BETWEEN:

WALSH ADVERTISING COMPANY LIMITED .... SUPPLIANT;

1960 Oct. 3, 4, 5, 6

1961 Oct. 23

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Crown—Petition of Right—Claim against Crown for services rendered in connection with sale of securities—Bank of Canada Act, R.S.C. 1952, c. 13, s. 20—Financial Administration Act, R.S.C. 1952, c. 116, Part IV, ss. 39, 41, 42 and 43—Minister not competent to contract—Necessity of Order in Council—No liability on quasi contract—Recovery allowed on quantum meruit basis—Comptroller's certificate.

Suppliant brings its petition of right to recover from the Crown the sum of $60,000 for breach of an alleged contract in 1957. It claimed to have been requested in December, 1956 and in January, 1957 to prepare advertising material, arrange television programmes and generally advertise the government's 1957 campaign for sale of Canada Savings Bonds. It alleged that it had been engaged by the Bank of Canada to perform such services in a previous bond sales campaign and that such arrangement entitled it to consider it would act likewise for the 1957 sales campaign but that its contract was terminated by the Minister of Finance on July 10, 1957, after certain expenses had been incurred and considerable work done in preparation for the campaign.

Respondent contends, *inter alia,* that there was no binding contract entered into between the suppliant and the Crown and that the suppliant had rendered the services in question in the hope of getting a contract.

Held: That there was no binding contract between the suppliant and the Crown at the time of the alleged breach in July, 1957.

2. That by virtue of the *Financial Administration Act,* R.S.C. 1952, c. 116, neither the Minister nor any one acting on his instructions was authorized to enter into a contract on behalf of the Crown relating to the borrowing of money or the issue or sale of securities relating thereto without Parliamentary authority to borrow the money and an Order in Council authorizing the Minister to enter into such a contract.

3. That neither in December, 1956 nor in January, 1957 nor at any time subsequently up to July 10, 1957 when its services were dispensed with was there any such Order in Council authorizing the alleged contract.

4. That since the Crown subsequent to July 10, 1957 had adopted some of the results of the services rendered by the suppliant and used them in the campaign later authorized and conducted it was bound to compensate suppliant on a *quantum meruit* basis.

1961
WALSH ADVERTISING CO. LTD. v. THE QUEEN

5. That s. 39 of the *Financial Administration Act* provides no defence to such a claim as herein presented since that provision applies only in respect of contracts and affords no answers to claims not founded on a contract.

PETITION OF RIGHT to recover from the Crown damages for breach of contract.

The action was tried before the Honourable Mr. Justice Thurlow at Toronto.

The Honourable R. L. Kellock, Q.C. and *D. J. Wright* for suppliant.

W. R. Jackett, Q.C., W. G. Gray, Q.C. and *S. Samuels* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (October 23, 1962) delivered the following judgment:

By the petition of right herein, the suppliant seeks to recover for services rendered and moneys expended pursuant to a contract alleged to have been made in or about November, 1956, whereby the suppliant was employed by the Crown to prepare advertising material, to arrange television programs, and generally to prepare, schedule and place the advertising for the Government's 1957 campaign for the sale of Canada Savings Bonds.

The suppliant alleges that its employment to render these services was summarily terminated after the bulk of the work had been carried out and that it was deprived of the opportunity of recovering the remuneration to which it was entitled under the contract of employment.

The story unfolded in the evidence begins with the following letter, written to the suppliant by the Minister of Finance on June 18, 1955:

You will have learned from Mr. W. G. Abel that I have decided to continue the advertising accounts in this Department on the same basis throughout this calendar year. I hope he has also told you that I stated to him that at the end of the year there will be a change in your favour.

To this, the suppliant replied on June 21, 1955, as follows:

This will acknowledge receipt of your letter of June 18th, 1955, in which you inform us that you have decided to continue the advertising accounts in your Department on the same basis throughout this calendar year.

Col. Abel has told us that you stated to him that at the end of the year there will be a change in our favour.

We very much appreciate receiving your confirmation of Col. Abel's message to us.

We are looking forward to serving you and your Department, and can assure you that your advertising and public relations problems will receive the best and most conscientious attention of our organization.

