

IN THE MATTER of the Petitions of Right of

JAMES W. JOHNSTON.....SUPPLIANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT ;

AND

FREDERIC COUSE.....SUPPLIANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1910
Oct. 6,
—

Commissioners National Transcontinental Railway — Contract—Services connected with construction of Eastern Division—Disputed claim—Petition of Right—Liability of Commissioners.

A petition of right will not lie in the case of a disputed claim founded upon a contract entered into with the Commissioners of the National Transcontinental Railway for services connected with the construction of the Eastern Division of such railway. Under the provisions of 3 Edward VII. chap. 71, the Commissioners are a body corporate, having capacity to sue and be sued on their contracts. Action, therefore, upon such a claim should be brought against the Commissioners and not against the Crown.

THESE were cases arising upon two petitions of right seeking payment for services alleged to have been rendered by the suppliants to the Crown in connection with the valuation of certain lands taken for the purposes of the National Transcontinental Railway.

October 28th, 1910.

The cases now came before the court for the purpose of argument of points of law before trial. The points of law raised in both cases being identical, they were argued together.

C. J. R. Bethune, for the respondent, argued that the suppliants were not employed by or on behalf of the

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Crown, nor was the Crown liable for their remuneration. (Cites sec. 22 of the National Transcontinental Railway Act, 3 Edw. VII c. 71). The National Transcontinental Railway Commissioners are a body corporate liable to be sued on their contracts; and it was never contemplated that the Crown should be liable on petition of right in respect of matters controlled directly by the Commissioners. The petitions set up no case for relief in this court. (Cites *Matton v. The Queen* (1); *Kimmitt v. The Queen* (2).

J. Travers Lewis, K.C., for the suppliants, contended that the Commissioners were merely constructing a certain portion of railway for the Crown. The Eastern Division of the National Transcontinental Railway is a Government railway. (Cites secs. 5 and 8 of 3 Edw. VII c. 71). It is true the Commissioners are a body corporate, but they are an emanation of the Crown and act for the Government, which is responsible on their contracts. The Commissioners are substantially in the same position here as the Intercolonial Railway Commissioners were in respect of that undertaking, and on their contracts petitions of right were entertained.

[CASSELS, J. I think not. It would seem as if the framer of the National Transcontinental Railway Act had purposely used language to distinguish the positions of the two boards.]

I submit there is no substantial difference between them. (Cites *Jones v. The Queen* (3); *Berlinguet v. The Queen* (4). The English cases do not help us, because the various statutory boards there are differently constituted.

I rely on *Graham v. Commissioners of Queen Victoria Niagara Falls Park* (5). The case at bar is closely analogous to that case.

(1) 5 Ex. C. R. 401.

(2) 5 Ex. C. R. 133.

(3) 7 S. C. R. at p. 575.

(4) 13 S. C. R. at p. 29.

(5) 28 O. R. at p. 12.

[CASSELS, J. Looking at sec. 22 of the Act, do you think you could sue the Crown in the absence of the certificate?]

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The plain meaning of Clause I of the agreement between the railway company and the Government, read together with sec. 5 of the Act, fixes upon the Crown liability for the lawful acts and contracts of the Commissioners. The Commissioners have no funds to pay with, and it all comes round to the primary liability of the Crown. (Cites *Tait v. Hamilton* (1); *Tully v. Principal Officers of Ordnance* (2).

Mr. Bethune, in reply, contended that in any event the Crown could not be liable until the certificate of the Commissioners, under sec. 22 of the Act, had been obtained; and it was not pleaded. The present argument is proceeding on principles of demurrer, and the suppliants must plead everything that will entitle them to judgment.

CASSELS, J., now (October 6th, 1910) delivered judgment.

These are two petitions of right instituted by two different suppliants. The petitions are for the recovery against His Majesty the King of compensation for services claimed to be due under the circumstances detailed in the petitions. The services are of a similar character in each case, the amounts only differing, and the petitions are framed in identical language except as to amount. I will set out the petition in the *Johnston* case:—

“1. The Commissioners of the National Transcontinental Railway, hereinafter referred to, were constituted under the Dominion Act of 1903, 3 Edward VII, chapter 71, being an Act respecting the construction of a National Transcontinental Railway, and Acts amending the same.

(1) 6 U. C. Q. B. (O. S.) 89.

(2) 5 U. C. Q. B. 6.

