BETWEEN:

HOCHELAGA SHIPPING AND TOWING COMPANY LIMITED..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1937
June 10, 11 & 15.
1938
Oct. 22.

Crown—Petition of Right—Public Work—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Damages—Loss of ship through collision with submerged part of a jetty constructed by the Crown—Negligence on part of officers or servants of the Crown—Contributory negligence on part of master of ship—Non-feasance or misfeasance—Trap—Damages limited to cost of repair of ship.

In 1931, the Dominion Government undertook the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien, N.S. The method of construction was cribwork made of logs and timber, with stones used as ballast. Before it was completed, a large part of the upper portion of the outward end broke away during a storm on September 9, 1932. This left the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. Under instructions of the assistant engineer in charge of the work for the Department of Public Works, the foreman in charge of the job squared off and sheeted the end of the portion of the jetty which remained in place and sawed the logs which emerged from the underportion of the part of the jetty washed away, leaving the understructure entirely submerged and invisible. No buoy or other warning sign was placed at or near the spot.

Suppliant's towboat *Ostrea*, engaged in salvage operations in Morien Bay, in the early morning of September 22, 1934, left her berth at Port Morien in good and seaworthy condition and while on her way out came into collision with the submerged portion of the jetty. The collision caused the *Ostrea* to spring a leak. She proceeded on her way for a distance of about 3½ miles when it became apparent to

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those on board that she was filling with water. She was abandoned and a few minutes after she sank with her furnishings and salvage equipment.

Suppliant seeks to recover from His Majesty the King the value of the *Ostrea* and her salvage equipment.

Held: That the jetty is a public work within the meaning of s. 19 (c) of the Exchequer Court Act.

2. That the accident was due to the negligence of officers or servants of the Crown, namely, the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation, after the top part of the outer end had been practically washed away, were effected, acting within the scope of their duties or employment on a public work.

3. That, after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea.

4. That the damage for which the respondent is responsible is limited to the cost of the repair of the vessel.

PETITION OF RIGHT to recover from the Crown the sum of $22,016.50 for damages for the loss of suppliant's steamship and salvage equipment alleged to have been caused through the negligence of officers and servants of the Crown acting within the scope of their duties or employment on a public work.

The action was tried before the Honourable Mr. Justice Angers, at Halifax, N.S.

L. A. Lovett, K.C. and *W. C. MacDonald, K.C.* for suppliant.

F. D. Smith, K.C. and *J. G. Fogo, K.C.* for respondent.

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

ANGERS J., now (October 22, 1938) delivered the following judgment:

The suppliant, a body corporate, incorporated under the laws of the Province of Nova Scotia and having its head office in the City of Halifax, in the said province, by its petition of right, seeks to recover from His Majesty the King the sum of $22,016.50 for the loss of the steamship *Ostrea* and her salvage equipment at Port Morien, N.S., on September 22, 1934.

[The learned Judge referred to the pleadings and continued.]

The *Ostrea* was built at Sorel, Province of Quebec, by the Department of Marine and Fisheries in 1916. Her first port of registry was Ottawa.

The suppliant purchased the *Ostrea* from the Dominion Government in 1932; from that time the vessel was registered at Halifax, Nova Scotia.

John Simon, president of the suppliant company, testified that the latter paid $200 for the ship; at the time of the purchase the hull and engines were practically all that was left.

The evidence shows that the suppliant had the *Ostrea* repaired and equipped at Charlottetown, P.E.I., and at Dartmouth, N.S., shortly after its acquisition.

The suppliant used the *Ostrea* for salvage operations.

The *Ostrea* left Halifax for Port Morien in July, 1934. According to the testimonies of the said John Simon, Leonard Williams, the master of the ship, William King, the mate, John L. Worthen, the engineer, the *Ostrea* was then in good and seaworthy condition.

On September 21, 1934, the *Ostrea* arrived at Port Morien to land upon the government wharf materials salvaged from the wreck of the steamship *Watford*.

The next morning the *Ostrea* left the wharf to continue its salvage operations on the said wreck. While passing at the end of the wharf, at a distance of five or six feet, she struck an obstruction. The collision caused the ship to spring a leak. The fact however was not noticed immediately and the *Ostrea* continued her way. A short time later she became difficult to steer and it was found that she was filling with water. As nothing could be done to save her, the crew got into a life-boat to save themselves. A few moments after the crew had left her, the *Ostrea* sank at a distance of about one-half mile east of the bell buoy in Morien Bay.

Is the respondent responsible for the loss of the *Ostrea*?

