IN THE MATTER OF THE PETITION OF RIGHT OF

1915
Oct. 30.

CHARLES WILLIAM GAUTHIER, SUPPLIANT;

AND

HIS MAJESTY THE KING, RESPONDENT.

Constitutional Law—Effect of new provincial legislation on pre-existing rights of the Crown represented by Dominion Government—Specific performance of contract entered into by Crown—Dominion Interpretation Act, (R.S. 1906 c. 1) sec. 10.

Where the Crown, represented by the Dominion Government, prior to the enactment of the *Ontario Arbitration Act* (R.S.O. 1914, c. 65)had the right to revoke any agreement for submission to arbitration to which it may have been a party,

Held, that such right was not taken away by the provisions of the Act mentioned.

2. The Court will not decree against the Crown specific performance of its contract entered into with its subjects.

3. Observations upon the effect of sec. 10 of *The Interpretation Act* (R.S.C. 1906 c. 1) in applying the law of the province, as it exists at the time of action brought in cases of tort. *The King v. Desrosiers*, 41 S.C.R. 75., referred to.

PETITION OF RIGHT for certain relief claimed by the suppliant as arising out of an agreement entered into with the Dominion Government.

The facts are stated in the reasons for judgment.

The case was heard at Ottawa on the 17th September, 1915 before the Honourable Mr. Justice Cassels.

McGregor Young, K.C., for suppliant;

W. D. Hogg, K.C., for respondent.

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CASSELS, J. now (October 30, 1915) delivered judgment.

This was a petition of right filed on behalf of the suppliant claiming certain relief against the Crown for alleged breach of an agreement said to have been entered into between the suppliant and the Crown.

The allegations of the suppliant are "that on or "about the 15th February, 1909, the suppliant was "granted by the Crown, in the right of the Province "of Ontario a license of occupation to enter upon, "possess, occupy, use and enjoy during the term of "twenty-one years certain parcels of land covered by "water in the Detroit River in the Province of Ontario, "said parcels of land being the land already in "occupation of the suppliant."

"That during the years 1909 and 1910 negotiations "were carried on between the Crown in right of the "Dominion of Canada and the suppliant for the "purchase by the Crown from the suppliant of certain "of said fishing gear and improvements and of the "rights of the suppliant under said license of "occupation."

"The suppliant alleges that pursuant to said "negotiations an agreement was arrived at between "the Crown and the suppliant as set forth in Order in "Council dated August 1, 1910, and a letter from the "said Deputy Minister to the suppliant dated the "4th August, 1910, whereby it was agreed that such "purchase be made at a price to be fixed by arbitration "such arbitration to be final and the award to be "accepted by both parties,—the purchase to cover so "much of the said fishing gear and improvements as "should be requested by the Department of Marine "and Fisheries for the Dominion of Canada, and other-

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"wise as in the said Order in Council and letter set "forth."

"The suppliant further alleges that on the 11th "August, 1910, pursuant to the said Order in Council "and letter, the Crown, represented by the Minister "of Marine and Fisheries, for the Dominion of Canada, "and the suppliant entered into a written agreement, "whereby it was agreed that the price to be paid by "the Crown to the suppliant as aforesaid be referred "to the arbitration of Francis Henry Cunningham, "Superintendent of Fish Culture of Ottawa, nominated "by the Crown, and one Alfred Miers, nominated by "the suppliant, together with a third arbitrator to be "appointed by the two arbitrators already nominated, "and otherwise as in the said agreement set forth."

The petition proceeds that on or about the 11th August, 1910, pursuant to the said agreement the said Cunningham and Miers did duly and validly by writing under their hands, appoint one Albert F. Healy as such third arbitrator.

The petition further alleges that "on or about "September 23rd 1910, the said arbitrators, by a "majority of them, namely, the said Miers and the "said Healy, did duly make and publish their award "in writing whereby they awarded to the suppliant "the sum of $2,401.90 for fishing gear and buildings "taken over by the said Department of Marine and "Fisheries, and the annual sum of $9,990.00 for the "relinquishment of all rights under the said license of "occupation such annual payments to commence "with and cover the year 1910, and to continue "the term of said license of occupation, the whole "as in the said award set forth."