At that time, Mr. Abel was vice-president of the suppliant company. He died some time before the trial of the petition.

The next event following the exchange of the letters occurred in May or June of 1956, when several members of the suppliant's staff met with officials of the Bank of Canada in Ottawa and a deputy governor of the Bank outlined certain areas of responsibility which the suppliant was to assume in connection with the promotion of the sale of the eleventh series of Canada Savings Bonds. Thereafter, until the conclusion of the sales campaign in November of the same year, the suppliant arranged for and provided advertising material which was used in the campaign and also arranged for space for such advertising in newspapers and other publications and for television broadcasting time. For the services so rendered the suppliant received payment through a discount or commission allowed to it by the publishers and other parties with whom contracts were arranged. The practice generally followed by these parties was to charge the suppliant or its client for the space, time or services rendered at a gross rate and to pay or allow as a commission to the suppliant on settlement of the account a discount of 15 per cent of the gross amount, with in some cases an additional two per cent for prompt settlement. Where a party in his account charged at a net rate, the suppliant would add its commission on its own invoice for that particular account to its client. This method of realizing payment for advertising agency services was common in the business, there was no secrecy about it, and there is no reason to think that it was not known and accepted by the officials of the Bank of Canada, from whom the suppliant received its instructions, as the basis and manner upon and by which the suppliant was to obtain payment for its services.

Earlier in the year 1956, another advertising agency, at the request of the Bank of Canada, had rendered certain services in developing advertising material for use in the eleventh series Canada Savings Bonds sales campaign, and some time after the suppliant received its instructions it was

1961
WALSH ADVERTISING CO. LTD.
v.
THE QUEEN
Thurlow J.

requested by the Bank to pay an account rendered by that agency for its services. The suppliant did this and was reimbursed by the Bank.

To put on a bond sales campaign of the sort that had taken place in 1956 and earlier years involved advertising by a variety of means and on a considerable scale. It entailed among other things the creating of written or printed advertising material, including art work therefor for use in advertisements in newspapers and other publications and in posters and circulars of various kinds, the creation and production of advertising commercials for radio and television programs, the creation, production and distribution of theatre newsclips and the arranging for the publication of the material across Canada at the appropriate time or times. It also entailed work or services of various kinds by many different persons. Needless to say, if all these things were to be done organization, thought and preparatory work could not very well be left to the last minute before a campaign was to be held.

On January 9, 1957, shortly after the conclusion of the eleventh Canada Savings Bond sales campaign, a meeting was held at the request of the Bank of Canada at the suppliant's Toronto office between members of its staff and an official of the Bank "to discuss with him the place of television in the 1957 Canada Savings Bond campaign, on the assumption that there would be a twelfth series of bonds." When requesting this meeting, the Bank had asked the suppliant to consider certain ideas for television advertising for such a campaign, which the suppliant did at a meeting of its staff on or about January 7, 1957, and at the meeting on January 9 these ideas were discussed and the suppliant was asked to undertake a number of particular preliminary tasks in connection with advertising for a twelfth series of Canada Savings Bonds. The suppliant carried out these instructions, as well as many further instructions received from time to time from the Bank both by mail and at ten further meetings held between members of the suppliant's staff and officials of the Bank between that time and June 14, 1957. In so doing, a great deal of time and effort was expended by members of the suppliant's staff and expense was incurred by the suppliant for travelling by members of its staff between Toronto and Ottawa, for telephone calls, for art work for the proposed advertisements, and for the production of

material for films of newsclips and TV commercials. These efforts on the part of the suppliant resulted in the production of some 196 or more pieces of original roughs and preliminary development material for a 1957 Canada Savings Bond campaign. In addition, the suppliant arranged for TV network time for four 90-minute programs and for the services of certain persons to take part in the advertising portions of them and presented estimates of the cost of the proposed advertising campaign, all as requested by the Bank.

No twelfth series Canada Savings Bond campaign had, however, been authorized by the Governor in Council when, on July 10, 1957, the Minister of Finance wrote to Mr. Abel as follows:

> I wish to advise you that the Government has decided to change its advertising agencies in connection with the sale of Canada Savings Bonds. In terminating our relations, I wish to thank you for the services you have rendered the Department of Finance.

