BETWEEN: 1932

CYRILLE ROCHON .....SUPPLIANT; April 4, 5. July 6.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Responsibility—Workmen's Compensation Act—Application of same to the Crown—Provincial Laws—Exchequer Court Act—"Head of an enterprise"—"Owner of an industry."

Mullin Brothers, Carters, with whom R. was employed as a teamster, contracted with the Department of Railways and Canals to move a winch weighing between three and four tons from one of their yards in Montreal to the Canal Bank, the loading to be done by the employees of the Department. In the course of moving the same, and when still in the yard, one of the wheels of the float stuck in the ground at a point where a trench had been recently dug and where the earth was accordingly softer, and the winch, by reason of the jerk and of the negligent loading, slid forward crushing R.'s leg, which had later to be amputated. R. recovered a certain sum under the Workmen's Compensation Act of Quebec as against Mullin Brothers and now sues the Crown for damages alleged due to the negligence of its servants in the performance of their duty. The Crown contended that R. having exercised his recourse against his immediate employers under the said Act, has waived any claim against the Crown and that if any claim ever existed it would be one jointly and severally against the Crown and the employers under the Workmen's Compensation Act.

Held, that there is no recourse against the Crown for injury to the person, except in cases coming within the ambit of subsection (*c*) of section 19 of the Exchequer Court Act (R.S.C., 1927, c. 34).

2. That the cause of action having arisen in the Province of Quebec, the case is governed by the laws of that Province.

3. That the provisions of the Workmen's Compensation Act of Quebec do not apply to the Crown in right of the Dominion of Canada, the legislature of a Province having no authority to pass legislation purporting to modify the liability of the Crown in matters of injury to the person.

4. That even if the said Act did apply to the Crown, suppliant's act in electing to claim and recover compensation from his employer, under the Act did not deprive him of his recourse against the Crown (respondent).

5. That the Crown, in right of the Dominion of Canada, is not the "head of an enterprise" or "the owner of an industry" within the meaning of subsection 2 of section 22 of 18 Geo. V, c. 79, Quebec.

ACTION by the suppliant to recover from the respondent $8,180 damages alleged to result from the negligence of a servant of the Crown.

The action was tried before the Honourable Mr. Justice Angers at Montreal.

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Jean Martineau, K.C., for suppliant.

T. J. Coonan, K.C., and *M. C. Holt* for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (July 6, 1932), delivered the following judgment.

The suppliant, by his petition of right, seeks to recover from the respondent the sum of $8,180 representing damages which he alleges he suffered as the result of an accident.

On the 6th day of March, 1931, the suppliant was employed as teamster by Mullin Brothers, carters, of the city of Montreal.

On the morning of the said date, Rochon received instructions from his employers to take his team, consisting of two horses and a float, to the yard of the Department of Railways and Canals, at the corner of Mill and Riverside streets, in Montreal. Following his instructions the suppliant drove to the yard in question.

A winch, weighing between three and four tons, was loaded on the float by employees or servants of the Crown and the suppliant was instructed by them to take it to the bank of the Lachine canal, near Black Bridge, in Montreal. The winch was loaded on the float at a point indicated by letter A on the plan filed as exhibit 2.

The suppliant drove his float a short distance when the right rear wheel sank two or three inches in the ground. The suppliant however was able to proceed; he had only driven a few feet when his left rear wheel sank. The suppliant, this time, was unable to go any further. The employees of the Department of Railways and Canals were compelled to jack up the float, which was done whilst the suppliant was at lunch.

The suppliant came back after lunch with a second team of horses and a helper. The four horses were hitched to the float and the suppliant proceeded over a distance of 15 or 20 feet when the rear right wheel sank to the nave. As a result the winch slid sideways and forward and the suppliant's right leg was caught between the front skid of the winch and the front of his float and fractured. The suppliant was immediately taken to the hospital where he was under treatment until the 23rd of May, 1931. He had to have his right leg amputated above the knee.

