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*June 6.
*Oct. 1.

MARY EMMELINE HARPER (PLAINTIFF) ..... APPELLANT;

AND

THE MUNICIPAL CORPORATION OF THE TOWN OF PRESCOTT (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Negligence—Injury from fall on icy sidewalk—Liability of municipality—Question as to "gross negligence" within s. 480 (3) of Municipal Act, R.S.O., 1937, c. 266.

This Court dismissed (Crocket and Taschereau JJ. dissenting) the plaintiff's appeal from the judgment of the Court of Appeal for Ontario, [1939] 4 D.L.R. 453, holding (reversing judgment at trial), in an action for damages against defendant municipality for injuries to plaintiff from a fall on an icy sidewalk on a street within the municipality, that, on the facts and circumstances in evidence, the municipality was not guilty of "gross negligence" within the meaning of s. 480 (3) of the *Municipal Act*, R.S.O., 1937, c. 266, and therefore was not liable.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Chevrier J. at trial) (Riddell J.A. dissenting) held that the defendant municipality was not guilty of "gross negligence" within the meaning of s. 480 (3) of the *Municipal Act*, R.S.O., 1937, c. 266, and dismissed the plaintiff's action for damages for injuries to her from a fall on an icy sidewalk on a street within the munici-

* PRESENT:—Duff C.J. and Crocket, Davis, Hudson and Taschereau JJ.

(1) [1939] Ont. W.N. 492; [1939] 4 D.L.R. 453.

pality, which occurred on February 4, 1937, at about 10.30 o'clock in the evening. The appeal to this Court was, by the judgment now reported, dismissed with costs, Crocket and Taschereau JJ. dissenting.

R. L. Kellock K.C. and *H. Beaumont* for the appellant.

T. N. Phelan K.C. and *J. D. Watt* for the respondent.

THE CHIEF JUSTICE—This appeal should be dismissed with costs.

CROCKET J. (dissenting)—The appellant, a widow of 38 years, who had been employed as city passenger and ticket agent of the Canadian National Railways at Prescott for several years, slipped on an icy sidewalk in Prescott on February 4th, 1937, and sustained such painful and serious comminuted or shattered fractures of both the tibia and fibula bones of her right leg that she was unable to return to her office to resume her duties until the first week in September, and then only with the aid of crutches, which she continued to use for a further period of three months. During the first three weeks of this period of nine months she endured all the pain and discomfort attending the binding of these shattered bones as well as her badly bruised and swollen thigh in a special metal splint. On its removal a plaster cast was applied to the whole limb up to the hip and kept her in further discomfort until March 22nd, when before her removal to her apartment another cast had to be applied and kept on until May 15th. Altogether she was confined to bed for 17 weeks. Although—thanks to what seems to have been a very high order of surgical care and skill—she made a remarkable recovery from such an injury, her limb at the time of the trial two years after the accident was not restored to its former natural condition. It then showed a permanent disfigurement due to the unavoidable formation of a callous lump at the fracture point and was one-half inch shorter than the left leg, producing a noticeable limp.

The accident happened at about 10.30 p.m. on the west side of West street, which runs southerly down hill from Park street across Dibble and Henry streets, when Mrs. Harper was returning from a public concert, which had been given in the schoolhouse, situated on the northeast

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corner of Dibble street. She brought this action against the respondent to recover damages for her injury and pecuniary loss, which she alleged was caused by the negligence of the municipal corporation, relying on the provisions of the *Municipal Act*, R.S.O., 1937, ch. 266. Subsections 1, 2 and 3 of sec. 480 of this Act read as follows:

(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk.

The action was tried before Mr. Justice Chevrier without a jury in February, 1939. He found on the facts established by the evidence adduced before him that the respondent's servants were guilty of gross negligence within the meaning of subs. 3 of s. 480 of the Act and directed the entry of judgment in favour of the appellant for $2,710.80 together with her costs.

