

1922  
May 31.

IN THE MATTER OF GASTON, WIL-  
LIAMS AND WIGMORE OF CAN-  
ADA, LIMITED; AND GASTON, } CLAIMANTS;  
WILLIAMS AND WIGMORE  
STEAMSHIP CORPORATION.... }

AND

HIS MAJESTY THE KING, REPRE-  
SENTED IN THAT BEHALF BY THE } RESPONDENT.  
GOVERNMENT OF CANADA..... }

*Re. Requisition of Ship Lord Dufferin.*

*Requisition of ships—War Measures Act, 1914—Order in Council, 24th  
November, 1916—Powers of Minister of Marine and Fisheries  
thereunder—Compensation—“Off hire.”*

1. That in virtue of the Order in Council dated 24th November, 1916, and passed under the War Measures Act, 1914, the Dominion Government was empowered to requisition ships in its own name and as principal and not as agent for the British Government; and that the Minister of Marine and Fisheries, acting thereunder, had no power to vary the same by adding thereto or derogating therefrom.
2. That inasmuch as conditions prevailing in Canada are more alike those in the United States than in Britain, the rate of compensation allowed in the United States affords a safer comparative guide than the English rate, in establishing a just and reasonable rate for Canada.
3. That for the same reasons the rule obtaining in the United States with respect to “off hire” should also apply to vessels requisitioned by Canada.
4. Where a ship is “off hire” due to a collision occurring in the war zone, when acting under instructions of the Admiralty and according to signals given by the destroyers escorting her, she is entitled to the full rate of compensation; credit however being given to the Crown for any expenses saved the owners during this period.
5. Where on the other hand the accident takes place out of the war zone, etc., the owners should only receive half the “off hire” rate.

REFERENCE by the Minister of Justice of Canada under the provisions of the War Measures Act, 1914, of a claim for compensation in respect of the ship *Lord Dufferin* requisitioned during the war.

March 6th, 7th, 8th and 9th, 1922.

Case now heard before the Honourable Mr. Justice Audette, at Ottawa.

*A. C. McMaster, K.C.* and *N. A. Belcourt, K.C.* for claimants.

*F. E. Meredith, K.C.* and *A. R. Holden, K.C.* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 31st day of May, 1922) delivered judgment.

This is a Reference, made to this Court by the Minister of Justice for Canada, under the provisions of section 7 of the War Measures Act, 1914 (5 Geo. V., c. 2) of a claim for compensation in respect of the ship *Lord Dufferin* requisitioned, during the war, in the manner hereinafter mentioned.

The *Lord Dufferin* is a British cargo steamship, registered on the Canadian Register of Shipping, in the port of Montreal, P.Q., of 4,664 tons gross register and gross deadweight capacity of 7,250.

On the 24th November, 1916, the Government of Canada passed an order in council, under the special powers given the Governor in Council, under the War Measures Act, 1914, whereby it was, among other things, provided that "any British ship registered in the Dominion of Canada" may be requisitioned by and on behalf of His Majesty, for the carriage of

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foodstuffs and of any article of commerce—and authorizing the Minister of Marine and Fisheries to give effect to these regulations by causing notices of requisition to be served on the owner of any such ship, and furthermore vesting in him the power to give instructions and directions accordingly.

The power and authority to so requisition any British ship registered in Canada was by this order in council vested in the Minister of Marine and Fisheries, to be exercised entirely in conformity with and within the scope of the order in council, and such power and authority are to be thereby measured and ascertained. Any such specific power vested in the Minister of Marine and Fisheries by the order in council does not carry with it the authority to vary its terms. The order in council does not provide that the Canadian Government shall requisition vessels as agents for the British Government and there was no such authority given therefor to the Minister by the order in council, Cf. *The King v. the Vancouver Lumber Company* (1); and *The British American Fish Corporation, Limited v. the King* (2). Therefore to ascertain what power and authority is so vested in the Minister for the requisitioning of ships, reference must be had to the order in council which is the only source and foundation of such power and authority.

Freed from all unnecessary details it may be said that the *Lord Dufferin* was, under the authority of this order in council, requisitioned, that the owner delivered possession of the same, at Durban, Africa, on the 14th March, 1917, and that the vessel was released on the 25th November, 1918. The ship remained under requisition 621 days and a fraction, or 622 days.

(1) [1914] 17 Ex.C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6.

(2) [1918] 18 Ex.C.R. 230; 59 S.C.R. 651.

