1946
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Apr. 17

BETWEEN:

PAUL BELLEAU.....PLAINTIFF;

AND

MINISTER OF NATIONAL HEALTH AND WELFARE, THE HONOURABLE BROOKE CLAXTON AND THE CHIEF of NARCOTIC BRANCH, DEPARTMENT OF NATIONAL HEALTH AND WELFARE, COLONEL C. H. L. SHARMAN, both personally and ès qual.....DEFENDANTS.

Crown—Minister of National Health and Welfare—The Department of National Health and Welfare Act, 8 Geo. VI, c. 32, ss. 3 and 5 (g)—Chief of the Narcotic Branch—Action by a user of drugs seeking relief against orders given by the Minister and the Chief of the Narcotic Branch of the Department of National Health and Welfare and directed to his physicians to refrain from supplying him with morphine. —The Exchequer Court Act, R.S.C., 1927, c.34—Minister of National Health and Welfare is not an officer of the Crown within the meaning of s. 30 (c) of the Exchequer Court Act—The Opium and Narcotic Drug Act, 1929, ss. 6 (1), 7, 16 and rule 9—Acts done by the Minister and by the Chief of the Narcotic Branch acting upon the directions of the Minister in the administration of the Act, are not subject to review by the Exchequer Court if done in an administrative capacity—The Exchequer Court of Canada has no power under law to prevent a Minister of the Crown from transgressing his administrative function and entering the judicial field—The provisions of the Opium and Narcotic Drug Act, 1929, are intra vires of the Parliament of Canada —Action dismissed.

Held: That the Court has not jurisdiction to grant the relief sought in the action.

2. That the Minister of National Health and Welfare is not an officer of the Crown within the meaning of section 30 (c) of the Exchequer Court Act.

3. That the actions done by the Minister of National Health and Welfare and those by the Chief of the Narcotic Branch thereof acting upon the directions of the Minister in the administration of the Opium and Narcotic Drug Act, are not subject to review by the Exchequer Court if done in an administrative capacity.

4. That the Court has no power under law to prevent a Minister of the Crown from transgressing his administrative function and entering the judicial field.

5. That the Opium and Narcotic Drug Act, 1929, is valid and is not ultra vires of the Parliament of Canada. *Rex* v. *Gordon* (1928) 49 C.C.C. 272; *Ex parte Wakabayashi* (1928) 49 C.C.C. 392 and *Standard Sausage Company* v. *Lee* (1933) 4 D.L.R. 501; (1934) 1 D.L.R. 706 followed.

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ARGUMENT on questions of law ordered to be set down and disposed of before the trial.

The argument was heard before the Honourable Mr. Justice Angers at Ottawa.

Charles M. Cotton, K.C. for plaintiff.

Rosario Genest, K.C. and *Charles Stein K.C.* for defendants.

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

ANGERS J. now (April 17, 1948) delivered the following judgment:

The plaintiff, by his action, asks that it be declared:

a) that under the Opium and Narcotic Drug Act, 1929, and its amendments and the regulations made thereunder the defendants have no right or authority to interfere in the treatment duly licensed physicians and members of the College of Physicians and Surgeons of the Province of Quebec, in good standing, consider necessary for their patients, and particularly to order physicians to refrain from prescribing such amount of morphine as they may deem their patients require for medicinal purposes;

b) that the defendants have no right or authority under the said Act, its amendments and regulations to deprive duly licensed physicians and members of the College of Physicians and Surgeons of the Province of Quebec, in good standing, of the right to obtain such morphine as they may require for their patients for medicinal purposes and to deprive them of the right of having their drug prescriptions filled;

c) that by giving orders to the attending physicians of plaintiff, all of whom were duly licensed physicians and members in good standing of the College of Physicians and Surgeons of the Province of Quebec, to decrease the amount of morphine they deemed necessary to prescribe the plaintiff for medicinal purposes, the defendants violated the provisions of the Quebec Medical Act;

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d) that plaintiff is suffering from a medical and physical condition which requires him to receive such morphine as may be prescribed by his attending physicians for medicinal purposes;

e) that the defendants be enjoined for the future from interfering in any manner in the treatment that plaintiff's attending physicians may deem that he requires for medicinal purposes, and particularly that they be enjoined to refrain from giving any orders whatsoever to any attending physicians of the plaintiff, duly licensed and members in good standing of the College of Physicians and Surgeons of the Province of Quebec, as to the amount of morphine such attending physicians may prescribe for him for medicinal purposes, whether the plaintiff be at a hospital or not;

f) that the defendants be ordered, after the service upon them of the judgment to be rendered herein, to abide by and obey all the orders therein contained under pain of all legal penalties;

g) that it be declared by the judgment to be rendered herein that the judgment will be authority for any druggist or other lawful supplier of morphine to fill in any prescriptions for morphine that any attending physician of plaintiff, duly licensed and a member in good standing of the College of Physicians and Surgeons of the Province of Quebec, may deem necessary to prescribe for plaintiff for medicinal purposes;

And subsidiarily, should the prayers contained in paragraphs a) and b) not be granted, that it be declared that insofar as the Opium and Narcotic Drug Act, 1929, its amendments and regulations made thereunder, may purport to authorize the defendants to interfere with the morphine treatment which duly licensed physicians and members in good standing of the College of Physicians and Surgeons of the Province of Quebec are of the opinion that their patients require for medicinal purposes and to order such physicians to cease so prescribing morphine for their patients and to blacklist such physicians who may not obey their orders and to deprive them of their rights to obtain morphine to treat their patients and to have their drug prescriptions filled, is to that extent unconstitutional

and ultra vires of the legislative powers of the Parliament of Canada as being for other reasons legislation relating to civil rights within the Province;

The plaintiff prays for costs in any event against the defendant Sharman personally, but without costs against the defendant The Minister of Health and National Welfare, except in case of contestation of the present action by them, and subsidiarily, should this prayer not be granted, that the Court recommend the Crown to pay the costs of the present action.

In his statement of claim the plaintiff says in substance as follows:

he is presently and has been for some months hospitalized at the public charge or at the charge of relatives at Notre Dame Hospital, City of Montreal, where he has been and is obliged to remain because of the illegal and ultra vires acts of the defendants;

he enlisted as a volunteer in the Canadian Army during the war of 1914-18; he was sent overseas, and subsequently in the fall of 1916, he was sent back to Canada as a 100 per cent war casualty from tuberculosis;

he was hospitalized in military hospitals till some time in 1917, when he was given his discharge;

he is in possession of the King's Certificate, which is only given to soldiers who suffer total disability and receive honourable discharge for honourable service;

subsequently to his discharge, he was in a private sanatorium until 1918, and thereafter at various times he was, because of his health, obliged to be in sanatoria and hospitals, up to 1920;

at all times while he was in military hospitals and in the sanatoria and other hospitals, he was administered morphine because of his medical and physical condition; and when he was not in hospitals, or sanatoria, he was under the care of physicians, who prescribed morphine for him because of his medical and physical condition;

in 1929, he was obliged to go to the "bush" for his health, and was given a permit by the Narcotic Branch of the Department of Pensions and National Health, to purchase morphine up to an amount of from 29 to 30 grains per day;

