

1894 THE CITY OF QUEBEC (SUPPLIANT)....APPELLANT ;

\*May 15, 16.

Oct. 9.

AND

HER MAJESTY THE QUEEN (RE- }  
 SPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Constitutional law—Dominion Government—Liability; to action for tort—  
 Injury to property on public work—Non-feasance—39 V. c. 27 (D)  
 R. S. C. c. 40, s. 6—50 & 51 V. c. 16 (D).*

50 & 51 V. c. 16 ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau J. expressing no opinion on this point.)

By 50 & 51 V. c. 16, s. 16 (D) the Exchequer Court is given jurisdiction to hear and determine, *inter alia*: (c). Every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment ;  
 (d). Every claim against the Crown arising under any law of Canada. \* \* \*

In 1877 the Dominion Government became possessed of the property in the city of Quebec on which the citadel is situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth until in 1889, a large portion of the rock fell from the cliff into a street of the city below, causing great damage for which compensation was claimed from the Government.

*Held*, per Taschereau, Gwynne, and King JJ., affirming the decision of the Exchequer Court, that as the injury to the property of the city did not occur upon a public work, subsec. (c) of the above Act did not make the Crown liable, and, moreover, there was no evidence

\*PRESENT.—Sir Henry Strong C.J. and Fournier, Taschereau, Gwynne and King JJ.

that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

*Held*, per Strong C.J. and Fournier J., that while subsec. (c) of the Act did not apply to the case, the city was entitled to relief under subsec. (d); that the words "any claim against the Crown" in that subsec., without the additional words would include a claim for a tort; that the added words "arising under any law of Canada" do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Canada and even if the meaning be restricted to the statute law of the Dominion the effect of sec. 58 of 50 & 51 V. c. 16 is to reinstate the provision contained in s. 6 of the repealed Act R.S.C. c. 40 which gives a remedy for injury to property in a case like the present; that this case should be decided according to the law of Quebec, regulating the rights and duties of proprietors of land situated on different levels; and that under such law the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain.

*Held also*, per Strong C.J. and Fournier J., that independently of the enlarged jurisdiction conferred by 50 & 51 V. c. 16 the Crown would be liable to damages for the injury complained of not as for a tort but for a breach of its duty as owner of the superior heritage by altering its natural state to the injury of the inferior proprietor.

**APPEAL** from a decision of the Exchequer Court of Canada (1) granting a motion on behalf of the Crown for a nonsuit.

The facts of the case sufficiently appear from the above head-note and the judgments published herewith. The Chief Justice in his judgment also points out the grounds relied on by counsel in argument.

*Pelletier* Q.C. and *Flynn* Q.C. for the appellant.

*Hogg* Q.C. for the respondent.

**THE CHIEF JUSTICE.**—This is a petition of right by which the city of Quebec seeks to recover from the Crown reparation for the damage caused by an acci-

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dent which took place on the 19th September, 1888, when a large portion of rock fell from the side of Cape Diamond into Champlain Street, in the Lower Town of that city, breaking into pieces and forming an enormous heap by which the street was blocked up for a considerable length, and communication between the northerly and southerly ends of it rendered impossible, and whereby the water pipes and drains belonging to the city were covered over and rendered inaccessible. A demurrer by the Crown having been overruled, the petition of right came on for hearing before the judge of the Exchequer Court, who, at the close of the suppliant's case, ordered judgment of non-suit to be entered from which judgment the present appeal has been brought.

One of the principal questions to be decided by this appeal is the extent of the remedy by petition of right, which depends on the construction to be placed on two Acts of Parliament.

Before the passing of the Petitions of Right Act, 39 Vic. ch. 27, there was no remedy against the Crown as representing the Dominion of Canada, in any dominion or provincial court, in respect of any act or omission on the part of the Crown, or any of its officers or servants, which in the case of a subject would have entailed liability as being a tortious act or a negligent omission of duty, save in so far as by statute (hereafter referred to) power was given to certain ministers of the Crown, being heads of departments, in their discretion to refer claims for relief in such matters to the arbitration of public officers, called "official arbitrators."

The Petitions of Right Act did not confer any remedy in such a case, for by the 19th section of Revised Statutes of Canada, ch. 136, sec. 21, it was enacted that :

Nothing in this Act contained shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of an Act of the Parliament of the United Kingdom, passed in the 23rd and 24th years of Her Majesty's reign, intituled "An Act to amend the law relating to Petitions of Right, to simplify the proceedings and to make provision for the costs thereof."

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That the law of England did not authorize a petition of right as a remedy for a tortious act alleged against the Crown, or its officers or servants, is a proposition scarcely requiring any authority. The cases of *Lord Canterbury v. The Attorney General* (1); *Tobin v. The Queen* (2); and *Feather v. The Queen* (3), may be referred to as establishing it beyond a doubt or question. That the Petitions of Right Act did not alter the law in this respect was held in *The Queen v. McLeod* (4), and *The Queen v. McFarlane* (5), which are conclusive authorities for that proposition binding on this court. If therefore the present appellant is now entitled to a judicial remedy against the Crown in respect of a delict or tort such remedy, and the jurisdiction to enforce it, must have been conferred since the decision of the last of the two cases referred to. In order to ascertain whether this is so or not it is necessary to examine with care the subsequent legislation which is relied on by the appellant as having so altered the law, and also to notice some prior enactments referred to in such subsequent legislation.

By the 6th section of chapter 40 of the Revised Statutes of Canada, intituled "An Act respecting Official Arbitrators," which was a consolidation and re-enactment of previous legislation, it was enacted as follows:

If any person has any claim for property taken, or for alleged direct or consequential damage to property arising from or connected

(1) 1 Ph. 306.