By the notice of requisition it is, *inter alia*, provided that the British Admiralty is thereby "authorized to take over immediately the possession and control of the said ship for the purposes aforesaid"—that is, as provided by the order in council and the notice for the carriage of foodstuffs and other articles of commerce necessary to be transported for the purposes of the present war.

Now, it has been contended, on behalf of the Crown, resting such contention on both the order in council and the notice of requisition, that when the Minister was acting thereunder, he was acting on behalf of the Imperial Government as agent, and therefore the Canadian Government does not admit any liability, although it will be recouped of any condemnation by the British Government.

I am unable, on reading the order in council of the 24th November, 1916, to accede to such contention. The Minister has no power to vary the order in council, either by adding thereto or derogating therefrom, and there is nothing in the order in council suggesting that the Canadian Government, in thus acting under the provisions of the Canada War Measures Act, 1914, was acting as agent for the Imperial Government. The vessel was on both occasions requisitioned and released by and on behalf of the Canadian Government, through Canadian officials, and furthermore, kept under control by them, as shewn by the several cables and letters filed of record.

Moreover, that fact is fully and amply supported by other evidence and documents filed of record. The Deputy Minister of Marine and Fisheries for Canada—through whom practically all requisitions were effected—testified upon this point as follows: at page 2 of his examination on discovery, which was partly read at trial, viz.:

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"Q. Then, I believe, was objection taken by the Government of the Dominion of Canada to the requisitioning of steamers on the Canadian registry by the British Government? A. The right in general was asserted by the Dominion Government that the power to requisition vessels of Canadian registry rested solely in the Canadian Government."

Then at p. 5 thereof:

"Q. And the ship was taken for the purposes of the British Government? A. No.

"Q. The space was taken. A. No.

"Q. How do you put it? A. She was taken for the purposes of His Majesty by the Canadian Government.

"Q. That is the way you put it? A. Yes.

"Q. Well, then, she was for that purpose delivered by the Canadian Government to the British Government? A. To the British Government.

Then at page 8:

"Q. Did the Canadian Government requisition any steamers for its own purposes? A. They were all requisitioned for our own purposes. We regarded the purposes ours just as much.

"Q. Did you requisition any steamers that you did not turn over to the British Admiralty? A. No, I do not think so."

Affirming and recognizing this Canadian view, we have, as exhibit No. 34, the despatch of Sir Walter Long, the British Colonial Secretary, to the Governor General, bearing date the 19th May, 1917, stating that "*requisitioning authority should be regarded as vested in and only to be exercised on behalf of the Government of that part of the Empire in which vessel's port of registry situated . . . In last resort wishes of Government in whose country vessel registered will prevail . . .*"

Moreover, the Imperial Proclamation of the 3rd May 1914 (Statutory Rules and Orders, Vol. 1, p. 806) in respect of requisitioning of British ships only extends to British ships within the British Isles or the waters adjacent thereto and does not apply to British ships of Canadian registry.

Moreover, the rights of the Canadian Government with respect to requisitioning British vessels of Canadian registry is fully asserted and set forth in the Order in Council of the 3rd January, 1917, filed herein as exhibit No. 33.

Having said so much, it becomes unnecessary to consider whether or not under these circumstances of national emergency and in the interest of the defense of the realm, the view set up by the Crown could be supported and, furthermore, whether the Canadian Government really contracted as principal although intending to contract only as agent of the Imperial Government. Bowstead, Law of Agency, 388; *Graham v. Public Works* (1).

I find the action was properly instituted coming, as it does, within the ambit of sec. 7 of the War Measures Act, 1914; that this Court has jurisdiction to hear, determine and adjudicate upon the same and that the Crown, in the rights of the Canadian Government, is the party that requisitioned in its own name and behalf the vessel in question herein.

Coming to the question of the rates for compensation to be awarded for the use of a requisitioned vessel in Canada it may well be said as a prelude that the British Blue Books referred to in the Imperial "Indemnity Act, 1920," do not apply to the present case.

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(1) [1901] 2 K.B. 781, at p. 790.

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A copy of these "Blue Books" has been filed as exhibit No. 26, and at p. 7 thereof, dealing with the requisition of "Cargo Liners," such as the *Lord Dufferin* the following clause is therein enacted, viz.:—

"6. The rates of hire set forth in the following schedule are not to apply to vessels taken up in the Dominion overseas where the circumstances will probably call for *higher rates*."

It is in evidence that in normal days owing to British competition, there has been great difficulty for American owners to make profit on their ships. The operating of a British ship being in almost all respects much cheaper (p. 205).

