

IN THE MATTER of the Petition of Right of

JOSEPH GAGNON.....SUPPLIANT ;

1904

May 25.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public Work—Injury to property—Barge wintering in Lachine Canal—  
Lowering level of water—Omission to notify owner—Negligence  
—50-51 Vict., ch. 16, s. 16 (c).*

In the autumn of 1900, the suppliant placed his barge for winter-quarters at a place in the Lachine Canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying anyone on behalf of the Crown, to leave his barge in the canal, and, during the winter, some officer of the Canals Department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of Art. 32 of the Tariff of Tolls framed by the department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the Superintending Engineer, for the province of Quebec, of the Canals Department, wrote officially to O., the Superintendent of the Lachine Canal, directing him to have the water lowered on certain dates during the winter to facilitate certain work then being done, by the Grand Trunk Railway Company on their swing-bridge at St. Henri. M. also gave a verbal order to O. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such verbal order, O. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. This employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the water that she became a total loss.

*Held*, confirming the report of the Registrar, that as the canal was a public work a case of negligence was established for which the Crown was liable under the provisions of section 16 (c) of *The Exchequer Court Act*, 50-51 Vict. ch. 16.

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**PETITION OF RIGHT** for damages arising from an accident to a barge belonging to the suppliant while wintering in the Lachine Canal.

The facts of the case are stated in the Registrar's report.

January 25th, 1904.

The case was referred to the Registrar for enquiry and report.

March 26th 1904.

The Registrar filed his report, which, for a better understanding of the case, is printed in full below.

The Registrar's report was as follows:—

“Whereas by an order made in this cause on the 25th day of January, A.D. 1904, it was ordered that the matters in question herein be referred to Louis Arthur Audette, Registrar of the Exchequer Court of Canada, for enquiry and report, under the provisions of section 26 of *The Exchequer Court Act*, the rules of court and amendments thereto in respect of the same.

“And whereas the reference was proceeded with, at Montreal, before the undersigned, on the 2nd day of March, A.D. 1904, in presence of C. Archer, K.C., of counsel for the suppliant, and A. Delisle, Esq., as counsel for the respondent, upon hearing read the pleadings and upon hearing the evidence adduced on behalf of the suppliant, none being offered by the respondent, and upon hearing what was alleged by counsel aforesaid, the undersigned hereby submits as follows:

“The suppliant brings his petition of right to recover compensation for damages to his barge, the *Balmoral*, 104'4 feet in length by 23'2 feet in width, while wintering during the season of 1900-01 in the Lachine Canal, such damages being suffered through

the officers of the Crown lowering the waters thereof without notifying her proprietor beforehand of such step.

“The suppliant, in the fall of 1900, took his barge, in the usual and customary manner, to a place in the Lachine Canal where she had already wintered during the two previous seasons. He had also previously wintered his barge in the Lachine Canal for quite a number of seasons. Up to the season of 1900-01 it was sufficient for any proprietor, without asking leave or notifying anyone, to leave his barge in the canal, and during the winter time some officer of the Canals Department would go around, take the names of the barges then wintering in the canal, measure them, make up an account based upon the tonnage, and in the spring collect the amount thereof from the proprietor of the barge before she was permitted to leave the canal; the whole in conformity with the provisions of Art. 32 of the tariff confirmed by order in council filed of record as exhibit No. 3. However, since the season in question, beginning with the season 1901-02, the practice has been changed, and in December, 1901, Mr. Marceau, the superintending engineer of the canal, sent the suppliant a letter stating that in future the department would not assume any responsibility in connection with the wintering of vessels in the Lachine Canal during the coming season, and should any damage be done to any vessels wintering in said canal through the lowering of water, no claim would be recognized or allowed by the Government. The practice has changed from the date of this letter, and this does not affect the case in so far as the practice up to that date was different according to the evidence.

“On Friday, the 28th of December, 1900, Ernest Marceau, the Superintending Engineer of the Depart-

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ment of Canals for the Province of Quebec, and the head officer of the Lachine Canal, at Montreal, wrote officially to Denis O'Brien, the overseer or superintendent of the Lachine Canal, ordering him to have the water in the canal lowered on the following Sunday and every Sunday following until further instructed, in order to facilitate the work then being done by the Grand Trunk Railway Company at their St. Henri Swing-Bridge.

“ Such instructions or orders are, according to the evidence of L. A. Lesage, the Secretary, at Montreal, of the Department of Canals for the province of Quebec, within the scope of Mr. Marceau's duties. The same witness says he believes orders were given Mr. O'Brien verbally, by Mr. Marceau, to notify the proprietors in 1900-01, before lowering the water in the canal. He says the proprietors should have been notified, and it was Mr. O'Brien's duty to notify the proprietors or have them notified.