The suppliant, who is 64 years of age, was earning at the time of the accident, a salary averaging $15 a week.

The sum of $8,180 which he claims is made up as follows:

for complete permanent incapacity.....	$5,780
for doctor's and hospital bills, medicines and crutches	400
for pain, suffering and inconvenience.....	2,000

In his petition of right the suppliant alleges that, during the Fall of 1930, a trench had been dug by the employees of the Department of Railways and Canals in the said yard and a steam duct laid in the said trench; that the ground was softer where this trench had been dug, but that, as there was still snow and ice in the yard, it was impossible for anyone to know of this state of things, except for the employees in charge of the yard who were aware of the conditions; that this trench had been dug diagonally from right to left across the road in the yard, which explains why the left rear wheel sank about twenty feet before the right rear wheel did; that the accident is due solely to the negligence of the employees of the Department of Railways and Canals in charge of the yard and of the loading of the winch on the float, while engaged in a public work, because:

(*a*) they did not securely tie the winch to the float;

(*b*) they left a steel pipe, used as a roller, under the winch, thereby allowing it slide more easily;

(*c*) they allowed the suppliant, unaware of the conditions, to drive his heavy float over a spot which they knew or should have known to be soft, especially after the float had sunk once before in the trench;

(*d*) they took no precaution to prevent the right rear wheel from sinking after the left rear wheel had sunk.

In his statement of defence, the respondent prays acte of the admission that on the day of the accident the suppliant was in the employ of Mullin Brothers as teamster and that he received instructions from them to take his team to the yard of the Department of Railways and Canals where a winch was to be loaded on his float, admits that the accident occurred in the yard belonging to the said Department, denies or ignores the other allegations of the

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petition and especially pleads that the suppliant received his instructions from his employers, who in turn were under contract to remove the winch; that the suppliant recognized that his only recourse was against his employer by accepting payment from the Quebec Workmen's Compensation Commission, which compensation was from time to time paid by his employers; that the claim of the suppliant against his employers, Mullin Brothers, and United Provinces Insurance Company, insurer of said Mullin Brothers, was heard and decided on the 26th day of October, 1931, and suppliant was awarded a sum of $1,607.31 payable at the rate of $34.82 per month; that suppliant, in virtue of the Act 18 Geo. V, chapter 79, of the province of Quebec, is deprived of any recourse against third parties; that moreover the respondent was in the position of being the owner of the work employing a sub-contractor whose workman was injured and therefore the only recourse the latter has is under the Workmen's Compensation Act against the employer, the head of the enterprise or the owner.

The issues were joined by suppliant's answer and respondent's joinder of issue.

To have a recourse in damages against the Crown the suppliant must show that his case comes within the ambit of subsection (*c*) of section 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34), which reads as follows:

> 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.

To bring the case within the provisions of subsection (*c*) of section 19 the injury must have been caused:

(*a*) upon a public work;

(*b*) through the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

That the accident occurred on a public work is established by the admission contained in paragraph 5 of the statement of defence and by the evidence adduced at trial.

The only question which remains to be decided is whether the injury to suppliant was the result of the negligence of

an officer or servant of the Crown acting within the scope of his duties or employment.

The respondent does not dispute the fact that the employees or servants in charge of the yard acted within the scope of their duties when they loaded the winch on the float and gave instructions to the suppliant to take the winch to the canal bank. Lapointe says he was "homme de confiance" in the yard on the day of the accident and was acting under the instructions of the foreman. It seems to me that there can be no doubt in the circumstances that the employees or servants of the Crown acted within the scope of their duties on the day of the accident and that, if the accident was caused by their negligence, the Crown must be held liable therefor.