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“ 2. On the 18th day of January A.D. 1909, your suppliant was, on behalf of Your Majesty, employed by the said Commissioners of the National Transcontinental Railway to inspect and make a valuation of the several lands and properties which the line of the eastern division of the National Transcontinental Railway would cross, through the city of St. Boniface, in the province of Manitoba, and to report on the same, giving a separate valuation for each piece of land so to be crossed.

“ 3. Your petitioner duly accepted said employment and undertook the work ; and, on or about the 13th day of April A.D. 1909, your petitioner fully completed the work of valuing the said lands and properties and reported thereon to said Commissioners.

“ 4. The amount of your suppliant’s charges or compensation for so valuing said lands and properties and for making said report, is \$10,880, your suppliant’s account for which was duly rendered to the said Commissioners for Your Majesty.

“ 5. The said charges or compensation of your suppliant are based on a percentage of $2\frac{1}{2}$ per cent. upon the total valuation of the lands and properties so inspected and valued by your suppliant as aforesaid.

“ 6. The amount so claimed by your suppliant is a fair, reasonable, and just charge or compensation for the work so done by your suppliant ; but your suppliant has not been paid said sum, in whole or in part, by the said Commissioners on behalf of Your Majesty, for or in respect of the said work and labour so performed by your suppliant as aforesaid ; but the whole amount remains due and owing to your suppliant.”

Your suppliant therefore humbly prays :—

“ 1. That Your Majesty or this honourable court may direct payment to your suppliant of the said sum of \$10,880.

“2. That your suppliant may have judgment for the said sum of \$10,880 and interest, as money due and owing to your suppliant by Your Majesty for work and labour performed, at request as aforesaid, by your suppliant for Your Majesty.

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“3. That your suppliant may be awarded the costs of this petition, and of any further proceeding taken in assertion of the claims herein contained.

“4. And that your suppliant may have such further and other inquiries had and taken, and relief granted, as to this honourable court may seem meet.”

To each petition the respondent filed a defence denying the allegations in the petition; and by this defence pleaded as follows:—

“The respondent objects that the petition of right discloses no cause of action against the respondent in that no facts are alleged establishing any liability upon the respondent for the obligations of the Commissioners referred to in the petition of right.”

Under the rule of court a direction was made for the argument of the question of law raised by the defence.

The allegations in the petition were accepted as admitted for the purposes of the argument of the legal question.

The statutes relating to the National Transcontinental Railway were referred to. The arguments of counsel proceeded on perhaps broader lines than necessary for the consideration of the question of law, but it was desired to have my opinion on the question whether or not, a claim being disputed for services performed by a valuator under a contract with the commissioners created by the statute, an action should not be taken against the corporate body, the commissioners, to have the claim ascertained.

The contention of counsel for the suppliants is that under the statutes the commissioners act as agents for the Crown, and that the Crown is directly liable for damages for a breach of contract entered into between the suppliant and the commissioners.

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Counsel for the Crown argue that before the Crown can be called upon to pay such a claim, such claim must be "approved by the Commissioners and certified by the chairman," and then only if a sufficient appropriation has been made by Parliament for the purpose.

The case was very fully argued, and a great number of authorities, some of which I will refer to later, were cited.

It is not necessary to consider the terms of the statute 4 Ed. VII, cap. 24, and the agreement referred to, as there is nothing contained affecting the question before the court.

The statute 3 Ed. VII, Cap 71, "An Act respecting the construction of a National Transcontinental Railway" was assented to 24th October, 1903. It confirms the agreement set out as a schedule to the statute. This agreement bears date the 29th July, 1903, and is made between His Majesty the King, acting in respect of the Dominion of Canada, and the Grand Trunk Pacific Railway Company. It recites as follows:—

"Whereas, having regard to the growth of population and the rapid development of the production and trade of Manitoba and the North-West Territories, and to the great area of fertile and productive land in all the provinces and territories as yet without railway facilities, and to the rapidly expanding trade and commerce of the Dominion, it is in the interest of Canada that a line of railway, designed to secure the most direct and economical interchange of traffic between Eastern Canada and the provinces and territories west of the great lakes, to open up and develop the northern zone of the Dominion, to promote the internal and foreign trade of Canada, and to develop commerce through Canadian ports, should be constructed and operated as a common railway highway across the Dominion from ocean to ocean, and wholly within Canadian territory."