This letter was answered on the following day by the manager of the suppliant's Toronto office, who pointed out that a substantial portion of the work of preparing for and organizing advertising for a twelfth series Canada Savings Bond campaign had already been completed and that the advertising agencies derived their remuneration in the form of a 15 per cent commission from newspapers and other advertising media and that he assumed that the suppliant would continue to serve the Department of Finance until the end of the calendar year. The Minister, however, replied on July 12, 1957 that:

> In writing to you on the 10th instant, I did not intend to convey the impression that your firm would continue to serve this Department until the end of this calendar year. Other arrangements have been made for handling the work in connection with the 1957 Canada Savings Bond Campaign, and McKim Advertising Agency Limited will arrange to take over from your firm now.

Subsequently, on August 10, 1957, on the recommendation of the Minister of Finance, an order in council was passed, authorizing the issue and sale of Canada Savings Bonds, series twelve, and in the course of the advertising and sales campaign which ensued some of the suggestions and ideas which originated with or were developed by members of the suppliant's staff and which had been communicated by the suppliant to the Bank of Canada were

1961
WALSH ADVERTISING CO. LTD.
v.
THE QUEEN
—
Thurlow J.

used. Some, if not all, of the TV network time for which the suppliant had arranged was also used, personnel for whose services the suppliant had negotiated appeared on the programs, and a filmed commercial on which the suppliant had devoted time and incurred expense was also used. The suppliant has, however, received no payment for its services and is out of pocket to the extent of $9,873.82 for expenses which it incurred in having the advertising material prepared.

At all material times the Bank of Canada, which by s. 20 of the *Bank of Canada Act,* R.S.C. 1952, c. 13 is required to act as fiscal agent of the Government of Canada without charge and, if and when required by the Minister of Finance, to act as agent of the Government of Canada "in the payment of interest and principal and generally in respect of the management of the public debt of Canada," was in possession of a letter from the Minister of Finance to the Governor of the Bank, dated June 19, 1946, in the following form:

I have your letter of June 13th with reference to arrangements to be made between the Government and the Bank of Canada in connection with loan flotations.

The Bank of Canada is hereby authorized to make arrangements for and to conduct in the name of the Minister of Finance public loan operations in Canada designed:

(a) to provide facilities to the public for the continuation of systematic savings and investment in such issues of Dominion of Canada obligations as may from time to time be authorized therefor;

(b) to provide funds through channels normally used in the marketing of securities in Canada, to meet the borrowing requirements of the Government of Canada.

In discharging these responsibilities, the Bank of Canada may, with the approval of the Minister of Finance, form a Committee, or other organization, for the furtherance of such operations and also enter into such arrangements and commitments on behalf of the Minister of Finance as may be necessary, subject to the following provisions:

(1) Any basis for the payment of fees, commissions or other remuneration to banks, trust and loan companies, other financial institutions, authorized dealers and salesmen performing services in connection with any such operations for the sale of public issues of Dominion obligations shall be recommended to the Minister of Finance by Bank of Canada and shall upon approval by the Governor General in Council be the authorized basis upon which such fees, commission or other remuneration shall be determined.

(2) Expenses which are incurred in the promotion of the sale of new Government issues and which are properly chargeable against Loan Flotation Charges shall be subject to the approval of the Minister

> of Finance given by means of approving in advance a budget covering operations relating to a specific expenditure, and shall be paid by the Government out of unallotted monies in the Consolidated Revenue Fund.

This arrangement appears to have been followed in earlier Canada Savings Bonds campaigns and in the twelfth series campaign as well, and it was not suggested that any commitment incurred in earlier years by the Bank had ever been repudiated, but the authorization of the Bank by the Minister to make commitments is not shown to have been approved by the Governor in Council in any year or for any Canada Savings Bond campaign.