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from 1930 to 1938, the plaintiff and his physicians were in touch with the Department of Pensions and National Health, which at all times continued his permit to receive morphine because of his medical and physical condition;

the plaintiff was able, by great care, to regain his health and to reduce the amount of morphine that he requires because of his medical and physical condition to 10 grains a day;

in the fall of 1934, and the spring of 1938, the defendant Sharman wrote the plaintiff, congratulating him upon his success in reducing his dosage of morphine and of the way he had been able to re-establish himself in civil life;

the Department of Pensions and National Health, on several occasions during said period, advised the plaintiff that it was not the policy of the Department to interfere with the morphine treatment which physicians deemed necessary to prescribe for their patients;

under the care of his physician and because of the amount of morphine he was receiving, the plaintiff had succeeded in arresting his tuberculosis and re-establishing himself in civil life; he also was able to occupy a position that allowed him to support himself and his wife and to enjoy the respect of his relatives and friends;

during or about the year 1939, the defendant Sharman began to interfere with the treatment the plaintiff was receiving from his then attending physician, Dr. G. H. Courchesne, of the City of Quebec, and demanded that the said Dr. Courchesne take steps to change the treatment he considered the plaintiff required, and demanded that the plaintiff be submitted to a treatment leading to a complete cessation of the use of any morphine by him;

the said Dr. Courchesne, despite the numerous threats of legal proceedings made by the defendant Sharman, refused to accede to defendant's demands;

the defendant Sharman continued his threats of legal proceedings against plaintiff's attending physician, Dr. Courchesne, which threats he never carried into effect, and in the beginning of the year 1942, the Minister of Justice was approached to use his influence with the Department of Pensions and National Health, to have the defendant Sharman cease interfering with the treatment being given to the plaintiff by his physician;

at the request of the Minister of Justice, the plaintiff was examined by Doctors Lucien Larue and Sylvio Caron, both eminent physicians of the City of Quebec, who reported to the Minister that the hospitalization of the plaintiff would be useless and disastrous from more than one point of view;

the then attending physician of the plaintiff, Dr. Courchesne, also made a report to the Minister of Justice to the same effect;

the defendant Sharman refused to accept the reports of Doctors Larue and Caron made to the Minister of Justice and which had been forwarded by him to the then Department of Pensions and National Health;

Dr. Lucien Larue, in company with Mr. Jean Genest, K.C., interviewed the Minister of Pensions and National Health on behalf of plaintiff, at which interview Dr. Larue expressed very strong opinions about the hospitalization of the plaintiff as demanded by Colonel Sharman, stating it would be disastrous to the plaintiff in every respect;

on the representations of the said Dr. Lucien Larue and Mr. Jean Genest, K.C., the Honourable Ian Mackenzie, the then Minister of Pensions and National Health, agreed to appoint a Board of three physicians to examine the plaintiff and decide if he should continue to receive morphine and to study his case;

the doctors who would examine the plaintiff were to be chosen by Dr. Lesage, Dean of the Faculty of Medicine of the University of Montreal, who nominated Doctors Jarry, Saucier and Legrand, all eminent physicians of Montreal;

at the time when the said Board made their examination of plaintiff, he had succeeded in reducing his daily morphine dosage of 29 to 30 grains to 10 grains per day;

the said Board of Physicians found that they could not advise a complete discontinuance; they thought the daily dose plaintiff was receiving of 10 grains per day could be slowly reduced to a dose difficult to precisely foresee; the reasons of their advice were that while he did not have any active tuberculosis, he had been taking morphine for 27 years and that his habit was now very old; that he had vainly submitted to cures; that formerly his doses had been enormous (as much as 30 grains per day); but that with the aid of his physicians he had succeeded in reducing his

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dose to 10 grains per day, which was compatible with his daily work which he was satisfactorily accomplishing; that a part of his salary paid an allowance to his wife; and to cut off his morphine would have the effect of rendering hospitalization obligatory for an indefinite period; that the chances of success were very doubtful considering the length of the habit; that, moreover, he would lose his living and he was not of an age when he could easily find a new position; also that he might become mentally and physically unbalanced and a charge upon society; as to the recurrence of his tuberculosis it was impossible to foresee what would happen, the report of said physicians being dated the 22nd day of April 1942;

the defendant Sharman accepted the report of the said Board, and did not further interfere between the plaintiff and his then physicians till the fall of 1942;

contrary to the advice of the Board of Physicians, chosen by the Minister of Pensions and National Health to settle the plaintiff's case, about the end of October, 1942, without further examination of plaintiff and without any consultation with either plaintiff or his physician, Dr. Courchesne, the defendant Sharman ordered Dr. Courchesne to cease prescribing morphine for the plaintiff and required that the plaintiff be hospitalized;

Dr. Courchesne refused the reiterated demands of defendant Sharman to cease prescribing for the plaintiff and advised him that he would be prepared to face any charges that the defendant Sharman might see fit to bring against him under the Opium & Narcotic Drug Act;

instead of taking any proceedings against either plaintiff or his attending physician, Dr. Courchesne, before the Courts, where the respective rights of the parties could have been decided, the defendant Sharman cancelled the permit that the plaintiff had to purchase morphine and ordered the supplier from whom the plaintiff had been receiving his morphine to cease supplying him;

furthermore, illegally, capriciously and arbitrarily and without any authority under the Opium & Narcotic Drug Act, the defendant Sharman blacklisted plaintiff with all the doctors in the City of Quebec and neighborhood and ordered them not to treat the plaintiff or to prescribe any morphine for him;

by reason of the illegal, arbitrary and capricious action of the defendant Sharman, the plaintiff was forced to become an inmate of the Mastai Institution, Quebec, on or about the 18th of January, 1943, of which Clinic the said Dr. L. Larue of Quebec was the physician in charge;

at the said institution, the said Dr. L. Larue, because of his fear of the defendant Sharman, was forced, under unauthorized orders of the defendant Sharman, to reduce the amount of morphine administered to plaintiff, until his dosage had been decreased to one-third of a grain every 24 hours;

the said Dr. L. Larue was so forced to reduce the morphine dosage of plaintiff against his own strongly expressed opinion as to the advisability of such reduction;

the said reduction of the amount of plaintiff's morphine dosage at the said Mastai Institution under the illegal and unauthorized orders of the defendant Sharman had the result foreseen by the physicians in their report of April 28, 1942, the plaintiff under the said treatment losing 40 lbs. in weight, losing his appetite, his capacity to sleep, and beginning to run a temperature, a sure sign that his tuberculosis was again becoming active;

by reason of his having been forced to enter the Mastai Institution at Quebec the plaintiff lost his position, his social standing, exhausted his savings, lost his health and has become a public charge and unable to support his wife;

his condition became such that on or about the 17th day of June, 1943, the plaintiff left the Mastai Institution and came to Montreal where, because of his medical and physical condition, he was hospitalized at the Notre-Dame Hospital, Montreal, under the instructions of Dr. Jean Saucier, one of the physicians who had formed part of the Board appointed by the Minister of Pensions and National Health hereinabove set forth, where, under medical instructions, he was given four grains of morphine per day;

he remained in the said hospital to the end of July or the beginning of August, when he was forced to leave;

about the week (?), he went to St-Benoit Refuge, in the City of Montreal, where he was again given morphine according to his requirements;

