THE QUEBEC SKATING CLUB.....SUPPLIANTS; 1893

AND Nov. 6.

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract, breach of—Undertaking by Government to promote legislation—Damages—Ordnance lands—Power of Minister of Interior to lease.

A Minister or Officer of the Crown cannot bind the Crown without the authority of law.

(2). An Order of His Excellency the Governor General in Council pledging the Government to promote legislation does not constitute a contract for the breach of which the Crown would be liable in damages.

(3). The Minister of the Interior cannot lease or authorize the use of Ordnance lands without the authority of the Governor in Council.

(R.S.C., c. 22, sec. 4; R.S.C., c. 55, secs. 4 and 5 discussed.)

Wood v. *The Queen*, 7 Can. S.C.R., 631; *The Queen* v. *St. John Water Commissioners*, 19 Can. S.C.R., 125; and *Hall* v. *The Queen*, 3 Ex. C.R. 373 referred to.

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

The facts of the case are stated in the judgment.

June 27, 1893.

The case was heard before Mr. Justice Burbidge.

Stuart, Q.C., for the suppliants: Our case rests upon a breach of contract.

A Minister of the Crown authorized by law to administer a department has as much power to deal with matters appertaining to such administration as an ordinary agent has to deal with the business of his principal under a power of attorney.

In the words of Richards, C.J., in *Wood* v. *The Queen* (1):

(1) 7 Can. S.C.R., 644.

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A department of State, presided over by a Minister of the Crown, responsible to Parliament for the conduct of the business of his department, may, I have no doubt, as the agent of, or representing, the Crown in all matters under the charge of that department, make agreements and enter into contracts which would bind the Crown, unless there is some legislative enactment or, perhaps, Orders in Council, controlling and limiting such power.

Argument of Counsel.

This is authority sufficient for the purposes of our case to show that a Minister of the Crown may bind the Crown by ordinary contracts made in the administration of the affairs of his department (1). There was a contract for the granting of these lands to the suppliants in this case made by the Minister of Interior, who was charged with the administration of the same. By their Order in Council the Government authorized the suppliants to enter into possession of the lands in question until such time as Parliament could be asked to perfect the transfer of the property by passing a bill for that purpose. That permission having been given, it could not properly be revoked by a Minister of the Crown until Parliament had been asked to legislate for the purpose mentioned. It was so revoked by the Minister of the Interior, and for this breach of contract the Crown is responsible. (He cites *Peterson* v. *The Queen* (2); *The Queen* v. *St. John Water Commissioners* (3); 54-55 Vict. c. 14; *Churchward* v. *The Queen* (4); *Thomas* v. *The Queen* (5); C.C.L.C., Art. 1703; 27 *Laurent*, no. 149.; *Pothier*, *Mandat* 148.

Secondly.—The Crown bound itself by Order in Council to promote the necessary legislation at the next session of Parliament, and failed to do so. I know of no case which says the Crown would be liable under such circumstances, but I submit that where there was a clear breach of this promise, and no reasonable excuse

(1) He refers to sec. 4, R.S.C. c. 22; R.S.C., c. 41; R.S.C. c. 55.
(2) 2 Ex. C.R., 74.
(3) 19 Can. S.C.R., 125.
(4) L.R. 1 Q.B., 173.
(5) L.R. 10 Q.B., 31.

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offered therefor, in view of the first principles of the law of contract the Crown ought to be held responsible for the results which flowed from the happening of such breach. (He cites *Holland* v. *Ross*) (1).

Hogg, Q.C. for the respondent.—There is no evidence here of any act on the part of the Government of the Dominion, as a whole, that would create a contract. The only act of the Government as such is the Order in Council of 13th October, 1888; and I submit that what we find there is purely a voluntary promise to invite Parliament to legislate for a certain purpose. There is no consideration transforming it into a legal obligation on the part of the Government. It is a mere declaration of intention; and for failure to carry out which no action will lie.

Secondly.—The Government did carry out their intention to invite Parliament to pass the necessary legislation at the next session. A bill was prepared and introduced, and what became of it afterwards is beyond the scope of our enquiry here. What they voluntarily promised to do they carried out. Parliament was invited to legislate.