The allegation is that prior to the making of the said award, the Minister of Marine and Fisheries gave

to the said arbitrators a notice stating that by writing under his hand, dated the 28th September, 1910, he had revoked, annulled and made void their authority as arbitrators, and that he thereby discharged and prohibited them from further proceeding in the matters of the said arbitration.

The petitioner contends that the said notice and the said revocation were invalid and ineffectual, and he claims the benefit of the provisions of the Arbitration Act of the Province of Ontario.

The suppliant prays:

"(a) That the Crown be condemned to pay him the amount of the said award.

" (b) In the alternative that the Crown be condemned to pay him damages, to be assessed, for the breach by the Crown of its agreement to refer as herein set forth.

" (c) In the alternative for a declaration that the Crown is bound to carry out its agreements to purchase and to refer as herein set forth.

" (d) In the alternative that the Crown be condemned to pay him damages, for the breach by the Crown of its agreement to purchase as herein set forth together with the damages occasioned by the interruption of his fishery business."

The Attorney-General of Canada, on behalf of His Majesty, filed a defence in which he alleges that the award referred to was made and signed by the two arbitrators, Miers and Healy, after the agreement of submission had been duly revoked and cancelled by the Minister of Marine and Fisheries, by reason whereof the said award was and is now of no effect, and the Crown denies the right of the petitioner to any relief.

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The Order in Council of the 1st August, 1910, states that the attached Memorandum fully "explains the "details connected with the fisheries surrounding "Fighting Island as they have arisen since the sale of "the Island by the Government in 1858."

This memorandum which is stated to be annexed to the Order in Council and forms part thereof, is a memorandum purporting to be signed by F. H. Cunningham, Superintendent of Fish Culture, and is dated the 17th March, 1910. This memorandum and the evidence of Mr. Gauthier give a detailed statement of the rights of the suppliant and the facts connected with his fishery which led up to the agreement referred to in the petition.

It would appear that the island called Fighting Island, situate on the Canadian side of the Detroit River, between Sandwich and Amherstburg, was sold by the Government (Indian Department) in 1858 for the sum of $6,000. This island is situate about 8 miles South of Windsor and 4 or 5 miles from Amherstburg.

Down to the year 1890 the purchaser of this Island enjoyed the right of fishing off the Island when it was discovered that the sale of the Island did not include the right of fishing, but that these privileges were still reserved to the Crown.

The question of the title has been dealt with by the Courts in the case of *Bartlet* v. *Delaney* tried before Mr. Justice Latchford, subsequently heard before the Court of Appeal in Ontario, and finally before the Supreme Court of Canada (1).

Apparently the right of fishing for whitefish is of considerable value. It is stated in this memorandum, that previous to 1890 there was no "close season for

(1) EDITOR'S NOTE.—See a report of the case at trial in 11 D.L. R. 584; Rev. 29 O.L.R. 426.

" whitefish in the Detroit River, and licenses were " issued to such as desired to fish and amongst them is " Mr. C. W. Gauthier, who fished several stations in " the river, amongst them the five stations on Fighting " Island."

It also alleges that considerable money was expended by the Gauthier family in preparing these stations.

The memorandum further states—" It might be " explained here that whitefish fishing in the Detroit " River is only productive during the close season " (November) as it is at this time that the fish are in " the river, passing up to Lake St. Clair for spawning " purposes.

" That in 1892 a close season for whitefish was put " in force in Lake Erie and the Detroit River, and of " course no licenses were issued to fish in the River " during this period, which rendered Mr. Gauthier's " fishing stations useless to him as a fishing commodity."

The Memorandum states " that in that year, 1892, " the Department took possession of these fishing " stations and not withstanding innumerable protests " from Gauthier, continued to fish for the purpose of " procuring eggs for the Sandwich Hatchery up to 1903, " in which year Mr. Gauthier took possession of the " most important stations, claiming that the fishing " was being conducted in American waters."

It appears that Mr. Gauthier's contention was upheld and that in 1903 the November close seasons was abolished and licenses have been issued by the Provincial Government of Ontario to fish these stations.

The memorandum proceeds " that it has not been " possible to make any satisfactory arrangements with " Mr. Gauthier to procure eggs for the Sandwich " Hatchery and the Department has, at additional

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" expenditure, been securing its eggs from the different " points, offering the best facilities for so doing. This " process has been expensive and the procuring of the " eggs has been largely dependent upon weather " conditions."