(3) 6 B. & S. 295.

(2) 16 C. B. N. S. 310.

(4) 8 Can. S. C. R. 1.

(5) 7 Can. S. C. R. 216.

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with the construction, repair, maintenance, or working of any public work, or arising out of anything done by the government of Canada, or arising out of any death, or any injury to person or property on any public work, or any claim arising out of or connected with the execution or fulfilment, or an account of deductions made for the non-execution or non-fulfilment, of any contract made and entered into on behalf of Her Majesty, such person may give notice in writing of such claim to the Secretary of State, stating the particulars thereof, and how the same has arisen, which notice the Secretary of State shall refer to the head of the department with respect to which the claim has so arisen; and thereupon the minister may, at any time within thirty days after such notice, tender what he considers a fair compensation for the same with notice that the said claim will be submitted to the decision of the arbitrators, unless the sum so tendered is accepted within ten days after such tender.

I have set forth this long section *in extenso*, for although the statute itself is repealed it has, nevertheless, a very material bearing on the question of the Crown's liability.

By the same Act provision was made for the appointment of official arbitrators, for their powers and for the procedure on references before them.

By 50 & 51 Vict. ch. 16, by which the Exchequer Court, the jurisdiction of which up to that time had been administered by the judges of the Supreme Court, was re-constituted under a separate judge, with an enlarged and more fully defined jurisdiction, it was (by the 15th section) enacted that:

The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

The 16th section is as follows:

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

(a.) Every claim against the Crown for property taken for any public purpose ;

(b.) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work ;

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

(d.) Every claim against the Crown arising under any law of Canada or any regulation made by the governor in council.

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By section 23 it is provided that :

Any claim against the Crown may be prosecuted by petition of right, or may be referred to the court by the head of the department in connection with the administration of which the claim arises, and if any such claim is so referred no fiat shall be given on any petition of right in respect thereof.

By section 58 of the same Act chapter 40 of the Revised Statutes of Canada was repealed, but expressly "subject to the provisions of the Interpretation Act," and it was enacted that :

Whenever in any Act of the Parliament of Canada, or in any order of the governor in council, or in any document, it is provided or declared that any matter may be referred to the official arbitrators acting under the "Act respecting the Official Arbitrators," or that any powers shall be vested in or duty shall be performed by such arbitrators, *such matters shall be referred to the Exchequer Court* and such powers shall be vested in and such duties performed by it ; and whenever the expression "official arbitrators" or "official arbitrator" occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court.

Upon the argument of the demurrer in this case it was contended, on behalf of the Crown, that the effect of this legislation was to leave parties just where they were before the passing of the 50 & 51 Vic. ch. 16 (the Exchequer Court Amendment Act) in respect of any right to recover against the Crown in respect of a *tort*, for the reason that it was not intended to confer any new or enlarged right to maintain a petition of right against the Crown in the matter of such claims,

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but merely to enact that wherever there was a previous liability of the Crown in respect of the matters referred to in section 16, that liability might be enforced by a reference to the Exchequer Court instead of to the official arbitrators. And in support of this proposition the case of *Northcote v. The Owners of the Henrich Björn* (1) was relied on. That case, however, does not seem to have any application. Jurisdiction was there given to the Court of Admiralty in certain new cases, and the question was whether this necessarily implied that a maritime lien was thereby conferred. It was held that the only effect of the Act was to enable a liability *in personam*, which before had existed at common law, to be enforced in the Admiralty. This manifestly has no application here.

This objection was overruled by the learned judge of the Exchequer Court, and I am of opinion that in this his decision was correct.

The right of the city of Quebec to relief in respect of the grievances alleged in the petition of right depends on subsection (d) of section 16 of the Exchequer Court Act and not on subsection (c) of the same section 16, the last subsection being for several reasons inapplicable to the case before us. This subsection (d) which gives jurisdiction to the Exchequer Court to hear and determine "every claim against the Crown arising under any law of Canada" would indubitably and upon the direct authority of two recent decisions of the Privy Council, if the words "under any law of Canada" were eliminated, have the effect of giving a remedy to the subject against the Crown in all claims for damages for *torts* or *delicts*. In the case of *Farnell v. Bowman* (2), an appeal from New South Wales, it was held that the government of that colony was liable to be sued in an action *ex delicto* under a statute providing "that

(1) 11 App. Cas. 270.

(2) 12 App. Cas. 643.

any person having or deeming himself to have any just claim or demand whatever against the government" might set forth the same in a petition to the governor, upon which petition a certain prescribed procedure being followed, judicial relief might be obtained as in the case of an ordinary action between subject and subject. In this judgment it is said with reference to the proper construction of the statute :—

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Thus, unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatsoever against the government. These words are amply sufficient to include a claim for damages for a *tort* committed by the local government by their servants.

In the case of the *Atty. Gen. of the Straits Settlement v. Wemyss* (1), the words of an ordinance authorizing a remedy by petition of right against the Crown for tortious Acts was in words even more apposite to the case before us ; these words were :

Any claim against the Crown for damages or compensation arising in the colony shall be a claim cognizable under this ordinance.

The Judicial Committee in their judgment make the following observations upon the meaning of this provision :

Their Lordships are of opinion that the expression "claim against the Crown for damages or compensation" is an apt expression to include claims arising out of *torts*, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning. In the case of *Farnell v. Bowman* (2), attention was directed by this committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon *torts*, it should mean exactly what it expresses.