The case, in my opinion, is governed by subsection (*c*) of section 19 of the Exchequer Court Act:

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19 The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(a) * * * * * * * * * *

(b) * * * * * * * * * *

(c) every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work

If the case cannot be brought within the ambit of subsection (c) of section 19, I believe that it must fail.

According to the testimony of D. Harold McDonald, assistant engineer of the Department of Public Works, under whose supervision the work was effected, the jetty or extension to the government wharf at Port Morien, sometimes referred to in the evidence as an L, was commenced in the latter part of the fall of 1931. This addition, shown on plans, exhibits 11 and B, was erected to act as a shelter.

On September 29, 1932, McDonald made an inspection and found that a portion of the superstructure of the outer end of this jetty for a length of about 55 feet had been washed away and carried ashore; the plan, exhibit B, shows the portion of the jetty which was carried ashore.

On July 20, 1933, McDonald made an examination of the remaining portion of the section of the cribwork which had been carried away; he found that the foundation was insufficient and unsuitable for setting on it a new cribwork. McDonald says that, after consultation with the foreman, it was decided that the portion of it which was in good condition should be utilized in constructing the return L running toward the shore, indicated on plan exhibit B in cross-hatched lines. The under portion of the outer section of the jetty, the top part of which had been washed away, was partly removed and the outer end of the remaining portion of the jetty was sheeted; it seems to me apposite to quote the passage of McDonald's deposition in this regard:

Q. What was done in respect to the outer end?

A. It was close piled, sheeted

Q. Just describe how it was done; what was done in respect to the portion outside the crib work?

A. What remained on the bottom outside the pier comprised some old logs and loose stones and ballast and this would not provide a satisfactory foundation. A new crib work could not be fitted on it and you

could not put a block and span work there as these would carry it away and we made the only feasible use we could of the block which was washed up on the beach.

Q. What did you do with the remainder of the material left at the end of the 154 feet?

A. The foreman was instructed . . .

Mr. McDonald: He must tell us what was done.

The Witness: I visited the work each month and satisfied myself that he had removed as much of the obstruction as he could with a cross-cut saw.

Q. What was done about sheeting the outer end?

A. It was driven down as far as it could be driven.

Perhaps I had better cite an extract from the witness' deposition in cross-examination dealing with the same subject:

Q Mr. Martel stated that the first thing he did under the $2,000 vote was to straighten out the wharf leaning to the south and started to build it up and, after finishing this, he went to the outer part and sawed all the logs down as far as he could see to low water?

A. Yes.

Q. And the end of that wharf was sheeted over and nothing was left to indicate that there was anything underneath the water, a completely sheeted and piled end?

A. Yes.

Q. And the part that had been washed ashore, you say, had been squared off and put as an L; instead of being put up out alongside of the end of the wharf where it came from—it was put as an L at right angles to the wharf?

A. Yes.

As previously mentioned the work was done under the supervision of D. H. McDonald, who was then assistant engineer, and the latter kept the district engineer, T. J. Locke, aware of what he was doing. I deem it convenient to again refer to McDonald's testimony and quote therefrom the following passage:

Q. And the various works that were authorized were done under your supervision?

A. Yes.

Q. And you would make reports to the District Engineer?

A. Yes.

Q And the District Engineer would, in turn, report to the Chief engineer in Ottawa?

A. Yes.

In cross-examination, the witness made the following statements:

Q And all that work there was under your supervision?

A. Yes.

Q And you and Mr. Locke were down there?

A Yes.

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Q. Was Mr. Locke there when the work was going on?
A. Yes, when it began, but I was there during its progress.

It seems obvious that the underportion of the outer end of the jetty washed ashore was left submerged. The evidence does not suggest any other obstruction which the *Ostrea* could have met. This underportion, submerged and invisible, was not charted or buoyed in any way. It remained there a menace to navigation until the accident happened.

Although the evidence is perhaps not as definite as could be desired, I am satisfied that the *Ostrea* struck the said submerged underportion of the outer end of the jetty.

It was urged on behalf of the suppliant that the injury to the vessel and her loss were attributable to the negligence of officers or servants of the Crown, consisting in that they, while acting within the scope of their duties or employment on a public work, viz. the jetty aforesaid, knowing that the top part of the outward end of the same had been washed away, did not replace it nor remove the underportion thereof, which was allowed to remain in a submerged position, uncharted and unbuoyed, thus constituting a menace to navigation.