The suppliant's case, as put forward at the trial, was that it was retained either generally or alternatively in connection with the promotion of the sale of Canada Savings Bonds, series twelve, as the Crown's advertising agent, in which capacity it was to produce and develop ideas for advertising and to act as agent for the Crown in making contracts with publishers and others relating thereto, for which services it was to be permitted to place advertising and recover remuneration in the form of discounts or commissions from the publishers and others with whom contracts might be arranged, that it carried out the work requested by the Bank of Canada (which was authorized by the Minister's letter of June 19, 1946 to enter into such arrangements and commitments on behalf of the Minister as might be necessary to carry out its responsibilities for arranging and conducting public loan operations), all of which work was necessary for that purpose, and was entitled to place a particular portion of the advertising for the twelfth series Canada Savings Bond campaign if such a campaign should be authorized and a budget for such advertising approved (both of which events in fact occurred) and to recover remuneration for its services in the way which was customary in its type of business, that the Crown wrongfully broke this contract in July, 1957, by summarily discharging the suppliant as its agent and thereby prevented the suppliant from completing its work and recovering its remuneration and that the suppliant is accordingly entitled to damages equal to the $60,000 or thereabouts which it would have been paid for commissions and disbursements if it had been allowed to complete the work and place the advertising.

1961
WALSH ADVERTISING CO. LTD. v. THE QUEEN
Thurlow J.

Counsel for the Crown, on the other hand, besides raising a number of other defences, submitted that the suppliant rendered the services in question not in performance of any existing contract with the Crown, but merely in the hope of being awarded a contract for advertising for such a campaign, if held.

In the circumstances disclosed by the evidence, I would infer that the suppliant rendered its services and incurred expenses and commitments in connection with the twelfth series Canada Savings Bonds in the expectation that it would be remunerated by being allowed to place the advertising for the campaign and to receive the commissions in accordance with the practice prevailing in that business, that without such expectation the suppliant would not have rendered the services or incurred the expense or made the commitments and that the Minister and the Bank were aware of this. There is no reason to think that these extensive services were rendered gratuitously, and I would reject the submission that they were rendered by the suppliant purely in the hope and expectation of being awarded a contract for advertising if a bond sales campaign should be held. In the previous year, the services of an advertising agency had been dispensed with prior to the authorization of the eleventh series bonds, but after the agency had done substantial work in preparation for the sales campaign, and the agency had been paid for the services which it had rendered, and I see no reason to doubt that it was contemplated by all parties concerned, when the suppliant was requested to render services in preparation for a twelfth series Canada Savings Bond campaign, that the suppliant would be similarly compensated for what it had done if, by any chance, its services should be dispensed with prior to the completion of the campaign. In view of what had happened in the previous year, I should have thought that it was part of the understanding between the parties that the Minister was to be entitled to dispense with the suppliant's services at any time if he saw fit to do so, in which event the suppliant was to be paid for the services which it had rendered up to that time. However, it is unnecessary to decide whether or not this was a term of the arrangement, for if the arrangement was binding on the Crown the suppliant, having been summarily discharged before the campaign was held, would, in my opinion, be entitled to damages for the breach of its

contract if the contract was to last for the entire campaign or, alternatively, to recover remuneration for the services which it rendered if it was a term of the contract that the Minister might dispense with the suppliant's services at any time prior to the completion of the campaign. In either case, however, the right to recover depends on whether or not the understanding was binding on the Crown.

On this question, a number of contentions were made on behalf of the Crown, but in view of the conclusion which I have reached on one of them it will be unnecessary to deal with the others. The submission in question was based on the provisions of Part IV of the *Financial Administration Act,* R.S.C. 1952, c. 116, ss. 41, 42, and 43 of which were as follows:

41. No money shall be bororwed or security issued by or on behalf of Her Majesty without the authority of Parliament.

42. Where authority is conferred by Parliament to borrow money on behalf of Her Majesty, the Governor in Council, subject to the Act authorizing the borrowing, may authorize the Minister

(*a*) to borrow the money by the issue and sale of securities in such form, for such separate sums, at such rate of interest and upon such other terms and conditions as the Governor in Council may approve, and

(*b*) to enter into such contracts or agreements relating to the borrowing of the money or the issue or sale of securities relating thereto on such terms and conditions as the Governor in Council may approve.

43. The Governor in Council may authorize the Minister to borrow such sums of money as are required for the payment of any securities that were issued under the authority of Parliament, other than section 44, and are maturing or have been called for redemption.