In February, 1909, the Provincial Government issued to Mr. C. W. Gauthier a license of occupation for a period of twenty-one years for certain parcels of land covered with water in front of the western shore of Fighting Island for the sum of $50.00 per annum.

The memorandum proceeds that " whilst this " license of occupation conveys no fishing rights the " very fact of his controlling the land covered with " water creates an exclusive fishing privilege as of " course no one could trespass on this area.

" This area includes the only five stations in the " Detroit River that can be relied upon for the purpose " of filling the Sandwich and Sarnia hatcheries with " eggs each year.

" The International Fisheries Regulations will, when " they become law, prohibit all fishing in the Detroit " River, except for fish breeding purposes, and will " thus render the area referred to valueless to Mr. " Gauthier, from the standpoint of commercial fishing " but as the lease given by the Ontario Government " will still be in force this Department will still be " debarred from using these stands."

The Memorandum proceeds, " that owing to the " great value to the Fisheries of Canada resulting from " the Department's Fish Breeding operations, it is of " the utmost importance to successful operations that " these fishing stands should be absolutely under the " control of this Department, especially as they are " situated within a short distance of the Sandwich " Hatchery.

"In correspondence with the Ontario Government "this Department has practically asked them to cancel "this lease and Mr. Cochrane, Minister of Lands, "Forests and Mines, states 'with all respect I do not "think we can interfere in the matter further than the "way I have indicated, that is to say, when you have "acquired Mr. Gauthier's fishery rights, such as they "are, we should give you a License of Occupation on "the same terms we gave it to him, that is at an annual "rental of $50.00.'"

The memorandum proceeds, "every possible means "has been taken with Mr. Gauthier with a view of "getting him to name a lump sum or an annual "payment and transfer this lease to this Department "but without success as he refuses to move in the "matter except under arbitration.

"The Honourable L. P. Brodeur has practically "agreed to purchase Mr. Gauthier's fishing gear used "in operating these stands and was inclined towards "a favourable consideration of settling the matter by "arbitration but he reached no final decision.

"It was agreed however that, should arbitration be "finally decided upon, Mr. Alfred Miers of Walker-"ville should represent Mr. Gauthier, the undersigned "(F. H. Cunningham) to represent this Department, "and these two arbitrators to have authority to decide "upon a third person. Whilst I anticipate con-"siderable difficulty in arriving at what would be "considered a fair amount from a Departmental "standpoint still, knowing the value that these stands "would be to the Department in its endeavours to "build up the fisheries of Canadian waters I recommend "favourable consideration to arbitration as being the "only means of settling this difficulty of thirty years "standing."

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The disputes between the Department of Marine and Fisheries on the one hand, and Mr. Gauthier, the Suppliant, on the other, extending for over a period of some ten years prior to the order in council relied upon, are detailed in this memorandum and are referred to at considerable length in the evidence of Mr. Gauthier.

There is no claim put forward in respect of any supposed grievances on the part of the suppliant detailed but it is important to have them in mind as showing the reason why during a period of years the suppliant did not utilize all the stations owned by him for the purpose of catching whitefish; and it is also important when dealing with the question as to whether he has ever been out of occupation of his fishing rights.

This memorandum also indicates the reasons why the Department of Marine and Fisheries were anxious to procure by purchase from Mr. Gauthier any right which he had under his license of occupation from the Crown represented by the Province of Ontario.

I think the Crown, represented by the Dominion Government, bound itself to purchase and acquire Mr. Gauthier's rights. The only question that was left open was with respect to the amount to be paid therefor. The parties failing to agree upon a specific sum it was mutually agreed that the sum which was to be paid should be arrived at by arbitration in the manner designated.

I cannot adopt the contention put forward by Mr. Hogg on the part of the Crown that the arbitration was entered upon with the object of ascertaining what amount Mr. Gauthier's rights would be valued at, and that it was open to the Crown after the award if they desired, to desist from further negotiations. In other words, it is contended by the Crown that they were

merely negotiating and with the view of enabling them to say whether they would enter into an agreement or not—this arbitration was to take place, and that then the Crown would decide whether they would continue the negotiations and enter into an agreement or recede from the negotiations. I think it obvious that the intention was that there was to be a complete agreement of bargain and sale, the purchase money to be arrived at in the manner indicated.