“ Mr. O'Brien, the superintendent of the Lachine Canal in 1900-01, admits in his evidence having received the letter of the 28th December, 1900, and says that since that date the water was lowered every Sunday in that season until the 15th March. He further tells us he himself also received from Mr. Marceau, his superior officer, the customary verbal order of always taking the precaution to notify everybody when lowering the water, in fact not only the barge owners, but the mill owners and everybody else concerned in using the water. Whereupon Superintendent O'Brien, previous to drawing off the water in December 1900, commanded one of his employees, named Matthew Fitzpatrick, to notify weekly, every Saturday, until further orders, the proprietors of the barges which were on that level of the Lachine Canal affected by such change of level.

“ However, on cross-examination O'Brien states that his instructions to Fitzpatrick were to notify the people at the barges. The following is part of his evidence in this respect :—

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“ My instructions were, that he was to notify the people at the barges that the water was to be drawn off.”

*By the Registrar :*

“ Q. At the barge ? ”

“ A. At the barge.”

*By the Registrar :*

“ Q. Well, in the winter there was nobody at the barge ? ”

“ A. Some were, and some were not.”

*By the Registrar :*

“ Q. What were your instructions when there was nobody at the barge ? ”

“ A. No instructions outside of that was concerned.”

*By the Registrar :*

“ Q. You limited your instructions, to Fitzpatrick, to notify only such people who were on board the barges, and if there were nobody on board the barges, what was he to do ? ”

“ A. Well, if he could not see anybody to notify, I suppose there would be no notification, as far as I can see.”

“ Witness O'Brien states also, that there were only four barges lying in the canal affected by the withdrawal of water. So it would have been an easy matter to notify them all. He also finds that the notice to withdraw the water in the first instance was rather short. He said so to Mr. Marceau, saying the notice was too short and it was certainly taking people by the throat. However, that would not apply to the notice for the second Saturday, when he had a full week before him to give a reason-

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able notice, and in the second week it appears from Fitzpatrick's evidence that the barge was not as yet damaged; so there was ample time to give reasonable notice the second time.

"Further on in his evidence, he says he has no doubt the proprietors of the barges should know when the water is to be lowered, and admits he does not know if there was anybody living on board the barges as far as he himself knows. He often passed there and has never seen anybody on board.

"Then we have the evidence of Matthew Fitzpatrick who was in the employ of the Government in 1900-01, and who was directed by his superior officer Denis O'Brien, the Superintendent of the Canal, to notify the proprietors of the barges as above mentioned. He states that if there is nobody on board the barge they do not notify them.

"He further states he did not notify the proprietor of the barge *Balmoral*, but on the first occasion he saw a man on the bow of the barge, asked him in English if he was in charge of the barge, received an answer in French in the affirmative and told him then of the lowering of the water. He says he saw the same man on the following Saturday when he went again to notify, but the man did not appear to him as living on board. He appeared to him not to be much interested in what he told him and he adds if he had had more time he would have tried to find the proprietor. However, if that could have been anything like a reasonable excuse for the first time, how about the other numerous notifications, and especially the second one? He also had time on the first lowering of the water.

"On the third Saturday there was nobody on board the barge according to Fitzpatrick."

“ The suppliant swears he was never notified that the water was to be lowered during the winter of 1900-01. The former Superintendent, Mr. Conway, always notified them on such occasions. Had he been notified he says he would have cut the ice around his barge, as is done in the spring when he is notified. He was informed of the damages to his barge by the end of January, when Leroux and Mondion, two witnesses heard on the reference, told him. The barge was a total loss and he had no means to repair her, and accordingly has been working as a laborer ever since. He tells us also there was nobody in charge of the barge during the winter of 1900-01. There was never, on any occasion, anybody on board in charge of his barge after having been placed in her winter-quarters. The several barge owners heard as witnesses corroborate this evidence in stating that no one lives on board the barges in the winter and no man is placed on board in charge.

“ Tavernier, the foreman at Cantin's dockyard, which is about 150 feet from where the barge *Balmoral* was wintering, says he never saw anybody on board, except children who were playing in the barge, and he even sent them away on some occasions. In winter there has never been anybody on board these barges for the 28 years he has been at Cantin's.

“ The suppliant was well known at the canal. Giroux, the collector, had known him for 22 years; and they had no trouble to find his residence at St. Henri, where he resided for over 40 years in the same house, when they collected the dues for their wintering the barge in the canal. On previous occasions when they lowered the water they used to send somebody to his house to let him know. On this point the suppliant is corroborated by a number of barge owners.

“ There is the further question as to whether or not

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there exists a contract between the Government and the proprietor of the barge, especially when the monies for the rent are paid. Gagnon places his barge in the canal under the authority of the order in council above mentioned; the Crown levies the rent against the barge, and Giroux, the assistant collector, tells us the barges are not allowed to leave the canal in the spring only until after the dues have been satisfied. These dues were even collected for the year of the accident, as appears by Exhibit No. 2. The question would then arise as to whether or not the Crown is answerable for the damages resulting from the breach of the duty or obligation arising from their contract, but it is not necessary for me to decide this point under the present circumstances. *Henderson v. The Queen* (1); *Johnson v. The King* (2).