Thirdly.—There was no contract entered into by a Minister of the Crown to make a grant of these lands. There was nothing officially done by the Minister of the Interior, within whose administration the matter properly fell, to amount to an act in the law. Mere informal conversations, such as occurred in this case between one or two members of the suppliant club and one or two Ministers of State, could never be construed into a formal or departmental transaction. It was distinctly intimated to suppliants that nothing final could be done without the sanction of Parliament.

Fourthly.—What has been cited by counsel for the suppliants from the case of *Wood* v. *The Queen* (2) is a

(1) 19 Can. S.C.R. 566. (2) 7 Can. S.C.R. p. 644.

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mere dictum of Richards, C.J. The point before the court there, was the validity of an executed parol contract for materials provided and which the Crown accepted and got the benefit of, a state of facts not at all applicable to this case. He cites *Goodwin* v. *City of Ottawa* (1); R.S.C. c. 55, subsec. 4; *Smith* v. *The Queen* (2).

Stuart, Q.C. replied.

BURBIDGE J. now (November 6th, 1893) delivered judgment.

The suppliants, in 1877, purchased from the Government of Canada, for two thousand dollars, certain Ordnance land situated at the city of Quebec, on which they put up a skating-rink. In 1888 they were proposing to themselves to remove this rink to another site, and in August of that year the Local Goverment of Quebec, in view of the contemplated removal, offered them fifteen thousand dollars for the land on which it then stood, on condition that the rink should be removed and the land levelled and cleared during that year. They also offered to pay to the suppliants a further sum of five thousand dollars in case the latter should rebuild the rink that year or the next year, on the south side of the Grande Allée at a place and according to plans approved by the former, and should bind themselves to give *gratis* the use of the building for certain industrial and other exhibitions. The suppliants then applied to the Government of Canada for a free grant of other Ordnance lands, at Quebec, that were so situated as to enable them to comply with the conditions for which the Local Government had stipulated. The terms of the offer made by that Government were communicated to the Minister of the Interior, and it was represented to him, that from a military point of view the buildings which the Club

(1) 28 U.C, C.P. 561. (2) 10 Can. S.C.R. 1.

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then occupied were too near to the fortification walls. The Minister was, under the circumstances, willing to recommend the grant; but the *Act respecting Ordnance and Admiralty Lands* (1) presented a difficulty. By the third section of that Act it is provided that such lands shall be divided by the Governor in Council into two classes, to be denominated respectively, Class one, and Class two; and that lands in either class may from time to time be placed or replaced in the other class by the Governor in Council. Lands in Class one are by the fourth section of the Act to be retained by the Government of Canada for the defence of Canada, and when not occupied by any military force may be leased or otherwise used as the Governor in Council thinks best for the advantage of Canada. There appears to be no authority for selling them while they remain in Class one. By the fifth section lands in Class two may be sold leased or otherwise used as the Governor in Council from time to time thinks meet, but any sale of any such lands other than a sale to the Government of a Province must be made at public auction. A part of the lands for which the suppliants applied was in Class one and the remainder in Class two. To meet the difficulty, it was proposed that an Act of Parliament should be procured. That proposition was made during a discussion of the matter that took place about the 11th of October, 1888, between Mr. White, the President, Mr. Chinic, one of the Directors, and Mr. Campbell, the Secretary of the Club, on the one side, and Sir John Thompson and Sir Adolphe Caron on the other. Mr. Campbell, the only witness examined, testified that when it was proposed to invite Parliament to pass an Act authorizing the grant, he remarked to Sir John Thompson that the session of Parliament would probably not take place until the

(1) R. S. C. c. 55.

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end of January or the beginning of February, whereas the Local Government required that the building should be removed before the first of January; and that Sir John Thompson replied that the difficulty could be got over, so that they could proceed, by passing an Order in Council in the meantime and that then they could pass the Bill. But perhaps it will be better to let the witness tell his story in his own way:—

Then the President, he continues, said:

What position will we be in, Sir John, if Parliament does not pass the Bill.