(1) 13 App. Cas. 192.

(2) 12 App. Cas. 643.

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These two cases have a two-fold application here, first as showing that the words "any claim against the Crown" are sufficiently comprehensive to include *torts*, more especially as the 15th section makes express provision for the case of claims arising from contracts; secondly, these judgments of the Privy Council lay down a rule or canon for the construction of colonial enactments by which the remedy of the subject against the Crown is enlarged, which it is the duty of this court to apply, as far as possible, to the acts of parliament now under consideration.

It being then established by the cases cited that the language of section 16, subsection (d) "every claim against the Crown" is to have the wide construction before stated applied to it, which would include claims for damages arising *ex delicto*, we are next to inquire whether any and what restriction on the meaning which would be thus attributable to the expression in question, if it had stood alone, is imposed by the words "arising under any law of Canada," which immediately follow. It may be said that these are words of limitation which confine the clause to claims in respect of which some pre-existing law had imposed a liability on the part of the Crown. Again, it may be said that a "law of Canada" necessarily means not only some prior law of Canada, but must also exclusively refer to statute law. In support of this last proposition it might be said that there is no general common law prevailing throughout the Dominion of Canada, that each of the several provinces possesses its own private common law, and that the common law of the territories not included within any of the provinces depends on the enactments of the Dominion Parliament. This may be true, and is a necessary incident and result under every system of federal government where the several provinces or states forming the confederation have

each its own separate and different system of private law. This has been recognized as a necessary consequence under the federal constitution of the United States, and that for a reason which would be equally applicable to Canada. It can make no difference that all the provinces, save one, derive their common law from that of England; the circumstance that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law, apart from statute, generally prevalent throughout the Dominion. No inconvenience can result from this, since every case which could arise would be provided for by the law of some one or other of the provinces.

Were I obliged to determine this question of construction as one on which the decision of this appeal depended I should probably come to the conclusion that the clause in question ought not to be so interpreted as to exclude claims in respect of *torts* and *delicts*, not referable to any prior statute of the Dominion, but being such as would, under the law of any of the provinces of Canada, have entitled parties to relief as between subject and subject. Taking the rule so clearly and emphatically laid down by the Privy Council in the cases before cited as a guide which we are bound to follow, it would appear to be proper that a wide and liberal construction, what is called a beneficial construction, should be placed upon the language of the legislature; a construction calculated to advance the rights of the subject by giving him an extended remedy. Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some pre-existing liability of the Crown, but that it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every

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case in which a claim was made against the Crown which, according to the existing general law, applicable as between subject and subject, would be cognizable by the courts. Further, I am of opinion that it would be right to hold that the words "law of Canada" did not mean exclusively a statute of the Dominion of Canada, but might be interpreted as meaning the law of any province of Canada which would have been appropriate for the decision of a particular claim in respect of a *tort* or *delict* if it had arisen between subjects of the Crown. It would not, I think, be taking any unwarrantable liberty with the language of the legislature so to interpret the words "any law of Canada," for in a non-technical and popular sense the laws of the several provinces of Canada are laws of Canada, and the rule laid down by the cases before cited requires us to give the terms used the most favourable and comprehensive construction possible. Granting, however, that this subsection (*d*) of section 16 is to be construed as literally and narrowly as possible, and that it is to be confined to cases of claims arising under some pre-existing law; and further that such pre-existing law must be a law of Canada which shall be an act of parliament of the Dominion; my proposition is that a remedy to be obtained through the exercise of the jurisdiction of the Exchequer Court is conferred on the subject by this subsection (*d*) of section 16 for a claim such as the present.

Section 6 of the Revised Statutes of Canada, chapter 40, before set forth, gives in the most explicit terms a remedy to be attained by means of the administrative procedure thereby prescribed, for any direct or consequential damage to property arising from or connected with the construction, repair, maintenance or working of any public work, or arising out of anything done by the government of Canada. If this enactment, or that

particular portion of it to which I have just referred, still remains in force, it is clear that there is an existing law of Canada which authorizes the claim against the Crown made by the suppliant in this petition of right. I now proceed to show how this section 6 of chapter 40 is kept alive, notwithstanding the express repeal of the whole chapter 40 by section 58 of 50 & 51 Vic. ch. 16. In the beginning of section 58 it is provided that the Acts and parts of Acts mentioned in schedule B to the Act are thereby repealed, and in the schedule this chapter 40 is specified as wholly repealed; such repeal is, however, expressly made subject to the "Interpretation Act." By the subsequent part of section 58 it is declared that wherever in any Act of Parliament it is provided that any matter may be referred to "the official arbitrators" or "that when any powers shall be vested in or duty shall be performed by such arbitrators" such matters shall be referred to the Exchequer Court, and such powers shall be vested in and duties performed by that court, and that wherever the expression "official arbitrators" occurs in any such Act it shall be construed as meaning the Exchequer Court. It follows from this that claims provided for by section 6 of the Revised Statutes, chapter 40, which by that Act were to be referred to the arbitrators, are now, under this Act 50 & 51 Vic. ch. 16, to be referred to the Exchequer Court, which necessarily implies that all such claims against the Crown are saved from the repeal and are therefore matters in which parties are for the future to be entitled to a remedy by the judicial procedure of the Exchequer Court. According to the section just quoted from, the matters so saved from the repeal of chapter 40 are to be referred to the Exchequer Court; from this, if it stood alone, it would follow that the jurisdiction of the Exchequer Court in such cases, could only be exer-