The Crown's submission was that the alleged contract was one relating to the sale of securities within the meaning of s. 42(*b*), that in December, 1956 or January, 1957, when the alleged contract was made, (1) Parliament had not authorized the borrowing of money, and (2) the Governor in Council had not authorized the Minister of Finance to enter into the alleged contract, and that it was therefore not binding upon the Crown.

In my opinion, the second portion of this submission is well founded. It appears to be established as a general proposition that a Minister of the Crown has no authority to enter into contracts on behalf of the Crown unless he has

1961
WALSH ADVERTISING CO. LTD. v. THE QUEEN
Thurlow J.

been authorized by a statute or by order in council so to do. See *Drew v. The Queen*[1], where the President of this Court said:

It is an established rule that a contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly or under the provisions of a statute: *vide Mackay v. Attorney General for British Columbia*, (1922) 1 A.C. 457 at 461. And it is an elementary principle that a Minister cannot bind the Crown unless authorized by order in council or by statute: *vide The Quebec Skating Club v. The Queen*, (1893) 3 Ex. C.R. 387; *The King v. McCarthy*, (1919) 18 Ex. C.R. 410 at 414; and *The King v. Vancouver Lumber Co.*, (1920) 50 D.L.R. 6.

In *The King v. McCarthy*[2], Audette J. put the point thus at p. 414:

Moreover, there is the important question as to whether the Minister of Public Works could under the circumstances, and without valid authority, bind the Crown. Unless authorized by order in council or by statute, a Minister of the Crown cannot bind his Government. The Minister of Public Works, in the matter in question, has obviously no power to enter into such an agreement as set forth in Exhibit No. 24, without proper authority, and without the same he cannot bind the Crown in that respect. The question is so elementary that I shall confine myself in that respect to citing a few cases establishing that proposition, although the authorities are very numerous: *Quebec Skating Club v. The Queen*, (1893), 3 Can. Ex. 387; *Jacques-Cartier Bank v. The Queen*, (1895), 25 Can. S.C.R. 84; and *The King v. The Vancouver Lumber Company*, (1914), 17 Can. Ex. 329, 41 D.L.R. 617, affirmed on appeal to the Supreme Court of Canada on the 4th December, 1914.

See also *Livingstone v. The King*[3]. There are statements in the judgment of this Court in *Wood v. The Queen*[4] which may be difficult to reconcile with the view expressed in the cases cited, but, so far as there is conflict, I think the view expressed in the latter must prevail.

A second general proposition which appears to me to apply in the present situation is stated in *The Queen v. Woodburn*[5], where Sedgwick J., in delivering the judgment of the Supreme Court, said at p. 123:

It is perfectly clear that a contractor dealing with the Government is chargeable with notice of all statutory limitations placed upon the power of public officers. Where a statute expressly defines the power it is notice to all the world.

Turning now to ss. 41 and 42 of the *Financial Administration Act*, it will be observed that s. 41 prohibits the borrowing of money on behalf of the Crown except with the

[1] June 4, 1959. (Unreported)
[2] (1919) 18 Ex. C.R. 410.
[3] (1919) 19 Ex. C.R. 321.
[4] 7 S.C.R. 645.
[5] (1898) 29 S.C.R. 112.

authority of Parliament and that s. 42 then prescribes what the Governor in Council may do when authority to borrow exists. It is, I think, manifest that the intention of Parliament in enacting these sections is to ensure that money is borrowed only when Parliament has authorized it and that contracts relating to the borrowing of money are made only with relation to borrowing which Parliament has authorized. And since it would be idle for Parliament to enact that in certain situations the Governor in Council might authorize the Minister to enter into contracts relating to the sale of securities if a broader general power to confer such authority were held to exist independently of the statute, in my opinion, s. 42 should be regarded as a definition of the powers of the Governor in Council on this subject. Accordingly, whatever may have been the position prior to the enactment of s. 42(*b*) in 1951, it seems clear that, following its enactment, neither the Minister nor anyone acting on his instructions could have authority to make on behalf of the Crown "a contract relating to the borrowing of the money or the issue or sale of securities relating thereto" unless there was (a) parliamentary authority to borrow the money and (b) an order in council authorizing the Minister to enter into such a contract.