Sir John replied to this, that if Parliament would not pass the Bill it was tantamount to saying that they did not possess the confidence of the country. We looked upon this as a Ministerial question and made a contract and proceeded to do the work.

Q. Will you state whether the three Ministers were present at this conversation? A. At the first conversation there were Sir Adolphe Caron and Mr. Dewdney, and at the second there were Sir Adolphe Caron and Sir John Thompson.

Q. Were all the circumstances fully explained to the Ministers at the several interwiews that you had? A. The whole circumstances were talked over with Sir Adolphe Caron and were gone over again with Mr. Dewdney and again with Sir John Thompson.

Q. Was it made clear to them that the Club had to have possession of the land immediately? A. We explained the offer that was made to us by the Local Government and we said to them that it was necessary to have immediate possession to enable us to accept that offer.

Q. Did you state to the Ministers at the time, that the Club would not accept the Local Government's offer unless they were sure of a grant of this land and the immediate possession of it? A. We did.

Q. Did you immediately after that interview proceed to make the contract of the 12th November, 1888, (Exhibit No. 2) or did you wait until the Order in Council passed? A. We waited until we got a certified copy of the Order in Council and then we went to the Local Government and the Corporation of the City of Quebec and explained to the latter the offer of the Local Government. We entered into a notarial contract with the Local Government and also with the city.

And again on cross-examination:—

Q. As I understand from conversations with the Minister of Militia and the Minister of the Interior and the Minister of Justice, as you

have said they were, they told you that on receipt of the Order in Council, you could then proceed with your work? A. That was at the interview we had here at Ottawa. It was the object of passing the Order in Council to give us the right to do so at once.

Q. Did you explain to the Ministers that you required the lands at once? A. After we had explained the Minister said, as I said before, we "will pass a Bill." I said: "That will not help us to accept the offer of the Government. We have to do the work at once." Then the Minister of Justice said: "We will pass an Order in Council and you can proceed on that in the interval, until the Bill passes."

Q. Was it distinctly understood between all parties that it was necessary for you to have the land before the Bill passed? A. Certainly.

* * * * * *

Q. You say it was understood, who was it that understood that you were to go into possession at once? A. We understood that when the Minister of Justice told us "we will pass the Order in Council and upon that you can go and take possession."

Q. Did he say you might go and take possession? A. He said you can proceed at once.

Q. Did he say that you could go and take possession at once? A. I am not prepared to swear that, but he said, "you can proceed at once with your work."

Q. That was in about the beginning of October? A. Yes, a day or two after the 9th, the date of the telegram."

On the 30th of October, 1888, an order of His Excellency the Governor General in Council was passed approving of a recommendation made by the Minister of the Interior that Parliament should be invited at its then next session to authorize a free grant to the suppliants of the lands applied for, upon the condition that the building to be erected thereon by them should be suitable and available for the purpose of public exhibitions. The approval of the recommendation was given on the further condition that neither the suppliants nor their assignee should at any time erect buildings or other constructions on the site from which the suppliants proposed to remove their rink.

On the 31st of October, Mr. Benoit, Sir Adolphe Caron's Secretary, telegraphed to Mr. Campbell, the

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Secretary of the Club, that the Order in Council had been passed, and on the 10th of November, Sir Adolphe Caron, himself, appears to have sent a copy of the order to Mr. Campbell. On the 14th of November, Mr. Douglas, the assistant Secretary of the Department of the Interior, by direction of the Minister of that Department, enclosed to the Secretary of the Quebec Skating Club, for his information, a copy of this Order in Council. Mr. Douglas, in his letter, refers to the order, inadvertently no doubt, as granting portions of certain lots in the city of Quebec to the Club. But as a copy of the Order in Council was forwarded at the same time, the suppliants were not, and for that matter do not claim, to have been misled by the terms in which it was described in the covering letter.