It provides by section 5 as follows :—

“5. The said Eastern Division shall be constructed by, and at the expense of the Government, upon such location and according to such plans and specifications as it shall determine, having due regard to directness, easy gradients and favourable curves.”

Section 7 is as follows :—

“7. In order to ensure, for the protection of the company as lessees of the Eastern Division of the said railway, the economical construction thereof in such a manner that it can be operated to the best advantage, it is hereby agreed that the specifications for the construction of the Eastern Division shall be submitted to, and approved of by, the company before the commencement of the work, and that the said work shall be done according to the said specifications and shall be subject to the joint supervision, inspection and acceptance of the chief engineer appointed by the Government and the chief engineer of the company, and in the event of differences as to the specifications, or in case the said engineers shall differ as to the work, the questions in dispute shall be determined by the said engineers and a third arbitrator, to be chosen in the manner provided in paragraph four of this agreement.”

Section 8 is as follows :—

“8. The construction of the said Eastern Division shall be commenced as soon as the Government has made the surveys and plans and determined upon the location thereof, and shall be completed with all reasonable despatch.”

Section 15 is as follows :—

“15. The expression ‘cost of construction’ in the case of the Eastern Division, shall mean and include all the cost of material, supplies, wages, services and transportation required for or entering into the construction of the said Eastern Division, and all expenditure for right of

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way and other lands required for the purposes of the railway and for terminal facilities, accommodation, works and damages and compensation for injuries to lands and for accidents and casualties; cost of engineering, maintenance, repairs and replacement of works and material during construction and superintendence, book-keeping, legal expenses, and, generally, costs and expenses occasioned by the construction of the said division, whether of the same kind as, or differing in kind from, the classes of expenditure specially mentioned, including interest upon the money expended; the interest upon such outlay in each year shall be capitalized at the end of such year, and interest charged thereon at three per cent. per annum until the completion of the work and until the lessees enter into possession under the terms of the said lease; and, for the purposes of this agreement, the amount of such cost of construction, including the principal and all additions for interest, to be ascertained in manner aforesaid, shall, on completion, be finally determined and settled by the Government upon the report of such auditors, accountants, or other officers as may be appointed by the Government for that purpose."

Section 20 of the agreement contains the provision for leasing the Eastern Division when completed.

It is obvious that the construction of the Eastern Division is a work of large magnitude and that a special enactment would be required in order that the right-of-way be acquired, the necessary valuations for land arrived at, the railway constructed, and the conditions of the agreement performed.

It becomes necessary to consider the various clauses of the statute 3 Ed. VII, chap. 71.

By clause 2 the agreement is confirmed and made legally binding upon His Majesty and the railway.

Section 9 of the statute reads as follows:—

“9. The construction of the Eastern Division and the operation thereof until completed and leased to the company pursuant to the provisions of the Agreement shall be under the charge and control of three Commissioners, to be appointed by the Governor in Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of The Commissioners of the Transcontinental Railway and are hereafter called ‘the Commissioners’.”

Reference may be had to the *Interpretation Act* (1), sec. 34, sub-sec. 30.

The corporate body thus created can sue and be sued. Section 10 of the statute provides that the Governor in Council may appoint a Chief Engineer for the Eastern Division. This section reads as follows:—

“10. The Governor in Council may appoint a secretary to the Commissioners, who shall hold office during pleasure, and may also appoint a chief engineer for the Eastern Division, who shall hold office during pleasure, and who, under the instructions of the Commissioners and subject to the provisions of the Agreement, shall have the general superintendence of the construction of the Eastern Division.”

Section 11 is as follows:—

“11. The Commissioners may appoint and employ such engineers (under the chief engineer), and such surveyors and other officers, and also such servants, agents and workmen, as in their discretion they deem necessary and proper for the execution of the powers and duties vested in them under this Act.”

Section 15 is as follows:—

“15. The Commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers, conferred by this Act, all the rights, powers remedies and immunities conferred upon a railway company

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under *The Railway Act* and amendments thereto, or under any general *Railway Act* for the time being in force, and the said Act and amendments thereto, or such general *Railway Act*, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act."

Section 18 is as follows:—

"18. No money shall be paid to any contractor until the chief engineer has certified that the work for or on account of which it is claimed has been duly executed and that such money is due and payable, nor until such certificate has been approved by the Commissioners."