The jetty with which we are concerned is, in my opinion, a public work within the meaning of subsection (*c*) of section 19. On the other hand, the assistant engineer and district engineer, in charge of the construction of the said jetty and of the reparation of the damage caused to it in the month of September, 1932, must, as I think, be considered as officers and servants of the Crown. Did the loss of the *Ostrea* result from their negligence, while acting within the scope of their duties or employment? This is the question which remains for determination.

It was submitted by counsel for the respondent that His Majesty is not responsible for mere non-repair of a public work; in support of his contention counsel cited: *Hamburg American Packet Company* v. *The King* (1); *Legault* v. *The King* (2); *Harris* v. *The King* (3); *McHugh* v. *The Queen* (4); *Joubert* v. *The King* (5), and *Canada Steamship Lines Ltd. et al.* v. *The King* (6).

(1) (1901) 7 Ex.C R 150; (1902) 33 S.C.R. 252.
(2) (1931) Ex.C.R 167.
(3) (1904) 9 Ex.C.R. 206.
(4) (1900) 6 Ex.C R. 374
(5) (1931) Ex.C R. 113.
(6) (1926) Ex.C.R. 13; (1927) S.C.R. 68.

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In the matter of *Hamburg American Packet Company* v. *The King,* the suppliant, by its petition, sought to recover damages for injuries to the steamship *Arabia* and her cargo. The vessel, while passing through the channel at Cap à la Roche in the St. Lawrence River, took the ground or struck some obstruction and was injured and her cargo damaged. The work of digging a channel between Montreal and Quebec, in the St. Lawrence River, had been commenced by the Harbour Commissioners of Montreal and continued by the Government of Canada. The work, after the Government took it over, was carried on under the direction of the Minister of Public Works. During the opening of the channel, the work of excavation was tested from time to time by sweeping the channel to find out if the required depth had been reached. Once the work was completed, no further tests were made and the sweeping was discontinued. After the accident, the Minister caused the channel to be swept and two anchors and a boulder were found.

The learned trial judge, after briefly relating the facts, said that, having regard to the evidence as to the marks on the vessel's bottom and the position in which the anchors and boulder were found, it was not probable that the injuries to the *Arabia* had been caused by either of them; that it was obvious that the ship had come into contact with some obstruction or else had taken the ground, her draught having been by accident or inadvertence unduly increased; that in the view he took of the case it was not necessary to come to any conclusion as to which of the two things was more likely to have happened or as to whether or not the master or pilot of the vessel had not by imprudent navigation contributed to the accident.

After citing sections (*c*) and (*d*) of section 16 (now section 19) of the Exchequer Court Act, the learned judge says (p. 176):

> I refer to the latter provision in respect to claims arising under any law of Canada only to add that it does not in my view come in question here, as there is no law of Canada making the Crown liable in a case such as this, unless it be that which is recognized in the earlier provision of the section that I have cited. There is no law under which the Crown is liable for the mere non-repair of a public work, or for not using, to keep it in a safe condition, money voted by Parliament for a public work. Whether in any such case the repair shall be made or the

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money expended is within the discretion of the Governor in Council, or of the Minister of the Crown under whose charge the work is, and for the exercise of that discretion he and they are responsible to Parliament alone, and not to any court. As has been frequently pointed out there is no remedy in any such case unless the claim arises out of a death or injury to the person or to the property on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. I have had occasion in a number of cases to refer to this provision and to discuss its origin, scope and object, and I do not see that I can now on these subjects usefully add anything to what I stated in *The City of Quebec* v. *The Queen* (2 Ex.C.R. 252; 3 Ex C R. 164); and in *Lavoie* v. *The Queen* (3 Ex. C R. 96). On the general question of the liability of the Crown for torts I have nothing to add to what I stated in the cases referred to.

Dealing with the question of the existence of a public work in the case before him, the learned judge, after stating that the Exchequer Court Act contains no definition of the expression "public work" but that the Act from which clause (*c*) of section 16, namely section 1 (*c*) of chapter 40 of the Revised Statutes of Canada, 1886, re-enacted in the Expropriation Act (52 Vict., chap. 13, s. 2 (*d*)), included such a definition, continues as follows (p. 177):

> With the exception of some works that are under the charge of other ministers, the Minister of Public Works is by the 7th section of The Public Works Act given the management, charge and direction of the public works so enumerated. Among them we find "the construction and repair of . . . works for improving the navigation of any water." Now it cannot be doubted that the ship channel of the St. Lawrence 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.