The Court of Appeal, McTague and Gillanders, JJ.A. (Riddell, J.A., dissenting), reversed the trial judgment and directed the dismissal of the action with costs.

With all deference, I think the majority judgment on appeal is erroneous for the reason that it proceeds upon a misinterpretation of the term "gross negligence," as used in s. 480 of the *Municipal Act*, and an unwarranted disregard of the specific findings of the learned trial judge upon essential questions of fact depending upon the credibility of evidence adduced before him.

In the reasons for the appeal judgment delivered by McTague J.A., His Lordship says that, while he is in agreement with the proposition laid down by Chief Justice Anglin in this Court in *Holland* v. *City of Toronto* (1), that there could be no *a priori* standard for determining when negligence should be deemed "very great negligence," as Sedgewick J. expressed it in *City of Kingston* v. *Drennan* (2), he thought that in general what a plaintiff had

(1) The judgment of the Supreme Court of Canada (Dec. 1, 1926) is reported in full in 59 Ont. L.R. 628, at 631-637.
(2) (1897) 27 Can. S.C.R. 46, at 60.

to prove under that standard was that there was a breach of the duty to keep the sidewalk reasonably safe for pedestrians using same reasonably, "and that the breach of that duty approaches the wilful, the reckless, the wanton; the breach must be flagrant."

That the Legislature ever intended that a municipal corporation should not be liable for any personal injury caused by snow or ice upon a sidewalk without proof of such a standard of gross negligence as that laid down in this judgment I cannot for my part believe. While it is clear that the Legislature meant something more than the failure to exercise ordinary reasonable care and attention in maintaining and keeping its sidewalks safe for pedestrians, it is to my mind hardly possible to suppose that, in legislating this civil liability upon a municipal corporation, as it expressly does by subs. 1 of the above section, it had any thought in enacting subs. 3 of exempting all municipalities from such liability so long as they or their servants were not guilty of a degree of negligence which is only measurable by the standard of the Criminal Law.

There have been several judgments in this Court and also in the Ontario courts dealing with the meaning of "gross negligence" as used in this enactment. Not one of these judgments has ever ventured to suggest that the enactment requires the proof of either "wilful," "reckless," "wanton," or "flagrant" negligence as necessary to fix a municipal corporation with liability for personal injury caused by snow or ice upon a sidewalk.

In *Holland* v. *City of Toronto* (1), Anglin, C.J.C., pointed out that the term "gross negligence" in this statute was not susceptible of definition, and that the circumstances "giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence and the extent of the risk which it creates" depends upon so many different elements as to make it impossible to lay down any dependable criterion of liability for all cases. Referring to the evidence in that case His Lordship said:

> The highly dangerous condition of the sidewalk from Wednesday to Friday was fully proven. The risk of accident, having regard to the relatively heavy pedestrian traffic, was great. An intelligent person observing the conditions with any reasonable degree of care on the Thursday should have realized the risk of leaving the sidewalk uncleaned

(1) 59 Ont. L.R. 628 (Supreme Court of Canada).

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and unsanded. The duty of the city sectionman was simple and easy—merely to give notice to the occupant to clear off the snow and ice or to sprinkle sand or ashes over it.

There was, in our opinion, on the part of Blackburn, the city sectionman, such "very great negligence" that to hold it to be less than "gross" would be to encourage a reckless indifference on the part of municipal authorities to the safety of persons lawfully using the streets, and would, in effect, be to declare that municipal corporations in Ontario are immune from liability for personal injury caused by accidents due to snow and ice on sidewalks. We agree with Mr. Justice Riddell—"on any definition of gross negligence" we are unable to see that Blackburn's conduct "does not come within the words."