With regard to the relative conditions governing the operating cost of freighters such as the *Lord Dufferin*, there is evidence before the Court to show that the expense of running such a ship is greater in the United States than in Canada (p. 177) owing to the larger crews carried, the greater amount of food necessary, and the higher wages paid in the former country.

Witness Grey reckoned it to be one-third more in the United States than in Canada, while witness Robinson contends the difference runs from  $\frac{1}{3}$  to  $\frac{1}{2}$  more in Canada, and other witnesses state that the cost in Canada is almost  $\frac{3}{4}$  to  $\frac{2}{3}$  of the American. However, witness Austin, on behalf of the claimants, contends that the costs of operating American or Canadian vessels are exactly equal; but more than operating a British vessel. This witness further states that during the time of the requisition of the *Lord Dufferin*, their American company chartered vessels for which they paid from 35 to 55 shillings per dead weight ton. On 25th July, 1917, they chartered the *Harold*, 2,500 tons, dead weight, at 55 shillings (p. 53).

Witness Cowan, the Director of Operations of the Canada Steamship Co., testified that on the 11th January, 1917, his Company chartered the steamer *Nepawaw*, 2,100 tons dead weight, to the French Government at 43 shillings; on the 31st December, 1916, the steamer *A. E. McKinstry*, 2,905 tons, dead weight, at 43 shillings, as well as the *Winona*, 2,440 tons, deadweight, and the steamer *Acadian*, 3,100 tons dead weight, at same price.

Then witness Robinson, heard on behalf of the Crown, stated that, in the middle of 1919, the rate obtainable for a charter of about a year, depending upon the class of steamers, was somewhat between \$9.00 and \$10.00 a ton dead weight—or between 45 to 50 shillings, assuming the pound at \$4.00 and the shilling at 20 cents.

The English rate fixed by the British blue books on gross weight under special British conditions is entirely inadequate for Canada as determined by the blue books themselves. But conditions prevailing in Canada are more like those in the United States and it is, therefore, obvious that the United States rate affords a safer comparative guide than the English rate in establishing a just and reasonable rate for Canada. The British rate, as stated under the signature of the Deputy Minister of Marine, in exhibit No. 35, is altogether inadequate to enable vessel owners to even meet operating expenses and he further adds:

“The conditions in Canada, so far as the operation is concerned, are somewhat similar to those which obtain in the United States. The rate of wages, etc., are practically similar. The United States

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Government quite recently decided upon a policy to requisition steamers, and they have fixed rates to govern as from the 15th instant. These rates are as follows:—

“Over 10,000 tons deadweight, \$5.75 per ton per month.

“8,001 to 10,000 tons deadweight, \$6.00 per ton per month.

“6,001 to 8,000 tons deadweight, \$6.25 per ton per month.

“4,001 to 6,000 tons deadweight, \$6.50 per ton per month.

“3,001 to 4,000 tons deadweight, \$6.75 per ton per month.

“2,500 to 3,000 tons deadweight, \$7.00 per ton per month.”

“It will be seen at a glance that the rate fixed by the United States Government are substantially in excess of the rates paid by His Majesty’s Government. While vessels under requisition in the service of His Majesty’s Government are being paid at blue book rates, neutral vessels doing similar service for His Majesty’s Government are receiving compensation ranging from 40s. to 47s.”

Under the American rates fixed on 27th September, 1917, with retroactive effect, the *Lord Dufferin* would call for a price of \$6.25 per ton deadweight with more advantageous terms and conditions with respect to the insurance and off hire.

Prior to the war period the usual way of hiring and chartering vessels, generally throughout the world, including Canada, United States and England, was on tonnage deadweight and not gross. The British blue books introduced gross tonnage and this change only applied to them and the United States retained the usual basis of deadweight.

As a general proposition it may be said that where there is no agreement to the contrary, a requisitioned vessel is assumed to be always available for service and the moment she ceases to be so, she becomes off hire and not entitled to remuneration.

However, since the rules obtaining in England are not to prevail in Canada, under the provisions of the blue books, and that the conditions in Canada are somewhat similar to those in the United States, the rules obtaining in the United States with respect to off hire should also apply to Canadian vessels under the present circumstances, and clause 22 of the United States Requisition Charter will be followed.

The *Lord Dufferin* was off hire 13 days between 14th September and 27th September, 1917; 42 days between 3rd February and 17th March, 1918; 21 days between 22nd March and 12th April, 1918; 117 days between 29th July, 1918, and 25th November, 1918. In all one hundred and ninety-three days.