Now parliamentary or statutory authority to borrow money to the extent necessary to pay maturing or redeemed securities which had been issued under the authority of Parliament existed under s. 43 of the *Financial Administration Act* at all times material to these proceedings. But neither in December, 1956 or January, 1957, when the suppliant was first requested to render services in preparation for a twelfth series Canada Savings Bond sales campaign, nor at any time subsequently up to July 10, 1957, when its services were dispensed with, had any order in council been passed authorizing the Minister to borrow by the issue and sale of securities the money necessary to pay maturing or redeemed securities or any other money the borrowing of which had in the meantime been authorized by Parliament, or to enter into contracts relating thereto. In my opinion, the contract in question was one of the kind with which s. 42(*b*) deals, for its object was the sale of securities in connection with the borrowing of money, and it follows, in my

1961

WALSH ADVERTISING CO. LTD. v. THE QUEEN

Thurlow J.

view, that in the absence of an order in council authorizing the Minister to enter into it, the alleged contract was not binding on the Crown.

Nor, in my opinion, is the position affected by the fact that an order in council was passed on August 20, 1957, authorizing with parliamentary authority the borrowing of money by the sale of Canada Savings Bonds, twelfth series, and the payment out of the Consolidated Revenue Fund of "such expenses as are incurred in connection with the issue and sale" of such bonds. By the time this order in council was passed, the suppliant's services had already been terminated, and I do not think it can be regarded as a ratification by the Governor in Council of any commitment made prior to that time.

It was also submitted on behalf of the suppliant that the Bank of Canada is the statutory fiscal agent of the Government of Canada under the provisions of the *Bank of Canada Act* and that the *Financial Administration Act* has no application to a contract of the kind here in question, but even if these submissions are well founded there is, in my opinion, nothing in s. 20 of the *Bank of Canada Act* or any other section thereof which confers authority on the Bank of Canada to enter into such a contract on behalf of the Crown, and without the authorization of the Governor in Council either to it or to the Minister I do not think the Bank had any such authority.

Nor, in my opinion, is there in the facts existing up to the time of the making of the order in council any basis for a claim against the Crown in quasi contract for the value of the services rendered by the suppliant pursuant to the arrangement. It was suggested in argument that the rule followed in this country differs on this point from that followed in England, but I do not think any case has gone so far as to hold the Crown responsible in quasi contract where the alleged obligation was incurred by a person having no authority to bind the Crown. In *The Quebec Skating Club v. The Queen*[1] Burbidge J., referring to this question, said at p. 400:

> I had occasion in *Hall v. The Queen*, 3 Ex. C.R. 373, to follow the opinion of the learned Chief Justice, though it was expressed with some reserve and in a case which was decided on other grounds. In doing so, however, I thought it proper to add that there might be cases in which some question would arise as to the authority of the officer at whose

[1] (1893) 3 Ex. C.R. 387.

1961

WALSH ADVERTISING CO. LTD. v. THE QUEEN

Thurlow J.

instance the service was rendered. If the Minister of a department, or the officer acting under him, has no authority to bind the Crown in respect of such work or materials, I do not see how a petition of right can lie for the value thereof, and that view is not, it seems to me, opposed to, but, on the contrary, supported by the case of *The Queen v. The Saint John Water Commissioners*, 19 S.C.R. 130, upon which the suppliants rely.

After discussing the *Saint John Water Commissioners* case, Burbidge J. continued at p. 402:

In the case of *Hall v. The Queen*, 3 Ex. C.R. 373, the claimant, to enable certain improvements connected with the Trent Valley Canal to be proceeded with, closed down his mill at the request of the Chief Engineer of Canals, and the officers under him. There was evidence that what was done in reference thereto was, in that case, expressly ratified by the Minister of Railways and Canals, who had power to take possession of the mill and to agree with the claimant as to the amount of compensation, 31 Vict., c. 12, s. 24; R.S.C., c. 39, s. 3, and 52 Vict., c. 13, ss. 3 and 15, and I thought that under the circumstances a promise should be implied on the part of the Crown to indemnify the claimant for the actual loss he had thereby incurred. The Minister might himself have made such a contract, and I could see no good reason why it might not be implied from what his officer with his approval did.