In an earlier case in this Court, *German* v. *The City of Ottawa* (1), in which the majority of the court held that failure to sand or harrow a sidewalk before 9 a.m. of February 2nd, when the conditions calling for it only arose on that morning, was not gross negligence and that the city was not liable for personal injury caused at that hour by ice on the sidewalk, especially if it was not in a place of special danger, nor on a street of heavy traffic and did not call for immediate attention, Anglin J. based his judgment, in which Davies J. concurred, upon the fact that there was no direct evidence that the city's servants had any actual or specific notice of the existence of the danger at the locus of the accident, and that there was nothing in the record to suggest that this place was one of special hazard, which called for preferential care or treatment. (See p. 90). The vital question involved in that case, he pointed out at p. 89, was whether the failure of the city employees to prevent an admittedly dangerous condition amounted to gross negligence within the meaning of R.S.O., ch. 192, s. 460 (3). "Its solution," His Lordship said, "must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it." Duff, J., who with Davies and Anglin, JJ., constituted the majority, simply stated that the appeal should be dismissed with costs. Fitzpatrick, C.J., and Idington, J., dissenting, held that, notwithstanding the city's servants had no actual or specific notice of the existence of the danger at the locus of the accident, the city officials should have realized from the sudden drop of the temperature on the afternoon preceding the accident that the sidewalks would be dangerous

(1) (1917) 56 Can. S.C.R. 80.

on the following morning, and that in such circumstances it was gross negligence to reduce the working staff and to fail to do work on the sidewalk where the accident occurred.

In *Pierce* v. *City of Toronto* (1), in which the County Court Judge of the County of York had held the city liable under the same enactment for personal injury to the plaintiff's wife caused by her falling on an icy street crossing, and awarded judgment in favour of her husband and herself, the Court of Appeal, *per* Latchford, Britton and Middleton, JJ. (Meredith, C.J. C.P., dissenting), dismissed an appeal from the County Court judgment. Latchford, J., in his reasons said that,

> As found by the trial judge, the crossing at which Mrs. Pierce was injured was a particularly dangerous one, and was known to be such by the defendants, who had not taken effective measures to render it reasonably safe for persons lawfully using the street. . . . In this case the city authorities were well aware that the crossing was in a dangerous condition, but the means which they adopted to provide a remedy were insufficient and ineffective.

Middleton, J., in his reasons said that,

> There was a condition full of peril known to the defendants, and an attempt to cope with the situation which was quite inadequate and which ought to have been appreciated as inadequate by those in charge. This constituted gross negligence.

The learned trial judge in his reasons for judgment in the present case refers to the above cases, as well as to that of *Legris* v. *Town of Cobalt* (2), in which it appeared that the slippery place where the accident occurred had been sanded in the morning but that most of the sand had been blown away by a high wind before Mrs. Legris slipped and was injured in the afternoon. In that case, following the *Pierce* case (3), the Appeal Court dismissed the municipality's appeal.

In *Fletcher* v. *City of Calgary* (4), the Appeal Division of the Alberta Supreme Court (Harvey, C.J., and Stewart and Beck, JJ.) held that,

> When a sidewalk is on a steep slope and is used, to the knowledge of city officials whose duty it is to put sand and ashes on the slippery places, by children with sleighs and toboggans, making it more than naturally slippery, there is a duty on the city to pay more attention to it than to others not so dangerous and failure to take extra precautions to prevent injury to pedestrians is negligence for which the city is liable.

(1) (1919) 16 Ont. W.N. 48.
(2) (1921) 21 Ont. W.N. 187. (3) (1919) 16 Ont. W.N. 48.
(4) (1921) 60 D.L.R. 357.

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It is clear, I think, that the decisions and dicta, to which I have refererred, far from lending any support to, actually negative the premise upon which the majority judgment in the Appeal Court is based, viz.: that there must be proof of negligence measurable by the standard of that prescribed by the Criminal Law before there can be any recovery against the municipality under the provisions of the *Municipal Act*. This, in my respectful opinion, marks the judgment *a quo* as one which ought not to be affirmed by this Court.

Apart, however, from this fundamental objection, an examination of the record clearly shows that the majority judgment in the Appeal Court has disregarded and reversed specific findings of the trial judge upon questions of fact involving the credibility of witnesses, which it was his right and duty, and not that of the Appeal Court, to determine, as essential factors in the consideration of the degree of negligence imputable to the respondent corporation.