It has been proven that, during the Fall of 1930, two trenches were dug diagonally across the yard where the accident happened, for the purpose of laying a steam duct. The plan (exhibit 2) indicates by means of a dotted line the position of this duct; it runs from point E to point F, between the blacksmith shop and the heating room, and from point E to point M, between the heating room and the garage. The float coming from a point indicated by letter A on the plan crossed over the trench between points E and F at point B. The rear right wheel sank in the ground a few inches at the point indicated by the letter B. The float proceeded however for a short distance and the left rear wheel sank at the point indicated by letter C on the same plan (exhibit 2). This time the wheel had sunk deeper and the plaintiff was unable to proceed. He went to lunch and came back in the afternoon with another team of horses and a helper. The evidence shows that in the meantime the respondent's employees had succeeded in jacking up the float. The new team of horses was hitched to the float with the other two horses and suppliant again started to drive his float in the direction of the place where the winch had to be carried. The suppliant had only proceeded a few feet when the rear right wheel sank in the ground to a much greater depth; witnesses say that it sank to the nave. As a result the winch moved sideways and forward; the right leg of the suppliant was caught between the front skid of the winch and the front part of the float and fractured.

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It may appear extraordinary that the winch slid forward when it is one of the rear wheels of the float which sank. The explanation given by the suppliant that this movement was caused by the pipe or roller left by the respondent's employees under the winch on the float is quite plausible. There is one thing certain in my mind and that is that the movement of the winch was due to the jerk caused by the sinking of the wheel. The evidence discloses no other cause to which the sliding could be attributed.

Can the respondent be held responsible for the sinking of the wheel and the consequential movement of the winch? Yes, if I come to the conclusion that the sinking and sliding were due to some negligence of the respondent's servants or employees. This is the crucial point which I have to determine. If I find negligence on the part of the defendant's servants or employees, there will remain for me to decide whether the suppliant himself is free of all blame or whether the accident is in part attributable to his negligence. In the latter alternative, I shall have to apportion the responsibility of each of the parties.

The employees of the respondent knew that a trench had been dug during the late Fall of 1930 and they should have known that the ground where the digging had taken place was softer: see the depositions of Fitzpatrick, machinist in charge of the machine shop, and of Lapointe, acting foreman on the day of the accident. The suppliant was not made aware of this fact; he should have been.

The winch was installed on the float and fastened thereto by the respondent's employees; the suppliant had nothing whatever to do with this work: see the depositions of Lapointe, Fitzpatrick and Rochon. A pipe used as a roller was left under the rear part of the winch at the points indicated by an X on the photograph filed as exhibit 3 (depositions of Lapointe and Rochon). It was argued on behalf of the respondent that the movement of the winch may have been due to the jerk caused by the four horses. This might have been the case had the accident occurred immediately when the float started from point C, i.e., the point where the rear left wheel had sunk. But this is not what happened; the rear right wheel sank at point D whilst the float was moving. It seems to me obvious that the jerk was caused by the sinking of the wheel. If there had

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been no roller under the winch, it is possible that the jerk would not have caused the winch to slide; what seems probable however is that if it had slid, the sliding would have been backwards and there would have been no accident. Moreover whatever may have been the cause of the sliding of the winch, it could and would have been avoided had the winch been securely fastened to the float.

My conclusion is that the accident resulted from the negligence of the respondent's employees or servants consisting:

1. In not notifying the suppliant that the ground was soft at the points where a trench had been dug;

2. In not loading the winch on the float properly and in leaving under it a pipe or roller which caused it to slide;

3. In not fastening the winch to the float securely so as to prevent it from moving.

See *The King* v. *Canada Steamship Lines* (1).

See also *The Queen* v. *Filion* (2).