The off hire of the 13, 42 and 21 days above mentioned making a total of 76 days, was the result of the accident which happened when the *Lord Dufferin* loaded with aeroplanes and shells of every kind, collided with the *Largo Law* on sailing from Malta and laying her course under Admiralty instructions, according to signals given by the destroyers, escorting her. See *British and Foreign Steamship Co. v. the King* (1); *Atlantic Transport Co., Ltd., v. Director of Transports* (2); *Cf. Adelaide Steamship Co. v. the King* (3).

(1) [1917] 2 K.B. 769; [1918] 2 K.B. 879. (2) [1921] 38 T.L.R. 160.  
(3) [1922] 38 T.L.R. 362.

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I find that with respect to these 76 days there should be no deduction, the collision having occurred in the war zone, acting under the instructions of a war vessel and in direct guidance of military or naval authority. However, a certain credit should be given to the Crown for any expenses saved to the owners during these 76 days. There is no tangible evidence of such savings and this matter will be taken into consideration in arriving at the rate of compensation.

Then with respect to the off hire during 117 days resulting from the collision with the *Ciudad de Buenos Aires* I find, again following the American requisition charter, that the accident took place out of the war zone etc., and the claimants are entitled to recover only one half of the hire. *Britain Steamship Co., Ltd.*, v. *The King* (1).

The genius of the English common law is that no property should be taken from the subject by the Sovereign power without proper compensation. *DeKeyser's Royal Hotel, Limited*, v. *the King* (2); *Newcastle Breweries, Limited*, v. *the King* (3); and see per Lord Atkinson in *Central Control Board v. Cannon Brewery Co., Ltd.* (4). And further, as said in *The Aquitania* (5), the aim of the Court is to work out principles which make for justice and seek to avoid the turning away of a bona fide suitor without remedy.

Taking all the circumstances of the case into consideration, charging the claimants with all premium of insurance they saw fit to place upon the vessel, and

(1) [1919] 1 K.B. 575.

(3) [1920] 1 K.B. 854.

(2) [1919] 2 Ch. D. 197, 226.

(4) [1919] A.C. 744 at 752.

(5) [1920] 270 Fed. R. 240.

allowing a certain amount by way of set off resulting from the obvious and necessary saving of some expenses during the repair period—approaching this last consideration as a jury would—I have come to the conclusion to allow as a fair, just and reasonable compensation to be paid the claimant the sum of \$5.75 per deadweight ton, per calendar month of thirty days. Scrutton on Charterparties, 10th ed. 384, I reckon the number of days of requisition at 622, and allow 505 days at the rate of \$5.75 per ton dead weight per month and one hundred and seventeen days (117) at half rate, namely, at \$2.87½ per ton dead weight.

The compensation is to be ascertained at prevailing rates at the date of the taking and is to be reckoned and paid in Canadian currency. *Atlantic Shipping, etc., v. Dreyfus* (1).

The statement of the amounts already paid on account, by the Crown, under British rate, and accepted under protest, as well as the evidence in respect of such payments are both unsatisfactory. This statement is somewhat clouded from the fact that the claimants have kept their books of account in United States currency, which must be transposed into Canadian currency. Moreover, counsel at bar on behalf of the Crown, was not in a position to satisfactorily establish these payments without communicating with the British Government.

Under the circumstances, failing the parties, through their counsel, to agree as to such payment made on account, and to adjust the same, leave is hereby given them to apply to the Court, upon notice for further direction in respect of the same.

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(1) [1922] 38 T. L. R. 556.

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The compensation monies are made payable to the owners of the vessel excluding the charterers; the owners, through their counsel at bar, having undertaken to adjust the matter out of court as between themselves, regarding it, so to speak, as a domestic and internal business and as set forth in the charter between themselves.

Therefore, there will be judgment adjudging and declaring that the claimants, Gaston, Williams and Wigmore of Canada, Limited, the owners of the *Lord Dufferin*, are entitled to be paid by the Crown, as total compensation for the hire of their requisitioned vessel at the rate of \$5.75 per ton dead weight for 505 days, and at the rate of \$2,87½ per ton dead weight for 117 days, after deducting the several and large amounts already paid on account by the Crown. The whole with costs against the respondent.

*Judgment accordingly.*

Solicitor for claimants: *Edmund Bristol. K.C.*

Solicitor for respondent: *F. E. Meredith. K.C.*

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