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the authorities of the St-Benoit Refuge reported to the defendant Sharman that he was an inmate of that institution, and the said authorities were ordered by the defendant Sharman to immediately and drastically reduce plaintiff's morphine treatment, and further ordered, if plaintiff did not consent to such reduction, he was to be sent from the said institution;

plaintiff, in view of his experience at the Mastai Institution, was absolutely unable to consent to any reduction of his morphine requirements and was obliged to leave the said institution on or about the 10th September, 1943;

after leaving the said hospital, he was unable to obtain any proper treatment; and, after about ten days, plaintiff was in a state of collapse, and Dr. Edmond Laurendeau was called to see him and immediately ordered his hospitalization at the Hospital Notre-Dame de la Merci, of which hospital the said Dr. Laurendeau is Superintendent, and which said hospital is under the direction of the Frères Hospitaliers de St. Jean de Dieu;

he was hospitalized and received proper treatment at the said hospital, from the 20th September 1943 to about the 1st of May, 1944;

when plaintiff entered the said Hospital of Notre-Dame de la Merci, he was suffering from a right pleuro congestion of a tubercular nature;

the plaintiff was also suffering from an excessive amount of sugar in his blood;

the physical condition of plaintiff when he entered the said hospital was due to the plaintiff having been deprived of the amount of morphine which he required because of his medical and physical condition, and was the (cumulative) result of the reduction of his morphine doses at the Mastai Institution as hereinabove set forth and his subsequent inability to obtain proper treatment, the whole because of the illegal, unauthorized, arbitrary and capricious interference of the defendant Sharman in the treatment of plaintiff considered necessary by his physicians;

the said Dr. Laurendeau advised the defendant Sharman that plaintiff was in the said institution and notwithstanding the medical and physical condition of plaintiff, the said defendant Sharman illegally, capriciously, arbitrarily and

without right ordered the said Dr. Laurendeau to rapidly and drastically decrease the morphine being administered to plaintiff, and failing plaintiff's consent to said reduction, that he should leave the said institution;

plaintiff, because of his medical and physical condition and because of the effect upon his health of any reduction in the morphine doses would have refused to consent to such reduction and was obliged to leave the said hospital at the end of April or the beginning of May, 1944;

while plaintiff was out of hospitals, he was unable to get proper treatment;

on or about the 7th day of July, 1944, plaintiff was entered as a public patient in Notre-Dame Hospital, in a weakened condition and running a temperature, under arrangements made by the Department of Public Health for the Province of Quebec and by the Anti-tuberculosis League;

he remained in the said hospital till about the 19th day of February 1945;

while he was in the said hospital, representations were made to the defendant, the Minister of National Health and Welfare, the Honourable Brooke Claxton, requesting him to interfere and to see that the plaintiff was able to obtain the medical treatment that his medical and physical condition required;

the defendant the Minister of National Health and Welfare refused to interfere;

during the last few weeks the plaintiff was at the said Notre-Dame Hospital his morphine doses were reduced from 4 to 3 grains per day, without his consent;

the plaintiff was aware of such reduction because of its reaction upon his health, though his physician and hospital authorities assured him that he was still receiving 4 grains a day;

on the 19th day of February, he was again transferred to the Hospital of Notre-Dame de la Merci in such a weakened condition that for a time the said Dr. Laurendeau, the Superintendent of said hospital, had doubts that plaintiff would survive;

on the 18th day of March 1945, in view of a condition of progressive asthenia in the plaintiff, said Dr. Laurendeau referred plaintiff to Dr. Saucier for consultation;

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on the 23rd day of March 1945, Dr. Saucier reported that the plaintiff could not stand the reduction to 3 grains of morphine per day, that he had lost weight since his last reduction and had not regained it; that he slept badly, had no appetite and was coughing and that it was in the interest of plaintiff that he should be again given the dosage of 4 grains per day;

on the 4th of May, the said Dr. Laurendeau asked Dr. Antonio Barbeau, Neurological Professor at the University of Montreal and head of the Neurological Division of the Hôtel-Dieu, Montreal, and attached to the Neurological Department of Notre-Dame de la Merci Hospital, to examine the plaintiff, which he did; and after such examination, reported as follows:

> I do not believe that it would be wise to decrease the morphine of this sick person, because of the length of the habit and because of his organic and psychological state and because of the mental danger that, under the circumstances, might result from the discontinuance.

the defendant Sharman refused to accept the opinion of Doctors Saucier, Barbeau and Laurendeau, and on the 4th day of June 1945 wrote by his subordinate, K. C. Kossick, to Dr. Laurendeau to the effect that the Minister could not approve the continuation of morphine at the dosage indicated and required Dr. Laurendeau to advise him that the dosage would be immediately and rapidly diminished or that he would abandon the case;

at that time the plaintiff suffered from asthenia and from an eruptive sore with a grayish scab, in the planatary region of his right foot; also the right cavities of his heart were distended and the cross of his aorta had moved to the level of the clavicles;

the said Dr. Laurendeau also reported as Superintendent of the Hospital Notre-Dame de la Merci to the defendant Sharman he sincerely believed that the general condition of plaintiff was precarious and necessitated hospitalization;

in conformity with the orders of the defendant Sharman, the said Dr. Laurendeau, because of his fear of the defendants, required plaintiff to leave the Hospital of Notre-Dame de la Merci notwithstanding that he was strongly of the opinion that the plaintiff required hospitalization and had so advised the defendant Sharman;

no arrangements had then been made for the plaintiff to receive proper medical treatment when he left the

Hospital of Notre-Dame de la Merci, though such medical treatment was absolutely necessary in the then state of his medical and physical condition;

the plaintiff is presently being hospitalized in Notre-Dame Hospital, Montreal, where he has been obliged to remain because of his inability to receive proper medical treatment from responsible physicians outside of any hospital by reason of the illegal, wrongful and ultra vires interference of the defendants with his medical treatment deemed necessary for him by responsible physicians;

the present precarious and weakened health of the plaintiff is solely due to the illegal, unauthorized, arbitrary and capricious action of the defendants in interfering in the treatment of plaintiff deemed necessary by duly licensed physicians and members in good standing of the College of Physicians and Surgeons of the Province of Quebec, and particularly by reason of the defendant Sharman ordering such physicians to refrain from prescribing such morphine as plaintiff required for medical purposes;

the defendants, by ordering the attending physicians of plaintiff, who were duly licensed and members of good standing of the College of Physicians and Surgeons of the Province of Quebec, to immediately and drastically reduce the amount of morphine such physicians deemed that plaintiff required for medicinal purposes, have violated the provisions of the Quebec Medical Act;

the defendants, and particularly the said Colonel Sharman, by giving the orders he has given as aforesaid to the attending physicians of plaintiff to cease prescribing such amount of morphine as they deemed the plaintiff required for medicinal purposes have arrogated to themselves powers and authority not given them under the Opium and Narcotic Drug Act 1929, its amendments and regulations made thereunder, and their interference in the treatment of plaintiff deemed necessary by his attending physicians as aforesaid has been and is a gross unauthorized, illegal and ultra vires abuse of executive power and actions in excess of the powers conferred upon them by the said Act, its amendments and regulations made thereunder;

the attending physicians of plaintiff submitted to the orders of the defendant Sharman, under fear of reprisal by the defendants and of being blacklisted and being unable