The order in council which is dated the 1st August, 1910, states that "On a memorandum dated 6th July, "1910, from the Minister of Marine and Fisheries "submitting that it is in the interests of the Fish "Cultural Service as conducted by the Department of "Marine and Fisheries to obtain absolute control of "certain fishing stations located off the shore of "Fighting Island in the Detroit River, Province of "Ontario;

"That these stations are now in the possession "of Mr. C. W. Gauthier, of Windsor, Ontario, by virtue "of a License of Occupation issued by the Provincial "Government of Ontario for twenty-one years, dating "from February, 1909, which leases to him certain "parcels of land covered by water in front of the "western shore of Fighting Island for the sum of "Fifty dollars per annum;

"That the attached memorandum (this is the memorandum signed by F. H. Cunningham previously referred to and which I have quoted at considerable length) fully explains the details connected with the "the fisheries surrounding Fighting Island as they "have arisen since the sale of the Island by the "Government in 1858;

"The Minister recommends, in view of the value of "the stations to the Department of Marine and

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"Fisheries that the annual amount of money to be "paid to Mr. C. W. Gauthier for the relinquishment "of all rights and privileges conveyed by the lease of "occupation be settled by Arbitration and that the "additional sum to be paid to him for such of his "fishing gear as is required by the Department of "Marine and Fisheries be also covered by Arbitration.

"The Minister further recommends,—as Mr. "Alfred Miers, of Walkerville, Ontario, has been "nominated by Mr. C.W.Gauthier to act as Arbitrator "for Mr. Gauthier,—that Mr. F. H. Cunningham, "the Superintendent of Fish Culture, be arbitrator "for the Department of Marine and Fisheries, and that "these arbitrators be authorized to appoint a third "party;"

Then follows a provision as to the costs, and "the "Minister further recommends that the finding of the "arbitration shall be final and shall be accepted by "all parties interested."

This document is followed up by the agreement bearing date the 11th August, 1910, between His Majesty the King, represented by the Honourable Louis Brodeur, Minister of Marine and Fisheries, and Mr. C. W. Gauthier.

It recites the facts and it agrees to refer the matter to arbitration, and contains further provisions, and amongst others, "that the parties shall, on their "respective parts, in all things obey, abide by, perform "and keep the award so to be made and published as "aforesaid."

This is signed by Mr. A. Johnson, the Deputy Minister of Marine and Fisheries.

Up to this point it seems to me there is a binding agreement and a contract between the Crown on the one part, and Mr. Gauthier on the other, by which the

Crown agreed to purchase and Mr. Gauthier agreed to sell the property in question.

Prior to the making of the award notice was served on behalf of the Crown revoking, annulling and making void Mr. Cunningham's authority to act as an arbitrator, and a formal document was served notifying the arbitrators that they were discharged from making any award.

The contention is put forward on behalf of Mr. Gauthier that this notification was given without authority of an Order in Council. If this be a valid objection it has been remedied by the subsequent Order in Council which adopts and confirms the action of the Minister in revoking the authority.

It is conceded that at common law the revocation referred to would be operative and effectual to cancel the rights of the arbitrators to proceed, and the award would be null and void unless the Legislation in Ontario takes away the right of the Crown to withdraw.

It is contended, however, by Mr. Young, that the Crown represented by the Dominion is bound by the Arbitration Act, enacted by the Legislature of the Province of Ontario. This statute is Cap. 65, of the Revised Statutes of Ontario, 1914.

The statute has been carried into the Revised Statutes from earlier statutes, and is to a great extent similar to the statute in force in England. It first became part of the Statute Law of Ontario so far as it purports to bind the Crown in 1897, 60 V. cap. 16, 346. The Act specifically provides that the Act shall apply to an arbitration to which His Majesty is a party. And it is provided that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect as if it had been made an order of the Court.

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In the Interpretation Act of the Ontario Statutes is the following:—

"His Majesty," "Her Majesty," "The King" "The Queen," or "The Crown," shall mean the sovereign of the United Kingdom of Great Britain and "Ireland and of the British Dominions beyond the seas for the time being."