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cised upon a reference by a minister. By the 23rd section of 50 & 51 Vic. ch. 16, it is, however, provided "that any claim against the Crown may be prosecuted by petition of right, or may be referred to the court" by a minister; "any claim" of course would include a claim such as that made by the petition of right in the present case in respect of "direct or consequential damage to property" under the sixth section of the Revised Statutes, ch. 40, as reinstated by section 58 of 50 & 51 Vic. ch. 16. Therefore not merely are such claims now the proper subject of reference to the Exchequer Court, but they may also be asserted by petition of right. This must follow not merely from the use of the comprehensive expression "any claim" but also from the latter part of section 23. This latter part of the section provides that "if any claim is referred no fiat shall be given on any petition of right in respect thereof." This I construe as necessarily implying that claims which might have been referred may be properly the subject of petitions of right, thus indicating that the wide meaning which I have already attached to the words "any claim" in the preceding part of the section is in accord with the deliberate intention of the legislature. And this may well be considered not to be an extravagant concession on the part of the Crown in favour of claimants for reparation for *torts* or *delicts*, inasmuch as the power to grant or withhold the fiat on a petition of right enables the administrative officers of the Crown to exercise as much control over a remedy in that form as a minister could under the statute exercise in granting or refusing a reference.

The case made by the petition of right must then, for the foregoing reasons, be considered a claim against the Crown under subsection (d) of section 16 of the Exchequer Court Amendment Act arising under that

particular law of Canada which is embodied in the reinstated section 6 of the repealed Act, Revised Statutes ch. 40. The claim is one within the purview of that section inasmuch as the suppliant complains of and claims damages for a direct and also a consequential injury to its property, or to the street which it was bound to keep and maintain as a thoroughfare, by blocking it up with a heap of rock, stones and earth which also covered its water and drainage pipes, thus preventing access to the pipes in case of leakage, which damage the suppliant says is proved to have arisen from or in connection with the construction, repair and maintenance of a public work, namely, a certain drain, running through the property of the Crown. It is true that the allegations of the petition of right are very general, merely alleging carelessness, want of precaution and gross negligence on the part of the Crown and its officers. But no objection was taken to this general form of pleading, either at the trial or upon the appeal to this court, and I therefore feel justified in putting the case as it was shaped in argument by the appellant's counsel at this bar, and as it was disclosed by the evidence which was admitted without objection. It being then sufficiently established that the suppliant was rightly before the Exchequer Court on a petition of right, the next question is: In what system of law is the rule of decision applicable to the case so presented to be found? So long as such a claim was one at large to be referred to lay arbitrators under the administrative procedure prescribed by the repealed Act, it might not matter that it should be brought under any particular system of law, but where it was made a matter for judicial decision, as it was by the transfer of the jurisdiction to the Exchequer Court, it became necessary to ascertain by what rules of law the suppliant's case was to be

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determined. The decision of the case must of course be regulated either by the law of the province of Quebec as expressed in the civil code, and by the old French law by which the code is supplemented, or by the law of England, these being of course the only systems to which resort can properly be had for a rule of decision. As both the property of the suppliant alleged to have received the injury, and the property of the Crown from which the damage proceeded, are in the province of Quebec, I think there can be no question but that the proper rule of decision is that afforded by the law of that province. It matters, however, in my opinion, but little whether the law of England or the law of the province of Quebec be applied to this case, as in all material respects the two systems of law are identical in the principles applicable to the facts disclosed by the evidence in the present record.

The learned judge of the Exchequer Court was of opinion that neither misfeasance nor negligence on the part of the Crown or any of its officers was proved. What the learned judge said on this head is contained in the following paragraph, which I extract from his judgment :

With reference to this question of nonfeasance 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, or 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 suppliant 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.

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 *primâ 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.

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In the judgment delivered in the Exchequer Court there occurs the following passage :

The accident so far as the evidence goes was occasioned, or at least hastened, by the discharge of the water from the drain which has been so much spoken of.

I have read the evidence several times and attentively considered it, and I entirely agree that this is on the whole a proper conclusion from it, although I might be induced to put it a little stronger and say that in the present state of the record it appears from the evidence that this drain was the sole and immediate cause of the disastrous accident which has led to the present claim.

I do not propose to deal with the evidence exhaustively or with any degree of fulness, as in the event of the case being sent down to another trial such a discussion might lead to embarrassment; but in order to make what I have to say as regards the non-suit plain, I must refer to it to some slight extent.

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In the deposition of Mr. Baillairgé, a civil engineer, and the city engineer of Quebec, a witness whose evidence seems to have commended itself to the learned judge as entirely worthy of credit (which, however, is not now material since on this appeal against the non-suit we have nothing to do with the credibility of witnesses or the weight of testimony) I find the following description of the accident itself, and of the causes which led to it :

Q. You remember the 19th September, 1889, the evening of the catastrophe?—A. Yes.

Q. Will you in a few words, state what occurred and how it occurred, that landslide?—A. Well, what occurred was that the whole section of rock between the outer and inner crevasses moved forward about between six and seven inches, moved outwards with the terrace, taking the terrace with it, about two hundred feet of the western end of the terrace. The floor of it had been scribed to the rock, and it still can be seen, the scribing to the rock. It will be seen now that this is six inches at its greatest amplitude and going upward diminishes off to five, four and two inches, showing that the whole cliff moved away ; and another point that shows it is the stairs reaching up to the citadel, on the second landing of the stairs the ramps are dislocated, are torn asunder about seven inches so there is no doubt the whole cliff with the terrace moved outwards about six inches ; and this section thrust out the other. The present section on which the terrace is built, by pushing out gave the other a push and caused it to fall over. That is my idea. The outer face of the section there at present leans over six feet in sixty or one in ten, and as the crevasse was about two feet, therefore the rear part of the rock must have leaned over about eight feet, making it very unstable the portion that fell.