The suppliant on the other hand had nothing whatever to do with the loading nor the fastening of the winch on the float. His only duty was to drive his float from one point to another in accordance with the instructions given by the respondent's employees. I do not think that he can be held responsible by the fact that a roller was left under the winch or that the winch was not properly fastened to the float, although it might be said that he could have requested the respondent's employees to fasten the winch more securely and to remove the roller on which it rested. I cannot see however how his failure to notice that the roller had been left under the winch or that the winch had not been sufficiently fastened—the proof shows that it had been tied with chains (see deposition of Lapointe)—can constitute a negligence on his part. It has been argued on behalf of the respondent that the suppliant was negligent in standing behind the seat of his float. There is no doubt that the accident would not have occurred had the suppliant been either sitting on or standing in front of the seat of his float. It may be said in his favour that if the winch had been securely fastened it would not have slid and the accident would not have happened. This is no excuse

(1) (1927) 1 D.L.R. 991.

(2) (1894) 4 Ex. C.R. 134 and (1895) 24 S.C.R. 482.

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however for putting himself in a position which could be dangerous and which in fact proved to be dangerous. The suppliant is not entirely blameless and I think that in all fairness I can fix his liability at 25 per cent. The apportionment of the responsibility always offers some difficulty. Taking into consideration all the circumstances of the case, I believe that justice will be done if I decide that the damages shall be borne in the proportion of $\frac{3}{4}$ and $\frac{1}{4}$, three-fourths by the respondent and one-fourth by the suppliant.

The cause of action arose in the province of Quebec and the case is governed by the laws of that province: *The King* v. *Desrosiers* (1); *The King* v. *Armstrong* (2); *Sabourin* v. *The King* (3); *Lapointe* v. *The King* (4); *Nichols Chemicals Co.* v. *Lefebvre* (5).

It has been urged on behalf of the respondent that the suppliant, having exercised his recourse against his employers under the Workmen's Compensation Act of the province of Quebec (18 Geo. V, ch. 79), has thereby waived any claim he may have had against the Crown. It has been further contended that the suppliant's only recourse against the Crown, if there was any, was governed by section 21 of the Workmen's Compensation Act and that the suppliant should have enforced his claim both against the Crown and his employers, jointly and severally, under the provisions of said section. I cannot agree with either of these contentions. The legislature of a province has no authority to adopt legislation purporting to modify the liability of the Crown in such matters. There is no recourse against the Crown for injury to the person except in cases which come within the ambit of subsection (*c*) of section 19 of chap. 34 of the Revised Statutes of Canada, 1927, i.e., the Exchequer Court Act; the text of subsection (*c*) is quite clear and moreover there are numerous decisions to that effect, among which I may cite the following: *Joubert* v. *The King* (6); *Legault* v. *The King* (7); *Johnson* v. *The King* (8); *Manseau* v. *The King* (9).

See also *Fort Francis Pulp and Paper Co.* v. *Spanish Pulp and Paper Co.* (10), in which it was held that, where

(1) (1908) 41 S.C.R. 71.
(2) (1908) 40 S.C.R. 229.
(3) (1911) 13 Ex. C.R. 341.
(4) (1913) 14 Ex. C.R. 219.
(5) (1909) 42 S.C.R. 402.
(6) (1931) Ex. C.R. 113.
(7) (1931) Ex. C.R. 167.
(8) (1931) Ex. C.R. 163.
(9) (1923) Ex. C.R. 21.
(10) (1931) 2 D.L.R. 97.

a liability not existing at common law is created by statute and the statute provides a remedy, such remedy must be followed.

But even if I came to the conclusion that the Workmen's Compensation Act does apply to the Crown, I would still see no foundation in the respondent's contention that the suppliant, having elected to claim and recover compensation from his employers under the Act, has thereby lost his recourse against the respondent. Subsection 2 of section 22 of the Act reads as follows:

1. . . . .

2. Apart from the rights granted under this act, the injured person or his representatives shall retain, against the authors of the accident, other than the employer or the head of the enterprise or the owner of the industry or his servants or agents, the right to claim compensation for the damage caused, in accordance with the rules of common law.

Subsection 3 of section 22 confers upon the employer the right of action against the third party responsible for the accident, in the event of the victim neglecting to exercise this right. I cannot, in the circumstances obtaining, consider the Crown as the "head of an enterprise" or "the owner of an industry," within the meaning of subsection 2 of section 22 above cited.

