

IN THE MATTER OF THE PETITION OF RIGHT OF

LAKE CHAMPLAIN AND ST. LAWRENCE SHIP CANAL COMPANY, A BODY POLITIC AND CORPORATE HAVING ITS HEAD OFFICE IN THE CITY AND DISTRICT OF MONTREAL.....SUPPLIANT.

1916
June 26.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Company incorporated for construction of canal—Charter—Plans—Failure of approval by Governor in Council—Lapse of Charter—Damages—Liability of Crown.

The suppliant was incorporated by 61 Vict. (Dom.) chap. 107. By section 22 thereof it was enacted that "before the Company shall break ground, or commence the construction of any of the canals or works hereby authorized the plans, locations, dimensions and all necessary particulars of such canals and works shall be submitted to and approved by the Governor in Council. Certain plans were prepared by the suppliant and submitted for the approval of the Governor in Council, but the same were not so approved. Owing to such approval being withheld the suppliant alleged that it was unable to comply with the statutory requirements of its charter and that the same lapsed. By its petition of right the suppliant claimed damages against the Crown for breach of contract to approve the plans.

Held, that as there was no contract or undertaking by the Crown in the statute incorporating the suppliant, or otherwise, that the Governor in Council would approve of the plans, the same being left to the discretion of that body, the Crown was not liable in damages for such failure to approve of the plans.

PETITION OF RIGHT for damages for an alleged breach of contract by the Crown.

June 17th, 1916.

The facts are stated in the reasons for judgment.

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The case was now heard before the Honourable Mr. Justice CASSELS at Ottawa.

Mr. *Brosseau*, K.C. (with whom was Mr. *R. V. Sinclair*, K.C.), for the suppliants, argued that in as much as section 22 of Ch. 107 of 61 Vict. enacted that the plans of the canals and works "shall be submitted to and approved by the Governor in Council" that there was a clear contract between Parliament and the company that the Governor in Council would approve of the plans. The word "shall" imposes an obligation on the Governor in Council in the nature of a contract, which the Governor in Council is obliged to fulfil. The five years have elapsed in which the company were expected to finish the canal, and the charter expired since the petition of right was filed. The power given to the Governor in Council in respect of the plans is not a power to destroy the charter of the company, but purely and simply a power to regulate the way in which the company shall proceed with the works, and if the Governor in Council does not act the company has an action against the King.

He cites *Bouvier's Law Dictionary* (1), *Covington v. Sandford* (2). It is laid down in *Broom's Common Law* (3) "that wherever a statute enacts anything, "or prohibits anything for the advantage of any "person, that person shall have a remedy to recover "the advantage given him, or have satisfaction "for the injury done him, contrary to law." The charter is a contract and I have a right to invoke the aid of the Court unless Parliament otherwise directs. (Cites *Trustees of Dartmouth College v. Woodward* (4). I think it clear that the company would have a right of mandamus to enforce the approval of the Government to the plans. The company has an

(1) Vol. 1 p. 986;

(2) 164 U.S. 578.

(4) 4, Wheaton, 518.

action for damages also for breach of contract. The contract is an executed one and the company is entitled to recover whatever damage it has been put to arising out of the loss of its charter. He cites *McKay v. The King* (1); *Tobin v. The Queen* (2); *Clode on Petition of Right* (3). It is laid down in *Bouvier's Law Dictionary* at p. 840 as follows: "Grants or franchises cannot be impaired or diminished without the consent of Parliament."

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Mr. *Newcombe*, K.C., for the Crown. Now when we examine the act of incorporation of the suppliant company we see that it is a corporation receiving legislative power and capacity to construct certain works. This power is given conditionally. There are statutory restrictions and statutory conditions which are imposed here, in the public interest, upon compliance with which and not otherwise the concern thereby incorporated is authorized to proceed with the construction of its works. This is an Act in the nature of a private Act. The Crown is not bound because it is not mentioned in the Act. Moreover, the rights of the Crown are not affected by anything in this Act because there are no adequate terms used for the purpose. It is not the slightest use for the suppliant in the case before the Court to cite cases in the United States Courts. There they have constitutional provisions which expressly forbid the impairment of contracts. In Canada there is no case where the Crown is liable in damages by virtue of a statute except when the statute provides that the Crown is to respond in damages. Cites the *Dominion Interpretation Act*, Sec. 34, par. 7, also par. 10.) Now the claim here, if any, should be, I submit, in the nature of a mandamus directed to the Governor in Council. The Court

(1) 17 Q.L.R. 337

(2) 33 L.J.C.P 199.

(3) p. 137.

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cannot review the discretion of the Governor in Council. That discretion is expressly derivable from the phraseology of the statute in question. For the purposes of this case the Governor in Council are acting in a judicial or quasi-judicial capacity in considering and approving these plans. Consequently although their conclusions may be erroneous, although they, in the exercise of their authority, may not consider the plans, they are not liable to any action for failure to approve. On reference to *Hudson on Building Contracts* (1), it will be found that: "No mandamus will issue to a corporation to approve the plans of a proposed building which are in accordance with their by-laws, as the corporation ought not to be compelled to sanction operations which, in their honest opinion, would interfere with anything under their charge, even though their by-laws do not deal with the matter." It is not possible for the court to review the discretion of the Governor in Council. The Governor in Council did not give any reason for their refusal to approve the plans. There is no allegation in the petition of right, that they did not consider them. No action for damages can be maintained upon the petition of right, as there is nothing between the parties giving rise to any obligation in favour of the suppliants in case the plans submitted by them were not approved.