For instance, on the vital question as to whether the town street foreman had actual or specific notice of the existence of the dangerous situation which had been created at the locus of the accident by the school children sliding down the sidewalk, as their custom was on coming from school at 4 o'clock, and his opportunity of remedying it, the learned trial judge specifically found that the defendants were in fact made aware in time of the dangerous condition of West street, and further, that the fact that the school children had brushed off the sand which the sanding crew had sprinkled upon the icy sidewalk before the dismissal of the school in the afternoon was known to one of the town's employees (Annable, the street foreman).

Annable, who gave evidence as a respondent witness, swore in cross-examination that a citizen, a Mr. Fretwell, who lived on that street, had told him about half past four in the afternoon that the kids had slid the sand off "the hill" and that "the hill" was dangerous and slippery. Yet the majority judges in the Appeal Court say that "there is evidence that the foreman of the street gang was notified by a citizen about 4.30 in the afternoon that there were slippery places that needed sanding due to children sliding," and that "the evidence is that no particular street was mentioned, but that the foreman

took the statement to include West street"; and further, that "the foreman's attention was not called to a particular part of West street, but to slippery conditions on a number of streets." It is true that later on in his evidence Annable attempted to get away from his earlier statement by saying he "didn't think" West street had been mentioned to him, though admitting that in any event he knew the warning was diretced to "that hill." It was surely for the trial judge, and not for the Appeal Court, to determine which of Annable's two apparently contradictory statements should be accepted as the true version in relation to this all important question of an actual and specific warning having been given to the street foreman in time to enable him to remedy a specially dangerous situation and make the hilly sidewalk safe for pedestrians. The trial judge further found that Annable about 8 o'clock on the morning of the day of the accident told Roberts, who was in charge of the town's sanding crew, to sand West street sidewalk because there was to be a school concert that night at the school at the top of the hill. That clearly shows that Annable himself anticipated that there would be more than the usual number of pedestrians subjected to the peril of using this particular icy sidewalk that night. He himself admitted that West street was the steepest hill in the town, and the trial judge found that the accident happened at a point on the edge of the sidewalk about 118 feet below the top of the hill, where the down grade running south was between 6 and 7 per cent., and the grade of the four-foot wide concrete sidewalk from its inside to its outside edge was 6 per cent. There were several slides between the top of the hill and that point, and the one, on or beside which Mrs. Harper fell, according to the evidence of Annable, ran from near the west side of the sidewalk diagonally down and over the east side of the sidewalk and "right on to the road." Notwithstanding that he had been notified about half past four in the afternoon that the sand, which had previously been scattered over the sidewalk on this hill, had been brushed off by the children sliding after school, and of the existence of dangerous slides, and knew that an unusual number of pedestrians would be passing up and down this particular sidewalk that night, he concerned himself no more about the matter that night, but continued on his

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way to his home for supper while the teams and men of the town sanding machine were still out and easily available. He went back to the town hall after supper, he said, in accordance with what he intimated was his usual custom during the winter season, so as to be available for any emergency calls, not so much as bothering to go down by West street, which it appears was little out of his way. When he got back to the town hall, he said, "the boys was there" with the team and the sand. "And did you send one of them right up to West street?" he was asked. "No," he replied, "they said they had sanded West street." Further questioning brought from him the intelligence that it was at the fire barn where he saw "the gang" when he went back to duty after supper; that "they had put their equipment all away for the night, and that after they went away he hung around there, went here and there and up on Dean street, in the pool rooms, and on the corners," and started for home between half past eight and nine o'clock, going this time by way of West street, when, seeing the slide where, to quote his own words, "the kiddies had slid the sand off * * * I just took my foot like that and I just kicked some sand over it and went on"—sand, he explained, which he kicked off the sidewalk. When asked how he happened to go up West street he said that "he went up that way around to see the mayor," who, it seems, runs an hotel on Main street, denying that it was on account of any dangerous spots on West street. The accident claimed for happened two hours later. If this evidence, which I have quoted from the mouth of the respondent's street foreman, is itself not sufficient to warrant a finding of gross negligence on his part, then for my part I can conceive of no case in which any municipality could be held liable for a personal injury caused by snow or ice upon a sidewalk under the provisions of s. 480 of the Ontario *Municipal Act.*