Q. When it comes there what direction does the water take, does it go into a sewer or drain?—A. Yes, it now takes a direction parallel to the riprap wall on the face of the glacis. This is since last fall when the drain was renewed. It is indicated here on suppliant's exhibit no. 9 by the letters A, F, G, H. The portion A, P, is parallel to the foot of the glacis, A, F, G, H, running out down over the cliff towards the St. Lawrence. That was a drain built for the water, I don't know how many years ago, perhaps fifty years ago, and it was completely choked at the time of the landslide ; but it was burst out here just near the bastion, and any water flowing out from it, instead of flowing down the drain, poured out from the side of the brick drain and naturally ran towards and into the crevasse.

By the court :

Q. The upper crevasse ?—A. The inner crevasse, the present crevasse.

Q. All that water had to come and go into the sewer and drain which went parallel to the riprap wall ?—A. Yes, it would have come down that drain and followed the face of the cliff and gone down into Champlain street, but the drain was choked.

Q. You say you found that drain choked somewhere ?—A. Yes, the drain was choked, completely choked, at point A on exhibit no. 9.

Q. You do not say it was choked there, you say that all the water came out from there ?—A. All the way down from the point A it was choked, it was all filled, completely filled from the *debris* falling into it.

Q. You found that drain choked ?—A. Yes, sir.

Q. Well, where had the water to go ?—A. Well, there was a hole in the side of the brick drain which was only four inches thick, half brick thick.

Q. On which side ?—A. The outer side, the side towards the river.

Q. By what you saw, Mr. Baillaigé, is there any appearance that this drain was choked lately or long ago ?—A. It must have been choked, according to appearances, I should say for more than twenty years. It was very solidly packed, solidly packed with earth and stones to the very summit of the arch. I don't think a drop of water could pass through.

Q. So it had to run down into the crevasse ?—A. Yes, it had to run into the crevasse.

Q. Which is immediately under that ?—A. Yes, the crevasse is immediately under that or opposite.

Q. That drain was built long ago, I suppose ?—A. I suppose at the time the citadel was finished, some fifty or sixty years ago.

Q. That sewer was made to drain the citadel ?—A. Yes, evidently made to drain the waters from the ditches of the citadel.

Q. Mr. Baillaigé, in the whole of your evidence this morning, the conclusion was that you attributed the fall of the rock to the extra quantity of water coming from the citadel and which did not pass through the sewer ?—A. Yes, sir.

Q. You have no doubt about it ?—A. No.

Q. Have you any doubt that if that drain which was choked had not been choked, that the water which drained from the citadel would not have gone into the crevasse ?—A. Certainly not ; it would have run eastward.

Q. And you have no doubt that the natural quantity of rainfall which went directly into the crevasse would not have been sufficient in pressure to push the rock out ?—A. No.

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Q. It would have been impossible?—A. It would not have exercised the necessary pressure.

Now, I think after this evidence it was impossible to say that there was no proof in support of the suppliant's claim as it was put forward in argument here, and as it has been propounded in the appellant's factum.

It is sufficiently proved for the purpose of a *prima facie* case that the landslide in question was caused by a drain which had been constructed when the works of the citadel of Quebec had been completed by the Imperial Government, some sixty years before the accident, having become completely blocked so that it did not after a certain length carry off any water; that it had probably been in this condition for some twenty years previously; that the stopping up of this drain caused the water which ought to have been carried away by it to escape through a hole in the drain caused by its bursting and to spread over the adjacent rock and into certain crevasses of that rock which eventually led to the loosening of the earth and caused the rock to slide forward, which in turn pushed down the huge mass which fell into the street to the lamentable destruction of human life and private and public property before described.

If on a proper application of principles of law to this statement of the facts which I am of opinion was the result of the evidence, the suppliant was entitled to relief, the non-suit was wrong, and the Crown ought to have been called upon to proceed with its evidence in answer to the *prima facie* case thus established. I have been particular to point out that the defect in the drain, and probably the existence of the drain itself, was not known to any of the officers of the Crown before the accident, and that there was nothing to indicate its existence which would have made it negligence in them not to have known it, for two reasons, first,

because the learned judge lays stress on this which in point of fact he is entirely justified in doing ; secondly, because so far as the case depended in any way on proof of negligence this non-negligent ignorance of the existence of the drain would, on the authority of *The Sanitary Commissioners of Gibraltar v. Orfila* (1), be a conclusive answer.

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I now proceed to put forward the propositions of law which, applied to the conclusion from the evidence I have just stated, seem to me to show that a case calling for an answer from the Crown was sufficiently made out by the suppliant. I am of opinion that according to the law of the province of Quebec, if the land from which the mass of earth and rock which fell upon the suppliant's streets was detached had been the property of a subject, the city could, under the facts and circumstances established by the evidence, have maintained an action against such proprietor in order to obtain reparation for the damages thus caused. Therefore, under the statutes already referred to there does exist a claim against the Crown which is under the latter statute the proper subject of a petition of right. The principles of law which govern the case are those which regulate the rights and duties of proprietors of land situated on different levels, and these principles are formulated as applicable to one of the many instances in which they apply, by article 501 of the civil code of Quebec. This article is as follows :

Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land.

Article 501 is a literal reproduction of article 640 of the French Code. All the commentators on the Code

(1) 15 App. Cas. 400.