On the 12th of November, the suppliants concluded their arrangement with the Government of Quebec, and surrendered to Her Majesty, as represented by that Government, the lands upon which the rink stood and on the 6th of December following, they entered into a contract for the construction of a new rink on the lands for which they had applied to the Government of Canada. Part of the new material was placed on the ground that year, but by arrangement with the Local Government the tearing down of the old building was deferred until the latter end of March, 1889. In that month it was represented to the Minister of the Interior that the suppliants were proceeding with the excavations on the new site and he notified them by telegraph to stop work as Parliament had not passed the necessary legislation. His telegrams were confirmed by a letter of the 10th of April following, and the suppliants then notified their contractor to stop work.

On the 20th of April, the Parliament of Canada being then in session, the Minister of the Interior introduced

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a Bill to authorize the conveyance of the lands in question to the suppliants, and it was read a first time and ordered to be read a second time on the following Monday, the 22nd of April. This order was reached on the 27th and was then discharged, and the Bill withdrawn. On the 29th the Minister telegraphed to the suppliants that a resolution was to be introduced that day respecting the skating-rink, upon which a Bill would follow; and a resolution was put on the order paper but was never moved. Nothing was done with reference to the matter during the session of Parliament held in the year 1890.

On the 21st of January, 1891, the Minister of the Interior withdrew his letter of the 10th of April, 1889, adding, however, that under all the circumstances the responsibility of proceeding with the work must rest upon the suppliants. On the 28th of August, 1891, an Act of Parliament was passed that authorized a free grant of the lands mentioned to be made to the suppliants, and in accordance with its provisions, letters-patent were issued to them on the 2nd of November, of that year, and were accepted by them. In September of the year following they filed their petition.

Mr. *Stuart*, for the suppliants, concedes of course that they cannot recover except for a breach of contract. But he contends that the facts that I have stated disclose a good contract or agreement 1st, to ask Parliament in the session of 1889 to pass the Act mentioned, and 2ndly to allow the suppliants to go into possession and to keep possession of the land for which they had applied until Parliament had either authorized, or refused to authorize, a free grant thereof. In each case the consideration was, he argues, to be found in the suppliants' undertaking to remove the old rink from the site on which it stood and to build on the new site

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a rink that could be used for industrial and other exhibitions.

Now in the first place it seems to me that the Order in Council of the 30th of October, 1888, does not constitute or disclose a contract on the part of the Governor in Council that can be enforced in a court of law. For any failure to keep the promise then made the Ministers of the Crown may be responsible to Parliament, but the Crown is not bound to answer in any of its courts. The order was passed no doubt to pledge the Government to a definite and defined course of action in respect of the matter whereof it treats; but it was never intended that for a failure to keep the promise given the Crown should be liable for damages. That is clear, I think, from the position of the parties, from the character of the suppliants' application, and from what transpired in respect thereto. The suppliants were asking the Crown for a free grant of certain public lands, that it was not in its power to make without the authority of Parliament. The Ministers of the Crown being willing to recommend the grant suggested that an Act of Parliament should be obtained. The suppliants, however, wished to commence work on such lands at once, and to meet that difficulty it was proposed that an Order in Council should be passed, which would stand as an earnest of the Government's intentions and commit them to promote the necessary legislation. The contingency that such a course left unprovided for was not lost sight of, for the President of the Club asked what position they would be in if Parliament should not pass the Bill, and the Minister replied that if Parliament should refuse to pass the Bill, that would be tantamount to saying that the Government did not possess the confidence of the country. "We looked upon that," says Mr. Campbell, "as a Ministerial question and made a contract," that

is for removing the old and building a new rink, "and proceeded to do the work." The suppliants, it is clear, considered the promise made to them as one that involved the good faith of Ministers and nothing more. There was at the time no thought or question on the part of any one that the Government intended to enter into, or was entering into, a contract for the breach of which the Crown would be liable in damages.

More than that, if it had then been proposed that they should make with the suppliants such a contract as that which the suppliants now seek to set up, it would at once have been obvious that the Governor in Council had no such power or authority. As no Minister or officer of the Crown can make a contract binding on it without due authority of law, so the Crown itself cannot without like authority dispose of public lands or public moneys. In the present case it could not make the free grant applied for because the authority of Parliament was wanting, and for a like reason it could not have entered into a contract to make such a grant. If that is so, on what principle could the Governor in Council incur an obligation, to be answered for in damages if broken, to invite Parliament to give the necessary authority therefor. Were that possible it might happen that before Parliament had an opportunity of passing upon the matter the Crown would be bound to satisfy the suppliants' demand with public land or money, and in that indirect way the settled and well understood rules of law governing the disposition of such lands and money come to be evaded.