In addition to this, however, the trial judge had before him the statement of Roberts, the man in charge of the sanding crew, another of the respondent's own witnesses, that if this sidewalk was sanded before 4 o'clock it wouldn't do much good because of the unfailing habit of the school children to use it for sliding after the dismissal of school.

The purpose, of course, of all municipalities in sanding icy sidewalks is to make them safe for the use of pedes-

trians. It is a matter of common knowledge that all populous cities and towns, which undertake to provide and maintain concrete or tarvia sidewalks, now recognize that pedestrians cannot be adequately protected against accidents on such sidewalks, when covered with dangerously slippery ice, by the use of cold sand, which will not take a firm hold upon the slippery ice surface, and that either hot sand, or sand which has been so mixed with salt or other material of like properties as to make it stick by eating into the glare ice, must be used if any real or effective protection against such danger is to be afforded. And it must be obvious, it seems to me, to anybody that the spreading of sand which cannot stick or produce any effect upon the icy surface of sidewalks—particularly running down steep hills—is more likely to create a trap than to provide a protection for pedestrians, who are thus invited to rely upon their safety and traverse them.

In the present case the learned trial judge has specifically found that the sand, which was scattered over the West street sidewalk earlier in the day, was cold sand, which was not properly mixed with the sodium chloride the town had provided for the purpose so as to cause it to adhere to or destroy the surface of these admittedly dangerous ice slides, and in my judgment the undisputed fact that it disappeared so quickly as the result of the sliding of the school children is itself ample evidence to warrant that finding. The appeal judgment, completely ignoring this finding, as well as the finding concerning actual notice of the existence of special danger in this particular locality in ample time to remedy it before the occurrence of this unfortunate accident, plainly suggests, as I read the reasons given for that judgment, that the mere fact that the street foreman had at 8 o'clock in the morning of the day in question ordered West street to be sanded, presumably in the usual manner, precludes the fixing of any liability upon the municipality for "gross negligence" within the meaning of the *Municipal Act*, and that the manner in which that order was carried out, and the efficacy of the sanding to meet the dangerous conditions it was intended to remedy, was not a consideration which should be taken into account in the circumstances of this case, as the two learned Appeal Judges in their examination of the printed record believed them to be.

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I fully agree with the opinion expressed by Mr. Justice Riddell in his dissenting judgment that there was gross negligence on the part of the municipality and its servants within the meaning of the *Municipal Act*. I would therefore allow the appeal and restore the judgment of the learned trial judge with costs throughout.

DAVIS J.—The Ontario *Municipal Act*, being R.S.O., 1937, ch. 266, expressly provides by sec. 480 (3) that a municipal corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk—except in case of gross negligence. The appellant fell upon an icy sidewalk in the town of Prescott, Ont., and she sued the municipal corporation for damages for her personal injuries. I do not think the evidence discloses gross negligence on the part of the municipal corporation.

I would dismiss the appeal with costs.

HUDSON J.—In this case there is no dispute about the material facts necessary to dispose of the matter. The sole question is whether or not on these facts it could properly be found that there was what the Ontario statute calls "gross negligence" on the part of the municipality. A trial judge held there was and the majority of the Court of Appeal held there was not.

Unlike the facts in a number of cases cited, here the municipality had done nothing to create a dangerous condition, or increase the danger caused by natural forces, and it had taken some precautions to avoid danger to pedestrians by sanding the sidewalk on the very day of the accident. It was not until about 4.30 p.m. that its street foreman was told that there were some slippery places due to children sliding. At that time the sanding gang were at work in some other part of the town and were due to stop work at 5 p.m.