Accordingly, in the view I have of the matter, the suppliant had no right of any kind to relief against the Crown in respect of any services which it had rendered or expenses which it had incurred, either when the services were rendered or the expenses were incurred or in July, 1957, when its services were dispensed with, or at the time when the order in council was passed. There were, however, certain events which occurred afterwards which, in my opinion, afford a basis for relief to a limited extent.

The order in council, which was made on the recommendation of the Minister of Finance, recites that it is desirable to *continue* to provide facilities for the investment of savings by the general public in Government securities, to be entitled Canada Savings Bonds, Series Twelve, and after authorizing the sale of such securities and dealing with their terms and certain matters pertaining to their sale it goes on to give authority to pay out of unappropriated moneys in the Consolidated Revenue Fund "such expenses as are incurred in connection with the issue and sale of Canada Savings Bonds Series Twelve." Statutory authorization to pay such expenses out of the Consolidated Revenue Fund on the authority of the Governor in Council existed in s. 51 of the *Financial Administration Act*. This authorization to pay such expenses out of the Consolidated Revenue Fund is not in itself an express authority to the Minister

1961
WALSH ADVERTISING CO. LTD. v. THE QUEEN
Thurlow J.

under s. 42(*b*) to enter into contracts relating to the borrowing of the money or the sale of the securities, but reading the order in council as a whole, including its implied reference to earlier Canada Savings Bonds campaigns, in the light of what is shown to have transpired in them, I think it should be interpreted as impliedly authorizing the Minister to incur expenses for advertising and promoting the sale of the bonds as had been done in earlier years. Nor do I think the authority so given or the exercise of it was subject to any further approval by the Treasury Board under the Government Contracts Regulations established pursuant to s. 39 of the *Financial Administration Act*. Section 42(*b*) deals specially with authority to enter into contracts of the kind therein referred to and reserves the granting of authority to enter into them, as well as the terms and conditions of such contracts for the approval of the Governor in Council. Contracts of this kind, in my opinion, are accordingly excepted from the scope of s. 39 and of the regulations established thereunder. From the time of the passing of the order in council, therefore, the Minister in my opinion had authority to arrange for advertising on behalf of the Crown, and the arrangements between the Minister and the Bank of Canada, authorizing the Bank of Canada to make commitments on his behalf, could have effect.

Accordingly, so far as the results of the services rendered by the suppliant were subsequently adopted and used in the campaign, there is, in my opinion, no reason to think that the Crown was not bound to pay for them. The results of the suppliant's services were available, the Crown could repudiate them or adopt and use them if it saw fit, but, in my opinion, if it did adopt or use them an obligation to pay for them would arise, and at that stage the Minister and, through him, the Bank as well had authority to act on behalf of the Crown. In so far, therefore, as use was made in the campaign of the advertising materials which the suppliant had produced or developed or assisted in developing, and in so far as arrangements had been made for broadcasting time and the services of personnel which were subsequently adopted or ratified, I think the suppliant is entitled to recover. *Vide Hall v. The Queen*[1], *The Gresham Blank*

[1] (1893) 3 Ex. C.R. 373.

1961

WALSH ADVERTISING CO. LTD. v. THE QUEEN

Thurlow J.

Book Co. v. The King[1], *The Queen v. Henderson*[2], *The Queen v. Woodburn* (*supra*), *May v. The King*[3]. Nor do I think that s. 30(1) of the *Financial Administration Act* provides a defence to such a claim. That section provides that no contract providing for the payment of any money by Her Majesty shall be entered into or have any force or effect unless the Comptroller certifies that there is a sufficient unencumbered balance available out of an appropriation or out of an item included in estimates before the House of Commons to discharge any commitments under such contract that would, under the provisions thereof, come in course of payment during the fiscal year in which the contract was entered into, and it has been established that no such certificate was issued. This subsection, however, applies only in respect of contracts and, in my view, affords no answer to a claim which is not founded upon a contract. Nor, in my opinion, is the right of the suppliant to recover for its services to the extent that they have been used by the Crown necessarily founded only on contract or the implication of a contract. In *Craven Ellis v. Connors Ltd.*[4], where a plaintiff claiming remuneration for services rendered pursuant to a contract which was held to be void recovered, nevertheless, on a *quantum meruit*, Greer L.J. said at p. 412:

> In my judgment, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law and not by an inference of fact arising from the acceptance of services or goods.