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Napoléon recognize that article 640 is but a single instance of the application of a general principle of law which is not confined to the case of the flowage of water from higher to lower lands belonging to different proprietors, but which is also applicable to the case of earth, rock and stone falling or sliding down from the superior upon the inferior of properties owned by several proprietors. Demolombe (1) says :

L'article 640 n'est relatif qu'à l'écoulement des eaux, mais il est clair que les fonds inférieurs sont également assujettis à recevoir les lavanges, les avalanches, les éboulements, enfin, de toutes sortes de terre, de neige, de glaces, de gravier, de rochers, etc., qui se détachent des fonds supérieurs. C'est là une règle de nécessité qui, pour n'avoir point été consacrée dans un article spécial, n'en est pas moins évidente et dont l'article 640 n'est lui-même qu'une application.

C'est donc d'après la pensée du législateur telle que l'article 640 la révèle et d'après les principes de l'équité et du bon sens, que les magistrats doivent se décider dans les différentes hypothèses qui peuvent se présenter à cet égard, et qui sont très fréquentes dans les pays de montagnes.

55. Ainsi, la première condition est que les éboulements descendent naturellement des fonds supérieurs *et sans que la main de l'homme y ait contribué*; art. 640.

Point de doute, par exemple, que le propriétaire qui, par des travaux quelconques, aurait créé lui-même la pente du sol, ne fût responsable des dommages qui en résulteraient pour ses voisins. (Zachariæ t. 1, p. 427).

Pothier also shows that the principle which was subsequently adopted in the code admits of a very wide generalization. This author, in treating of "Voisinage," in the second appendix to his *Traité de Sociétés* (2) says:—

Le voisinage oblige les voisins à user chacun de son héritage de manière qu'il ne nuise pas à son voisin. Dig. 50-17-61 De Reg. Jur.

Cette règle doit s'entendre en ce sens que quelque liberté qu'un chacun ait de faire ce que bon lui semble sur son héritage, il n'y peut faire rien d'où il puisse parvenir quelque chose sur l'héritage voisin, qui lui soit nuisible. Dig. 8-5-8 Si. serv. vind.

(1) Servitudes, tome 1, n° 54.

(2) Nos. 235 and 236.

So long as the higher lands are left in their natural state and nothing is done by the owner of the superior heritage to cause the descent of water, rock, earth or other matter upon the inferior heritage, the proprietor of the latter cannot complain of the natural flowage of water or falling of earth, but if by any works of the superior proprietor upon his own land, water, rocks, stones or earth are caused to fall upon the lower property and damage is thereby caused, which, if things had been left in their natural state, would not have resulted, the proprietor of the inferior property is entitled to reparation.

Thus Demolombe says (1) :

Le propriétaire supérieur n'est pas tenu de réparer le dommage que les éboulements auraient causé aux fonds inférieurs. C'est là un de ces accidents de la nature dont nul n'est responsable, toutes les fois, bien entendu, qu'on ne lui impute d'ailleurs aucune faute.

Marcadé (2) commenting on article 640 C.N. says :

Si c'était par le fait du propriétaire supérieur, que les cailloux, des eaux, etc., descendissent sur le terrain inférieur le propriétaire de celui-ci ne serait plus obligé de les recevoir, car la loi n'entend consacrer que le résultat naturel de la position des lieux.

LaLaure has this passage (3) :

Le propriétaire inférieur peut s'opposer à ce que le propriétaire supérieur aggrave sa servitude par quelques travaux qui augmenteraient, à son préjudice, le volume des eaux et leur affluence ; sa servitude étant imposée par la nature, il n'est obligé à recevoir les eaux que dans l'état où la nature les lui renvoie elle-même.

I also refer to Merlin (4), and to Baudry-Lacantinerie (5). Two *arrêts* referred to by Demolombe (6), are also much in point, as are also the observations of Aubry et Rau (7), and Laurent (8) upon this point.

(1) Servitudes t. 1, n° 56.

(2) Vol. 2, n° 583.

(3) Traité des Servitudes Réelles p. 655.

(4) Rep. Vo. Eaux Pluviales, n° 1.

(5) Droit Civil 1, p. 880.

(6) Servitudes t. 1, n° 60.

(7) Droit Civil Français, vol. 3, pp. 8, 9, 10, 11.

(8) Principes du Droit Civil Français, vol. 7, p. 428, n° 360.

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The streets of the city of Quebec are by C. S. C. ch. 85, secs. 1, 2 and 3 vested in the suppliant as to the right of user if not as to the property also, and must therefore be deemed to be in the possession of the suppliant who, by the enactment referred to, is bound to keep them in repair and is liable to indictment for neglect of such duty. That the city therefore was subjected to great damage from this landslide must be apparent when it is considered that not only were the streets blocked up by the rock and earth which fell upon them, but the water pipes and drains belonging to the city were also covered by it and rendered inaccessible. That a public street or highway is to be regarded as a servient heritage for the purpose of the application of the article 501, is demonstrated very clearly and satisfactorily by Laurent (1) who shows that public ways, roads and streets are subject to the servitude recognized by the code and that consequently they are entitled to the benefit of the same limitations as regards abstinence from aggravation on the part of the dominant owner as applies to private proprietorship.