No jurisprudence was cited at hearing by either side; I must say that I found only one decision to the point, that is the one rendered by the Supreme Court of Canada in re *Ryder* v. *The King* (1) where it was held that the Manitoba Workmen's Compensation Act does not apply to the Crown.

The case of *The Ship Catala & Martha Dagsland* (2) offers no similarity, inasmuch as the Crown was not a party to the suit and moreover the defendant in the action taken before this Court was the same party against whom the widow of the victim had exercised her recourse under the Workmen's Compensation Act of the province of British Columbia. In the case of *McClenaghan* v. *City of Edmonton* (3), in which also the Crown was not a party, it was held that an employee who has exercised his recourse against his employer under the Workmen's Compensation Act of Alberta (Accident Fund, R.S.A., 1922, ch. 177) cannot bring any action against other parties under the common law. This case is distinguishable from the present

(1) (1905) 36 S.C.R. 462. (2) (1928) Ex. C.R. 83.
(3) (1926) 1 D.L.R. 1042.

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one: as already stated, the Crown was not a party to the action; furthermore the Workmen's Compensation Act of Alberta contains no clause similar to subsection 2 of section 22 of the Quebec Compensation Act.

The fact that the suppliant exercised his recourse against his employers, under the Workmen's Compensation Act of Quebec as he did (see exhibits D, E and F), does not, in my opinion, deprive him of his right of action against the Crown, if such right exists under the provisions of subsection (*c*) of section 19 of the Exchequer Court Act.

It was further argued that the contractual relationship between the Crown and the employers (Mullin Brothers) deprived the suppliant of his recourse against the respondent. I must admit that I fail to see on what basis the respondent rests this contention. Moreover I must say that there is no proof of any contractual relation between the Crown and Mullin Brothers: see deposition of Michael Mullin. This last argument invoked by counsel for the respondent is unfounded both in fact and in law.

I must now proceed to determine the amount of the damages.

At the time of the accident the suppliant was earning an average of $15 a week. His total temporary disability lasted six months according to the reports of Doctor Demers (exhibits A and B). On this account the suppliant would be entitled to $390 representing loss of wages for 26 weeks at the rate of $15 a week.

Doctor Demers, at the trial, fixed the suppliant's partial permanent incapacity at 80 per cent. In his reports he estimated it at 50 per cent. He states in his first report that, if the victim had accepted the amputation when it was first suggested to him, he would have suffered a permanent disability of 44 per cent, but that the delay caused by his refusal to submit to an operation necessitated the amputation of the leg above the knee and that the permanent disability was thereby increased to 50 per cent. I do not think that the suppliant can be blamed for having delayed the amputation in the hope of saving his leg and I adopt the figure of 50 per cent as representing the partial permanent incapacity which the suppliant is suffering as a result of the accident. The figure of 80 per cent mentioned by Doctor Demers at the trial seems to me exagger-

ated. Considering the age of the suppliant, his expectancy of life, the nature of his employment, the wages he was earning, the possibility of unemployment, I consider that a sum of $3,500 will be a fair compensation for the partial permanent disability.

The suppliant is claiming $400 for doctor's fees and hospital charges. The account filed as exhibit 7 shows a total of $522.25. The suppliant is entitled to the amount of $400.

The suppliant further claims a sum of $2,000 for pain, suffering and inconvenience; I think that a sum of $500 will be a fair and sufficient award on this ground.

The sums of $390, $3,500, $400 and $500 form a total of $4,790 representing the damages suffered by the suppliant as a result of the accident.

As I have reached the conclusion that both parties were at fault, the proportion of the suppliant's negligence being fixed at 25 per cent, the above mentioned amount shall be reduced accordingly. The suppliant is accordingly entitled to recover from the respondent the sum of $3,592.50.

There will be judgment in favour of the suppliant against the respondent for $3,592.50 and costs.

Judgment accordingly.