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to obtain any drug whatsoever which they may require for the treatment of their patients for medical purposes and to have their drug prescriptions filled;

if the Opium and Narcotic Drug Act, 1929, its amendments and regulations purport to authorize the defendants to interfere in the morphine treatment which attending physicians duly licensed and members of the College of Physicians and Surgeons in good standing believe to be necessary for their patients and to order such physicians to cease prescribing morphine to those patients, and blacklist any such physicians who may not obey their orders, the said Act, to that extent, is unconstitutional and ultra vires of the legislative power of the Parliament of Canada as being, for other reasons, legislation relating to civil rights within the Province;

as long as the plaintiff is hospitalized and is living a quiet life, he requires a minimum dosage of 4 grains of morphine a day which he is now receiving, but to regain his health and again take his place in society and to earn his livelihood he will require a minimum dosage of 6 grains a day because of his medical and physical condition;

the defendant Sharman is the subordinate and is under the complete power, orders and authority of the defendant the Minister of Health and National Welfare and the said defendant is bound to obey all directions and orders given him by the defendant the Honourable Brooke Claxton;

by reason of the illegal and ultra vires actions of the defendants, the plaintiff, in addition to losing his health, has been obliged to give up his occupation and by reason of the expenses to which he was put by the defendants, he has been reduced to penury and has been supported either at the public charge or by relatives;

the course of conduct of the defendant Sharman towards the plaintiff from the time he demanded that Dr. Courchesne cease prescribing morphine for the plaintiff, up to the present time, has been malicious;

without the benefit of an injunction to restrain in future the defendants from interfering in the medical treatment plaintiff requires and to restrain them from preventing plaintiff obtaining such morphine as he may require for medical purposes in the opinion of duly licensed physicians and members in good standing of the College of Physicians

and Surgeons of the Province of Quebec the plaintiff will be obliged to spend the rest of his life in hospitals, either at the public charge or at the charge of relatives, friends and should he be unable to remain in hospitals, he will be doomed to a premature and painful death.

In their original statement of defence the defendants, contrary to the provisions of Rule 95, denied generally the allegations of the statement of claim and pleaded specifically:

as a result of reports and inquiries made the Minister of the Department of National Health and Welfare came to the conclusion that plaintiff was a habitual user of drugs and that such drugs were supplied to him for self-administration and that he was not suffering from a diseased condition caused otherwise than by excessive use of drugs;

on September 22, 1942, the Deputy-Minister of the Department of Pensions and National Health wrote to Doctor Courchesne, the plaintiff's physician, and advised him that he was of opinion that there was not present in the plaintiff a diseased condition caused otherwise than by an excessive use of any drug and asked him to refrain from supplying narcotics to plaintiff, by prescription or otherwise, after October 31, 1942, and he advised him that, if he did not so refrain, appropriate action would be taken;

the statement of claim discloses no cause of action;

this Court has no jurisdiction to make the orders or grant the relief sought herein;

the defendant, the Honourable Brooke Claxton, is not an officer of the Crown within the provisions of the Exchequer Court Act;

all actions done by the defendant, the Honourable Brooke Claxton, as Minister of the Department of National Health and Welfare, in the administration of the Opium and Narcotic Drug Act, were done by him as he, in his discretion, saw fit and that such discretion is not subject to review by this Court;

the defendant, Colonel C. H. L. Sharman, in administering the provisions of the Opium and Narcotic Drug Act, was acting upon directions of his Minister, the Honourable Brooke Claxton, as the latter, in his discretion, saw fit and any acts done by him in pursuance thereto are not subject to review by this Court;

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this Court has no power to prescribe the manner in which a Minister of the Crown shall exercise his duties or functions.

As might be expected, plaintiff moved the Court:

for an order to strike out paragraph 1 of the statement of defence, as not being in compliance with Rule 95 of the Court;

for an order that the defendants furnish to plaintiff a statement specifically denying each one of the allegations of the statement of claim, which they do not admit, and the reasons for such denials;

for an order to try immediately the issues of law raised by the defendants in paragraphs 5, 6, 7, 8 and 9 of the statement of defence.

Rule 95 is clear and unequivocal; it reads thus:

95. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

Judgment was rendered on plaintiff's motion on February 22, 1946, ordering:

that the defendants furnish to the plaintiff a statement of defence specifically denying each one of the allegations of the plaintiff's statement of claim which the defendants do not admit before the 15th day of March, 1946;

that the issues of law raised by the defendants in paragraphs 5, 6, 7, 8 and 9 of the statement of defence be tried at the Exchequer Court, in the City of Ottawa, on Tuesday the 2nd day of April, 1946.

The defendants, on March 22, 1946, filed a "supplementary statement of defence" dealing specifically with each allegation of fact of the statement of claim. With this "supplementary" defence we are not concerned. The points of law to be disposed of in compliance with the judgment of the 22nd day of February 1946 may be summed up as follows:

1. Has the Exchequer Court jurisdiction to make the orders or grant the relief sought by the statement of claim?
2. Is the defendant, the Honourable Brooke Claxton, an officer of the Crown within the provisions of the Exchequer Court Act?

3. Assuming that all actions done by the defendant, the Honourable Brooke Claxton, as Minister of the Department of National Health and Welfare, in the administration of the Opium and Narcotic Drug Act, were done by him as he in his discretion saw fit, is such discretion subject to review by this Court?
4. Assuming that the defendant Colonel C. H. L. Sharman, in administering the provisions of the Opium and Narcotic Drug Act, was acting upon directions of His Minister, the Honourable Brooke Claxton, as the said Minister in his discretion saw fit, are any acts done by him in pursuance thereto subject to review by this Court?
5. Has this Court the power to prescribe the manner in which a Minister of the Crown shall exercise his duties or functions?

Counsel for plaintiff relies on paragraph (*c*) of section 30 of the Exchequer Court Act. The relevant part of the section reads thus:

> The Exchequer Court shall have and possess concurrent original jurisdiction in Canada
>
> (*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.

The first question arising is whether a Minister is an officer of the Crown within the meaning of paragraph (*c*) of section 30. The question has arisen several times and I deem it expedient to analyse briefly the various decisions which dealt with it.

In the case of *McHugh* v. *The Queen* (1), the head note, fairly accurate, is thus worded:

> There is nothing in The Public Works Act (R.S.C. c. 36) in relation to the maintenance and repair, by the Minister of Public Works, of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub-sec. (*c*) of sec. 16 of The Exchequer Court Act.

The suppliant's petition was brought to recover damages for injuries he suffered by falling from his horse while crossing a bridge over the Old Man's River, at McLeod in the North West Territories. It was alleged in the petition that the bridge was out of repair and that the horse, having put a foot into a hole, stumbled and fell upon the suppliant,

(1) (1900) 6 Ex. C.R. 374.

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causing him serious injury. There were issues of fact as to whether or not the bridge was out of repair; also as to whether the fall took place on the bridge, because of its condition. These facts were denied. The Crown also relied on the defence of contributory negligence on the part of suppliant. After stating that he did not find it necessary to determine any of these issues, Burbidge J. expressed the following opinion (p. 381):

> There is no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within clause (c) of the 16th section of The Exchequer Court Act. It was contended for the suppliant that the Minister of Public Works is an "officer or servant of the Crown" within the meaning of that provision; and that under The Public Works Act, (1886) R.S.C. c. 36, it was his duty to keep this bridge in repair; and that for his negligence in that respect the Crown is liable. It was not suggested, of course, that the minister was under any duty himself from time to time to inspect the bridge and to see that it was repaired, if repairs were needed; but that he should have taken care that there was some one charged with that duty. It is not for me, I think, to express any opinion as to whether the minister ought or ought not under the circumstances existing in this case to have appointed, or to have recommended the appointment of an overseer or caretaker for this bridge. That was, it seems to me, a matter within his own discretion which is not to be reviewed in this court, and for the proper exercise of which he is answerable to Parliament alone.