The Exchequer Court Act was enacted in 1887, 50-51 V. The provisions of the Arbitration Act as I have stated purporting to bind the Crown first became part of the Statute Law of Ontario in 1897. If the view suggested that in dealing with rights of action arising in any province regard must be had to the laws of the Province as they were in force at the time of the passing of the Act of 50-51 V. 1887, is the correct view, then that part of the Arbitration Act of Ontario purporting to make a submission executed by the Crown irrevocable would not apply even if the Crown represented by the Dominion were otherwise bound by such legislation. Regard, however, must be had to Sec. 10 of the *Interpretation Act*, R.S.C., 1906.

"The law shall be considered as always speaking "and whenever any matter or thing is expressed in the "present tense the same shall be applied to the cir- "cumstances as they arise so that effect may be given "to each act and every part thereof according to its "spirit true intent and meaning."

I do not think the view put forward can be upheld. If such a construction were placed on the Exchequer Court Act innumerable absurdities might arise as the Statute laws of the various provinces are from time to time repealed or varied.

The question raised that the Crown represented by the Dominion is bound by the provisions of the

Arbitration Act is an important one. In *Fry on Specific Performance* (1) will be found a note of various authorities which, dealing between subject and subject, decide that where the price is to be settled by arbitration and no award has been made the Court cannot decree specific performance. *Wilks* v. *Davis*, (2) and *South Wales Railway Company* v. *Wythes*, (3) decide that there is no case where the Court has ordered specific performance to proceed to Arbitration. *Darbey* v. *Whitaker*, (4) is a case where one party had appointed an arbitrator and had subsequently forbidden him to act. *Jureidini* v. *National British & Irish Millers Insurance Company*, (5) is a case where the ascertainment of the amount of loss by arbitration was a condition precedent of the right to sue as in *Scott* v. *Avery* (6). The contract having been repudiated in toto the House of Lords entertained the action without the amount being ascertained by Arbitration. In the present case the amount has been ascertained by the award of a majority of the Arbitrators and the suppliant claims a declaration that the amount found due should be paid.

For reasons which I shall give I am of opinion that the Crown represented by the Dominion is not affected or bound by the provisions of the Arbitration Act enacted by the Legislature of Ontario.

Before doing so I will consider another point of considerable importance. The question raised is that whether the Crown is named in the Arbitration Act or not is immaterial, as wherever a subject is liable if in the action he were a defendant, the Crown represented by the Dominion is liable. I think the law is as stated

(1) 5th Ed. (1910) p. 777.
(2) 3 Mer. 509.
(3) 5 De G. M.G. 880.
(4) 4 Drew. 134; *Vickers v. Vickers*, L. R. 4 Eq. 534.
(5) (1915) A. C. 499.
(6) 5 H. L. C. 811.

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by the Chief Justice of Canada in *The King* v. *Desrosiers*, (1).

"Since the judgment in *Armstrong* v. *The King* (2) "it must be considered as settled law that the "Exchequer Court Act" not only creates a remedy, "but imposes a liability upon the Crown *in such a case* "*as the present*, and that such liability is to be deter- "mined by the laws of the Province where the cause "of action arose."

In the *City of Quebec* v. *The Queen* (3) the view of the late Chief Justice, Sir Henry Strong, is stated as being that the laws of the various provinces govern, and that a plaintiff suing for relief to which he becomes entitled under the provisions of the Exchequer Court, becomes entitled to the same relief as would be granted between subject and subject.

Regard must be had to the fact in question in the case of *Desrosiers* v. *The Queen*. The Chief Justice carefully guards himself by using the words "in such a case as the present." Prior to the Stat. 50-51 V. c. 16 (*The Exchequer Court Act*) an action would not lie against the Crown for tort by a servant. *The Exchequer Court Act* by section 16, section 20 of the present Act, sub-sec. c., expressly provides the remedy and when expressing his view of the law the Chief Justice had reference to this provision, so also Sir Henry Strong.

I have no doubt that in a case such as the *Desrosiers* case, or the *Armstrong* case, where the facts bring the case within the provisions of sub-sec. c. of sec. 20, the Crown would be liable if a subject were liable were defendant instead of the Crown. This I think is obviously the effect of the decision in the *Desrosiers* case. If the remedy were to be only in cases in which the Crown represented by the Dominion was made

(1) 41 S. C. R. 71. (2) 40 S. C. R. 229.
(3) 24 S. C. R. 420.

liable by legislation of the province it would be useless legislation as the local legislature could not enact laws making the Crown represented by the Dominion liable. The liability imposed upon the Crown is as stated by the Chief Justice by the Exchequer Court Act section 20, sub-sec. c.