Then there would be, it is evident, great difficulty and inconvenience in determining such an issue as that raised in this case. If the Government's authority to make the contract were beyond debate a court

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ought not, I suppose, to be too greatly deterred by any such consideration. But where the question is doubtful the inconveniences incident to the trial of such an issue may very properly be looked at. Suppose for the moment that the Government could make the contract which it is alleged that they made, what must they do and how far must they go to discharge their obligation, and by what rules or test should a court determine the question? The suppliants in a letter to the Minister of the Interior of the 7th of May, 1889, informed him that they did not consider that the bringing in and laying before Parliament a Bill at the end of the session, and then withdrawing it without any real cause, as the leading men of the opposition, as they were informed by one of them, the Mayor of Quebec, were not going to oppose it, was a compliance with the Order in Council of the 30th of October, 1888. But how is the court going to determine whether there was "real cause," or a good one, for withdrawing the Bill. Is it to ascertain by evidence whether or not the opposition would oppose it, and when that is done what about those who sit on the other side of the House? Are they not to be taken into account? Are they to have no voice in the matter? And who is to speak for them and to say whether they, or any of them, were in favour or opposed to the measure? Is the court to poll the House, or must it hold that nothing but a vote would discharge the Government's obligation in the matter? If Ministers thought the opinion of the House was against the Bill would it be for them a case of defeat or damages? That would indeed be something new, and such and like considerations need only be suggested to show how untenable is the position for which the suppliants contend.

We come now to the contention that there was a contract to allow the suppliants to go into possession

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of the land for which they had applied, and to keep the possession until Parliament had given or refused authority for the proposed grant. And here again I may say that it seems clear to me that there was never any intention on the part of any one to enter into such a contract. There is nothing of all that in the Order in Council of the 30th of October, and no Minister could, without authority of law bind the Crown by such an agreement. Had any Minister any such authority? By the fourth section of the Act respecting the Department of the Interior (1), it is provided that the Minister of the Interior shall have the control and management of all Crown lands which are the property of Canada, including those known as Ordnance and Admiralty lands. But that is a general provision, which is obviously limited to a control and management in accordance with the law relating to such lands. By the Act respecting Ordnance and Admiralty lands, to which I have already referred, such lands may, in certain cases, be leased or otherwise used as the Governor in Council thinks best for the advantage of Canada (2). But the Minister of the Interior is not by the Act entrusted with the power of deciding whether they may be so leased or used or not. In practice he would, no doubt have a large, perhaps a controlling influence in determining such a question; but the decision, to have any legal force, must be made by the Governor in Council.

It is contended, however, that as the consideration for the promise alleged to have been made to the suppliants was executed at least in part, their petition will lie, and it is argued that the contention is supported by two cases to which I shall refer presently. Now, no doubt the belief that it would be in the public interest

(1) R. S. C. c. 22.

(2) R. S. C. c. 55, s. 4, ss. 4 and s. 5, ss. 21.

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to have the old rink removed from the site it then occupied adjacent to the walls of the fortifications of the city, and that no other building should be there erected without the consent of the Governor in Council, afforded a reason or motive for the Government pledging themselves to promote an Act for a free grant of a new site; but I do not think that the conditions on which the Order in Council was passed as an earnest of the Government's intention can properly be regarded as a consideration that would support a legal obligation. Not to quarrel with that, however, I do not see how the suppliants can succeed if there was no due authority for the promise on which they rely. In *Wood* v. *The Queen* (1), Chief Justice Sir William Richards gave it as his view that the provisions of the 7th section of the Public Works Act (2), then in force, did not apply where work was done for, or materials supplied to, a department of the Government and accepted by such department, and that in such a case the law would imply a contract on the part of the Crown to pay the fair value of such work or materials. I had occasion in *Hall* v. *The Queen* (3) 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 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.