The same view was adopted by Audette, J. in *Mavor* v. *The King* (1) where it was held (inter alia) that a Minister of the Crown is not an officer or servant of the Crown within the meaning of section 20 (now 19) of The Exchequer Court Act and that the Court will not review the decision of a Minister in the exercise of his statutory discretion.

The report shows that the suppliant, by his petition of right, was seeking to recover damages resulting from an accident he met with on a return trip in his automobile on the King Edward highway from Laprairie to the City of Montreal. The accident was alleged to be due to improper maintenance of the road by the Crown.

The learned judge came to the conclusion that there was not a tittle of evidence establishing that there was any officer or servant of the Crown whose duties or employment involved the maintenance of the road in question. He concluded that from this fact it will necessarily follow that there was not any negligence of an officer or servant of the Crown acting within the scope of his duties which

(1) (1919) 19 Ex. C.R. 304.

could have caused the accident. I believe it proper to quote a passage of the judgment (p. 309):

There is no evidence on the record to show that the Crown was in any manner, under any obligation to maintain the road in question in good repairs and as was decided in the case of McHugh *v.* The Queen, (1900), 6 Can. Ex. C.R. 374, in respect of a bridge built by and at the expense of the Dominion Government where there was no officer or servant of the Crown in charge of the same, that such duty could not be ascribed to the minister himself who is not an officer or servant of the Crown within the meaning of section 20 of the Exchequer Court Act Moreover the Court has no jurisdiction to sit on appeal from exercise of any statutory discretion given to the minister. Harris *v.* The King, (1904), 9 Can. Ex. C.R. 206; Municipality of Pictou *v.* Geldert, (1893) A.C. 524; Sanitary Commissioners of Gibraltar *v.* Orfila, (1890), 15 App. Cas., 400.

A judgment in the same sense, apparently overlooked, is the one rendered by Burbidge, J. in *The Hamburg American Packet Company et al.* v. *The King* (1). The head note reads in part thus:

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.

On page 177 are the following observations by the learned judge:

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 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.

(1) (1901) 7 Ex. C.R. 150

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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.

This judgment was affirmed by the Supreme Court of Canada, 33 S.C.R. 252.

In the case of *Harris* v. *The King* (1) the facts were substantially as follows. The suppliant's husband was killed by being struck by the tender of an engine on a level crossing over the Intercolonial Railway tracks in Halifax. The evidence showed that the crossing was dangerous and that no special provision had been made for the protection of the public. Immediately before the victim attempted to cross the tracks, a train of cars had been shunted over this crossing in a direction opposite to that from which the engine and tender were coming. The engine used in shunting this train was leaking steam. The atmosphere was heavy and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke which was carried over toward the track on which the engine and tender were running and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross and, when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way.

In his judgment Burbidge J. set forth the following observations (p. 208):

And first, it is said that the accident would not have happened had there been gates or a watchman at the Green Street crossing referred to, and that His Majesty's officers and servants in charge of the Intercolonial Railway were guilty of negligence in not maintaining either a watchman

(1) (1904) 9 Ex. C.R. 206.

or gates at that crossing. That view I am not able to adopt. There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at times had been done, a watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom, in the administration of the affairs of his Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, or the Crown's officer under him whose duty it is to decide as to the matter, comes in his discretion to the conclusion not to employ a watchman or to set up gates at any crossing, it is not, I think, for the court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection.

The decisions in *Municipality of Pictou* v. *Geldert* and *Sanitary Commissioners of Gibraltar* v. *Orfila,* above referred to, may also be consulted with advantage.

Another material case is that of *McArthur* v. *The King* (1). Discussing the scope of the words "officer or servant of the Crown" within the meaning of paragraph (*c*) of section 19 of the Exchequer Court Act, the President, after saying that, with a view to fixing the limits of the liability of the Crown for negligence within the terms of the statute it would not be a correct approach to the problem to assume that every person is included in the term merely because he is performing some national or public duty or service and is in receipt of an emolument from the Crown, made these remarks (p. 96):

That such an assumption is unwarranted seems obvious. It was contended, for example, in McHugh *v.* The Queen, (1900) 6 Ex. C.R. 374, that the Minister of Public Works was an "officer or servant of the Crown" within the meaning of section 16 (c) of the Exchequer Court Act of 1887, but this view was negatived by Burbidge J. This case was later approved and followed by Audette J. in Mavor *v.* The King, (1919) 19 Ex. C.R. 304. These two cases can be considered as authorities for the statement that the term "officer or servant of the Crown" in section 19 (c)

(1) (1943) Ex. C.R. 77.

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of the Exchequer Court Act does not include a Minister of the Crown, even although he is in receipt of an emolument from the Crown. The Minister although appointed by the Crown is an adviser to the Crown and responsible to Parliament. There are also many other persons, who, although their appointments and emoluments come from the Crown, are clearly not in any sense "officers or servants of the Crown" within the meaning of the statute under discussion, such as, for example, the Lieutenant-Governors of the provinces who, although appointed and paid by the Crown, are His Majesty's representatives, and likewise the Judges of the Dominion or Provincial Courts, who, although appointed and paid by the Crown, are independent of it. These observations are made only for the purpose of showing that although the term "officer or servant of the Crown" is a general one, it does not follow that there are no limitations to its meaning. Indeed there are limitations to the term, inherent in the origin of the statute in which it appears, its context in the statute and the judicial interpretation of the meaning of the statute. . . .

Moreover, since it is quite clear that the liability of the Crown for negligence in the original statutory enactment was strictly limited, it is not to be assumed that the liability although it now covers a much wider field than it did at the outset, has now become unlimited.

A recent decision, which has some pertinence to the question at issue, is that rendered by the President in *Nicholson Limited* v. *The Minister of National Revenue* (1), in which the scope of the discretion of the Minister and the extent of the Court's jurisdiction are treated at some length (pp. 201-205).

In the case of *Literary Recreations Ltd.* v. *Sauvé* and *Murray* (2) it was held by the British Columbia Court of Appeal that "under the Post Office Act, R.S.C. 1927, c. 161, and the regulations made thereunder, the Postmaster-General of Canada has the right to determine which is 'mailable matter' and has a discretion to prohibit the use of the mails for the sending of non-mailable matter and his discretion is not open to review by a Court."

At the foot of page 391, we find the following comments by McPhilipps, J.A., relating to the discretionary power of the Postmaster-General to determine what is "mailable matter" and the absence of right of a Court of Justice to review his decision:

The Legislature having clothed the Postmaster-General with these extreme powers—but I have no doubt proper powers considering the question of peace, order and good government—it is not within the province of a Court of Justice to say what is the reasonable use of the conferred powers granted by statute. That is to say the discretion given by statute to the Postmaster-General is an unfettered discretion to determine what shall and what shall not be deemed to be mailable matter. How is it possible for the Court to say—that the Postmaster-General has

(1) (1945) Ex. C.R. 191. (2) (1932) 58 C.C.C. 385.

exercised a wrong discretion here? The language of the Legislature is, "if it be established to the satisfaction of the Postmaster-General . . . no letter . . . or other thing sent or sought to be sent through the Post Office . . . shall be deemed mailable matter:" reg. 219. That the Postmaster-General having pursued the statutory authority vested in him and having arrived at the conclusion that the appellant was using or endeavouring to use the Post Office for a fraudulent or illegal purpose—declared against the attempted user—something he was authorized to do and having exercised the power it is not for the Court to say that he has come to a wrong conclusion—he has acted and made his declaration all within the conferred powers granted to him by the Legislature. I cannot see that there is any right in the Court to invade the authority of the Postmaster-General so clearly and pronouncedly granted by the statute law.