In the case before me the right of action of the suppliant is founded on contract not in tort. It is regulated by section 19 of *The Exchequer Court Act.* Prior to the enactment of the Ontario Legislature (the Arbitration Act referred to) the Crown represented by the Dominion had the right to revoke the submission to Arbitration. I am of opinion the Local Legislature cannot legislate so as to take away this right. In *Burrard Power Co.* v. *The King* (1) the question was determined where the province attempted to enact Laws interfering with rights of property of the Crown represented by the Dominion. Chitty's *Prerogatives of the Crown* (2) states: "But Acts of Parliament "which would divest or abridge the King of his "prerogatives, his interests or his remedies, in the "slightest degree, do not in general extend to, or bind "the King unless there be express words to that effect." (3).

The case relied on by Mr. Young of *Exchange Bank* v. *The Crown* (4) does not effect the question. This case was decided under the French law prior to Confederation. The Quebec Civil Code was enacted in 1866 continued as law by the Confederation Act.

A further point to be considered is that I could not decree specific performance against the Crown. There would be no means of enforcing any such judgment.

(1) (1911) A. C. 87.
(2) p. 283.
(3) See per Burbidge, J., in *Powell* v. *The King*, 9 Ex. R. 374. Also per Chancellor of Ontario in *Weiser* v. *Heintzman*, 15 Pr. R. 407.
(4) L. R. 11 A. C. 157.

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In the case before me not merely has the Crown, the defendants in this petition, cancelled the powers of their arbitrator and terminated the proceedings, but by subsequent letter of the 13th October, 1910, forwarded to the suppliant, they have repudiated the agreement in toto, and declined to further proceed with the purchase.

The letter states that " Moreover, I am to say that " upon further inquiry it appears very doubtful " whether you are entitled to any rights or privileges " in respect of the fisheries at Fighting Island or under " your License of Occupation which it would be in the " public interest for the Government to acquire, and " the Minister has therefore decided not to proceed " further with the negotiations for purchase. You " may consider therefore that the Government is not " contemplating the purchase of your interest in the " premises, whatever it may be."

The Crown declines to carry out their contract. This being so the only remedy which the suppliant can obtain is damages for the breach of the contract.

I think if the suppliant can prove damages he is entitled to recover them and be paid the amount by the Crown. It was suggested on the trial that the parties would agree upon a referee who could assess the claim for damages, and if a reference becomes necessary perhaps the parties will agree. It appears from the evidence that the suppliant has never been out of occupation or enjoyment of his fishing privileges. Mr. Gauthier in his evidence puts it in this way:

" There were no fishery operations going on at that " particular time in August; they were not being " occupied. (Referring to the fishery sites.) The " season does not begin until the 1st of November, or " a week before that, in the fall; so that at that time " they were not in actual possession of anybody.

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"Q. When did they (referring to the Crown) go "into possession?

"A. They did not as a matter of fact go into "possession.

"Q. There was no loss occasioned by the taking "away of the fisheries between the Order in Council "and the revocation of the arbitration?

"A. No, and the loss really did not begin until the "beginning of the fall season, about a week prior to the "1st of November, etc.

It would therefore appear, that so far as any injury is occasioned to the petitioner by reason of being out of possession of his fishery, there is no loss.

The submission to arbitration, made provision in regard to the costs of the arbitration proceedings. This was all based upon the supposition that the agreement would be carried out. It seems to me that it would be fair if the parties could come together, that the suppliant should be reimbursed by the Crown any loss that he has been put to by reason of these arbitration proceedings. This, however, is a matter for consideration by the parties themselves.

Judgment will issue declaring that there is a valid contract, and that the Crown is liable in damages for breach thereof, and a reference to a party to be named if the parties fail to agree.

I think the suppliant is entitled to costs up to judgment; but subsequent costs and further directions will be reserved until after the report as to damages.

Judgment accordingly.

Solicitors for suppliant: *Young & McEvoy.*

Solicitors for respondent: *Hogg & Hogg.*