And further on the learned judge adds (p. 178, in fine):

> On the broad question as to whether or not the Crown was under a legal obligation to keep the ship channel at Cap à la Roche in repair,

and to sweep it and see that no obstruction had occurred therein, my opinion is that no such obligation existed. The importance of such precautionary measures is not questioned, and the expenditure necessary for the purpose is small and trifling compared with the great commercial interests involved. But the question as to whether the public money should be so expended or not was for the Governor in Council, or the responsible minister to determine, and it is not for the court to review the exercise of that discretion. On this question I adhere, without repeating them, to the views that I expressed in *McHugh* v. *The Queen* (6 Ex.C R. 374).

The suppliant appealed to the Supreme Court, but the appeal was dismissed: see 33 S.C.R., 252.

The facts in the case of McHugh *v.* The Queen, referred to in the decision of Mr. Justice Burbidge in *re Hamburg American Packet Company* v. *The King* and relied upon by counsel for the respondent, are briefly as follows.

The suppliant McHugh, by his petition, claims damages for personal injuries alleged to have been suffered by falling from a horse while crossing the bridge over the Old Man River, at McLeod, in what was then the North-West Territories. The petition states that the bridge was out of repair and that the horse, having put his foot into a hole, stumbled and fell upon the suppliant, causing him serious injury. There were issues of fact as to whether or not the bridge was out of repair and as to whether or not the fall took place on the bridge or because of its condition. The Crown further relied upon the defence of contributory negligence. The learned judge declared that he did not find it necessary to determine any of these issues and he went on to say (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 (R S C, 1886, ch. 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.

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There is no duty on the Crown, or any minister of the Crown, to keep a public work, such as this bridge was, in repair for the failure of which a petition of right will lie against the Crown at the suit of one injured by reason of non-repair. In such a case the suppliant cannot recover against the Crown unless the case falls within the terms of the provision of The Exchequer Court Act to which reference has been made. This case is not, I think, within the statute.

The facts in the case of Harris *v.* The King were briefly as follows. The suppliant's husband was killed by the tender of an engine on a level crossing over the tracks of the Intercolonial Railway, in Halifax. The crossing was a dangerous one and no means had been taken for the protection of the public. Immediately before the suppliant's husband attempted to cross, cars had been shunted over the crossing in a direction opposite to that from which the engine and tender by which he was killed were coming. The engine used in shunting leaked steam; the atmosphere was heavy and the steam and smoke from the engine did not lift quickly. As a result a cloud of steam and smoke was carried over toward the track on which the engine and tender, cause of the accident, were running and obscured them from the view of the victim. The train that was being shunted and the engine and tender passed each other at a short distance from the crossing. The cars and shunting engine being clear of the crossing the suppliant's husband attempted to cross the tracks. The engine and tender which were being backed at a rate of six miles an hour, emerged from the cloud of steam and smoke and were upon him before he had time to escape.

It was held that the accident was due to the negligence of officers and servants of the Crown employed on the railway in using a defective engine and maintaining too high a rate of speed.

It was contended on behalf of the suppliant, Eliza Harris, that the accident would not have occurred if there had been gates or a watchman at the crossing and that the officers and servants of His Majesty in charge of the Intercolonial Railway were guilty of negligence in not maintaining a watchman or gates at said crossing. The learned trial judge said that he could not adopt this view; and he added (p. 208):

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.

In the case of *Legault* v. *The King,* the suppliant, Dame Flore Legault, by her petition sought to recover damages for the death of her husband drowned off one of the wharves in the harbour of Montreal.

In the evening of the 15th of November, 1929, Willie Chagnon, husband of the suppliant, without being invited and without business drove in his automobile, with his two children, onto a wharf, in the harbour of Montreal, to visit friends engaged in loading freight from a shed on the wharf. Chagnon had been drinking and was under the influence of liquor. When told to go, he got in his car with his children and drove straight into the canal, where all were drowned.

The Honourable Mr. Justice Audette dismissed the petition, holding that Chagnon had no business on the wharf, that he was there by tolerance and that the Crown was under no duty to him; further that Chagnon, being inebriated, was the victim of his own condition and conduct.

This case was evidently cited on account of the following statements by the learned judge, with which I agree (p. 170):

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To succeed in a case of the kind, it is necessary to bring the case within the ambit of subsection (c) of section 19 of The Exchequer Court Act), R.S.C. 1927, ch. 34).

(Subsection (c) is here quoted.)

Where a liability not existing at common law is created by statute, and the statute provides a particular remedy, that remedy must be followed. *Fort Francis Pulp & Paper Co.* vs. *Spanish River Pulp & Paper Co.* (1931, 2 D.L.R. 97).