(1) 7 Can. S. C. R. 646. (2) 31 Vict. c. 12.
(3) 3 Ex. C. R. 373.

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The Saint John Water Commissioners (6), upon which the suppliants rely. The facts of that case were that the respondents' system of water works had in the year 1884 been injuriously affected by the execution by the Crown of certain works and improvements in the yards and tracks of the Intercolonial Railway, at or near the station of the railway at the City of Saint John. By a verbal arrangement between the Chief Engineer of the railway and the respondents' engineer, it was agreed that such works as were necessary to restore the respondents' property to its former safe and serviceable condition should be executed under the direction of their engineer, but at the expense of the Crown. The works that were carried out went in some particulars beyond this, but they were executed upon and adjacent to the railway property, where they were at all times open to the inspection of the officers and engineers of the railway, and the necessary excavations for laying the water pipes that the respondents' engineer was putting down were made by workmen employed and paid by the Minister of Railways and Canals. The question of the Chief Engineer's power to bind the Crown by the arrangement that he made was not raised in this court; but on appeal to the Supreme Court his authority was called in question, and Mr. Justice, now Chief Justice Sir Henry Strong, and Mr. Justice Gwynne thought the appeal should be allowed because he had no such power. But a majority of the court, consisting of the Chief Justice, and Mr. Justice Taschereau, and Mr. Justice Patterson were of opinion to dismiss the appeal. The case cannot, however, be taken as deciding that the Chief Engineer could bind the Crown without due authority, but that in the case in question he had such authority. By the fifth section of *The Government Railways Act*, 1881, then in force,

(6) 19 S. C. R., 130.

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the Minister of Railways and Canals was empowered by himself, his engineers, superintendents, agents, workmen, and servants, to do the acts and execute the works by which the respondents' property was injured, and to agree with any person as to the amount of compensation to be paid for any damages thereby occasioned, and the money for carrying on such works had been voted by Parliament (1). But if the Minister had the power to agree with the respondents as to the amount of compensation to be made to them, what was there to prevent him from doing so by or through the Chief Engineer or some other officer of the railway? Would that not be the natural and usual course to pursue, and if not, how is the public service with its great interests and wide scope of operations to be carried on? When then we find the Chief Engineer, the officer under the Minister charged with the execution of the public work, exercising, without question, the powers necessary for its completion, and the settlement of the claims arising therefrom, is it not fair, in the absence of evidence to the contrary, to infer that he is acting by the Minister's authority and direction? In the case of *Hall* v. *The Queen* (2), 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 (3), and I thought that under the circumstances a promise should be implied on the part of the Crown to indem-

(1) See the Appropriation Act, 1883, pp. 10 and 24, and that of 1884, pp. 16 and 31.

(2) 3 Ex. C. R. 373.

(3) 31 Vict., c. 12, s. 24; R.S. C., c. 39, s. 3, and 52 Vict., c. 13, ss. 3 and 15.

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nify 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.

In coming to the conclusion to dismiss the petition, I have not considered the defence set up that it was thought necessary to secure the consent of the War Office before proceeding with the Bill. In the view I have taken of the case, that has not been necessary. Neither have I laid any stress on the incident that in the deed of surrender from the suppliants to the Queen, as represented by the Goverment of Quebec, executed on the 12th of November, 1888, there is no condition or stipulation that no buildings or other constructions should, without the consent of the Governor in Council, be erected on the lands surrendered. That was one of the conditions mentioned in the order in council of the 30th of October, 1888, and had the Government of Canada, because the suppliants had failed to have such a provision inserted in the deed by which they parted with the property on which the old rink stood, refused to promote the passing of the Act to which they had pledged themselves, I do not well see what ground of complaint the suppliants would have had. But that has not been insisted upon. The condition is not repeated in the order in council of the 2nd of November, 1891, and is not to be found in the letters-patent of the same date, and I do not understand the Crown to raise any such question as an answer to the claim put forward by the suppliants.

Judgment for respondent, with costs.

Solicitors for suppliants: *Pentland & Stuart.*

Solicitors for respondent: *O'Connor & Hogg.*