Sections 25 and 26 are as follows:—

"25. The Commissioners shall from time to time, as moneys are required for payment for work or services in the construction of the Eastern Division, issue and deposit with the Minister of Finance and Receiver-General a debenture of the Commissioners in an amount sufficient to cover such payments, which debenture shall bear date the day on which it is issued and shall be repayable in fifty years from the 1st day of July, 1903, and in the meantime shall bear interest at the rate of three per cent. per annum payable half yearly on the first days of January and July in each year."

"26. The debentures so issued shall be in such form as the Governor in Council approves, and the Commissioners may issue them as provided by the next preceding section and such debentures when issued, and the interest thereon, shall be a first lien and charge upon the Eastern Division, and upon all revenue and income derivable therefrom by the Government or by the Commissioners after payment of all necessary charges by the Government or by the Commissioners for the maintenance or running thereof: Provided always that nothing herein shall make

the Commissioners personally liable for the payment of the principal or interest of any such debenture."

Under these two latter sections the Commissioners issue debentures for such amounts as are required for payment for work or services in the construction of the Eastern Division, and these debentures form a first charge on the Eastern Division.

Reference may be made to clause 15 of the Agreement which declares the meaning of the term "cost of construction." It includes "all costs of services and all expenditures for right-of-way and other lands required" &c.

As stated, sections 25 and 26 of the statute authorize the Commissioners to issue the debentures and these become a first charge on the Eastern Division.

These debentures apparently are issued for the purpose of giving the Government a first charge, and possibly to assist in settling the amounts due when the rental is ascertained as provided by the Agreement. The debentures are to be deposited with the Minister of Finance and Receiver-General. The monies for payment have to be provided by the Government.

Safeguards are provided in the public interest, as by section 18, which reads as follows:—

"18. No money shall be paid to any contractor until the chief engineer has certified that the work for or on account of which it is claimed has been duly executed and that such money is due and payable, nor until such certificate has been approved by the Commissioners."

Sections 22 and 23 of the statute are as follows:—

"22. The Minister of Finance and Receiver-General may, on the recommendation of the Minister of Railways and Canals, from time to time pay such claims and accounts for work done or services performed in the construction of the Eastern Division as have been approved by the Commissioners and certified by the Chairman:

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Provided, however, that no money shall be so paid until a sufficient appropriation has been made by Parliament for the purpose."

"23. The Governor in Council may, in addition to the sums now remaining unborrowed and negotiable of the loans authorized by any Act of Parliament heretofore passed, raise by way of loan such sum or sums of money as are required for the purpose of making any payment on account of the said work as provided by the next preceding section."

In the numerous authorities cited the principle laid down in the case of *Mersey Docks etc. v. Gibbs* (1) is followed.

As stated in *Sanitary Commission of Gibraltar v. Orfila* (2) the rule is "that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created."

In the case in question, having regard to the provisions of the statute and the agreement, I am of the opinion that while the funds are to be furnished by the Government, nevertheless payments can only be recovered after the approval of the commissioners and the certificate of the chairman.

The commissioners make the contract. They are given very extensive powers. It would be difficult to carry on the business of the Commission if all claims had to be brought in the Exchequer Court by petition of right.

If the suppliant obtained judgment against the commissioners, although it might be no execution could issue, I have no doubt the commissioners would give the necessary certificate to enable the suppliant to obtain payment, or could be compelled to do so.

(1) L. R. 1 E. & I. App. 93.

(2) L. R. 15 A. C. 408.

A case to my mind very much in point is *Graham v. His Majesty's Commissioners of Public Works and Buildings*. (1) Ridley, J. there deals with the general principles affecting contracts made by agents. At page 788 he says :—

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“It might be, therefore, that from the surrounding circumstances of the case now before us we ought, to conclude that the defendants were contracting as servants of the Crown only; but all the facts point, I think, in the opposite direction. It is a case far removed from either of the two authorities I have mentioned. The Commissioners of Works make these contracts, in the course of their duty, in all parts of the country in respect of works required for His Majesty's Government. I think the true inference is that they make them in their own capacity. There is nothing like the special appointment in *Dunn v. Macdonald* (2); nor is there any such relation between the commissioners and the contractor as existed between the defendant and the plaintiff in *Gidley v. Lord Palmerston* (3). I think this is a case in which the defendants have expressly contracted for themselves. If judgment be given against them when the action is tried, the judgment will, I suppose, be satisfied out of the funds granted by Parliament. Lindley, L.J.'s judgment *In re Wood's Estate; ex parte Her Majesty's Commissioners of Works and Buildings* (4) shows the way he regarded the position of the commissioners in that case. He said (31 Ch. D. at p. 621):—“No authority has been cited to show that this particular corporation, incorporated by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position as regards costs as the Crown. It is true that the precise point

(1) (1901) 2 K. B. 2781.