Counsel for defendants referred to the decision of the Ontario Court of Appeal in *Peccin* v. *Lonegan et al.* (1), the head note whereof, sufficiently comprehensive and exact, is thus worded:

The fact that the Temiskaming and Northern Ontario Railway Commission appointed by the Lieutenant-Governor in Council to administer a public undertaking of the Crown in the right of the Province, is a body corporate and may sue and be sued, does not destroy the old constitutional right of immunity in respect of tortious acts of the Crown's servants or agents. The provision in the incorporating Act enabling a fiat to be granted by the Attorney-General and the fact that it was given in this case is not in itself sufficient to destroy that prerogative right.

The next case invoked by counsel for defendants is *The King and Noxzema Chemical Company of Canada, Limited* (2). The facts must be summarized briefly for a proper understanding of the decision of the Supreme Court, which, by the way, reversed the judgment of the late President of the Exchequer Court.

The respondent, a United States corporation, which had since 1932 carried on in Canada the business of manufacturing and selling toilet articles and medicated preparations to chain stores and wholesale dealers and paid sales and excise taxes on the basis of the prices charged, in 1938 entered into an agreement with Better Proprietaries Limited, a company incorporated under the laws of the Province of Ontario for the purpose of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations, whereby Better Proprietaries Limited became the sole distributor in Canada of the respondent's products.

In virtue of the said agreement, which became effective

(1) (1934) 4 D.L.R. 776. (2) (1942) S.C.R. 178.

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on January 1, 1939, Better Proprietaries Limited was to sell them at the prices previously charged by the respondent (unless the latter designated other prices) and to pay to respondent certain prices, which, it was calculated, were less than Better Proprietaries Limited's selling prices by amounts estimated to have been the cost to respondent of selling, of which it was relieved. The respondent thereafter paid sales and excise taxes on the basis of prices received from Better Proprietaries Ltd. The Minister of National Revenue, in pursuance of the powers vested in him by section 98 of the Special War Revenue Act (R.S.C., 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20), determined that these last mentioned prices were less than the fair prices on which such taxes should be imposed and that the prices at which Better Proprietaries Limited sold the goods to dealers were the fair prices on which the taxes payable by the respondent should be imposed. By information in the Exchequer Court His Majesty the King sued for the further taxes claimed and for penalties. The claim was dismissed and the Crown appealed.

It was held by the Supreme Court that the appeal should be allowed and that the Crown should have judgment for the additional taxes in accordance with the Minister's determination and for the penalties provided for by section 106 (5) of the Act.

Mr. Justice Kerwin, who delivered the judgment of Mr. Justice Rinfret, himself and Mr. Justice Hudson, made the following statements (p. 185):

> I therefore turn to the grounds upon which the President proceeded and which, of course, are relied upon by the respondent. I proceed upon the assumptions that Better Proprietaries Limited is an independent sales corporation and that the Minister thought otherwise. Even with these assumptions, we cannot be aware of all the reasons that moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal.

The learned judge here referred to the language of the Earl of Selborne in *Spackman* v. *Plumstead District Board of Works* (1) and quoted an extract from his judgment, which reads thus:

> And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

In the judgment of the Chief Justice and Davis J., delivered by the latter, we find the following observations (p. 180):

> The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to perform a duty of that sort which is often described as a quasi-judicial duty.
>
> My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new sec. 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

In the matter of Ontario Boys' Wear Limited et al. and The Advisory Committee, appointed pursuant to the provisions of the Industrial Standards Act and the schedules for the Men's and Boys' Clothing Industry, and The Attorney-General for the Province of Ontario (2), it was held that The Industrial Standards Act (R.S.O. 1937, chap. 191) and the regulations made thereunder were not ultra vires and that they were sufficiently complied with in the creation of the schedule in question. The judgment of the Ontario Court of Appeal, (1943) O.R. 526, affirming the judgment of Mackay J., (1942) O.R. 518, dismissing appellants' action, was affirmed.

The report discloses that the appellants, in their action, claimed that the Industrial Standards Act and the regu-

(1) (1885) 10 App. Cas. 229, at 235. (2) (1944) S.C.R. 349.

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lations made pursuant thereto were ultra vires and that, in any event, a certain schedule, purporting to have been established in conformity with the Act, which was approved by the Minister of Labour and on his recommendation declared to be in force by the Lieutenant-Governor in Council on or about April 1, 1939, of wages and hours and days of labour for the Men's and Boys' Clothing Industry for the Province of Ontario and which purported to confer upon the respondent, The Advisory Committee, among others, the power to collect certain assessments of money from appellants and other manufacturers engaged in the industry and to administer the schedule, was illegal and ultra vires because certain proceedings and conditions required for the creation of the schedule were allegedly not observed; that an injunction to restrain the said respondent and its servants from proceeding with prosecutions brought under the Act and from attempting to collect from appellants any sums whatever alleged to be owing under the said schedule, be granted; and that damages for legal expenses incurred in defending the prosecutions and for loss of time and travelling expenses incurred be allowed.

It appears from the notes of Kerwin J., who delivered the judgment of the Court (p. 354), that by section 8 of The Industrial Standards Act it was enacted that, if in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, he may approve it; that upon his recommendation the Lieutenant-Governor in Council may declare such schedule to be in force.

Further on (p. 357) Kerwin J. states:

On January 16th a number of persons attended at the designated committee room and the meeting was adjourned to January 19th. On that day a committee was selected with full power to consider the matters mentioned in the notice. The general meeting adjourned without any definite date being fixed. The committee met on various dates until on February 7th its members decided that a plenary session of the conference would be held on February 8th and informed the parties they represented to that effect. On February 8th the conference reconvened and agreed to a schedule. Strenuous objection was raised to this method of procedure, but by the first branch of section 8 of the Act it was the prerogative of the Minister, and his alone, to determine whether a schedule was agreed to by a proper and sufficient representation of employers and

employees. Such a determination is not reviewable by the courts, as has been held in many cases, a recent example of which is The King *v.* Noxzema Chemical Company of Canada Ltd., (1942) S.C.R. 178. The Minister exercised that prerogative, approved the agreed schedule (which was also approved by the Board), and, upon his recommendation the Lieutenant-Governor in Council declared it to be in force.

Reliance was also placed by the defendants on the decision of the Supreme Court in the case of *Les Commissaires d'Ecoles pour la Municipalité de la Paroisse de St-Adelphe and Joseph Charest et al and Patrick Douville and Les Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St-Adelphe, m.e.c.* (1).

An action had been brought by some ratepayers against the school commissioners, under the provisions of article 50 of the Code of civil procedure, asking that a certain resolution passed by the commissioners ordering the building of a school house be declared illegal, irregular and null and that a contract entered into between the commissioners and a contractor to do the work be set aside. It was held that the superintending and reforming power, order and control given to the Superior Court by article 50 of the Code of civil procedure are different from the power attributed to an appellate court; that the Superior Court cannot substitute its own opinion to the opinion of the persons or bodies mentioned in that article as to the decisions taken by the latter. It was further held that, in order to enable the Superior Court to exercise its power under that article, it is not sufficient that these persons or bodies have failed to perform some duties imposed upon them by law, but that it is necessary that their conduct will give rise to an illegality or a denial of justice which would be equivalent to fraud.

