

JOHN A. BROWN AND HIRAM BEL- } SUPPLIANTS;  
 KNAP..... }  
 1892  
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 Sep. 1.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Construction of a Government fish-way in a private mill-dam—Damage to mill owner—Public work—50-51 Vic. c. 16, s. 16 (c).*

The suppliants complained that the Crown, by its servants, so negligently and unskilfully constructed a fish-way in a mill-dam used to secure a head of water for running certain mills owned by them, that such mills and premises were injuriously affected and greatly depreciated in value.

*Held*,—That the fish-way was not a public work within the meaning of 50-51 Vic. c. 16, s. 16 (c), and that the Crown was not liable.

PETITION of right for damages arising from the construction of a Government fish-way in a private mill-dam.

The facts of the case appear in the judgment.

May 31st, 1892.

*Ritchie*, (W.B.A.) for respondent: There was no cause of action in 1885, and suppliants cannot recover under the law as it stands to-day. The fish-way is not a public work within the meaning of 50-51 Vic. c. 16, s. 16 (c). The Dominion Government, it is true, bears a proportion of the expenditure on the fish-way, but that does not make it a public work. Public works are such things as are defined by statute, and must be works owned and operated by the Government. These elements are not present in the case of this fish-way.

*Ritchie*, (J.J.) for suppliants: The fish-way has all the elements of a public work. The very constitution of the Department of Marine and Fisheries gives it authority and control over fish-ways. The legislative authority for their construction is founded on their

1892  
 BROWN  
 v.  
 THE  
 QUEEN.  
 Reasons  
 for  
 Judgment.

being for the benefit of the public and for the public use. There is clear jurisdiction in the court to entertain this action. There is only a dictum of the Supreme Court of Canada that *The Exchequer Court Act* is not retroactive in giving a remedy in cases like this. [*Martin v. The Queen* (1).] There was a liability enforceable under 33 Vic. c. 23, before the Board of Official Arbitrators.

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliants complain that the Crown, by its servants, so negligently and unskillfully constructed a fish-way in a mill-dam used to secure a head of water for running certain mills owned by them, that such mills and premises were injuriously affected and greatly depreciated in value.

Immediately upon the case being opened it was objected that the court had no jurisdiction,—on the ground, among others, that neither the dam nor the fish-way was a public work of Canada (50-51 Vic. c. 16, s. 16 (c)); and I thought that the objection should prevail. As there were, however, a number of witnesses in attendance from long distances the parties agreed that the question should be reserved and the hearing of the case continued.

For the negligence of its officer in the construction, or in directing the construction, of a fish-way in the dam, it was admitted that the Crown was not liable unless such liability was founded on a statute; and that the suppliants could not succeed unless the fish-way in question was held to be a public work within the meaning of 50-51 Vic. c. 16, s. 16 (c). On that point I adhere to the view that I expressed at the trial. The case is, I think, very clear. The fish-way

(1) 20 Can. S. C. R. 240.

was not a public work within the meaning of the statute. Whatever right of action the suppliants might have had against the persons of whose negligence they complain, they have none against the Crown, because there is no Act of Parliament creating any liability to answer for such negligence.

A number of other objections were raised and discussed; but as the one I have mentioned disposes of the case it is unnecessary to refer to them.

*Judgment for the respondent with costs.*

Solicitor for suppliants: *J. A. Chisholm.*

Solicitor for respondent: *H. E. Gillis.*

1892  
 BROWN  
 v.  
 THE  
 QUEEN.  
 Reasons  
 for  
 Judgment.