The first requirement has been satisfied as I find the canal to be a public work; but coming to the second and third requirements, I first find there was no officer whose special duties were to supply the precautions alleged by the suppliant and that there was no negligence. I may add, as was decided in the case of *Harris* vs. *The King* (1904, 9 Ex.C.R. 206, at p. 207), that when the Minister of Railways and Canals, 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 have lights, gates, buoys, poles, etc., at the *locus in quo*,—it is not for the Court to say that the Minister or the Officer was guilty of negligence because the facts may even show that it was a dangerous place.

In the case of *Joubert* v. *The King*, the suppliant, by his petition, claimed damages arising out of the death of his son.

Charles Wilfrid Xavier Joubert, the son of the suppliant, at the time of his death, was employed by the Department of Marine and Fisheries on a barge used to lay buoys. He was paid by the hour and was in addition lodged and fed on the barge.

On April 25, 1929, after supper, the suppliant's son, accompanied by one Lefebvre, engaged in similar work, left the barge moored at Bureau Wharf, at Three Rivers, to go to the theatre. At eleven o'clock both returned to the Bureau Wharf to sleep on board the barge. On arriving at the place where the barge was moored when they left, they found that she had been moved some 800 or 900 feet, although still moored at the Bureau Wharf. Joubert and Lefebvre walked on the top of the concrete flat coping of the front wall of the wharf towards the barge. Joubert tripped on a nigger head, i.e. an iron post placed inside an indentation in the top of the wall and used for tying moorings, fell in the water and was drowned.

The petition was dismissed. The Honourable Mr. Justice Audette, in his judgment, says (p. 116):

The suppliant, to succeed, must bring his case within the ambit of subsec. (c) of sec. 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34).

(Section 19, subsection (c) is here quoted.)

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To bring the case within the provisions of subsec. (*c*) of sec. 19, the injury must be 1st—on a public work, 2nd—there must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; 3rd—the injury must be the result of such negligence.

There is not in this case a tittle of evidence upon the record establishing that there is a public work or that there was any particular officer or servant of the Crown whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident. From these facts, it necessarily follows that the Court cannot find that there was any negligence of any officer or servant of the Crown acting within the scope of his duties for whose negligence the Crown can be held responsible.

The learned judge adds that there is no evidence to show that the Crown was under any obligation to do anything which it failed to do in the circumstances of the case.

The last case cited by counsel for the respondent is that of *Canada Steamship Lines Limited et al.* v. *The King.* The suppliants, by their petition of right, sought to recover from His Majesty the King $65,744.61, being the amount of claims paid by them for personal injury and loss of property sustained by passengers landing from the steamship *Richelieu* at L'Anse Tadoussac on July 7, 1923, due to the collapse of a landing slip on a wharf owned by the Crown. The wharf, built between 1910 and 1912, had been but little used. Early in 1923, Canada Steamship Lines Limited applied to the Minister of Public Works to have it put in condition. The Minister assented and estimates for the cost were sanctioned late in June or early in July, 1923. To the knowledge of the company no substantial repairs to the wharf had been made. Without further notice to the Government, the *Richelieu* began to use the wharf in the latter part of June. On her fourth trip, on July 4, among the passengers landing at the wharf in question was one Brunet, a government engineer on a trip of inspection for his department. Brunet had some apprehension regarding the safety of the slip and, the next day, he made a casual examination of it. Before leaving Tadoussac that evening, Brunet, instead of making a personal inspection or reporting his fears to his department or warning the officers of the steamship company of the danger of using this slip in its present condition, asked one Imbeau, occasionally engaged as foreman by the

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Department of Public Works but not a permanent or regular employee of the government, to examine the slip and make a report to the Department of Public Works. Imbeau's report, dated July 7, was not received by the department until two days later. In the meantime the accident had occurred.

The trial judge came to the conclusion that there existed between the Crown and Canada Steamship Lines Limited a contract whereby the company, for a yearly consideration of $2,000, could use for its vessels the government wharves between Quebec and Chicoutimi, including the one at L'Anse Tadoussac, and that the Crown, in not keeping the last-mentioned wharf in safe and proper condition, was guilty of a breach of contract and was liable for the damages resulting therefrom. The learned judge said that, having reached the conclusion that the Crown was liable *ex contractu* for the damages arising from the said accident, it became unnecessary to delve into the other questions and particularly to decide whether or not the suppliants had a right of action under subsection (*c*) of section 19 (then section 20) of the Exchequer Court Act. An appeal was taken by the Crown to the Supreme Court. The latter, reversing the judgment of the Exchequer Court on that point, held that the Crown was under no contractual obligation to Canada Steamship Lines Limited to provide at L'Anse Tadoussac a safe landing place for its passengers, the sum of $2,000 per year received by the Crown in "payment of commutation of wharfage" not being equivalent to a rental for the use of the government wharves.