Article 50 of the Code of Civil Procedure reads thus:

50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the Province are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

Mr. Justice Taschereau, who delivered the judgment of the Court, expressed the following opinion (p. 395):

La présente action est instituée sous l'empire de l'article 50 du Code de Procédure Civile qui accorde à la Cour Supérieure un droit de surveillance et de réforme sur les corps politiques et les corporations dans la province, et cette Cour a déjà décidé que la Cour Supérieure n'est pas

(1) (1944) S.C.R. 391.

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un tribunal d'appel des décisions des commissaires d'écoles. Le pouvoir conféré à la Cour Supérieure par l'article 50 C.P.C. est un pouvoir de contrôle et de surveillance qui diffère des pouvoirs que possède une cour d'appel.

The learned judge then referred to the case of *Hébert* v. *Les Commissaires d'Ecoles de St-Félicien* (1) and cited a passage from the judgment of Brodeur J. appearing on page 180. I do not deem it necessary to reproduce this passage which may conveniently be consulted.

Following an observation thereon, Mr. Justice Taschereau added (p. 396):

Les tribunaux, évidemment, n'interviendront pas lorsque, dans l'exercice des pouvoirs que la loi leur confère, les commissaires d'écoles prennent des décisions qu'ils croient être dans l'intérêt de la population et que, cependant, d'autres personnes peuvent ne pas approuver. Ce serait, comme le dit M. le juge Brodeur, dans la cause citée précédemment, substituer leur opinion à celle des commissaires, empiéter sur leurs attributions, et faire jouer à la Cour un rôle que la loi attribue aux membres de la commission scolaire.

See also *Therrien* v. *l'hon. W. Mercier et l'hon. Boucher de la Bruyère et al., m.e.c.* (2).

Counsel for defendants also rested on the judgment of Mr. Justice Pierre-F. Casgrain in the case of *Paul Belleau* v. *Hon. Brooke Claxton, Minister of National Health and Welfare,* and *The Chief of the Narcotics Branch of the said Department, Colonel Sharman, both personally and ès qual.* (3). The purpose of counsel in citing this judgment was to establish: 1. that a decision of a Minister in his administrative capacity cannot be revised by a Court; 2. that this judgment constitutes res judicata, the Superior Court of the Province of Quebec and the Exchequer Court having concurrent jurisdiction in virtue of paragraph (*c*) of section 30 of The Exchequer Court Act.

With respect to the first holding, which, though not very explicit, may possibly be inferred from the following "Considérant" (p. 222):

Considérant que la Cour est sans juridiction en raison de la matière vu qu'il s'agit dans l'espèce d'actes ministériels, faits et exécutés par un Ministre de la Couronne relevant du Parlement fédéral du Canada, dans l'exercice de ses fonctions comme ministre, et d'un employé subalterne de son Département, exerçant ses fonctions sous son contrôle, en vertu d'une loi fédérale et de ses règlements dûment édictés et approuvés par le Parlement du Canada;

it abides by the previous decisions on the subject.

(1) (1921) 62 S.C.R. 174.
(2) (1915) R.J.Q. 24 B.R. 352.
(3) (1946) R.P.Q. 220.

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In connection with the second contention that the judgment constitutes res judicata counsel for defendants relied, as previously noted, on paragraph (*c*) of section 30 of The Exchequer Court Act. He could also have founded his contention on articles 40 and 48 of the Code of Civil Procedure of the Province of Quebec.

The material part of article 40 reads as follows:

40. The courts which have jurisdiction in civil matter in the Province are:

2. The Superior Court;

8. The Exchequer Court of Canada, which is a court of federal constitution.

Article 48 reads thus:

48. The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court or of the Exchequer Court of Canada and particularly in all suits or actions for alimentary pension; and it has exclusive original jurisdiction in cases of petition of right.

With respect to res judicata article 1241 of the Civil Code enacts:

1241. The authority of a final judgment (res judicata) is a presumption juris et de jure; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.

Notwithstanding paragraph (*c*) of section 30 of the Exchequer Court Act, articles 40 and 48 of the Code of Civil Procedure and the concurrence of the three elements necessary: identity of the parties, of the cause and of the thing, seeing that the judgment of Casgrain J. is principally based on the fact that the defendants were not legally summoned before the Superior Court of the Province of Quebec sitting in the District of Montreal, because they have not their domicile or residence within its jurisdiction and because the whole cause of action did not arise therein, and that the other reason set forth by the learned judge is not clearly and definitely the *ratio decidendi,* but constitutes rather an *obiter dictum,* I do not think that I can accept the claim of res judicata.

The question arose as to whether the doctrine of res judicata applies in the case of an interlocutory judgment. I believe that it does when the judgment disposes finally

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of the suit. Be that as it may, the problem offers very little interest in the present case seeing the conclusion which I have reached.

Another argument set forth on behalf of plaintiff is that The Opium and Narcotic Drug Act, 1929, is unconstitutional and ultra vires of the legislative power of the Parliament of Canada as being legislation relating to civil rights within the province. This question was dealt with and decided against plaintiff's contention in the following cases: *Rex* v. *Gordon* (1); *Ex parte Wakabayashi* (2); *Standard Sausage Company* v. *Lee* (3). After studying attentively the relevant sections of the Act and carefully perusing these decisions, I have come to the conclusion that the Act is valid and is not ultra vires of the Parliament of Canada.

It was urged on behalf of plaintiff that the judgments in *McHugh* v. *The Queen, Mavor* v. *The Queen* and *MacArthur* v. *The King* (supra) deal with an entirely different section of The Exchequer Court Act, a section worded differently to paragraph (*c*) of section 30, namely paragraph (*c*) of section 19. Paragraphs (*c*) and (*f*) of section 19 mention the negligence of any "officer or servant" of the Crown, whilst paragraph (*c*) of section 30 refers only to any "officer" of the Crown. It is idle to say that no explanation of this difference in the terminology is given; one should not expect too much accuracy from our legislators.

In the French version we find in paragraphs (*c*) and (*f*) of section 19 the words "employé ou serviteur" and in paragraph (*c*) of section 30 the word "fonctionnaire". Again a dissimilarity, which is not astonishing, taking into account such occasional occurrence. The word "officer" in paragraphs (*c*) and (*f*) of section 19 is translated into "employé" and in paragraph (*c*) of section 30 into "fonctionnaire". I do not think that either word includes a Minister of the Crown. The term "officer" is not as explicit and clear; still it is the one which was adopted when the statute was drafted. Unfortunately laws enacted by the Parliament often lack clearness and precision.

(1) (1928) 49 C.C.C. 272.
(2) (1928) 49 C.C.C. 392.
(3) (1933) 4 D.L.R. 501 and (1934) 1 D.L.R. 706.

As pointed out by counsel for plaintiff the Department of National Health and Welfare was established by an Act entitled "The Department of National Health and Welfare Act", 8 Geo. VI, chap. 22, and a Minister was appointed to preside over it and have the management and direction of its business.