If the city is not entitled to relief by petition of right it is manifest it will have to suffer a great wrong without any corresponding remedy. The statuté as already stated makes it incumbent on the corporation to maintain the streets and to keep them in good repair, and this of course involved the duty of clearing away the rock and rubbish which fell upon it on the occasion of this accident, thus burthening the city with a large expenditure. The failure of the suppliant to perform this duty would have left it liable to indictment. See *The Queen v. Greenhow* (2). Again, it was absolutely necessary to have the surface of the street cleared of this mass of rock and rubbish, in order that in case of need access might be obtained to the drains

(1) Vol. 7, nos. 130, 359.

(2) 1 Q.B.D. 703.

and water pipes, the latter being the property of the city. It is no answer to the claim of the city to be indemnified for the damage which it has thus suffered to say that the incumbrance of the street by the *débris* which fell from the property of the Crown was in the nature of a public wrong, an obstruction of the highway which, if it had been wilfully caused by a subject, would have been a public nuisance, for in addition to that it was a special private wrong as regards the city, causing the corporation special loss and damage apart altogether from the injury to the public caused by blocking up the street; for this wrong, as the suppliant is in possession of the street, is under the legal obligation to keep it in repair and open for traffic, and has, if not the full property, at least a *jus in re* by reason of its express statutory right of user, and also by reason of its water pipes and drains laid beneath the surface, it ought to be entitled to recover in this proceeding by petition of right.

The general principle of the law of the province of Quebec applicable to civil wrongs of this kind, is that in all cases where real and actual damage is caused to property, or to rights in the nature of property,—*jura in re*,—an action can be maintained, and if Champlain street had been land belonging to a private owner, not only might such proprietor have maintained an action, but any one having a *jus in re* in respect of the land, such as a servitude of passage over it, which right of passage had been obstructed by the fallen rock, would have been likewise entitled to legal reparation.

Then it appearing that the Crown is the owner of the property in which there existed a drain constructed, as far as can be now ascertained, by the Crown itself in the course of the citadel works, and the damage of which the suppliant complains having arisen from the non-repair of this drain, which became choked up and

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thus caused the accident; and it also appearing that the suppliant has a sufficient *locus standi* in respect of the streets and water pipes to maintain the petition of right, the authorities quoted show that the city of Quebec is entitled to recover from the Crown the indemnity which it seeks, unless the circumstance that the Crown officers were ignorant of the existence of the drain is an answer to the claim.

That the Crown or its predecessors in title having constructed the drain was bound to repair it there can be no doubt. Laurent says (1) :

Le défaut d'entretien et le vice de construction sont des fautes, etc.

It appears to me to be sufficiently proved, at least for the purpose of a *prima facie* case, that the drain was constructed by the Imperial Government in the course of the citadel works many years ago, for the purpose of draining the ditches appertaining to the fortifications; but even granting that it was made before the Crown acquired the property it would make no difference, the Crown would still have been liable to keep it clean and in good repair as the *auteurs* of the Crown had been originally liable to do.

There remains only the question: Does the ignorance of the officers of the Crown of the existence of the drain relieve it from responsibility? If the case depended on proof of negligence or *faute* that might be a reason why the Crown should be excused from liability. But the legal principles invoked by the appellant, those to which the article 501 gives expression, are such as to impose upon the owner of property a duty incident to that ownership in relation to the proprietors of lands on an inferior level which no want of knowledge or ignorance upon the part of himself or his servants of existing facts, however obscure or concealed, can

(1) Vol. 20 p. 692.

properly excuse. The whole doctrine of the law of the province of Quebec, by which this case has to be decided, is in accord with the law of England as laid down by the House of Lords in the case of *Rylands v. Fletcher* (1). Then in that case of *Rylands v. Fletcher* (1) there was ignorance of the true state of the premises, the owners of which were held liable, but that circumstance was not deemed sufficient to exonerate them from liability. And in a late English case, that of *Humphries v. Cousins* (2), this very point arose and the decision turned entirely upon it. The defendant there, although only a tenant, was held by reason of his occupation to be liable to the owner of the adjoining house for sewage which by means of a drain escaped from the premises of the former into the cellar of the latter, although he (the defendant) had not only not constructed the drain, but was entirely ignorant of its existence, and was expressly found by the jury to be free from negligence. These decisions, being those of English courts on questions of English law, have of course no direct application as binding authorities for the decision of this appeal, which we must determine by the law of Quebec. They are, however, guides which, in the absence of French authority upon the point, we may safely follow. The two systems of law are, as I have said, identical as to the liability here invoked being one arising from the breach of an incidental duty towards inferior proprietors appertaining to the ownership of property and not dependent upon any delict or quasi-delict in the nature of personal negligence. I see therefore no reason why the courts of the province of Quebec in administering their own law should not be content to adopt the principle of these English authorities founded upon reasons which must certainly commend them to every judicial mind.

(1) L. R. 3 H. L. 330.

(2) 2 C. P. D. 239.

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I should have pointed out that no legal servitude could have been acquired by the Crown in respect of the drain in question by prescription, since under the code of Quebec, which in this respect differs from the Code Napoléon, a servitude cannot be acquired by prescription.

I now proceed to notice another and distinct point which was forcibly put forward by Mr. Flynn in his very able argument. It was contended by the learned counsel that this is not the case of a party seeking a remedy by petition of right in respect of a cause of action which in English law is denominated a tort, and in French law is classed under the head of *delicts* or *quasi delicts*, a cause of action which according to authorities already quoted would not, irrespective of the statutory enlargement of the jurisdiction before referred to, entitle a subject to maintain a petition of right against the Crown. It was said that the case of the suppliant was not based on *faute* or negligence, but on a breach of duty imposed by the law, or in the nature of a *quasi-contrat*, namely, the duty which, as shown by authorities before quoted, is imposed upon the owner of a superior heritage, who executes works on his land or alters its natural state, to indemnify the owner of an inferior property if any damage should be caused by such works. That this is not in the nature of a *quasi delict* appears from the quotations from Pothier already given. It was insisted that there were no decisions establishing that a petition of right will not lie to compel the performance of an obligation of this kind, and that therefore under the general law as it stood under the petitions of right act, and without having to resort to any statutory extension of that mode of proceeding, just as in the case of a contract the suppliant is entitled to proceed against the Crown in the form of procedure adopted in the present instance.