In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ld.*[5] Lord Wright said at p. 61:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

and at p. 63:

> The gist of the action is a debt or obligation implied, or, more accurately, imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost. This is important because some confusion seems to have arisen though perhaps only in recent times when the true nature of the forms of action have

[1] (1912) 14 Ex. C.R. 236.
[2] 28 S.C.R. 425.
[3] (1913) 14 S.C.R. 341.
[4] [1936] 2 K.B. 403.
[5] [1943] A.C. 32.

1961

WALSH ADVERTISING CO. LTD. *v.* THE QUEEN

Thurlow J.

become obscured by want of user. If I may borrow from another context the elegant phrase of Viscount Simon L.C. in *United Australia, Ld. v. Barclays Bank, Ld.*, [1941] A.C. 1, 21, there has sometimes been, as it seems to me, "a misreading of technical rules, now happily swept away." The writ of indebitatus assumpsit involved at least two averments, the debt or obligation and the assumpsit. The former was the basis of the claim and was the real cause of action. The latter was merely fictitious and could not be traversed, but was necessary to enable the convenient and liberal form of action to be used in such cases. This fictitious assumpsit or promise was wiped out by the Common Law Procedure Act, 1852.

The view expressed in the cases referred to has not met with universal acceptance; *vide* Cheshire and Fifoot on the *Law of Contract*, 5th Ed., p. 553 *et seq.*, but it appears to have been the view of Audette J. in this Court in *May v. The King* (*supra*). Audette J. said at p. 347:

The fallacy of this argument lies *in limine*. Had there been a contract in existence, as alleged, under which the goods had been shipped, the situation would very likely be as he contends. But it must be found that in the present case that at no time there existed a valid contract, and that moreover the right of the suppliants to recover for the goods in classes 1, 2 and 4, under the authority of the *Gresham* case and the several well known cases cited in support of it, such as *Wood v. The Queen*, 7 S.C.R. 645; *The Queen v. Henderson*, 28 S.C.R. 425; *The Queen v. Woodburn*, 29 S.C.R. 112; and *Hall v. The Queen*, 3 Ex. C.R. 373, is a right to recover based, not on an executed contract, because there is no contract extant, but as upon a *quantum meruit*, under the circumstances there stated, where the Crown received the goods among its stock and received full benefit thereof.

I do not think, therefore, that s. 30(1) of the *Financial Administration Act* bars the suppliant's claim on a *quantum meruit*.

It remains to consider the extent to which the suppliant's services were adopted and used and to assess the amount to which the suppliant is entitled therefor. There is uncontradicted evidence that the newspaper advertising, as well as what was called the certificate of intent used in the campaign, bore a similarity of ideas to what the suppliant had developed. There was also such similarity in the newspaper advertising used to advertise television performances. In addition, a clock commercial which had been suggested by the Bank and later developed to some extent by or through the efforts of the suppliant was used. In this case, the suppliant had contracted for work by a film producer who, for the most part, was later paid by McKim Advertising Agency. But the suppliant paid $100 for what had been done at its request.

Use was also made of English television network time which had been reserved by the suppliant, and the form in which the programs were introduced was that which the suppliant had worked on, though it was suggested that two of the four programs were shortened from 90 to 60-minute performances, which presumably would involve a smaller payment for network time. Even so, the evidence indicates that the cost of network time reserved by the suppliant and used in the campaign would be in the vicinity of $60,000. In addition, a budget which had been prepared and submitted by the suppliant at the request of the Bank appears to have been used and, with minor alterations, adopted as the budget for such advertising for the campaign. On the whole of the evidence, I find it impossible to make anything but a very rough estimate of the value of the services which the suppliant rendered and which were made use of in the campaign, but estimating it as nearly as I can, I have come to the conclusion that the value should be set at $13,000.

Accordingly, there will be judgment declaring the suppliant entitled to $13,000, being part of the relief claimed in its petition of right, and costs.

Judgment accordingly.