Counsel drew the attention of the court to paragraph (*g*) of section 5, which entrusts the Minister with the administration of, amongst others, the Opium and Narcotic Drug Act. The relevant portion of section 5 reads thus:

5. The duties, powers and functions of the Minister shall extend to and include all matters relating to the promotion or preservation of the health, social security and social welfare of the people of Canada over which the Parliament of Canada has jurisdiction, and, without restricting the generality of the foregoing, particularly the following matters:

(*g*) the administration of the Food and Drugs Act, The Opium and Narcotic Drug Act, the Quarantine Act, the Public Works Health Act, the Leprosy Act, the Proprietary or Patent Medicine Act and The National Physical Fitness Act and of all orders and regulations passed or made under any of the said Acts.

From this counsel concluded that the Minister is an officer of the Crown under paragraph (*c*) of section 30 of The Exchequer Court Act. I cannot agree with this view.

Counsel for plaintiff submitted that, if parliament has handed over to a Minister of the Crown or any other person the duty to decide certain questions and given them the discretion to do so, a Court cannot interfere with that discretion, provided it is exercised within the limits of the law; that, on the other hand, if that discretion is abused, if it is quasi-judicial and if it does not give the party towards whom it is exercised an opportunity to be heard, the Court may interfere. Counsel urged particularly that The Opium and Narcotic Drug Act, 1929, gives no discretion to the Minister with regard to the matters set forth in the statement of claim. He specified that the only discretion given to the Minister by the Act is in connection with the subjects enumerated in section 3 and that he can only exercise it with the approval of the Governor in Council. Section 3 contains, among others, the following provisions:

(1) With the approval of the Governor in Council, the Minister may

(*a*) issue licences for the import, export, sale, manufacture, production and distribution at a stated place of any drug;

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(b) name the ports or places in Canada where any drug may be exported or imported;

(c) prescribe the manner in which any drug is packed and marked for export;

(d) prescribe the record that shall be kept by any person in connection with the export, import, receipt, sale, disposal and distribution of the drug or drugs mentioned in the schedule to this Act; and

(e) make all convenient and necessary regulations with respect to the issue and duration and the terms and forms of the several licences that may be issued hereunder and to the payment of fees for such licences.

The Minister unquestionably has a discretion to exercise regarding the powers allotted to him by section 3. The section uses the word "may" and not "must" or "shall". This naturally implies on his part the liberty to determine whether he will or not do any of the acts prescribed in the various paragraphs of section 3. May we conclude that these instances are the only ones in which the Minister has the power to use his discretion? Unfortunately the Act is not definite in this regard and one must interpret it to the best of his knowledge. I do not think that the contention of counsel for plaintiff is correct. His interpretation of the Act with respect to the Minister's discretion seems to me too narrow.

In reply to counsel for plaintiff's contention, counsel for defendants referred to sections 6, 7, 9 and 16 and regulation 9. Section 6 has no relevance to the question at issue. The second part of section 7 which enacts that "every physician, veterinary surgeon, dentist and retail druggist shall make to the Minister, *as and when required,* a declaration . . ." implies a discretionary power. The same remark applies to section 9, especially subsection (2), which says that the provisions of subsection (1) shall not apply to a duly authorized and practising physician, veterinary surgeon or dentist but that such physician, veterinary surgeon or dentist shall on request furnish the Minister with any information which he may require under any regulation made under the Act with respect to the drugs received, dispensed, prescribed, given away or distributed by such physician, veterinary surgeon or dentist.

Rule 9, although somewhat differently worded, is to the same effect, in fact substantially a repetition.

Counsel for defendants dwelt at some length on the point that, apart from his right to obtain information from physicians, veterinary surgeons and dentists regarding drugs received, dispensed prescribed and distributed by them, the Minister is entitled to use some discretion in the enforcement of the Act and the regulations made thereunder.

I believe that the Minister, in his administrative capacity, has a discretion to exercise in connection with the enforcement of The Opium and Narcotic Drug Act and the regulations made thereunder. This discretion, however, is not boundless; it should be limited to acts of administration and should not embrace judiciary powers.

The jurisdiction of the Exchequer Court is strictly limited. It is fixed by the Exchequer Court Act. Jurisdiction is also attributed to it by various Acts with which we are not concerned in the present case.

Counsel for plaintiff relied on clause *c*) of section 30 of the Exchequer Court Act to establish that the Court is competent to grant the relief sought in the petition. The clause in question, as we have seen, provides that the Exchequer Court shall have concurrent original jurisdiction in Canada in all cases in which relief is sought against any *officer* of the Crown for anything done or omitted to be done in the performance of his duty. After giving the matter a careful and elaborate study I am satisfied that a Minister is not an officer or, according to the French version of the law, "un fonctionnaire" of the Crown within the meaning of clause *c*) of section 30.

Dealing with the issues of law raised in paragraphs 5, 6, 7, 8 and 9 of the original defence, in compliance with the judgment of the 22nd day of February, 1946, I wish to make the following statements.

The Court has not, in my opinion, jurisdiction to grant the relief sought in the present suit.

The Minister is not an officer of the Crown within the meaning of paragraph (*c*) of Section 30 of The Exchequer Court Act.

The actions done by the Minister of National Health and Welfare in the administration of The Opium and Narcotic Drug Act are not subject to review by the Court

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if done by the Minister in his administrative capacity. I must say that I feel loath to admit that the executive should be allowed to infringe the rights of the judiciary.

The actions of Colonel Sharman, in administering the provisions of The Opium and Narcotic Drug Act pursuant to the Minister's instructions, are not subject to review assuming that he acted in compliance with his Minister's instructions.

The Court has no power under the law to prevent a Minister from transgressing his administrative function and entering into the judicial field.

There are, in my judgment, far too many encroachments by Ministers, Deputy Ministers and functionaries in the judicial as well as the legislative field; if they are not curtailed, the country may in a not too remote future be ruled by a dictatorial government.

The main question arising in the present instance was whether the defendants, the Minister of National Health and Welfare and the Chief of the Narcotic Branch thereof acting in compliance with the orders of the former, were exercising a purely administrative function in interfering with the treatment which licensed physicians and members of the College of Physicians and Surgeons of the Province of Quebec consider necessary for their patients and to order them to refrain from prescribing such quantity of morphine as they may deem their patients require for medicinal purposes. I am of opinion that the Minister transgressed his competence; unfortunately, as the law stands, the Court is unable to grant the relief prayed for.

After carefully perusing the pleadings and listening very attentively to the able and exhaustive argument of counsel, I felt inclined to conclude that the Minister, in acting as he did, was not exercising an administrative function but performing a quasi-judicial act, which is, or at least should be, outside the sphere of his jurisdiction. It seemed to me inconceivable that a Minister could take the place of a physician and prescribe the treatment to be given to the latter's patients and the drugs which they ought to receive. It is difficult to believe that the Parliament in enacting The Opium and Narcotic Drug Act, 1929, intended to vest the Minister entrusted with its administration with

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such wide and exorbitant powers. It is idle to note that the medical profession is subject to the various provincial acts governing it (British North America Act, s. 92); in the Province of Quebec it is the Quebec Medical Act, R.S.Q. 1941, chapter 264.

Anyhow after having examined the law and reviewed the precedents, none of which unfortunately are directly relevant, I have no other alternative but to accept, reluctantly I must say, the doctrine expounded on behalf of respondents. The action will accordingly be dismissed. The defendants will be entitled to their costs, if they deem proper to claim them.

Judgment accordingly.