The Supreme Court however held that the Crown was in part responsible for the accident due to the negligence of one of its officers or servants, namely Brunet, while acting within the scope of his duties or employment upon a public work.

After stating that the evidence did not sufficiently establish that Imbeau was an officer or servant of the Crown, Anglin C.J., who delivered the judgment of the Court, said (p. 77):

> The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of

the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection "comme il faut" of the slip because it might be "endommagé"—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an

> officer or servant of the Crown while acting within the scope of his duties or employment upon a public work (*The King* v. *Schrobounst*, 1925, Can. S.C.R. 458),

and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

The Chief Justice then considered the conduct of the steamship company's officers and concluded that, if Brunet had been negligent, the conduct of the former savoured of recklessness. The Court, in consequence, held that the damages should be borne in the proportion of two-thirds by the steamship company and one-third by the Crown.

The decision in the latter case, if at all in point, does not, in my opinion, support the contention of the respondent.

Two other cases, which are to some extent pertinent, may perhaps conveniently be referred to ; they are *Leprohon* v. *The Queen* (1) and *City of Quebec* v. *The Queen* (2).

The head-note in the former case, which is fairly accurate and complete, reads as follows:

> The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and steps leading to such building.
>
> A person who goes to a post office to post or get his letters goes of his own choice and on his own business; and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation.
>
> A petition of right will not lie against the Crown for injuries sustained by one who falls upon a step of a public building by reason of

(1) (1894) 4 Ex.C.R 100.

(2) (1892) 3 Ex.C.R. 164; (1894) 24 S.C.R. 420.

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ice which had formed there and which the caretaker of the building, employed by the Minister of Public Works, had failed to remove or to cover with sand or ashes.

After determining that a post office is a public work within the meaning of subsection (*c*) of section 16 (now section 19), the Honourable Mr. Justice Burbidge dealt with the question of negligence in the following terms (p. 108):

> Now it is obvious that the negligence of the Crown's officer or servant, for which it will be answerable, might arise either by his doing in a negligent and improper manner something that he should do, or in his neglecting to do something that it was his duty to do, and that his duty might arise in one or both of two ways.
>
> * * * * *
>
> Does the Crown then as the owner or proprietor of a public building, such as a post office, owe any duty, within the legal meaning of that term, to persons using the ways and steps leading to the building, to keep the same in repair, and in reasonably good condition, and in the winter time free from any accumulation of ice?

The learned judge then, after referring to the charter and by-laws of the City of Three Rivers, where the Post Office in question was located and after stating that the Crown, as owner of land abutting on a street, would not be bound thereby, continued as follows (p. 110):

> It is equally clear, it seems to me, that the Crown as the owner of the walk or way leading to the building is under no duty or obligation to keep the same in repair, for neglect of which an action would lie against it; and that not merely because of the incident, that, apart from certain special statutes, such as that on which the suppliant relies in this case, there is no remedy against the Crown in cases of tort, but also for the reason that there is no legal duty or obligation.

Further on the learned judge added (p. 112):

> Assuming, however, that such a duty exists and that the Crown is bound to the exercise of such care as a prudent owner would take in a like case, then its duty is either to warn or otherwise secure persons coming to the building from hidden dangers in the nature of a trap, not open to ordinary observation; or to keep it in a reasonably safe condition to secure such persons from harm from anything about the premises hidden or open to observation making it dangerous for such persons, using reasonable care, to be upon the premises for the purposes for which they are induced to come. Whether the Crown's obligation in such a case would fall within the larger or the more limited definition that I have given would depend upon the view taken as to whether or not such persons went to the post office as well on the business and interests of the Government as on their own business.

The facts in the case of the *City of Quebec* v. *The Queen,* concisely summed up, were as follows:

In 1887 the Dominion Government acquired the property in the City of Quebec on which the citadel is erected. Several years previously a drain had been laid through the property by the Imperial authorities. The existence of this drain was not known to the officers of the Crown; an inspection of the property in 1880 by the engineer of the City of Quebec and others did not reveal it. This drain became choked before the property came into the possession of the Dominion Government. The water escaping from the drain loosened the earth gradually until in 1889 a large portion of rock fell from the cliff into Champlain street, situate in the lower town, at the foot of Cape Diamond, blocking up the street and rendering impossible the access to the water pipes and drains.