Mr. *Brosseau* replied.

CASSELS, J., now (June 26th), 1916, delivered judgment.

The case came on for argument on the questions raised by the respondent, as to whether or not on the allegations in the petition, the suppliant is entitled to succeed. I suggested that the evidence might be taken

(1) Vol. 1 p. 51.

and the questions argued after the completion of the evidence.

Mr. *Newcombe*, K.C., on behalf of the Crown stated that they were unprepared to proceed with the evidence, as the understanding with counsel for the suppliant was that the question of law should be first argued; and that if the Court should be of opinion that a right of action existed, the trial might proceed on a subsequent day to be agreed upon. This course was adopted.

On the argument of the case I was strongly of the opinion that on the facts alleged, no liability attached as against the Crown for breach of contract. I reserved judgment in order to investigate the authorities which Mr. *Brosseau* cited, and any other authorities which he might refer me to at a later date.

I have considered these authorities and am still of the opinion the suppliant's case against the Crown fails.

The case presented is a novel one, and so far as I have been able to investigate the authorities, it is the first case of the kind which has been before the courts.

The allegations on behalf of the suppliant company are:—

That the corporation was incorporated by an Act of Parliament of Canada, 61 Vic., Cap. 107. There are subsequent statutes referred to in section 4 of the petition of right, extending the time for the commencement of the work on the canal.

By section 22 of Cap. 107, 61 Vic., it is enacted "that before the company shall break ground or commence the construction of any of the canals or works hereby authorized, the plans, locations, dimensions, and all necessary particulars of such canals, and works, shall be submitted to and approved by the Governor in Council."

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The meaning of this section is, I think, that the company shall submit their plans, and before commencing construction obtain the approval of the Governor in Council.

The suppliant alleges that on or about the 30th May, 1911, the plans, locations, dimensions, and all necessary particulars of such canals and works, were submitted to be approved by the Governor in Council, and duplicates of same were deposited with the Department of Railways and Canals and the Department of Public Works in Ottawa.

“ 11. That since the 30th May, 1911, your suppliant has repeatedly requested the approval of the plans by the Governor in Council.

“ 12. That all the information requested by the Department of Railways and Canals, and the Department of Public Works, at Ottawa, have been duly furnished.

“ 13. That in granting a charter to your suppliant for the construction of the said Canal, the Crown took the engagement and obligation to approve the plans made in conformity with the charter.

“ 14. That the plans, locations, dimensions, and all necessary particulars of such canals and works were made in conformity with the charter, and in conformity with the requirements of the Secretary of War of the United States, and notwithstanding the repeated and incessant requests of your suppliant for approval, the Crown without any reason has refused to do so.”

The words in the latter part of section 14, “the Crown without any reason has refused to do so”, may mean the Crown without any reason furnished to the suplicants has refused to do so.

The suppliant then alleges that the refusal of the Crown to carry out its engagement and obligation according to the said charter to approve the said plans has caused the lapse of the company's charter and that the suppliant has suffered great and irreparable damage which it has the right to claim.

The suppliant claims five million dollars for damages for breach of the contract, the contention being that the rights of the company to commence the canal terminated by reason of clause 38, in the said Statute, Cap. 107, 61 Victoria.

Mr. Brosseau's contention is that there was a contract entered into by and on behalf of His Majesty the King to approve of the plans in order to enable the company to proceed with its completion, and that by reason of the failure of the Governor in Council to approve of the plans, and the consequent lapse of the time, the company is entitled to claim damages for breach of the contract.

I fail to see how His Majesty the King can be liable on the allegations referred to.

Mr. Newcombe referred to section 16 of the Interpretation Act, Revised Statutes, which is as follows:—

“ No provision or enactment in any Act shall affect in any manner whatsoever the rights of His Majesty, his heirs, or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.”

There is nothing in Chapter 107 which refers to the Crown or makes the statute binding upon the Crown.

I think it may be conceded that in an ordinary case where a contract is entered into by and on behalf of His Majesty by those authorized by statute to execute such a contract, there would be a liability in damages based upon a breach of contract.

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After the best consideration I can give to the case, I fail to see where any case of contract has been proved as against the Crown. If the allegations in the petition are to be read as if the Governor in Council had wilfully refused to sanction the plans, in order to destroy the charter of the company, some right of action may exist against the Governor in Council, to compel them to grant their approval. Proceedings by a mandamus may be a remedy, although I do not wish to commit myself to the proposition that such a remedy does exist. The Crown certainly would not be liable for the tort or wrong of the Governor in Council. It is too clear for argument that the Crown is not liable for damages in tort, except in cases where a specific remedy is conferred upon the subject by statute. Such cases as *Tobin v. The Queen* (1); *Feather v. The Queen* (2); and the *Windsor & Annapolis Railway* case (3) may be referred to.

The petition is dismissed with costs.

Judgment accordingly.

Solicitors for suppliants: *Brosseau & Brosseau.*

Solicitor for respondent: *E. L. Newcombe.*

(1) 16 C.B.N.S. 356; 33 L.J.C.P. 199. (2) 6 B. & S. 257.
 (3) 11 App. Cas. 607; 10 S.C.R. 335.