s. 92, head 14—"The administration of justice in the province, including the constitution, maintenance and organisation of provincial courts,

(1) [1933] A.C. 508.

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both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts". Sect. 101, however, provides that: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the . . . establishment of any additional courts for the better administration of the laws of Canada".

The Exchequer Court of Canada was constituted in the year 1875 in exercise of this power. It was conceded by the appellants (and rightly, as their Lordships think) in the argument before the Board, that the Parliament of Canada could, in exercising the power conferred by s. 101, properly confer upon the Exchequer Court jurisdiction to hear and determine actions to enforce the liability on bonds executed in favour of the Crown in pursuance of a revenue law enacted by the Parliament of Canada. The point as to jurisdiction accordingly resolves itself into the question whether the language of the Exchequer Court Act upon its true interpretation purports to confer the necessary jurisdiction. The relevant section is s. 30, which is in the following terms: "30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information *in rem*, and as well in *qui tam* suits for penalties or forfeiture as where the suit is on behalf of the Crown alone; (*b*) in all cases in which it is sought at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands; (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. R.S., c. 140, s. 31." By virtue of s. 2(*a*) the Crown means the Crown in right or interest of the Dominion of Canada.

The learned President held that the Exchequer Court had jurisdiction, inasmuch as the bonds were required to be given by a law enacted by the Parliament of Canada in respect of a matter in which it had undoubted jurisdiction. The subject-matter of the actions directly arose from legislation of Parliament in respect of excise.

The Chief Justice thought that the cases fell clearly within s. 30(*d*), and probably also within s. 30(*a*). Duff J., while suggesting a possible doubt as to the application of sub-s. (*a*), held that the cases were plainly within sub-s. (*d*).

Their Lordships are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by s. 30, beyond what is necessary for the decision of this particular case. Each case as it arises must be determined in relation to its own facts and circumstances. In regard to the present case their Lordships appreciate that a difficulty may exist in regard to sub-s. (*a*). While these actions are no doubt "cases relating to the revenue", it might perhaps be said that no law of Canada is sought to be enforced in them. Their Lordships, however, have come to the conclusion that these actions do fall within sub-s. (*d*). It was suggested that if read literally, and without any limitation, that subsection would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be *ultra vires* the Parliament of Canada as one not covered by the power conferred by s. 101 of the British North America Act. Their Lordships, however, do not think that sub-s. (*d*), in the context in which it is found, can properly be read as

free from all limitations. They think that in view of the provisions of the three preceding sub-sections the actions and suits in sub-s. (*d*) must be confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be *ultra vires*, and the present actions appear to their Lordships to fall within its scope. The Exchequer Court accordingly had jurisdiction in the matter of these actions.

The present s. 29 was s. 30 when the above case arose.

The contention of the third parties is that the right asserted in the third party proceedings is a statutory one and not an action or suit either at common law or equity and further that Parliament could not confer and, therefore, has not conferred upon the Exchequer Court jurisdiction to enforce a right arising under a provincial statute.

The right asserted is, both in its nature and by the name given to it by the *Negligence Act*, a right to contribution or indemnity, and in my opinion the expression "actions and suits of a civil nature at common law or equity" is wide enough to embrace any civil action for contribution or indemnity, regardless of how such right to contribution or indemnity arose.

On the constitutional point, the test is whether or not the subject matter of the action is within the legislative competence of Parliament. The point is not free from difficulty, but I have come to the conclusion that, whether or not there is any other right or power exercisable by Parliament to legislate generally in relation to rights of the Crown arising as this one does under a provincial statute (as to which I express no opinion), it lies well within the legislative competence of Parliament in relation to aeronautics to enact laws respecting liability in tort in connection with or arising from aeronautical operations and to provide as well in such cases for both apportionment of fault and liability of one tort feasor to another. It would also be open to Parliament, if it saw fit, to change or abolish in such cases the right of contribution or indemnity between tort feasors which, but for such legislation, would attach in such situations under the general law of the province. Accordingly, I think this Court has jurisdiction under s. 29(*d*) of the *Exchequer Court Act* to entertain and determine the claim asserted by the Crown.

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The third point is that this Court does not have jurisdiction because the procedure enacted by s. 6 of the *Negligence Act* is inapplicable in this Court and such procedure is the only means of enforcing the right in cases to which s. 6 applies. I think this argument errs in treating s. 6 as legislation relating exclusively to courts and procedure in them rather than as legislation relating as well to the civil right created by s. 2(1). It may be noted that by s. 4 it is enacted that in certain circumstances "the court" shall apportion damages. In *Toronto Transportation Commission v. The King* (*supra*) this Court made such an apportionment apart from any statute of Parliament making s. 4 applicable in this Court, and the judgment on appeal was based on the apportionment so made. While s. 4 is couched in language appropriate to procedure, I do not think that the power of this Court to make an apportionment as mentioned in s. 4 is derived from s. 4. On the contrary, I think that, besides prescribing procedure, s. 4 also creates a substantive right to recover a portion of the damages, and when making such an apportionment this Court is not carrying out any function imposed on it by the provincial statute but is simply carrying out its ordinary jurisdiction to give effect to the substantive rights of the parties.

The situation is similar under s. 6. While that section may limit the mode by which, in certain circumstances, the substantive right created by s. 2(1) may be enforced, it couples with the right to indemnity or contribution under s. 2 a further right to have the other tort feasor made a party in the same action in which the first party is sued for the damages. In this view, I see no reason why the right given by s. 6 cannot be pursued by the Crown in the Exchequer Court when action is brought against the Crown and the Crown makes out an appropriate case for the application of s. 2(1).

The remaining point is that Rule 234 is inapplicable to proceedings of this kind. No doubt, rights of contribution or indemnity between tort feasors were non-existent when Rule 234 was first enacted, but that Rule by its terms provides a method for obtaining relief against a third party "where a defendant claims to be entitled to contribution or indemnity or to relief over against any person not a party to the action". As already mentioned, the right here sought

to be enforced is a right to *contribution or indemnity*. It is neither contractual nor delictual in its nature but is simply a right created by statute. It arises when two parties have been *found* at fault, a condition which can be satisfied only in a proceeding in which both are parties and are found at fault by an adjudication binding on both of them. While in this Court the third parties cannot be *found* at fault as between themselves and the suppliant, they may, as between themselves and the Crown, be found at fault for the purpose, if it becomes necessary, of determining the degrees of fault and the condition for giving the relief sought will thus be satisfied. I think that procedure by third party notice is appropriate procedure for this purpose, as well as to recover the contribution or indemnity provided by s. 2(1).

Under Rule 234 no leave is required for the issue of a third party notice. But under s. 6 of the *Negligence Act* it is provided that a person may be added as a defendant or may be made a third party "whenever it appears" that such person, not a party, is or may be wholly or partly responsible for the damages claimed. The words "whenever it appears" and "upon such terms as may be deemed just" would seem to make it necessary to apply for leave before issuing a third party notice in cases to which s. 6 applies. However, the view which I take on this point is that, if leave was necessary, the right to raise the objection was waived by The Hydro-Electric Power Commission and Ralph Edward Torgalson by entering an unconditional appearance and by Lambert John Rogers by entering an appearance reserving only the right to object to the jurisdiction of the Court in respect to the third party proceedings.

The applications to strike out the third party notice will be dismissed with costs and an order will be made for directions for the trial of the third party proceedings pursuant to the respondent's application therefor.

Judgment accordingly.

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