(2) (1897) 1 Q. B. 401.

(3) 3 B. & B. 275; 24 R. R. 668.

(4) 31 Ch. D. 607.

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here did not arise in that case, for the decision turned on the 18 and 19 Vict. c. 95, and the Lands Clauses Act, which it incorporated. It was held that the commissioners were bound by the provisions as to costs in the incorporated Act. But the objection was taken that the Crown would not be bound to pay costs and it was dealt with by saying that there was no ground for saying that such a corporation, specially incorporated in this way, is in the same position as the Crown."

And Phillimore, J., at page 789 :

"I am of the same opinion ; but I prefer to put my judgment upon a somewhat different ground. I think the Attorney-General rightly treated this case as depending upon whether or not the principle applied that a servant of the Crown as such cannot be sued. The Crown cannot be sued ; and, that being so, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a contract made by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable for the proper conduct of business that persons who contract with the Crown for business purposes should have the same power of appealing to His Majesty's Courts of Justice against a misconstruction of the contract by the head of a department as any subject might have against his fellow-subject. For that purpose the Crown has, with the consent of Parliament, in certain cases established certain officials who are to be treated as agents of the Crown but with a power of contracting as principals. The Secretary of State for

War and the Postmaster-General are known instances of this. Apparently the Commissioners of Woods and Forests are also an instance; they are a corporation incorporated for that purpose. There seems, too, to be no doubt that for certain purposes the Commissioners of Works and Public Buildings are liable to be sued. So, under the *Merchant Shipping Act* the Legislature has appointed a public official who may be sued for torts—not for his own tort, but for the tort possibly of the President of the Board of Trade, or of some official at a seaport, in detaining a ship as unseaworthy which in fact was not. In such cases the remedy is really sought against the Crown, and the judgment is declaratory only. No execution can follow upon it because there are no moneys out of which damages can be paid except moneys provided by Parliament for the purpose. The procedure amounts to obtaining a decision in the nature of a decision upon a hypothesis namely, if the person sued were a subject, what would be the decision of the Court on the case brought against him?"

And again at page 791:—

“Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley, L. J. in *Dixon v. Farrer* (1) as a ‘nominal defendant sued as representing one of the departments of the State’. There is no reason in principle why they should not be. As I have pointed out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and liability to be sued. Having regard to the facts that they are made a corporation, that there is no restriction with respect to them which would prevent their being subject to the ordinary incidents of a corporation, and

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(1) (1886) 17 Q. B. D. 658 ; 18 Q. B. D. 43.

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that in fact they have been sued in cases where their powers have been specially derived from certain Acts of Parliament, I see no reason for holding that their liability to be sued is restricted to cases coming under those Acts. I think that they have a general liability to be sued for the purpose of obtaining a decision, although, of course, no execution can go against them because their property (if they have any, and probably they have not) is Crown property, as was the case in *Reg. v. McCann* (1) and the judgment against them would have to be satisfied, if at all, out of moneys provided by Parliament for that purpose."

The case of *In re Wood's Estate, ex parte Her Majesty's Commissioners of Works and Buildings* (2) is also an important decision of the Court of Appeal.

I have read with a good deal of care the cases cited before me. They all are decided on the particular statutes, and the facts are different.

One case not cited, *McDougall v. Windsor Water Commissioners*, (3) bears on the question. I do not think this case, however, governs. In that case the decision was based upon the ground that the contract there sued upon was *ultra vires* and not binding.

I think judgment should go in favour of the Respondent in each case, dismissing the petitions with costs, including the costs of this hearing.

If the suppliants think they can better their position by amendment, and if I have jurisdiction to allow an amendment, I would give them leave to amend. This can be spoken to at any time in Chambers.

Judgment accordingly.

Solicitors for J. W. Johnston : *Elliott MacNeil & Deacon.*

Solicitor for F. Couse : *Elliott, MacNeil & Deacon.*

Solicitor for the Crown : *H. A. Robson.*

(1) L. R. 3 Q. B. 677.

(2) L. R. 31 Ch. D. 607.

(3) 27 Ont. App. Rep. 566; 31 S.

C. R. 326.