At the close of the suppliant's case, the trial judge ordered judgment of non-suit to be entered. An appeal was entered and the Supreme Court (Sir Henry Strong, C.J. and Fournier, J. dissenting, and Taschereau, Gwynne and King, JJ.) upheld the judgment of the Exchequer Court.

Dealing with the question of negligence, Mr. Justice Burbidge made (*inter alia*) the following observations (p. 179):

> That brings us to the question of negligence; and so far as misfeasance is concerned, I do not think there has been any case made out.
>
> * * * * * *
>
> With reference to the question of non-feasance, I agree with the view which Mr. Hogg and Mr Cook put forward, that no officer of the Crown is under any duty to repair or to add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the repairs or the addition.
>
> In that sense there is no evidence here of any officer who was charged with any such duty, and being so charged, neglected to perform his duty. The truth of the matter is, with regard to the drain, that no one knew of its existence until after this accident had occurred and minute inquiry was made into its causes. And it seems to me that the suppliants must fail, unless there was some officer or servant of the Crown whose duty it was to know of the existence of this drain, of its choking up, and to report the fact to the Government, and who was negligent in being and remaining in ignorance of the drain and of the defect.

It seems to me apposite to quote from the judgment of the Chief Justice, Sir Henry Strong, who, as indicated, was dissenting, the passage in which he deals with the questions of misfeasance and non-feasance on the part of the Crown (p. 435):

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Upon this view of the evidence the learned judge stopped the case at the end of the suppliant's evidence, and without hearing any evidence in defence ordered judgment to be entered for the Crown. So far as proof of any misfeasance on the part of the Crown, or negligence on the part of any particular officer of the Crown charged with any duty in respect of the lands of the Crown from which this landslide took place, is requisite to make out the suppliant's case, I agree that no such misfeasance or negligence was proved. I am of opinion, however, that the suppliant's evidence does show a *prima facie* case of nonfeasance on the part of the Crown which under the 6th and 7th paragraphs of the petition it was open to the suppliant to prove, and at all events such a case as would upon an amendment of the petition have entitled the suppliant to relief in the absence of any contradictory evidence on the part of the Crown.

See also *Jokela* v. *The King* (1).

The doctrine is well settled that the Crown is not bound to keep in repair any public work and that it cannot be held liable for injuries resulting from the unsafe condition thereof. Under subsection (*c*) of section 19 the liability of the Crown for damages for injury to the person or to property is qualified and restricted: the injury must result from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment upon a public work. The Crown's responsibility, as stated by the President in the case of *Jokela* v. *The King* aforesaid, cannot be enlarged except by express words or necessary implication. Subsection (*c*) of section 19 seems to exclude the case in which the injury was the result of non-repair or non-feasance. In some cases, however, non-repair or non-feasance may constitute a hazard or in other words create what has been called a trap; it may bring about a condition which renders an accident almost unavoidable. This is what happened in the present case. When on September 9, 1932, a storm blew off the top part of the outward end of the jetty and carried it ashore, the foreman, acting under the instructions of the assistant engineer in charge of the work for the Department of Public Works, squared off and sheeted the end of the portion of the jetty which remained in place and sawed the logs which emerged from the underportion of the part of the jetty washed ashore, leaving the understructure entirely submerged and invisible: in addition to the deposition of D. H. McDonald

(1) (1937) Ex C.R., 132.

previously mentioned, reference may be had to the testimonies of John Martel (pp. 59 and 62) and John Hennessy (p. 72).

This obstruction was left there uncharted and unbuoyed until the accident happened.

It was reasonable and natural for the *Ostrea,* when she left in the morning to go back to the wreck of the *Watford,* to turn around the end of the jetty. The pilot who steered her had reason to assume that at the end of the jetty the water was deep enough for his vessel to pass. There was not the slightest indication that the route he followed was in any way unsafe for navigation.

After a careful perusal of the evidence I have come to the conclusion that the accident is attributable to the negligence of officers or servants of the Crown, namely the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation after the top part of the outer end thereof had been partially washed away were effected, acting within the scope of their duties or employment on a public work.