I am of opinion that this argument was well founded and is entitled to prevail.

None of the cases in which the remedy by petition of right has been denied to a subject upon the ground that it was sought to make the Crown answer for the wrongful acts of its officers or servants at all resemble this.

From Lord Canterbury's case down to the present time, nothing more has been decided in cases of this class than that the Crown cannot be made liable for the malfeasance or misfeasance of those in its employ. It never has been decided that a petition of right will not lie to enforce a liability arising, not from any wrongful act, but from an obligation imposed by the law upon a proprietor to indemnify the owner of an inferior property from the consequences of works which, not wrongfully, but in the exercise of a perfect right, the former has constructed on his own property. To say that whilst a petition of right will lie against the Crown for the non-performance of a contract that proceeding is not available for the enforcement of an obligation such as that which is the basis of the suppliant's claim here, the breach of which does not consist in any act of a wrongful character, but consists in mere non-feasance, would, it seems to me, be to draw an arbitrary line between cases not to be distinguished in principle.

What we have to look at is not the form of action, but the nature of the substantial obligation for a breach of which a remedy is sought.

I do not consider it at all conclusive against the suppliant, or a reason entitled to any weight whatever, that under the old English system of actions and pleadings, now abolished, the appropriate remedy for a claim such as the present between subject and subject would have been an action on the case. And this argument,

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or rather suggestion, arising from the old forms of action formerly prevailing in English law, is the only one which occurs to me as of the slightest relevancy as an answer to the suppliant's contention, for at the bar no answer calling for any observation was given on behalf of the Crown to the point under consideration.

For this last reason, therefore, as well as for that first stated, it appears to me that the suppliant was entitled to relief

If I am correct in this conclusion the case need not at all depend on the reasons in favour of the jurisdiction based upon the Exchequer Act and other statutes which I have before stated, and to which I still adhere. The ground last mentioned shows that the suppliant is within the general jurisdiction entertained by the courts in claims against the Crown made with its assent by petition of right. Logically this important proposition should have been advanced first in order, but for convenience and to avoid repetition I have placed it here.

The conclusion therefore, is that the appeal must be allowed, the non-suit set aside, and the case referred back to the Exchequer Court in order that the Crown may proceed with its defence. I think both parties should have liberty to amend their pleadings.

The Crown must pay the costs of this appeal.

FOURNIER J.—I adopt the reasons of the learned Chief Justice for allowing this appeal.

TASCHEREAU J.—I would dismiss this appeal. I express no opinion as to whether or not the Act 50 & 51 Vic. ch. 16 has changed the law as decided in *The Queen v. McLeod* (1), so as to make the Crown liable in damages for a tort, but assuming that it has the rock upon which the citadel of Quebec rests is not, in my opinion, a public work or a work at all within the

meaning of the statute, and the suppliant has failed to prove any negligence on the part of any officer in the service of the Crown from which any injury to property on any public work has resulted. I adopt my brother Gwynne's reasons on these points.

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GWYNNE J.—It cannot be doubted that the Exchequer Court could only acquire jurisdiction over the subject matter of complaint made in the petition of right filed in this case in virtue of some act of the Dominion Parliament giving it jurisdiction in the premises. In 1883 it was decided by this court in *The Queen v. McLeod* (1), that upon the law relating to the court, as it then stood, a petition of right did not lie against the Crown for injuries resulting from thenonfeasance, misfeasance, wrongs, negligence and omissions of duty of the subordinate officers or agents employed in the public service upon the Prince Edward Island Railway, a public work placed by statute under the management, direction and control of the Minister of Railways and Canals. It is contended, however, that the law in this respect has been since changed, and no doubt it has been, by the Dominion statute 50 & 51 Vic. ch. 16, sec. 16, par. (c), which enacts that the Exchequer Court shall have jurisdiction over

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

and it is contended that this enactment confers jurisdiction upon the Exchequer Court in the circumstances of the present case. If it does not, then that court had no jurisdiction whatever in the premises. The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the

(1) 8 Can. S.C.R. 1.

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person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals. It has been suggested that the sentence is open to a wider construction, and it may be that it is so by the insertion of a stop after the word "person" in paragraph (c). The court would then have jurisdiction in the case of injury to the person wherever arising, if it should arise from the negligence of any officer or servant of the Crown. With that proposition we are not at present concerned, for the claim here is as to "injury to property" alone not occurring upon any public work, and we cannot hold that the Exchequer Court has jurisdiction in the present case without eliminating wholly from the sentence the words "on any public work," which it is not competent for us to do.

I am of opinion also that the evidence fails to show that the injury complained of resulted within the meaning of the provision of the statute from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The suppliant has, in my opinion, failed to bring the case within the provisions of the statute. The Exchequer Court therefore had no jurisdiction in the matter, and the appeal should, in my opinion, be dismissed.

KING J. concurred with Gwynne J.

*Appeal dismissed with costs.*

Solicitors for appellant: *Baillargé & Pelletier.*

Solicitors for respondent: *O'Connor, Hogg & Balder-son.*