“ The suppliant claims, *inter alia*, the sum of \$400.00 as representing the loss sustained from not having his barge during the summer following the accident. Such damages are too remote and indirect and when the value of the barge is allowed no more can reasonably be recovered. The interest which will be allowed on the amount representing the value of the barge from the time the Petition of Right was left with the Secretary of State, will cover all reasonable damages of the class referred to in the claim for \$400.

“ If through negligence A. kills a horse and pays the value thereof to the owner, surely the latter would not recover in addition the earnings of the horse for the following year. Stating the proposition is answering it in the negative.

“ Under the circumstances, the undersigned finds: (1) That the Lachine Canal, as admitted on the reference, is a public work and the property of the Dominion of Canada. (2) That Superintendent O'Brien was

(1) 6 Ex. C. R. 39.

(2) 8 Ex. C. R. 368.

guilty of negligence in giving instructions to notify the proprietor of the barge at the barge only. That a proper notice should have been given to the proprietor personally. (3) That Fitzpatrick was also guilty of negligence in giving the notice in such an unreasonable manner, specially when he knew that it had been customary to give notice in the past under such circumstances, and after his own admissions that proper notice should have been given.

"Therefore, the undersigned has the honour humbly to report that the respondent is liable under the circumstances for the damage to the suppliant's barge *Balmoral* as resulting, under the provisions of sec. 16 (c.) of *The Exchequer Court Act*, from the negligence of the servants or officers of the Crown while acting within the scope of their duties or employment, and this damage will be fixed at the sum of \$1,200, which the suppliant is entitled to recover from His Majesty the King, with interest thereon from the 25th day of November A. D. 1901, being the date upon which the Petition of Right was left with the Secretary of State, as appears by Exhibit No. 8 herein. The suppliant will also be entitled to his costs.

"In witness whereof the undersigned has set his hand, at Ottawa, the 26th day of March A. D. 1904.

"(Sgd) L. A. AUDETTE,  
"Registrar."

"April 19th, 1904."

The argument of a motion by suppliant for judgment on the Registrar's report, and of a counter motion by way of appeal therefrom, on behalf of the respondent, now proceeded at Ottawa.

*C. Archer, K.C.*, for the suppliant;

*A. Delisle* for the respondent.

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Mr. *Archer* formally moved for judgment on the Registrar's report.

Mr. *Delisle*, in opposing this motion, stated that the Crown had no fault to find with the amount of damages reported by the learned Registrar, but took exception in law to the liability of the Crown in such a case. He contended that there was no negligence by any officer or servant of the Crown while acting within the scope of his duty or employment on a public work. If there was any responsibility it rested upon the Grand Trunk Railway Company for whom the canal was unwatered. The canal was not unwatered for the purposes of the Crown, and the engineer in charge was not acting within the scope of his duties when he gave orders to have the canal unwatered for the railway company.

Again, the suppliant had notice of the fact that the canal was to be unwatered. The man, Fitzpatrick, who was instructed by Mr. O'Brien to notify the suppliant, went to his barge and notified the man in charge of the barge that he should take steps to protect the barge from any danger arising from the unwatering. It is true that Fitzpatrick did not really know whether the man on the barge was in charge of her but he was justified in thinking so. The suppliant, however, denies that this man was in charge of the barge.

If the court comes to the conclusion that Mr. Marceau, the engineer in charge of the canal, was acting within the scope of his duty in unwatering the canal, then we say that he did all that he could to notify the suppliant, and that the suppliant was guilty of contributory negligence in not protecting his barge.

Mr. *Archer*, in opposing the motion by way of appeal, contended that under Rules 19 & 20 the respondent should have given notice of appeal, and, having

failed to do that, could not go into the merits of the appeal.

[*By the Court* :—Under the circumstances I shall allow the argument to proceed as if notice of appeal had been given.]

On the merits of the case we are entitled to judgment. Mr. Marceau was the proper officer of the Crown to order the unwatering, and it was owing to the negligence of officers under him, in failing to notify the suppliant of the unwatering of the canal, that the accident happened. The barge was properly in the canal, and it is clear from the evidence that the suppliant was not notified before the unwatering took place on the occasion when the barge was damaged. It is a clear case of damage arising through negligence on a public work.

Mr. *Delisle* replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 25th, 1904), delivered judgment.

In this case there is no doubt that the injury to the suppliant's barge happened on a public work; and it is, I think, clear that it was occasioned by the negligence of the Crown's officers and servants; and that they were at the time acting within the scope of their duties or employment. The case falls, it seems to me, within the statute, and there will be judgment for the suppliant in accordance with the report of the Registrar of the court.

*Judgment accordingly.*

Solicitors for the suppliant: *Archer & Perron.*

Solicitor for the respondent: *E. L. Newcombe.*

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