I am of opinion, however, that, after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea. Had he found that the vessel was leaking, as I think he should have, if he had made a proper inspection of the hull immediately after the impact, he would not or at least should not, assuming he had acted prudently, have proceeded on his voyage but should have brought back his vessel to the wharf. He would thus have avoided the loss of his ship and of her equipment. In this connection I deem it expedient to refer to the evidence of Charles L. Waterhouse, a mariner of twenty-two years of experience at sea, master mariner for four years and supervisor and examiner of masters and mates for the Department of Transport. At page 175 of his deposition we find the following statements:

Q. You have heard the evidence given here in regard to the nature of the construction of the ship *Ostrea* and the circumstances of her sinking as described by the witnesses?

A. Yes.

Q. And you have heard the witnesses' description of the bump which was experienced at or near the dock at Port Morien on September 22, 1934?

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A. Yes.

Q Now, in the circumstances described by these witnesses, Captain, what, in your opinion, would have been the proper course to follow by those in charge of the ship?

A. Having felt a bump off the end of the pier it obviously must follow that the vessel hit some obstruction, and I would say the correct thing to do would have been to stop and find out if she was at all damaged before proceeding on the voyage.

Q. In order to find out what really happened what do you say should have been done by way of examination?

A. In this case she had a transverse bulkhead forward of the engine room and the Master should have ascertained from the engineer if she was making water and he should have taken a sounding near the forward hold to see if she was making water before he proceeded out to sea.

Q. Would an examination of the forward hold be more important where it appeared that the blow or contact had been made in the forward part of the ship?

A. If the bump was felt to have taken place forward, which it apparently was, then it would be much better to sound forward first and aft afterwards.

Q. In your view, it would have been a proper course, in this case, to look particularly to the forward part of the ship?

A. Yes.

Q. And if that had been done and if signs of leakage were apparent, what course should have been followed?

A. To go back alongside immediately or try and beach the ship at the nearest possible place.

Further on in his deposition the witness added (p. 178):

A. If soundings had been taken the vessel would have been found to have been leaking or not and if it was not leaking then it would be all right to proceed, but if she was leaking then it should have been run to the nearest shore water or returned to the wharf and put in a position where, if it did fill up, it would not sink. There are lots of mud flats around there and she should not have proceeded to sea.

Reference may also be had on this subject to the testimony of John Patterson, superintendent of the plant of the Halifax Shipyards, of which I believe it convenient to quote the following extracts (p. 154):

Q. And you would not expect anything?

A. If I was on board a composite vessel and felt any bump I would be suspicious.

Q. Would you not, as a seaman on a composite vessel, send some one down? What steps would you have taken had you been on board the ship?

A. Knowing this vessel to be of composite construction I would have examined the bottom.

Q. You say you would have examined the bottom; would you have gone down in the forward hold to examine the bottom of the ship?

A. Yes.

Then further on (p. 155):

Q. . . . If she was not making water, what would you do?

A. I would examine her inside and if she was not making water I would proceed providing I was coming back in the same day, but if I was going to stay out for a week I would return to the dock.

Q. And if the examination disclosed water, what would you do?

A. I would bring her back to the dock

Q. Would there be any question of that?

A. No, sir, if she was making water, the only thing to do would be to bring her back.

The investigation concerning the extent of the damage caused to the vessel by the collision was evidently summary and superficial: see deposition King (pp. 118 and 125) and deposition Worthen (pp. 141 and 142).

It seems to me convenient to quote from Worthen's deposition the following passage (p. 142):

Q. If some one had looked in the forward hold it is unlikely that this ship would have been lost; you had pumps and you could have easily used them and then returned to the dock; had you discovered water, could you not have returned to the pier?

A. Yes, if we had discovered anything.

Q. And if a reasonable investigation had been made, you would have discovered it?

A. May be so; as far as I know, yes.

I may note that the proof shows that the *Ostrea* was a vessel of composite construction, having a steel frame and a wooden shell.

I have no doubt that the extent of the damage caused to the ship by the collision could have been detected if a proper inspection had been made immediately after the collision.

In the circumstances, I believe that the damage for which the respondent is responsible is limited to the cost of the repair of the vessel. Unfortunately there is no evidence in the record enabling me to determine the said cost. If the parties cannot agree on an amount, they will be at liberty to refer the matter to me and to adduce evidence for the purpose of establishing, as exactly as possible, what the repair of the vessel would have cost.

As the suppliant alleges that it submits its petition on behalf and for the benefit of the underwriters who are subrogated to the rights of the suppliant, the parties, failing an agreement as to whom the amount agreed upon or awarded by the Court, as the case may be, should be paid, may also refer the question to me for adjudication.

Costs will follow the event.

Judgment accordingly.