Taking into account the climatic conditions at this season of the year, the brevity of time which elapsed between notice of the slippery condition and the accident, amounting at most to a few hours in the late afternoon and evening of a winter's day, it would seem to me that to hold the municipality liable would be imposing a burden upon it greater than could ever have been intended by the Legislature, when they provided that there should be liability only in the case of gross negligence.

I would dismiss the appeal with costs.

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TASCHEREAU J. (dissenting)—The appellant, Mary Emmeline Harper, sued the Municipal Corporation of the town of Prescott for damages sustained when she fell on an icy sidewalk on the 4th of February, 1937.

The defendant except in case of "gross negligence" is not liable for a personal injury caused by snow or ice upon a sidewalk (s. 480, *Municipal Act*). The trial judge decided that there was "gross negligence," maintained the action for $2,710.78, but the Court of Appeal came to a different conclusion and dismissed the claim.

"Gross negligence" is not defined in the Act, but in *Holland* v. *City of Toronto* (1), Anglin, C.J.C., says:—

> The term "gross negligence" in this statute is not susceptible of definition. No *a priori* standard can be set up for determining when negligence should be deemed "very great negligence"—a paraphrase suggested in *City of Kingston* v. *Drennan* (2), which for lack of anything better has been generally accepted. The circumstances giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence, and the extent of the risk which it creates—the character and the duration of the neglect to fulfill that duty, including the comparative ease or difficulty of discharging it—these elements must vary in infinite degree; and they seem to be important, if not vital, factors in determining whether the fault (if any) attributable to the municipal corporation is so much more than merely ordinary neglect that it should be held to be very great, or gross, negligence.

In *German* v. *City of Ottawa* (3), Anglin J. also says:—

> Whether the failure of the city employees to prevent that condition arising or to remove it before 9 a.m. on Wednesday, the 2nd of February, amounted to "gross negligence" (defined by this court as "very great negligence"; *Kingston* v. *Drennan* (4)); which is the statutory condition of the defendants' liability (R.S.O., ch. 192, sec. 460 (3)), is, therefore, the vital question involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it.

I believe that these principles should be applied to the present case. The evidence, in my opinion, shows that the respondent is guilty of "gross negligence" and not only of ordinary neglect. I find the elements of this negligence specially in the evidence given by the foreman of the municipality, Annable. It is true that the sidewalk where the accident happened on the night of February the 4th had been sanded during the morning but, before the accident, the foreman had been told at 4.30 o'clock

(1) 59 Ont. L.R. 628, at 634, (Supreme Court of Canada).
(2) (1897) 27 Can. S.C.R. 46.
(3) (1917) 56 Can. S.C.R. 80, at 89. (4) (1897) 27 Can. S.C.R. 46, at 60.

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p.m. that the street was in a dangerous condition. He knew that many people that night would pass through that street to go to the High School, where there was an entertainment. Later, he saw the slippery condition of the sidewalk, which he admits in his evidence, but did nothing to make it safe for pedestrians. He had sufficient time to fulfill his duty which, under the circumstances, was to take the necessary steps to remove this dangerous condition.

There was on the part of Annable, the city foreman, as Anglin, C.J.C., pointed out in the *Holland* case (1) at page 637:—

> * * * such "very great negligence" that to hold it to be less than "gross" would be to encourage a reckless indifference on the part of municipal authorities to the safety of persons lawfully using the streets, and would, in effect, be to declare that municipal corporations in Ontario are immune from liability for personal injury caused by accidents due to snow and ice on sidewalks.

I, therefore, come to the conclusion that the respondent is guilty of gross negligence and that it cannot escape liability.

I would allow the appeal and restore the judgment of the trial judge with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Casselman & Beaumont.*

Solicitors for the respondent: *Herridge, Gowling, MacTavish & Watt.*

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(1) 59 Ont. L.R. 628 (Supreme Court of Canada).